

# Praktikum za ustavno pravo

sodna praksa ESČP

Rok  
Dacar









Univerza v Mariboru

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Pravna fakulteta

# Praktikum za ustavno pravo

Praksa Evropskega sodišča za človekove pravice

Avtor

**Rok Dacar**

September 2026

|                                                     |                                                                                                                                                                                                                    |
|-----------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Naslov</b><br><i>Title</i>                       | <b>Praktikum za ustavno pravo</b><br><i>Constitutional Law Workbook</i>                                                                                                                                            |
| <b>Podnaslov</b><br><i>Subtitle</i>                 | <b>Praksa Evropskega sodišča za človekove pravice</b><br><i>Case Law of the European Court of Human Rights</i>                                                                                                     |
| <b>Avtor</b><br><i>Author</i>                       | Rok Dacar<br>(Univerza v Mariboru, Pravna fakulteta)                                                                                                                                                               |
| <b>Recenzija</b><br><i>Review</i>                   | Aljoša Polajžar<br>(Univerza v Mariboru, Pravna fakulteta)                                                                                                                                                         |
| <b>Lektoriranje</b><br><i>Language editing</i>      | Urška Kukovec<br>(Univerza v Mariboru, Pravna fakulteta)                                                                                                                                                           |
| <b>Tehnični urednik</b><br><i>Technical editor</i>  | Jan Perša<br>(Univerza v Mariboru, Univerzitetna založba)                                                                                                                                                          |
| <b>Oblikovanje ovitka</b><br><i>Cover designer</i>  | Jan Perša<br>(Univerza v Mariboru, Univerzitetna založba)                                                                                                                                                          |
| <b>Grafika na ovitku</b><br><i>Cover graphic</i>    | Evropsko sodišča za človekove pravice, foto: Zsófia Vera Mezei, unsplash.com, 2020                                                                                                                                 |
| <b>Grafične priloge</b><br><i>Graphic material</i>  | Viri so lastni, razen če ni navedeno drugače.<br>Dacar (avtor), 2026                                                                                                                                               |
| <b>Založnik</b><br><i>Published by</i>              | <b>Univerza v Mariboru</b><br><b>Univerzitetna založba</b><br>Slomškov trg 15, 2000 Maribor, Slovenija<br><a href="https://press.um.si">https://press.um.si</a> , <a href="mailto:zalozba@um.si">zalozba@um.si</a> |
| <b>Izdajatelj</b><br><i>Issued by</i>               | <b>Univerza v Mariboru</b><br><b>Pravna fakulteta</b><br>Mladinska ulica 9, 2000 Maribor, Slovenija<br><a href="https://www.pf.um.si">https://www.pf.um.si</a> , <a href="mailto:pf@um.si">pf@um.si</a>            |
| <b>Izdaja</b><br><i>Edition</i>                     | Prva elektronska izdaja                                                                                                                                                                                            |
| <b>Vrsta publikacije</b><br><i>Publication type</i> | E-knjiga                                                                                                                                                                                                           |
| <b>Dostopno na</b><br><i>Available at</i>           | <a href="http://press.um.si/index.php/ump/catalog/book/1157">http://press.um.si/index.php/ump/catalog/book/1157</a>                                                                                                |
| <b>Izdano</b><br><i>Published at</i>                | Maribor, Slovenija, september 2026                                                                                                                                                                                 |





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/ University of Maribor, University of Maribor Press

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Kataložni zapis o publikaciji (CIP) pripravili v Narodni in univerzitetni  
knjižnici v Ljubljani  
COBISS.SI-ID 289958915  
ISBN 978-961-299-194-4 (PDF)

**ISBN** 978-961-299-194-4 (pdf)

**DOI** <https://doi.org/10.18690/um.pf.3.2026>

**Cena**  
*Price* Brezplačni izvod

**Odgovorna oseba založnika**  
*For publisher* Prof. dr. Dean Korošak,  
rektor Univerze v Mariboru

**Citiranje**  
*Attribution* Dacar, R. (2026). *Praktikum za ustavno pravo: praksa Evropskega  
sodišča za človekove pravice*. Univerza v Mariboru, Univerzitetna  
založba. doi: 10.18690/um.pf.3.2026





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# Rehbock proti Sloveniji z dne 28. novembra 2000, št. 29462/95

V zadevi Rehbock proti Sloveniji je Evropsko sodišče za človekove pravice (Prva sekcija), kot Senat, ki so ga sestavljali naslednji sodniki:

ga. E. Palm, predsednica,  
g. L. Ferrari Bravo,  
g. Gaukur Jörundsson,  
g. R. Türmen,  
g. B. Zupančič,  
g. T. Pantîru,  
g. R. Maruste, sodniki

in tudi g. M. O'Boyle, sodna pisarna Sekcije,

na nejavnih sejah dne 16. maja in 7. novembra 2000 sprejelo naslednjo sodbo, izdano na zadnji navedeni datum:

## Postopek

1. Zadevo je Sodišču v skladu z določbami, veljavnimi pred začetkom veljavnosti Protokola št. 11 h Konvenciji za varstvo temeljnih pravic in svoboščin (»Konvencija«), predložila Evropska komisija za človekove pravice (»Komisija«) dne 11. septembra 1999 (člen 5 § 4 Protokola št. 11 in prejšnji 48. člen Konvencije).
2. Zadeva je zasnovana na pritožbi (št. 29462/95) proti republiki Sloveniji, ki jo je v skladu s prejšnjim 25. členom Konvencije vložil nemški državljani, g. Ernst Rehbock (»pritožnik«), dne 17. septembra 1995.
3. Pritožnik je navedel, da je bil deležen ravnanja, ki ni bilo v skladu s 3. členom Konvencije, da ni mogel začeti postopka, v katerem bi sodišče hitro odločilo o zakonitosti odvzema njegove prostosti, kot to določa člen 5 § 4 Konvencije, da ni bila spoštovana njegova pravica do odškodnine, kot to jamči člen 5 § 5 Konvencije, ter, da je bil z vmešavanjem v njegovo dopisovanje kršen 8. člen Konvencije.
4. Komisija je dne 20. maja 1998 razglasila za delno sprejemljivo. V svojem sklepu o sprejemljivosti je Komisija opozorila, da tožena Vlada ni podala nobenih pripomb na to, ali pritožnikova pritožba ustreza zahtevi po izčrpanju domačih sredstev, določeni s prejšnjim 26. členom Konvencije. Zatorej je bila Komisija mnenja, da ustreznih delov pritožbe ne more zavrniti, ker pritožnik ne bi izčrpal domačih pravnih sredstev.
5. V svojem poročilu z dne 23. aprila 1999 (prejšnji 31. člen Konvencije) je Komisija izrazila mnenje, da je bila podana kršitev členov 3, 5 § 4, 5 in 8 Konvencije (v zvezi z nadzorovanjem pritožnikovega dopisovanja s Komisijo). Nadalje je Komisija ugotovila, da ni bila podana kršitev 8. člena Konvencije v zvezi z nadzorovanjem ostalega pritožnikovega dopisovanja.
6. Pritožnika, kateremu je bila odobrena pravna pomoč, je pred Sodiščem zastopal g. F. X. Brem, odvetnik, iz Rottenburga (Nemčija). Slovensko vlado (»Vlada«) sta zastopala njena pooblaščenca, g. L. Bembič, generalni državni pravobranilec, ter ga. M. Remić, državna pravobranilka.



7. Dne 20. septembra 1999 je odbor Velikega Senata odločil, da naj zadevo obravnava Senat, sestavljen v okviru ene od Sekcij Sodišča (člen 5 § 4 Protokola št. 11, obravnavanega skupaj s členoma 100 § 1 ter 24 § 6 Poslovnika Sodišča). Zadeva je bila nato dodeljena Prvi sekciji Sodišča (člen 52 § 1 Poslovnika). V okviru te sekcije je bil Senat, ki naj bi obravnaval zadevo, sestavljen, kot to določa člen 26 § 1 Poslovnika.

8. Pritožnik in Vlada sta vložila vsak svoj memorandum.

9. Javna obravnava zadeve je bila v stavbi Human Rights v Strasbourgu dne 16. maja 2000 (člen 59 § 2 Poslovnika).

## **Dejstva**

### **I. Okoliščine zadeve**

A. Ravnanje s pritožnikom ob odvzemu prostosti in kasneje v priporu

1. Ravnanje s pritožnikom ob odvzemu prostosti

10. Dne 8. septembra 1995 je pritožnik okoli 14. ure popoldne prečkal mejo med Avstrijo in Slovenijo pri Šentilju, v avtomobilu, ki je bil last njegovega partnerja. V avtomobilu je imel zavitek tablet, za katere ga je prosil znanec slovenskega porekla. Pritožnik tablet ni prijavil carinikom. Ob 16.55h istega dne je pritožniku odvzela prostost slovenska policija v Doliču, približno 70 kilometrov od mejnega prehoda, kjer naj bi predal tablete neki drugi osebi.

11. Sporno vprašanje med strankama so okoliščine odvzema prostosti.

12. Pritožnik trdi, da ga je obkrožilo šest mož s kratkimi puškami in pištolami. Oblečeni so bili v črno in nosili črne maske. Pritožnika naj bi napadli pred predhodnega opozorila. Več drugih mož pa naj bi stalo v bližini. Pritožnika so naglo zajeli in nič se ni upiral. Čeprav je tako v nemščini kot v angleščini vpil, da se ne upira, so ga grobo odvedli do pokrova avtomobila. Dva moža sta ga trdno držala in potisnila njegov zgornji del telesa na pokrov. Roke sta mu potegnili nazaj na hrbet in jih vkenila v lisice. Istočasno so ga štirje drugi možje udarjali po glavi s pendreki in pestmi. S tem so njegov obraz hudo poškodovali in utrpel je hude bolečine.

13. Vlada je v svojem memorandumu z dne 25. novembra 1999 razložila, da so pritožniku odvzeli prostost v okviru akcije, ki so jo načrtovale pristojne oblasti na podlagi svojih delovnih podatkov. Ko so sestavljali ekipo za odvzem prostosti, so oblasti upoštevale dejstvo, da je pritožnik, ki je bil osumljen prekupečevanja z drogami, izjemno močan in da je bil večkratni prvak nemškega tekmovanja v body buildingu.

14. V svojih ustnih navedbah pred Sodiščem se je Vlada sklicevala na zaključke tričlanske komisije, ki je bila ustanovljena na ukaz načelnika policijske uprave v Slovenj Gradcu dne 9. februarja 1996, da bi presodila, ali je bila uporaba sile pri odvzemu prostosti pritožnika upravičena. Komisija je poročilo oddala dne 8. marca 1996, Vlada pa je izvod poročila predložila Sodišču dne 23. maja 2000 po obravnavi bistva zadeve. Ustrezni del poročila se glasi:

»... Imenovani so bili štirje kriminalisti, ki naj bi zajeli prekupečevalce. Imeli so standardno opremo – prepoznavne jopiče in osebno orožje. Imeli so tudi opremo, s katero naj bi vklenili in onemogočili osumljence ...

Na parkirišču so se kriminalisti približali (osumljencem) in zavpili »Stoj! Policija!«, ter jim ukazali, naj se ne premikajo ... Kriminalista B. in K. sta se približala (pritožniku) in ga poskušala preiskati ... (Pritožnik) ni ubogal njunega ukaza, naj se ne premika, in je poskušal zbežati. Kriminalista B. in K. sta mu to preprečila in ga prijela. Poskušala sta uporabiti prijem »zvijanja roke na hrbtu« (pritožnika). Glede na to, da je telesno močan, se je pritožnik skušal osvoboditi prijema. Kriminalista sta mu še naprej zvijala roko, ker sta hotela preprečiti, da bi (pritožnik) pobegnil. Zaradi (pritožnikove) moči mu nista mogla zviti roke v stoje, zato sta se dogovorila, da bosta (pritožnika) potisnila na tla. (Pritožnik) se je ponovno poskušal rešiti prijema, zato sta ga kriminalista morala podreti na tla na mestu, kjer so stali. Ker se je (pritožnik) upiral in je obstajala nevarnost poskusa pobega, kriminalista nista mogla izbrati mesta, kjer bi bilo manj nevarnosti, da poškodujeta pritožnika. (Pritožnika) sta potisnila na tla med parkiranimi avtomobili. Med padcem je (pritožnik) zadel z obrazom ob blatnik parkiranega avtomobila in asfaltirano površino parkirišča. Kriminalista sta vklenila (pritožnika), medtem ko je ta ležal na tleh.

Vse (tri) osumljence so nato odpeljali na policijsko postajo v Slovenj Gradcu. V času odvzema prostosti se (pritožnik) ni pritožil glede kakršne koli bolečine ali poškodbe ...



Dne 8. septembra ob 16.55h so (tri osumljence) odpeljali v pripor ... dne 10. septembra 1995 pa so jih privedli pred preiskovalnega sodnika na okrožnem sodišču v Slovenj Gradcu, ki je izdal nalog o priporu...

Dne 9. septembra se je (pritožnik) pritožil, da ga boli čeljust ... Odpeljali so ga v zdravstveni dom v Slovenj Gradcu, kjer so ugotovili, da ima zlomljeno spodnjo čeljust in da je utrpel hudo telesno poškodbo...

Na osnovi skrbno zbranih informacij je komisija zaključila, da sta kriminalista K. in B. postopala pravilno ter v skladu z zakonom. Do (pritožnikove) poškodbe je prišlo izključno na mestu odvzema prostosti, ko sta ga kriminalista potisnila na tla...

Pri odvzemu prostosti (pritožnika) sta kriminalista uporabila najbolj blago obliko omejitve – fizično silo in vklenitev. S tem sta osebi, zajeti na mestu kaznivega dejanja, preprečila pobeg. Do poškodbe je prišlo, ker se je (pritožnik) upiral odvzemu prostosti, zato ga kriminalista nista mogla potisniti na tla nekje drugje ali z manjšo uporabo sile.

Komisija zaključuje, da je bila uporaba sile, ne glede na posledice, upravičena ter v skladu s 54. členom Zakona o notranjih zadevah in z 9. in 12. členom Navodila o uporabi prisilnih sredstev...«

15. V pismu z dne 23. maja 2000 je Vlada na zahtevo Sodišča sporočila še to-to, da je v operaciji sodelovalo trinajst policistov, dva od njih pa sta imela nalogo vkleniti pritožnika.

## 2. Ravnanje s pritožnikom v času njegovega bivanja v priporu

16. Pritožnika je policija po odvzemu prostosti priprla v Slovenj Gradcu. Pred Sodiščem je navedel, da je imel glavobole in težave z vidom, ter, da ga je zdravnik prvič pregledal 9. septembra 1995 zjutraj. Istega dne ob 14.50h je pritožnik napisal in podpisal izjavo – po pritožnikovi navedbah naj bi take napotke dobil od policije -, v kateri je navedel, da je dan poprej padel in udaril z obrazom ob rob avtomobila.

17. Vlada je navedla, da se je pritožnik glede boleče čeljusti prvič pritožil dežurnemu policistu 9. septembra 1995 zjutraj, ter, da je ta nemudoma poklical zdravnika. Zdravnik je svetoval, naj pritožnika pregledajo v zdravstvenem domu Slovenj Gradec, od koder so ga premestili v splošno bolnišnico v Mariboru.

18. Dokumentacija, s katero razpolaga Sodišče, priča, da je pritožnika podrobno pregledal zdravnik na oddelku za facialno kirurgijo v splošni bolnišnici v Mariboru dne 9. septembra 1995. V poročilu je navedeno, da je pritožnika s poškodovano čeljustjo v bolnišnico privedla policija. Pritožnik je zdravniku trdil, da so ga poškodovali policisti, ti pa so izjavili, da je pritožnik udaril v rob avtomobila med odvzemom prostosti.

19. Zdravnik je ugotovil, da je sklep senčne kosti in spodnje čeljusti (temporo-mandibularni sklep) pritožnika občutljiv na otip in da pritožnik ne more normalno odpirati ust. Nadalje je v poročilu pisalo, da je pritožnikov ugriz nepravilen zaradi premaknjenih zob na levi strani čeljusti. Zdravnik je napotil pritožnika na rentgen in nato postavil diagnozo, dvojni zlom čeljusti in obrazne poškodbe.

20. Zdravnik je nato zaključil, da je potrebna operacija pod splošno narkozo, pritožnik pa naj bi bil operiran naslednji dan. Dovolil je, da policija pritožnika do tedaj odpelje nazaj v pripor.

21. Dne 10. septembra 1995 so pritožnika privedli v bolnišnico, a ta ni privolil v operacijo, ker je menil, da bo kmalu izpuščen in da ga bodo torej lahko operirali v Nemčiji. Dogovorili so se, da bo pritožnik prišel 12. septembra 1995 na kontrolni pregled.

22. Dne 12. septembra 1995 so pritožnika ponovno pregledali in ta je izjavil, da mu je slabo in da je bruhal. V operacijo, ki jo je priporočil zdravnik, ni privolil. Zdravnik je naročil, da morajo pritožnika hraniti samo s kašasto hrano in ga naročil na kontrolni pregled dne 18. septembra 1995.

23. Iz zdravniškega poročila z dne 18. septembra 1995 je razvidno, da je pritožnik počuti bolje. Čeljust ga je manj bolela, bolečine pa je še vedno čutil pri žvečenju in prehranjevanju.

24. Dne 25. septembra 1995 pritožnik ni hotel iti na ponovni kontrolni pregled v bolnišnico.

25. Pritožnika so ponovno pregledali v mariborski splošni bolnišnici dne 3. oktobra ter 25. in 27. novembra 1995. Priznal je, da so njegove težave s čeljustjo manjše, a pritožil se je, da čuti bolečine v področju trebušne votline, in navedel, da je opazil kri v svojih izločkih. Rektalni pregled je zavrnil. Zdravnik je pregledal njegov trebuh

in urin, a ni našel nobene anomalije. Pritožniku je predpisal posebno dieto in po potrebi ponoven pregled.

26. Dne 4. decembra 1995 so pritožnika pregledali v mariborski splošni bolnišnici. V poročilu je navedeno, da ima zamaknjen ugriz in bolečine v čeljusti.

27. Dne 7. decembra 1995 so pritožniku v bolnišnici oskrbeli dva površinska vreza na levem zapestju, ki si ju je naredil sam v trenutku potrnosti dne 3. decembra 1995.

28. V pismu z dne 17. decembra 1995, naslovljenem na Ministrstvo za pravosodje, se je pritožnik pritožil, da so ga surovo pretepli in da ima zato dvojni zlom čeljusti. Navedel je, da ni bil deležen ustrezne zdravniške oskrbe in zahteval odškodnino v višini 1.000.000 nemških mark (DEM).

29. Dne 16. januarja 1996 je bil pritožnik na ponovnem zdravniškem pregledu. Zdravnik mu je predpisal analgetike ter opomnil, da bi moral pritožnik v zvezi z zdravljenjem čeljusti obiskati specialista.

30. Dne 23. januarja 1996 je specialist zaključil, da bi pritožnik za svojo čeljust potreboval protetično rehabilitacijo ali celo operacijo. Ker je pritožnik izjavil, da se želi zdraviti v Nemčiji, je zdravnik priporočil, naj ga čimprej pošljejo tja.

31. Dne 5. marca 1996 se je pritožnik upravniku zapora pritožil, da ima bolečine zaradi vnetja srednjega ušesa, in zahteval zdravljenje v bolnišnici.

32. Dne 7. marca 1996 se je pritožnik zdravniku pritožil, da čuti hude bolečine v glavi ter da v zaporu ni deležen ustrezne zdravstvene oskrbe. Izrecno je navedel, da mu zdravil, ki mu jih je zdravnik predpisal, ne dajejo redno.

33. Dne 10. junija 1996 se je pritožnik upravniku mariborskega zapora pritožil, da mu pazniki dne 8. in 9. junija niso dali analgetikov, ki mu jih je predpisal zdravnik, ter da ima zato hude bolečine in je potr.

34. Dne 20. junija 1996 se je pritožnik upravniku zapora pritožil, da mu pazniki dne 18. in 19. junija niso dali predpisanih analgetikov. Dne 30. junija in 3. julija 1996 se je ponovno pritožil, da mu pazniki niso hoteli dati analgetikov. V svojih pritožbah



je pritožnik navedel, da bi rad sprožil kazenski postopek proti osebi zapora, in zahteval, naj mu dovolijo vložiti kazensko pritožbo proti policiji.

35. Dne 4. julija 1996 se je pritožnik sodniku višjega sodišča v Mariboru pritožil, da ima hude bolečine in da analgetike dobiva le neredno.

#### B. Sklepi glede preiskovalnega zapora

36. Dne 10. septembra 1995 je preiskovalni sodnik okrožnega sodišča v Slovenj Gradcu zoper pritožnika odredil pripor.

37. Dne 3. oktobra 1995 je pritožnikov odvetnik vložil zahtevo za izpustitev. Pritožnik je v njej zatrdil, da ne bo izginil, in ponudil 50.000 DEM varščine. Nadalje je trdil, da ni več potrebe, da bi bil še naprej priprt, saj so vse obremenilne priče v kazenskem postopku proti njemu že zaslišali in zbrali vse ustrezne dokaze.

38. Dne 6. oktobra 1995 je okrožno sodišče v Slovenj Gradcu podaljšalo pritožnikov pripor do 8. decembra 1995 v skladu s členom 205 § 2 Zakonika o kazenskem postopku. Sodišče je navedlo, da preiskave v pritožnikovi zadevi ni mogoče zaključiti v enem mesecu.

39. Pritožnik je vložil pritožbo. Trdil je, da ni razlogov za njegovo bivanje v priporu in da okrožno sodišče ni odločilo o njegovi zahtevi z dne 3. oktobra 1995.

40. Dne 19. oktobra 1995 je višje sodišče v Mariboru zavrnilo njegovo pritožbo. Navedlo je, da je pritožnik tujec, ki nima s Slovenijo nobenih vezi. Zatorej naj bi obstajalo tveganje, da bi pobegnil. Glede pritožnikove zahteve po izpustitvi proti varščini pa je bilo višje sodišče mnenja, da jo mora najprej preučiti okrožno sodišče.

41. Dne 26. oktobra 1995 je okrožno sodišče v Slovenj Gradcu zavrnilo pritožnikovo zahtevo po izpustitvi z dne 3. oktobra. Sodišču se varščina, ki jo je ponudil pritožnik, ni zdela zadostno jamstvo, da se bo ta udeležil nadaljnjega postopka.

42. Dne 27. novembra 1995 je okrožno sodišče v Slovenj Gradcu pritožniku podaljšalo pripor v skladu s členom 272 § 2 Zakonika o kazenskem postopku.

43. Dne 13. decembra 1995 je višje sodišče v Mariboru zavrnilo pritožbo pritožnika na zgoraj omenjeni sklep.

44. Dne 29. novembra 1995 je pritožnik, preko odvetnika, vložil ponovno zahtevo po izpustitvi. Trdil je, da ni ustreznih razlogov za njegovo bivanje v priporu in ponudil varščino v višini 50.000 DEM.

45. Okrožno sodišče v Slovenj Gradcu je zahtevo dne 22. decembra 1995 zavrnilo.

#### C. Nadzorovanje pritožnikovega dopisovanja s Komisijo

46. Med pritožnikovim bivanjem v preiskovalnem zaporu v Sloveniji je bilo njegovo dopisovanje, skupaj z dopisovanjem s Komisijo, pod nadzorom.

#### D. Kazenski postopek proti pritožniku

47. Dne 8. januarja 1996 je okrožno sodišče v Slovenj Gradcu pritožnika obsodilo zaradi nedovoljene proizvodnje in prekupčevanja drog ter tihotapljenja le-teh. Pritožnik je bil obsojen na enoletno zaporno kazen.

48. Dne 17. aprila 1996 je višje sodišče v Mariboru zavrnilo pritožnikovo pritožbo in ugodilo pritožbi državnega tožilca ter zvišalo pritožniku zaporno kazen na sedemnajst mesecev.

49. Dne 1. septembra 1996 so pritožnika pogojno izpustili.

## **II. Ustrezna domača zakonodaja in praksa**

### A. Ustava

50. 26. člen Ustave jamči vsakomur pravico do povračila škode, ki mu jo v zvezi z opravljanjem službe ali druge dejavnosti državnega organa s svojim protipravnim ravnanjem stori oseba ali organ, ki opravlja tako službo ali dejavnost opravlja.

B. Zakon o notranjih zadevah iz leta 1980 ter Navodilo o uporabi prisilnih sredstev iz leta 1981

51. Člen 54 prejšnjega spremenjenega Zakona o notranjih zadevah z dne 25. novembra 1980, je dovoljeval pooblaščenim uradnim osebam uporabo fizične sile pri opravljanju svojih dolžnosti, kadar, med drugim, ne morejo drugače streti odpora

osebe, ki se noče podrediti zakonitim ukazom, ali osebe, ki ji morajo odvzeti prostost.

52. Člen 9 prejšnjega dopolnjenega Navodila o uporabi prisilnih sredstev z dne 1. septembra 1981, kot je bil dopolnjen, med drugim določa, da naj bi bila uporaba fizične sile v primerih, omenjenih v 54. členu Zakona o notranjih zadevah iz leta 1980, običajno omejena na posebne prijeme. Ko pooblaščen osebe menijo, da tako sredstvo ne zadostuje, se lahko zatečejo k uporabi udarcev ali gumijastega pendreka. V vsakem primeru pa je fizično silo in gumijasti pendrek dovoljeno uporabiti le toliko, kolikor je nujno potrebno, da se zlomi odpor ali prepreči napad, uporaba sile pa naj ne bi nikoli vodila v grdo ravnanje z osebo.

53. Člen 12 Navodila o uporabi prisilnih sredstev dovoljuje pooblaščenim uradnim osebam, da vklenejo osebo ali jo omejijo z drugimi sredstvi, kadar lahko upravičeno pričakujejo, da se bo obravnavana oseba aktivno upirala ali poskušala pobegniti.

### C. Zakon o kazenskem postopku

54. Člen 205 § 1 določa, da sme biti obdolženec po sklepu preiskovalnega sodnika pridržan v priporu največ mesec dni od dneva, ko mu je bila vzeta prostost. Po tem času sme biti pridržan v priporu samo na podlagi sklepa o podaljšanju pripora.

55. Drugi odstavek 205. člena določa, da se sme pripor po odločbi senata podaljšati največ za dva meseca.

56. Člen 211 (3) določa, da si pripornik lahko dopisuje ali ima druge stike z osebami zunaj zavoda z vednostjo in pod nadzorom preiskovalnega sodnika, ki opravlja preiskavo. Ta lahko priporniku prepove pošiljanje in sprejemanje pisem in drugih pošilk ali vzpostavljanje stikov, ki so škodljivi za postopek, ne sme pa mu prepovedati, da bi poslal prošnjo ali pritožbo.

57. Člen 213b je bil uzakonjen dne 23. oktobra 1998. Njegov 3. odstavek dovoljuje varuhu človekovih pravic oziroma njegovemu namestniku, da pripornika obiskuje in si z njim dopisuje brez predhodnega obveščanja in nadzorstva preiskovalnega sodnika ali nadzorstva nekoga, ki ga ta določi. Ta določba velja prav tako za dopisovanje med pripornikom in Evropskim sodiščem za človekove pravice.



58. V skladu s členom 272 § 2, če je proti priporniku vložena obtožnica in v njej ni predlagano, naj se pripornik izpusti, preizkusi senat po uradni dolžnosti v treh dneh od prejema obtožnice, ali so še dani razlogi za pripor, in izda sklep, s katerim ga podaljša ali odpravi.

59. Člen 542 § 1 zagotavlja pravico do povrnitve škode: - osebi, ki je bila v priporu, ni pa bil zoper njo uveden kazenski postopek ali je bila s pravnomočno sodbo oproščena obtožbe, ali pa je bila obtožba zavrnjena; - osebi, ki je prestajala prostostno kazen, ki je bila kasneje skrajšana ali ji je bila odpuščena; - osebi, ki ji je bila zaradi napake ali nezakonitega dela organa neutemeljeno odvzeta prostost; ali – osebi, ki je prebila v priporu dalj časa, kot traja zapor, na katerega je bila obsojena.

## **Pravna presoja**

### **I. Predhodni ugovori vlade**

#### **A. Uporaba domačih pravnih sredstev**

60. Vlada je trdila, da pritožnik ni zahteval odškodnine po 26. členu Ustave pred ustavnim sodiščem v obliki ustavne pritožbe. Zaključila je, da pritožnik ni izčrpal domačih pravnih sredstev, kot to zahteva 35. člen (prejšnji 26. člen) Konvencije.

61. Sodišče ugotavlja, da bi Vlada lahko ugovarjala, ko je Komisija obravnavala sprejemljivost pritožbe (glej 4. odstavek zgoraj), pa tega ni storila. Zatorej tega sedaj ne more storiti (glej, med drugimi viri, Nikolova proti Bolgariji (GC), št. 31195/96, § 44, ECHR 1999-II).

#### **B. Preučitev pritožbenih razlogov, ki jih pritožnik ni uveljavljal**

62. Vlada je nadalje ugovarjala, da je Komisija preučila dejstva zadeve v zvezi s členom 5 §§ 4 in 5 Konvencije ne glede na to, da se pritožnik v svoji pritožbi ni skliceval na te določbe.

63. Sodišče ugotavlja, da so organi Konvencije pristojni za preučitev okoliščin, glede katerih se pritoži pritožnik, v okviru vseh zahtev Konvencije. Pri izpolnjevanju te naloge lahko dejstva zadeve, kakor so ugotovljena v dokaznem gradivu, ki ga imajo na razpolago, pravno opredelijo drugače, kot je to storil pritožnik, po potrebi pa

lahko dejstva tudi obravnavajo na drugačen način (glej, med drugim, sodbo Camenzind v. Švica z dne 16. decembra 1997, Poročila 1997-VIII, str. 2895, § 50).

64. Obseg pristojnosti Sodišča v zadevah, katerih bistvo je preučila Komisija, je določen s Sklepom Komisije, ki razglasi začetno pritožbo za sprejemljivo (glej Thlimmenos proti Grčiji (GC), št. 34369/97, § 28, ECHR 2000). Nadalje je pritožnik v postopku pred Sodiščem trdil, da je bila podana kršitev člena 5 §§ 4 in 5 Konvencije. Torej je preučitev teh pritožb v pristojnosti Sodišča.

### **III. Očitana kršitev 3. člena konvencije**

65. Pritožnik je trdil, da je bila podana kršitev 3. člena Konvencije, ki določa:

»Nikogar se ne sme mučiti ali nečloveško in ponižujoče z njim ravnati ali ga kaznovati.«

66. V postopku pred Sodiščem je pritožnik trdil, da so mu slovenski policisti med odvzemom prostosti povzročili resne telesne poškodbe, ter, da mu v priporu niso nudili ustrezne zdravstvene oskrbe.

67. Vlada je ugovarjala, da so policisti pri odvzemu prostosti uporabili silo le toliko, v kolikor je bilo potrebno zaradi pritožnikovega vedenja. Nadalje je oporekala trditvam pritožnika o neustrezni zdravstveni oskrbi v času bivanja v priporu. Vlada je še posebej poudarila, da pritožnik ni želel na operacijo, kot je to priporočil zdravnik.

1. Očitano grdo ravnanje s pritožnikom med odvzemom njegove prostosti

68. Sodišče ugotavlja, da stranki ne oporekata dejstvu, da je do poškodbe pritožnika, ki je razvidna iz zdravniških poročil, prišlo med odvzemom prostosti le-tega. Vseeno pa je vsaka stranka navedla različno razlago, kako naj bi bil pritožnik poškodovan (glej odstavke 12 do 15 zgoraj).

69. Po ustaljeni sodni praksi Sodišča je ugotavljanje in preverjanje dejstev v zadevah, ki jih najprej preuči Komisija, naloga le-te. Čeprav Sodišče ni vezano na ugotovitve Komisije in lahko uporabi svojo lastno presojo v okviru gradiva, ki mu je na razpolago, bo to svojo pristojnost uporabilo le v izjemnih okoliščinah (glej sodbo Kaya proti Turčiji z dne 19. februarja 1998, Poročila 1998-I, str. 321, § 75).

70. Komisija ni mogla sestaviti orisa celotne podobe dejanskih okoliščin, v katerih je bil pritožnik poškodovan. V svojem končnem poročilu je omenila, da Vlada kljub več zahtevam nikakor ni podprla svojih navedb, da je bil pritožnik poškodovan nenamerno. Pri ugotovitvi, da je bila podana kršitev 3. člena Konvencije, se je Komisija v glavnem oprla - sklicujoč se na zadevo Ribitsch proti Avstriji (sodba z dne 4. decembra 1995, Serija A, št. 336, str. 26, § 38) – na dejstvo, da Vlada ni podala verjetne razlage za poškodbe pritožnika in predložila ustreznih dokazov, s katerimi bi lahko vzbudila dvome glede navedb pritožnika.

71. Sodišče ugotavlja, da je do očitane grdega ravnanja, ki se je končalo s poškodbo, prišlo med odvzemom prostosti pritožnika in ne kasneje, v priporu. Zatorej se zadeva razlikuje od zadeve Ribitsch proti Avstriji, kjer je bil pritožnik poškodovan v času bivanja v priporu. Po drugi strani se zadeva razlikuje tudi od zadeve Klaas proti Nemčiji (sodba z dne 22. septembra 1993, Serija A št. 269, str. 16-18, §§ 26-30), pri kateri je med operacijo odvzema prostosti prišlo do manj hudih poškodb, a v kateri so domača sodišča ugotovila dejstva potem, ko so lahko iz prve roke zaslišala priče in ocenila njihovo verodostojnost.

72. V tej zadevi pritožniku ni bila odvzeta prostost med naključno operacijo, pri kateri bi potem prišlo do nepričakovanega razvoja dogodkov, zaradi katerih bi se policisti lahko sklicevali na to, da so se odzvali nepripravljeni. Gradivo, ki je na razpolago Sodišču, kaže na to, da je policija operacijo odvzema prostosti načrtovala vnaprej ter da je imela dovolj časa, da bi ocenila morebitno tveganje in uporabila potrebna sredstva za izvedbo odvzema prostosti. Sodelovalo je trinajst policistov, ki so torej v številu očitno presegali tri osumljence, ki naj bi jim odvzeli prostost. Nadalje pritožnik policistov, ki so mu odvzeli prostost, ni ogrožal, na primer, z odkritim nošenjem orožja ali z napadom.

Glede na navedeno, upošteva resno naravo pritožnikove poškodbe in glede na to, da spornih dejstev ni obravnavalo nobeno domače sodišče, mora Vlada s prepričljivimi argumenti dokazati, da uporaba sile ni bila pretirana.

73. Dne 23. maja 2000 je Vlada po obravnavi bistva zadeve Sodišču predložila poročilo z dne 8. marca 1996 o postopanju policistov med odvzemom prostosti pritožnika. Ko je Komisija obravnavala zadevo, ji Vlada tega poročila ni predložila. V poročilu je navedeno, da so kriminalisti, udeleženi pri operaciji, postopali v skladu

z zakonom ter da je bila uporaba sile potrebna, ker se je pritožnik upiral odvzemu prostosti (glej 14. odstavek zgoraj).

74. Sodišče ugotavlja, da je bil ukaz za izvedbo preiskave izdan pet mesecev po incidentu, ki se je zgodil dne 8. septembra 1995. Preiskavo je izvedla policijska uprava v Slovenj Gradcu, katere zaposleni so sodelovali pri odvzemu prostosti pritožnika. V poročilu ni navedeno, na katerih podatkih in pričevanjih je to zasnovano. Še posebej iz poročila ni razvidno, da bi njegovi avtorji zaslišali pritožnika, druge osebe, ki jim je bila odvzeta prostost istočasno z njim, ali katere koli druge priče razen policistov, ki so sodelovali pri operaciji. Nadalje Vlada ni razložila, zakaj je bilo poročilo na razpolago šele v kasnejši fazi postopka.

75. V postopku pred Komisijo je Vlada trdila, da je pritožnik utrpel poškodbo, ko je z glavo zadel v odbijač avtomobila (glej 21. odstavek poročila Komisije z dne 23. aprila 1999). V poročilu policije z dne 8. marca 1996 pa je navedeno, da je pritožnik zadel z obrazom v blatnik parkiranega avtomobila in na asfaltirano površino na parkirišču (glej 14. odstavek zgoraj). Vlada te nedoslednosti ni razložila.

76. Sodišče je opomnilo, da je imel pritožnik dvojni zlom čeljusti in udarnine na obrazu. Glede na resno naravo poškodb in ne glede na zaključke, navedene v zgoraj omenjenem poročilu, je Sodišče mnenja, da Vlada ni predložila prepričljivih ali verodostojnih argumentov, na osnovi katerih bi lahko razložila ali upravičila vrsto sile, ki jo je uporabila med operacijo odvzema prostosti. Zatorej je bila uporabljena sila v danih okoliščinah pretirana in neupravičena.

77. Posledica take uporabe sile so bile poškodbe, zaredi katerih je pritožnik nedvomno hudo trpel, torej so z njim ravnali nečloveško.

78. Zaradi ravnanja s pritožnikom med operacijo odvzema njegove prostosti je bila torej podana kršitev 3. člena Konvencije.

## 2. Očitano grdo ravnanje s pritožnikom v času njegovega bivanja v priporu

79. Pritožnik pred Sodiščem ni zanikal navedb Vlade, da so v priporu poklicali zdravnika takoj potem, ko je zahteval zdravniški pregled dne 9. septembra 1995 zjutraj. Nadalje je iz predloženega gradiva razvidno, da je bil pritožnik od tistega dne na rednih zdravniških pregledih ter da je odklonil operacijo, ki jo je priporočil



specialist. Sodišče torej ugotavlja, da se v tej zvezi ne postavlja posebno vprašanje po 3. členu Konvencije.

80. Po mnenju Sodišča ravnanje s pritožnikom v času njegovega bivanja v priporu, namreč dejstvo, da mu osebje pripora ob več priložnostih ni preskrbelo analgetikov, ni tako kritično, da bi lahko Sodišče zaključilo, da je bila tudi s tem kršena pritožnikova pravica v skladu s 3. členom Konvencije.

81. Zatorej ni bila podana kršitev 3. člena Konvencije glede ravnanja s pritožnikom v času njegovega bivanja v priporu.

### **III. Očitana kršitev člena 5 § 4 konvencije**

82. Pritožnik se je pritožil, da v začetku njegovega bivanja v priporu slovenska sodišča niso hitro razsodila o njegovi zahtevi za izpustitev. Skliceval se je na kršitev člena 5 § 4 Konvencije, ki določa:

»Vsakdo, ki mu je bila odvzeta prostost, ima pravico začeti postopek, v katerem bo sodišče hitro odločilo o zakonitosti odvzema prostosti in odredilo njegovo izpustitev, če je bil odvzem prostosti nezakonit.«

83. Vlada je trdila, da sta med 6. in 19. oktobrom 1995 sodišči na dveh stopnjah sodne pristojnosti preučili, ali naj bi pritožnikovo bivanje v priporu podaljšali v skladu z 205. členom Zakona o kazenskem postopku. Odločanje o tem vprašanju je imelo enako dejansko in pravno ozadje, kot preučitev zahteve za izpustitev, ki jo je pritožnik vložil dne 3. oktobra 1995. Po mnenju Vlade zatorej sodišču ni bilo treba ločeno odločati o pritožnikovi zahtevi za izpustitev, preden bi odločilo, ali naj podaljša pritožnikov pripor. V vsakem primeru pa je bilo zahtevi po »hitrem« odločanju zadoščeno.

84. Sodišče opozarja, da člen 5 § 4 zagotavlja priprtim osebam pravico začeti postopek, s katerim oporekajo zakonitosti odvzema njihove prostosti, v skladu s določili o takem postopku pa jim zagotavlja tudi pravico do hitrega sodnega sklepa glede zakonitosti pripora in sklepa o izpustitvi, če se za odvzem prostosti dokaže, da je bil nezakonit (glej Musial proti Poljski (GC), št. 24557/94, § 43, ECHR 1999-II). O vprašanju, ali je bila podana kršitev pravice, ki jo zagotavlja člen 5 § 4, je potrebno

odločiti glede na okoliščine vsake zadeve (glej, *mutatis mutandis*, sodbo R.M.D. proti Švici z dne 26. septembra 1997, Poročila 1997-VI, str. 2013, § 42).

85. V tej zadevi je pritožnik svojo prvo zahtevo za izpustitev vložil dne 3. oktobra 1995.

Okrožno sodišče v Slovenj Gradcu jo je zavrnilo dne 26. oktobra 1995, torej po triindvajsetih dneh. Dne 29. novembra 1995 je pritožnik vložil ponovno zahtevo za izpustitev. Okrožno sodišče v Slovenj Gradcu jo je zavrnilo triindvajset dni kasneje, dne 22. decembra 1995.

86. Sodišče ugotavlja, da zahtev za izpustitev, ki ju je vložil pritožnik dne 3. oktobra 1995 in dne 29. novembra 1995, sodišče ni preučilo »hitro«, kot to določa člen 5 § 4.

87. Dejstvo, da je višje sodišče v Mariboru odločalo o pritožnikovih pritožbah proti sklepom izdanim na prvi stopnji glede podaljšanja pripora, ki ju je podalo okrožno sodišče dne 6. oktobra in dne 27. novembra 1995, ne vpliva na ta zaključek. Dejansko je višje sodišče v Mariboru pri svojem sklepu z dne 19. oktobra 1995 v odgovoru na pritožnikovo pritožbo izrecno navedlo, da mora njegovo zahtevo za izpustitev z dne 3. oktobra 1995 najprej preučiti okrožno sodišče v Slovenj Gradcu (glej 40. odstavek zgoraj). Torej postopek obravnave zahtev za izpustitev, ki ju je vložil pritožnik, ni bil odvisen od postopka glede podaljšanja pritožnikovega pripora, ki so ga slovenske oblasti začele na lastno pobudo.

88. Zatorej je bila podana kršitev člena 5 § 4 Konvencije.

#### **IV. Očitana kršitev člena 5 § 5 konvencije**

89. Pritožnik se je pritožil, da ni imel iztožljive pravice do odškodnine zaradi zgoraj ugotovljene kršitve člena 5 § 4. Skliceval se je na kršitev člena 5 § 5 Konvencije, ki določa:

»Kdor je bil žrtev odvzema prostosti v nasprotju z določili tega člena, ima iztožljivo pravico do odškodnine.«

90. Vlada je ugovarjala, da se po členu 5 § 5 ne postavlja ločeno vprašanje, saj je tožena država spoštovala pritožnikove pravice po členu 5 § 4.

91. Sodišče je opomnilo, da 26. člen ustave, obravnavan skupaj s členom 542 § 1 Zakonika o kazenskem postopku, glede tega zagotavlja pravico do odškodnine v primerih, ko je bil odvzem prostosti nezakonit ali posledica napake. V tej zadevi pa ni nobenih dokazov za to, da bil pritožnikov podaljšan pripor, vključno z zavrnjenimi zahtevami po izpustitvi, nezakonit ali posledica napake, glede na slovensko zakonodajo.

92. Glede na dane okoliščine Sodišče ugotavlja, da pritožnikova pravica do odškodnine v zvezi s kršitvijo člena 5 § 4 Konvencije ni bila dovolj zanesljivo zagotovljena (glej sodbo Sakik in drugi proti Turčiji z dne 26. novembra 1997, Poročila 1997-VII, str. 2626, § 60 in druge vire).

93. Zatorej je bila podana kršitev člena 5 § 5 Konvencije.

## **V. Očitana kršitev 8. člena konvencije**

94. Pritožnik se je pred Sodiščem pritožil, da je bilo njegovo dopisovanje s Komisijo neupravičeno nadzorovano. Skliceval se je na kršitev 8. člena Konvencije, ki določa:

»1. Vsakdo ima pravico do spoštovanja svojega zasebnega in družinskega življenja, svojega doma in dopisovanja.

2. Javna oblast se ne sme vmešavati v izvrševanje te pravice, razen če je to določeno z zakonom in nujno v demokratični družbi zaradi državne varnosti, javne varnosti ali ekonomske blaginje države, zato da se prepreči neredi ali zločin, da se zavaruje zdravje ali morala ali da se zavarujejo pravice in svoboščine drugih ljudi.«

95. Vlada je trdila, da je bil nadzor pritožnikovega dopisovanja s Komisijo v skladu s 211. členom ZKP. Nadalje je omenila člen 213b § 3 ZKP, ki je začel veljati dne 23. oktobra 1998, s katerim dopisovanje med priporniki in Evropskim sodiščem za človekove pravice ni več nadzorovano.

96. Sodišče je mnenja, da nadzor pritožnikovega dopisovanja s Komisijo predstavlja vmešavanje v njegove pravice po členu 8 § 1.

97. Da ne bi predstavljalo kršitve 8. člena, mora biti tako vmešavanje »določeno z zakonom«, uporabljeno za doseg zakonitega cilja v skladu z drugim odstavkom tega člena ter nujno v demokratični družbi (glej sodbo Silver in drugi proti Veliki Britaniji z dne 25. marca 1993, Serija A št. 61, str. 32, § 84; ter sodbo Petra proti Romuniji z dne 23. septembra 1998, Poročila 1998-VII, str. 2853, § 36).

98. Vmešavanje je imelo pravno osnovo, in sicer člen 211 § 3 Zakonika o kazenskem postopku, Sodišče pa lahko tudi sklepa, da je bilo uporabljeno za doseg zakonitega cilja »preprečitve nereda ali zločina«.

99. Sodišče pa glede nujnosti vmešavanja ne vidi tehtnih razlogov za nadzor spornega dopisovanja, saj je treba spoštovati zaupnost le-tega (glej sodbo Campbell proti Veliki Britaniji z dne 25. marca 1992, Serija A št. 233, str. 22, § 62). Zatorej sporno vmešavanje ni bilo nujno v demokratični družbi v smislu člena 8 § 2.

100. Sodišče ugotavlja, da po uzakonitvi člena 213b § 3 Zakonika o kazenskem postopku dne 23. oktobra 1998 dopisovanje med priporniki in Sodiščem ni bilo več nadzorovano. Vseeno to dejstvo ne more vplivati na stališče Sodišča v tej zadevi.

101. Zatorej je bila podana kršitev 8. člena.

## **VI. Uporaba 41. člena konvencije**

102. 41. člen Konvencije določa:

»Če Sodišče ugotovi, da je prišlo do kršitve Konvencije ali njenih protokolov, in če notranje pravo visoke pogodbenice dovoljuje le delno zadoščenje, Sodišče oškodovani stranki, če je potrebno, nakloni pravično zadoščenje.«

### **A. Premoženjska škoda**

103. Pritožnik je zahteval 174.897 nemških mark (DEM), v glavnem zaradi izgube zaslužka in stroškov njegovega partnerja, ko je ta skrbel zanj v Sloveniji, zaradi pridržanja avta njegovega partnerja s strani slovenskih oblasti ter zaradi upada vrednosti njegovih delnic v času njegovega bivanja v priporu v Sloveniji.

104. Vlada je tej zahtevi oporekala, ker se ji je zdela neutemeljena.



105. Sodišče ne vidi neposredne vzročne povezave med ugotovljenimi kršitvami pritožnikovih pravic, ki jih zagotavlja Konvencija, in navedeno premoženjsko škodo. Zatorej ni razlogov za odškodnino pod to točko.

#### B. Nepremoženjska škoda

106. Pritožnik je zahteval 1.000.000 DEM kot odškodnino za bolečino in trpljenje zaradi ravnanja, katerega je bil deležen s strani slovenskih oblasti.

107. Vladi se je ta vsota zdela pretirana. Ugovarjali so, da je bil pritožnik sam odgovoren za svojo poškodbo in da je zavrnil operacijo.

108. Sodišče je mnenja, da je moral pritožnik trpeti precejšnje bolečine zaradi zadanih poškodb. Sodišče pa mora, pri ocenjevanju škode pod to točko, upoštevati dejstvo, da je pritožnik zavrnil ustrezno zdravljenje svojih poškodb v Sloveniji, ne glede na mnenje zdravnikov-specialistov, da je operacija potrebna (glej odstavke 20-30 zgoraj). Sodišče na pravični osnovi dodeljuje pritožniku 25.000 DEM.

#### C. Stroški in izdatki

109. Pritožnik je zahteval povračilo v višini 23.700 DEM, ki ga je upravičil na naslednji način:

a) 16.500 DEM za plačilo odvetnikov, ki so ga zastopali v kazenskem postopku v Sloveniji;

b) 7.200 DEM za pokritje stroškov telefonskih klicev, ki jih je opravil njegov partner, ko je poskrbel za varovanje pritožnikovih pravic tako v Sloveniji kot pred Komisijo.

110. Vlada je izjavila, da so ti stroški neupravičeni.

111. Sodišče opozarja, da mora za stroške in izdatke ugotoviti, ali so resnični, ali so bili res potrebni ter ali je njihova višina upravičena, da bi jih lahko vključilo v odškodnino v skladu z 41. členom (glej, med drugimi viri, Jecius proti Litvi, št. 34578/97, § 112, ECHR 2000)

Sodišče se ne strinja, da so bili stroški pritožnikovega partnerja potrebni zato, da bi se preprečile ali popravile ugotovljene kršitve Konvencije.

Povračilo za plačilo odvetnikov se je v glavnem nanašalo na obrambo pritožnika v kazenskem postopku pred slovenskimi sodišči, kar pa ni predmet postopka pred Sodiščem.

Sodišče nadalje ugotavlja, da je Svet Evrope odobril g. Rehbocku 17.098,12 francoskih frankov (FRF) pravne pomoči.

Po oceni na pravični osnovi se Sodišču zdi razumno dodeliti pritožniku 7.000 DEM skupaj z morebitnim DDV-jem, zmanjšane za 17.098,12 FRF pravne pomoči, ki mu jo je dodelil Svet Evrope.

#### D. Zamudne obresti

112. Po podatkih, ki so Sodišču na razpolago, je zakonita obrestna mera, veljavna v Nemčiji na dan izdaje te sodbe, 4 % letno.

### Zatorej sodišče

zavrne soglasno predhodni ugovor Vlade;

odloči s 6 glasovi za in enim proti, da je bila podana kršitev 3. člena Konvencije zaradi ravnanja, ki ga je bil pritožnik deležen med odvzemom prostosti;

odloči soglasno, da ni bila podana kršitev 3. člena Konvencije zaradi ravnanja, ki ga je bil pritožnik deležen med bivanjem v priporu;

odloči soglasno, da je bila podana kršitev člena 5 § 4 Konvencije;

odloči soglasno, da je bila podana kršitev člena 5 § 5 Konvencije;

odloči soglasno, da je bila podana kršitev 8. člena Konvencije;

odloči soglasno

a) da mora tožena država izplačati pritožniku v roku treh mesecev naslednje vsote: 25.000 (petindvajset tisoč) nemških mark za nepremoženjsko škodo in 7.000 (sedem tisoč) nemških mark za stroške in izdatke, skupaj z morebitnim DDV-jem, minus 17.098 (sedemnajst tisoč osemindvetdeset) francoskih frankov (FRF) ter 12 (dvanajst) centimov, preračunanih v nemške marke po tečaju, veljavnem na dan izdaje te sodbe;

b) da se navadne obresti po letni obrestni meri 4 % plačajo od poteka zgoraj omenjenega trimesečnega roka do plačila;

zavrne soglasno preostanek pritožnikove zahteve za pravično zadoščenje.

### **Smiselno dopolnite s pojmi na koncu besedila:**

ESČP je v zadevi *Rebbock proti Sloveniji* presojalo več različnih vidikov ravnanja države ob odvzemu prostosti in med priporom. V ospredju je bilo vprašanje, ali je bila sila, ki jo je policija uporabila ob odvzemu prostosti, \_\_\_\_\_ in sorazmerna glede na okoliščine primera.

ESČP je poudarilo, da odvzem prostosti ni bil spontana ali naključna policijska intervencija, ampak \_\_\_\_\_ operacija, pri kateri so imele oblasti dovolj časa, da ocenijo tveganje in pripravijo ustrezna sredstva. Pomembno je bilo tudi, da je v akciji sodelovalo kar \_\_\_\_\_ policistov, medtem ko so bili osumljenci samo trije.

Čeprav je Vlada trdila, da se je pritožnik \_\_\_\_\_ in da je bila zato uporaba sile nujna, ESČP ni štelo, da je država to dovolj prepričljivo dokazala. Posebej je opozorilo, da nobeno domače \_\_\_\_\_ ni celovito razjasnilo spornih dejstev in da je bilo policijsko poročilo, na katero se je sklicevala Vlada, pripravljeno šele več mesecev po dogodku. Poleg tega iz tega poročila ni bilo jasno razvidno, na katerih \_\_\_\_\_ in izjavah temelji.

ESČP je zato zaključilo, da Vlada ni ponudila dovolj \_\_\_\_\_ in verodostojne razlage za dvojni zlom čeljusti in druge poškodbe obraza pritožnika. Posledično je presodilo, da je bila uporabljena sila \_\_\_\_\_ in neupravičena, kar je predstavljalo kršitev prepovedi nečloveškega ravnanja iz 3. člena Konvencije.

Drugače pa je ESČP presodilo glede ravnanja s pritožnikom med njegovim bivanjem v \_\_\_\_\_. Ugotovilo je, da je bil po tem, ko se je pritožil zaradi bolečin, zdravniško pregledan in nato večkrat kontroliran. Pri tem je bilo posebej pomembno, da je pritožnik sam \_\_\_\_\_ operacijo, ki so jo zdravniki priporočali zaradi poškodb čeljusti. Zato ESČP glede zdravstvene oskrbe med priporom ni ugotovilo kršitve 3. člena.

V zvezi s 5. členom EKČP je bilo bistveno, da mora imeti oseba, ki ji je bila odvzeta prostost, možnost doseči \_\_\_\_\_ sodno odločitev o zakonitosti pripora. V tej zadevi je pritožnik dvakrat vložil zahtevo za \_\_\_\_\_, vendar je ESČP o vsaki odločilo šele po triindvajsetih dneh. Po presoji ESČP tako odločanje ni bilo dovolj \_\_\_\_\_.

ESČP je poudarilo, da postopka, v katerem je sodišče po uradni dolžnosti odločalo o \_\_\_\_\_ pripora, ni mogoče enačiti s postopkom, ki ga je začel sam pritožnik z zahtevo za izpustitev. Pravica iz 5. člena namreč varuje možnost posameznika, da sam sproži sodni nadzor nad zakonitostjo odvzema prostosti.

Ker slovensko pravo pritožniku v zvezi z ugotovljeno kršitvijo ni zagotavljalo dovolj zanesljive in \_\_\_\_\_ pravice do odškodnine, je ESČP ugotovilo tudi kršitev 5. člena v delu, ki se nanaša na \_\_\_\_\_ za nezakonit ali konvencijsko sporen odvzem prostosti.

Nazadnje je ESČP obravnavalo še nadzor pritožnikovega dopisovanja s Komisijo. Presodilo je, da tak nadzor pomeni poseg v pravico do \_\_\_\_\_ dopisovanja. Čeprav je imel ta poseg podlago v domačem zakonu, ni bil \_\_\_\_\_ v demokratični družbi, saj mora biti dopisovanje posameznika z organi za varstvo človekovih pravic praviloma \_\_\_\_\_. Prav zato je bila podana tudi kršitev 8. člena Konvencije.

**Možni pojmi:** sodišče, zaupno, potrebna, odškodnino, trinajst, pretirana, hitro, podatkih, zavrnil, tajnosti, načrtovana, iztožljive, priporu, upiral, nujen, podaljšanju, prepričljive, izpustitev, hitro

## Vprašanja

- Kakšne pozitivne obveznosti ima država, kadar oseba med policijskim postopkom utrpí resne telesne poškodbe?
- Kdaj uporaba sile pri odvzemu prostosti preseže mejo dopustnega in postane vprašanje 3. člena EKČP?
- Kako pomembna je hitrost sodnega odločanja pri presoji zakonitosti pripora z vidika 5. člena EKČP?
- Zakaj ni dovolj, da država zgolj formalno omogoča pravno sredstvo, ampak mora biti to tudi dejansko učinkovito?
- Kakšen pomen ima pravica do odškodnine, kadar je ugotovljena kršitev pravic iz 5. člena EKČP?
- Zakaj je varstvo zaupnosti dopisovanja posameznika z mednarodnimi organi za varstvo človekovih pravic posebej pomembno?
- Kaj nam ta odločba na splošno pove o razmerju med oblastjo države nad priprto osebo in varstvom človekovega dostojanstva?





# Refah partisi in drugi proti Turčiji z dne 13. februarja 2003, št. 41340/98, 41342/98, 41343/98 in 41344/98

In the case of Refah Partisi (the Welfare Party) and Others v. Turkey, the European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. Wildhaber, *President*,

Mr C.L. Rozakis,

Mr J.-P. Costa,

Mr G. Ress,

Mr Gaukur..Jörundsson,

Mr L. Caflisch,

Mr R. Türmen,

Mr C. Bîrsan,

Mr P. Lorenzen,

Mr V. Butkevych,

Mrs N. Vajić,

Mr M. Pellonpää,

Mrs M. Tsatsa-Nikolovska,

Mr A.B. Baka,



Mr R. Maruste,  
Mr A. Kovler,  
Mrs A. Mularoni,  
and also of Mr P.J. Mahoney, *Registrar*,

Having deliberated in private on 19 June 2002 and 22 January 2003,

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

### Procedure

1. The case originated in four applications against the Republic of Turkey lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish political party, Refah Partisi (the Welfare Party – “Refah”) and three Turkish nationals, Mr Necmettin Erbakan, Mr Şevket Kazan and Mr Ahmet Tekdal (“the applicants”) on 22 May 1998.
2. The applicants alleged in particular that the dissolution of Refah by the Turkish Constitutional Court and the suspension of certain political rights of the other applicants, who were leaders of Refah at the material time, had breached Articles 9, 10, 11, 14, 17 and 18 of the Convention and Articles 1 and 3 of Protocol No. 1.
3. The applications were transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).
4. The applications were allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). They were joined (Rule 43 § 1) and on 3 October 2000 they were declared partly admissible by a Chamber of that Section, composed of Mr J.-P. Costa, President, Mr W. Fuhrmann, Mr L. Loucaides, Mr R. Türmen, Sir Nicolas Bratza, Mrs H.S. Greve, Mr K. Traja, judges, and Mrs S. Dollé, Section Registrar.

5. On 31 July 2001 the Chamber gave judgment, holding by four votes to three that there had been no violation of Article 11 of the Convention and unanimously that it was not necessary to examine separately the complaints under Articles 9, 10, 14, 17 and 18 of the Convention and Articles 1 and 3 of Protocol No. 1. The joint dissenting opinion of Judges Fuhrmann, Loucaides and Sir Nicolas Bratza was annexed to the judgment.

6. On 30 October 2001 the applicants requested, under Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber.

On 12 December 2001 a panel of the Grand Chamber decided to refer the case to the Grand Chamber.

7. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

8. The applicants and the Government each filed a memorial.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 19 June 2002 (Rule 59 § 2).

## **The facts**

### **I. The circumstances of the case**

#### **A. The applicants**

10. The first applicant, Refah Partisi (the Welfare Party – “Refah”), was a political party founded on 19 July 1983. It was represented by its chairman, Mr Necmettin Erbakan, who is also the second applicant. He was born in 1926 and lives in Ankara. An engineer by training, he is a politician. At the material time he was a member of Parliament and Refah’s chairman.

The third applicant, Mr Şevket Kazan, who was born in 1933, lives in Ankara. He is a politician and a lawyer. At the material time he was a member of Parliament and a vice-chairman of Refah. The fourth applicant, Mr Ahmet Tekdal, who was born in

1931, lives in Ankara. He is a politician and a lawyer. At the material time he was a member of Parliament and a vice-chairman of Refah.

11. Refah took part in a number of general and local elections. In the local elections in March 1989 Refah obtained about 10% of the votes and its candidates were elected mayor in a number of towns, including five large cities. In the general election of 1991 it obtained 16.88% of the votes. The sixty-two MPs elected as a result took part between 1991 and 1995 in the work of Parliament and its various committees, including the Committee on Constitutional Questions, which proposed amendments to Article 69 of the Constitution that became law on 23 July 1995. During the debate in Parliament on the new sixth paragraph of Article 69 of the Constitution (see paragraph 45 below) the chairman of the Committee on Constitutional Questions explained when he presented the draft it had prepared that the Constitutional Court would not restrict itself to noting the unconstitutional nature of the individual acts of the members of a party but would then be obliged to declare that the party concerned had become a centre of anti-constitutional activities on account of those acts. One MP, representing the parliamentary group of the Motherland Party, emphasised the need to change the relevant provisions of Law no. 2820 on the regulation of political parties to take account of the new sixth paragraph of Article 69 of the Constitution. Ultimately, Refah obtained approximately 22% of the votes in the general election of 24 December 1995 and about 35% of the votes in the local elections of 3 November 1996. The results of the 1995 general election made Refah the largest political party in Turkey with a total of 158 seats in the Grand National Assembly (which had 450 members at the material time). On 28 June 1996 Refah came to power by forming a coalition government with the centre-right True Path Party (Doğru Yol Partisi), led by Mrs Tansu Ciller. According to an opinion poll carried out in January 1997, if a general election had been held at that time, Refah would have obtained 38% of the votes. The same poll predicted that Refah might obtain 67% of the votes in the general election to be held roughly four years later.

## B. Proceedings in the Constitutional Court

### 1. *Principal State Counsel's submissions*

12. On 21 May 1997 Principal State Counsel at the Court of Cassation applied to the Turkish Constitutional Court to have Refah dissolved on the grounds that it was a “centre” (*mihrak*) of activities contrary to the principles of secularism. In support of his application, he referred to the following acts and remarks by certain leaders and members of Refah.

– Whenever they spoke in public Refah’s chairman and other leaders advocated the wearing of Islamic headscarves in State schools and buildings occupied by public administrative authorities, whereas the Constitutional Court had already ruled that this infringed the principle of secularism enshrined in the Constitution.

– At a meeting on constitutional reform Refah’s chairman, Mr Necmettin Erbakan, had made proposals tending towards the abolition of secularism in Turkey. He had suggested that the adherents of each religious movement should obey their own rules rather than the rules of Turkish law.

– On 13 April 1994 Mr Necmettin Erbakan had asked Refah’s representatives in the Grand National Assembly to consider whether the change in the social order which the party sought would be “peaceful or violent” and would be achieved “harmoniously or by bloodshed”.

– At a seminar held in January 1991 in Sivas, Mr Necmettin Erbakan had called on Muslims to join Refah, saying that only his party could establish the supremacy of the Koran through a holy war (jihad) and that Muslims should therefore make donations to Refah rather than distributing alms to third parties.

– During Ramadan Mr Necmettin Erbakan had received the heads of the Islamist movements at the residence reserved for the Prime Minister, thus assuring them of his support.

– Several members of Refah, including some in high office, had made speeches calling for the secular political system to be replaced by a theocratic system. These persons had also advocated the elimination of the opponents of this policy, if necessary by force. Refah, by refusing to open disciplinary proceedings against the members concerned and even, in certain cases, facilitating the dissemination of their speeches, had tacitly approved the views expressed.



– On 8 May 1997 a Refah MP, Mr İbrahim Halil Çelik, had said in front of journalists in the corridors of the parliament building that blood would flow if an attempt was made to close the “*İmam-Hatip*” theological colleges, that the situation might become worse than in Algeria, that he personally wanted blood to flow so that democracy could be installed in the country, that he would strike back against anyone who attacked him and that he would fight to the end for the introduction of Islamic law (sharia).

– The Minister of Justice, Mr Şevket Kazan (a Refah MP and vice-chairman of the party), had expressed his support for the mayor of Sincan by visiting him in the prison where he had been detained pending trial after being charged with publicly vindicating international Islamist terrorist groups.

Principal State Counsel further observed that Refah had not opened any disciplinary proceedings against those responsible for the above-mentioned acts and remarks.

13. On 7 July 1997 Principal State Counsel submitted new evidence against Refah to the Constitutional Court.

## *2. The applicants' defence*

14. On 4 August 1997 Refah's representatives filed their defence submissions, in which they relied on international human-rights protection instruments, including the Convention, pointing out that these instruments formed part of Turkish written law. They further referred to the case-law of the Commission, which had expressed the opinion that Article 11 of the Convention had been breached in the cases concerning the United Communist Party of Turkey and the Socialist Party, and to the case-law of the Court and the Commission on the restrictions on freedom of expression and freedom of association authorised by the second paragraphs of Articles 10 and 11 of the Convention. They contended that the dissolution of Refah was not prompted by a pressing social need and was not necessary in a democratic society. Nor, according to Refah's representatives, was their party's dissolution justified by application of the “clear and present danger” test laid down by the Supreme Court of the United States of America.

15. Refah's representatives further rejected Principal State Counsel's argument that the party was a "centre" of activities which undermined the secular nature of the Republic. They submitted that Refah was not caught by the criteria laid down in the Law on the regulation of political parties for determining whether a political party constituted a "centre of anti-constitutional activities". They observed, *inter alia*, that the prosecuting authorities had not issued any warning to Refah (which had four million members) that might have enabled it to expel any of its members whose acts had contravened the provisions of the Criminal Code.

16. Refah's representatives also set out their point of view on the concept of secularism. They asserted that the principle of secularism implied respect for all beliefs and that Refah had shown such respect in its political activity.

17. The applicants' representatives alleged that in accusing Mr Necmettin Erbakan of supporting the use of force to achieve political ends and of infringing the principle of secularism the prosecuting authorities had merely cited extracts from his speeches which they had distorted and taken out of context. Moreover, these remarks were covered by Mr Necmettin Erbakan's parliamentary immunity. They further noted that the dinner he had given to senior officials of the Religious Affairs Department and former members of the theology faculty had been presented by Principal State Counsel as a reception organised for the leaders of Islamist fundamentalist movements, which had in any event been legally proscribed since 1925.

18. With regard to the remarks of the other Refah leaders and members criticised by Principal State Counsel's Office, Refah's representatives observed that these did not constitute any criminal offence. They asserted that none of the MPs whose speeches had been referred to by Principal State Counsel was authorised to represent Refah or held office within the party and claimed that the prosecuting authorities had not set in motion the procedure laid down in the Law on the regulation of political parties so as to give Refah the opportunity, if the need arose, to decide whether or not the persons concerned should continue to be members of the party; the first time Refah's leadership had been informed of the remarks criticised in the case had been when they read Principal State Counsel's submissions. The three MPs under attack had been expelled from the party, which had thus done what was necessary to avoid becoming a "centre" of illegal activities within the meaning of the Law on the regulation of political parties.

### *3. The parties' final submissions*

19. On 5 August 1997 Principal State Counsel filed his observations on the merits of the case with the Constitutional Court. He submitted that according to the Convention and the case-law of the Turkish courts on constitutional-law issues nothing obliged States to tolerate the existence of political parties that sought the destruction of democracy and the rule of law. He contended that Refah, by describing itself as an army engaged in a jihad and by openly declaring its intention to replace the Republic's statute law by sharia, had demonstrated that its objectives were incompatible with the requirements of a democratic society. Refah's aim to establish a plurality of legal systems (in which each group would be governed by a legal system in conformity with its members' religious beliefs) constituted the first stage in the process designed to substitute a theocratic regime for the Republic.

20. In their observations on the merits of the case, Refah's representatives again argued that the dissolution of their party could not be grounded on any of the restrictions permitted by the second paragraph of Article 11 of the Convention. They went on to say that Article 17 was not applicable in the case, as Refah had nothing in common with political parties which sought to install a totalitarian regime. Furthermore, the plurality of legal systems which their party proposed was actually intended to promote the freedom to enter into contracts and the freedom to choose which court should have jurisdiction.

21. On 11 November 1997 Principal State Counsel submitted his observations orally. On 18 and 20 November 1997 Mr Necmettin Erbakan submitted his oral observations on behalf of Refah.

### *4. The Constitutional Court's judgments*

22. In a judgment of 9 January 1998, which it delivered following proceedings on preliminary issues it had instituted of its own motion as the court dealing with the merits, the Constitutional Court ruled that, regard being had to Article 69 § 6 of the Constitution, the second paragraph of section 103 of the Law on the regulation of political parties was unconstitutional and declared it null and void. Article 69 § 6, taken together with section 101(d) of the same Law, provided that for a political party to be considered a "centre" of activities contrary to the fundamental principles

of the Republic its members had to have been convicted of criminal offences. According to the Constitutional Court, that legal restriction did not cover all cases where the principles of the Republic had been flouted. It pointed out, among other observations, that after the repeal of Article 163 of the Criminal Code activities contrary to the principle of secularism no longer attracted criminal penalties.

23. On 16 January 1998 the Constitutional Court dissolved Refah on the ground that it had become a “centre of activities contrary to the principle of secularism”. It based its decision on sections 101(b) and 103(1) of Law no. 2820 on the regulation of political parties. It also noted the transfer of Refah’s assets to the Treasury as an automatic consequence of dissolution, in accordance with section 107 of Law no. 2820.

24. In its judgment the Constitutional Court first dismissed the preliminary objections raised by Refah. In that connection it held that the parliamentary immunity of the MPs whose remarks had been mentioned in Principal State Counsel’s submissions of 21 May 1997 had nothing to do with consideration of an application for the dissolution of a political party and forfeiture of political rights by its members, but was a question of the criminal responsibility of the MPs concerned, which was not a matter of constitutional law.

25. With regard to the merits, the Constitutional Court held that while political parties were the main protagonists of democratic politics their activities were not exempt from certain restrictions. In particular, activities by them incompatible with the rule of law could not be tolerated. The Constitutional Court referred to the provisions of the Constitution which imposed respect for secularism on the various organs of political power. It also cited the numerous provisions of domestic legislation requiring political parties to apply the principle of secularism in a number of fields of political and social life. The Constitutional Court observed that secularism was one of the indispensable conditions of democracy. In Turkey the principle of secularism was safeguarded by the Constitution, on account of the country’s historical experience and the specific features of Islam. The rules of sharia were incompatible with the democratic regime. The principle of secularism prevented the State from manifesting a preference for a particular religion or belief and constituted the foundation of freedom of conscience and equality between

citizens before the law. Intervention by the State to preserve the secular nature of the political regime had to be considered necessary in a democratic society.

26. The Constitutional Court held that the following evidence proved that Refah had become a centre of activities contrary to the principle of secularism.

27. Refah's chairman, Mr Necmettin Erbakan, had encouraged the wearing of Islamic headscarves in public and educational establishments. On 10 October 1993, at the party's Fourth Ordinary General Meeting, he had said:

"... when we were in government, for four years, the notorious Article 163 of the Persecution Code was never applied against any child in the country. In our time there was never any question of hostility to the wearing of headscarves ..."

In his speech of 14 December 1995 before the general election he had said:

"... [university] chancellors are going to retreat before the headscarf when Refah comes to power."

But manifesting one's religion in such a manner amounted to exerting pressure on persons who did not follow that practice and created discrimination on the ground of religion or beliefs. That finding was supported by various rulings of the Constitutional Court and the Supreme Administrative Court and by the case-law of the European Commission of Human Rights on applications nos. 16278/90 and 18783/91 concerning the wearing of headscarves at universities.

28. The plurality of legal systems proposed by Mr Necmettin Erbakan was nothing to do with the freedom to enter into contracts as Refah claimed, but was an attempt to establish a distinction between citizens on the ground of their religion and beliefs and was aimed at the installation of a theocratic regime. On 23 March 1993 Mr Erbakan had made the following speech to the National Assembly:

"... 'you shall live in a manner compatible with your beliefs'. We want despotism to be abolished. There must be several legal systems. The citizen must be able to choose for himself which legal system is most appropriate for him, within a framework of general principles. Moreover, that has always been the case throughout our history.



In our history there have been various religious movements. Everyone lived according to the legal rules of his own organisation, and so everyone lived in peace. Why, then, should I be obliged to live according to another's rules? ... The right to choose one's own legal system is an integral part of the freedom of religion."

In addition, Mr Necmettin Erbakan had spoken as follows on 10 October 1993 at a Refah party conference:

"... we shall guarantee all human rights. We shall guarantee to everyone the right to live as he sees fit and to choose the legal system he prefers. We shall free the administration from centralism. The State which you have installed is a repressive State, not a State at the people's service. You do not allow the freedom to choose one's code of law. When we are in power a Muslim will be able to get married before the mufti, if he wishes, and a Christian will be able to marry in church, if he prefers."

29. The plurality of legal systems advocated by Mr Necmettin Erbakan in his speeches had its origin in the practice introduced in the first years of Islam by the "Medina Agreement", which had given the Jewish and polytheist communities the right to live according to their own legal systems, not according to Islamic law. On the basis of the Medina Agreement some Islamist thinkers and politicians had proposed a model of peaceful social co-existence under which each religious group would be free to choose its own legal system. Since the foundation of the Nizam Party in 1970 (dissolved by a judgment of 2 May 1971) Mr Necmettin Erbakan had been seeking to replace the single legal system with a plurality of legal systems.

30. The Constitutional Court further observed that in a plurality of legal systems, as proposed by Refah, society would have to be divided into several religious movements; each individual would have to choose the movement to which he wished to belong and would thus be subjected to the rights and obligations prescribed by the religion of his community. The Constitutional Court pointed out that such a system, whose origins lay in the history of Islam as a political regime, was inimical to the consciousness of allegiance to a nation having legislative and judicial unity. It would naturally impair judicial unity since each religious movement would set up its own courts and the ordinary courts would be obliged to apply the law according to the religion of those appearing before them, thus obliging the latter to reveal their beliefs. It would also undermine legislative and judicial unity, the

preconditions for secularism and the consciousness of nationhood, given that each religious movement would be empowered to decree what legal rules should be applicable to its members.

31. In addition, Mr Necmettin Erbakan had made a speech on 13 April 1994 to the Refah group in Parliament in which he had advocated setting up a theocratic regime, if necessary through force:

“The second important point is this: Refah will come to power and a just [social] order [*adil düzen*] will be established. The question we must ask ourselves is whether this change will be violent or peaceful; whether it will entail bloodshed. I would have preferred not to have to use those terms, but in the face of all that, in the face of terrorism, and so that everyone can see the true situation clearly, I feel obliged to do so. Today Turkey must take a decision. The Welfare Party will establish a just order, that is certain. [But] will the transition be peaceful or violent; will it be achieved harmoniously or by bloodshed? The sixty million [citizens] must make up their minds on that point.”

32. The reception given by Mr Necmettin Erbakan at the Prime Minister’s residence to the leaders of various religious movements, who had attended in vestments denoting their religious allegiance, unambiguously evidenced Refah’s chairman’s support for these religious groups *vis-à-vis* public opinion.

33. In a public speech in April 1994 Mr Şevki Yılmaz, MP for the province of Rize, had issued a clear call to wage a jihad and had argued for the introduction of Islamic law, making the following declaration:

“We shall certainly call to account those who turn their backs on the precepts of the Koran and those who deprive Allah’s Messenger of his jurisdiction in their country.”

In another public speech, also in April 1994, Mr Şevki Yılmaz had said:

“In the hereafter you will be summoned with the leaders you have chosen in this life. ... Have you considered to what extent the Koran is applied in this country? I have done the sums. Only 39% [of the rules] in the Koran are applied in this country. Six thousand five hundred verses have been quietly forgotten ... You found a

Koranic school, you build a hostel, you pay for a child's education, you teach, you preach. ... None of that is part of the chapter on jihad but of that on the *amel-i salih* [peacetime activities]. Jihad is the name given to the quest for power for the advent of justice, for the propagation of justice and for glorification of Allah's Word. Allah did not see that task as an abstract political concept; he made it a requirement for warriors [*cabudi*]. What does that mean? That jihad must be waged by an army! The commander is identified ... The condition to be met before prayer [*namaz*] is the Islamisation of power. Allah says that, before mosques, it is the path of power which must be Muslim ... It is not erecting vaulted ceilings in the places of prayer which will lead you to Paradise. For Allah does not ask whether you have built up vaulted ceilings in this country. He will not ask that. He will ask you if you have reached a sufficient level ... today, if Muslims have a hundred liras, they must give thirty to the Koranic schools, to train our children, girls and boys, and sixty must be given to the political establishments which open the road to power. Allah asked all His prophets to fight for power. You cannot name a single member of a religious movement who does not fight for power. I tell you, if I had as many heads as I have hairs on my head, even if each of those heads were to be torn from my shoulders for following the way of the Koran, I would not abandon my cause ... The question Allah will ask you is this: 'Why, in the time of the blasphemous regime, did you not work for the construction of an Islamic State?' Erbakan and his friends want to bring Islam to this country in the form of a political party. The prosecutor understood that clearly. If we could understand that as he did, the problem would be solved. Even Abraham the Jew has realised that in this country the symbol of Islam is Refah. He who incites the Muslim community [*cemaat*] to take up arms before political power is in Muslim hands is a fool, or a traitor doing the bidding of others. For none of the prophets authorised war before the capture of State power. ... Muslims are intelligent. They do not reveal how they intend to beat their enemy. The general staff gives orders and the soldiers obey. If the general staff reveals its plan, it is up to the commanders of the Muslim community to make a new plan. Our mission is not to talk, but to apply the war plan, as soldiers in the army ..."

Criminal proceedings had been brought against Mr Şevki Yılmaz. Although his antipathy to secularism was well-known, Refah had adopted him as a candidate in local-government elections. After he had been elected mayor of Rize, Refah had made sure that he was elected as an MP in the Turkish Grand National Assembly.

34. In a public speech on 14 March 1993 and a television interview first recorded in 1992 and rebroadcast on 24 November 1996, Mr Hasan Hüseyin Ceylan, Refah MP for the province of Ankara, had encouraged discrimination between believers and non-believers and had predicted that if the supporters of applying sharia came to power they would annihilate non-believers:

“Our homeland belongs to us, but not the regime, dear brothers. The regime and Kemalism belong to others. ... Turkey will be destroyed, gentlemen. People say: Could Turkey become like Algeria? Just as, in Algeria, we got 81% [of the votes], here too we will reach 81%, we will not remain on 20%. Do not waste your energy on us – I am speaking here to you, to those ... of the imperialist West, the colonising West, the wild West, to those who, in order to unite with the rest of the world, become the enemies of honour and modesty, those who lower themselves to the level of dogs, of puppies, in order to imitate the West, to the extent of putting dogs between the legs of Muslim women – it is to you I speak when I say: ‘Do not waste your energy on us, you will die at the hands of the people of Kırıkkale.’ ”

“... the army says: ‘We can accept it if you’re a supporter of the PKK, but a supporter of sharia, never.’ Well you won’t solve the problem with that attitude. If you want the solution, it’s sharia.”

Refah had ensured that Mr Ceylan was elected as an MP and its local branches had played videotapes of this speech and the interview.

35. Refah’s vice-chairman, Mr Ahmet Tekdal, in a speech he made in 1993 while on pilgrimage in Saudi Arabia which was shown by a Turkish television station, had said that he advocated installing a regime based on sharia:

“In countries which have a parliamentary regime, if the people are not sufficiently aware, if they do not work hard enough to bring about the advent of *‘hak nizamı’* [a just order or God’s order], two calamities lie ahead. The first calamity is the renegades they will have to face. They will be tyrannised by them and will eventually disappear. The second calamity is that they will not be able to give a satisfactory account of themselves to Allah, as they will not have worked to establish *‘hak nizamı’*. And so they will likewise perish. Venerable brothers, our duty is to do what is necessary to introduce the system of justice, taking these subtleties into

consideration. The political apparatus which seeks to establish '*hak nizam*' in Turkey is the Welfare Party."

36. On 10 November 1996 the mayor of Kayseri, Mr Şükrü Karatepe, had urged the population to renounce secularism and asked his audience to "keep their hatred alive" until the regime was changed, in the following terms:

"The dominant forces say 'either you live as we do or we will sow discord and corruption among you'. So even Welfare Party Ministers dare not reveal their world-outlook inside their Ministries. This morning I too attended a ceremony in my official capacity. When you see me dressed up like this in all this finery, don't think it's because I'm a supporter of secularism. In this period when our beliefs are not respected, and indeed are blasphemed against, I have had to attend these ceremonies in spite of myself. The Prime Minister, other Ministers and MPs have certain obligations. But you have no obligations. This system must change. We have waited, we will wait a little longer. Let us see what the future has in store for us. And let Muslims keep alive the resentment, rancour and hatred they feel in their hearts."

Mr Şükrü Karatepe had been convicted of inciting the people to hatred on the ground of religion.

37. On 8 May 1997 Mr İbrahim Halil Çelik, Refah MP for the province of Şanlıurfa, had spoken in Parliament in favour of the establishment of a regime based on sharia and approving acts of violence like those which were taking place in Algeria:

"If you attempt to close down the '*İmam-Hatip*' theological colleges while the Welfare Party is in government, blood will flow. It would be worse than in Algeria. I too would like blood to flow. That's how democracy will be installed. And it will be a beautiful thing. The army has not been able to deal with 3,500 members of the PKK. How would it see off six million Islamists? If they piss into the wind they'll get their faces wet. If anyone attacks me I will strike back. I will fight to the end to introduce sharia."

Mr İbrahim Halil Çelik had been expelled from the party one month after the application for dissolution had been lodged. His exclusion had probably only been an attempt to evade the penalty in question.

38. Refah's vice-chairman, the Minister of Justice, Mr Şevket Kazan, had visited a person detained pending trial for activities contrary to the principle of secularism, thus publicly lending him his support as a Minister.

39. On the basis of the evidence adduced on 7 July 1997 by Principal State Counsel's Office, the Constitutional Court held that the following further evidence confirmed that Refah was a centre of activities contrary to the principle of secularism:

– In a public speech on 7 May 1996 Mr Necmettin Erbakan had emphasised the importance of television as an instrument of propaganda in the holy war being waged in order to establish Islamic order:

“... A State without television is not a State. If today, with your leadership, you wished to create a State, if you wanted to set up a television station, you would not even be able to broadcast for more than twenty-four hours. Do you believe it is as easy as that to create a State? That's what I told them ten years ago. I remember it now. Because today people who have beliefs, an audience and a certain vision of the world, have a television station of their own, thanks be to God. It is a great event.

Conscience, the fact that the television [channel] has the same conscience in all its programmes, and that the whole is harmonious, is very important. A cause cannot be fought for without [the support of] television. Besides, today we can say that television plays the role of artillery or an air force in the jihad, that is the war for domination of the people ... it would be unthinkable to send a soldier to occupy a hill before those forces had shelled or bombed it. That is why the jihad of today cannot be waged without television. So, for something so vital, sacrifices must be made. What difference does it make if we sacrifice money? Death is close to all of us. When everything is dark, after death, if you want something to show you the way, that something is the money you give today, with conviction, for Kanal 7. It was to remind you of that that I shared my memories with you.

... That is why, from now on, with that conviction, we will truly make every sacrifice, until it hurts. May those who contribute, with conviction, to the supremacy of *Hakk* [Allah] be happy. May Allah bless you all, and may He grant Kanal 7 even more success. Greetings.”



– By a decree of 13 January 1997 the cabinet (in which the Refah members formed a majority) had reorganised working hours in public establishments to make allowances for fasting during Ramadan. The Supreme Administrative Court had annulled this decree on the ground that it undermined the principle of secularism.

40. The Constitutional Court observed that it had taken into consideration international human-rights protection instruments, including the Convention. It also referred to the restrictions authorised by the second paragraph of Article 11 and Article 17 of the Convention. It pointed out in that context that Refah's leaders and members were using democratic rights and freedoms with a view to replacing the democratic order with a system based on sharia. The Constitutional Court observed:

“Democracy is the antithesis of sharia. [The] principle [of secularism], which is a sign of civic responsibility, was the impetus which enabled the Turkish Republic to move on from Ummah [*ümmet* – the Muslim religious community] to the nation. With adherence to the principle of secularism, values based on reason and science replaced dogmatic values. ... Persons of different beliefs, desiring to live together, were encouraged to do so by the State's egalitarian attitude towards them. ... Secularism accelerated civilisation by preventing religion from replacing scientific thought in the State's activities. It creates a vast environment of civic responsibility and freedom. The philosophy of modernisation of Turkey is based on a humanist ideal, namely living in a more human way. Under a secular regime religion, which is a specific social institution, can have no authority over the constitution and governance of the State. ... Conferring on the State the right to supervise and oversee religious matters cannot be regarded as interference contrary to the requirements of democratic society. ... Secularism, which is also the instrument of the transition to democracy, is the philosophical essence of life in Turkey. Within a secular State religious feelings simply cannot be associated with politics, public affairs and legislative provisions. Those are not matters to which religious requirements and thought apply, only scientific data, with consideration for the needs of individuals and societies.”

The Constitutional Court held that where a political party pursued activities aimed at bringing the democratic order to an end and used its freedom of expression to issue calls to action to achieve that aim, the Constitution and supranational human-rights protection rules authorised its dissolution.

41. The Constitutional Court observed that the public statements of Refah's leaders, namely those of Mr Necmettin Erbakan, Mr Şevket Kazan and Mr Ahmet Tekdal, had directly engaged Refah's responsibility with regard to the constitutionality of its activities. It further observed that the public statements made by MPs Mr Şevki Yılmaz, Mr Hasan Hüseyin Ceylan and Mr İbrahim Halil Çelik, and by the mayor of Kayseri, Mr Şükrü Karatepe, had likewise engaged the party's responsibility since it had not reacted to them in any way or sought to distance itself from them, or at least not before the commencement of the dissolution proceedings.

42. As an additional penalty, the Constitutional Court decided to strip Necmettin Erbakan, Şevket Kazan, Ahmet Tekdal, Şevki Yılmaz, Hasan Hüseyin Ceylan and İbrahim Halil Çelik of their MP status, in accordance with Article 84 of the Constitution. It found that these persons, by their words and deeds, had caused Refah's dissolution. The Constitutional Court also banned them for five years from becoming founding members, ordinary members, leaders or auditors of any other political party, pursuant to Article 69 § 8 of the Constitution.

43. Judges Haşim Kılıç and Sacit Adalı expressed dissenting opinions stating, *inter alia*, that in their view the dissolution of Refah was not compatible either with the provisions of the Convention or with the case-law of the European Court of Human Rights on the dissolution of political parties. They observed that political parties which did not support the use of violence should be able to take part in political life and that in a pluralist system there should be room for debate about ideas thought to be disturbing or even shocking.

44. This judgment was published in the Official Gazette on 22 February 1998.

## II. Relevant domestic law

...

### The law

#### I. Alleged violation of article 11 of the convention

49. The applicants alleged that the dissolution of Refah Partisi (the Welfare Party) and the temporary prohibition barring its leaders – including Mr Necmettin Erbakan, Mr Şevket Kazan and Mr Ahmet Tekdal – from holding similar office in

any other political party had infringed their right to freedom of association, guaranteed by Article 11 of the Convention, the relevant parts of which provide:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association ...

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. ...”

A. Whether there was an interference

50. The parties accepted that Refah’s dissolution and the measures which accompanied it amounted to an interference with the applicants’ exercise of their right to freedom of association. The Court takes the same view.

B. Whether the interference was justified

51. Such an interference will constitute a breach of Article 11 unless it was “prescribed by law”, pursued one or more of the legitimate aims set out in paragraph 2 of that provision and was “necessary in a democratic society” for the achievement of those aims.

1. *“Prescribed by law”*

(a) Arguments of the parties

(i) *The applicants*

52. The applicants submitted that the criteria applied by the Constitutional Court in establishing that Refah had become a centre of anti-constitutional activities were broader than those laid down by Law no. 2820 on the regulation of political parties. The provisions of Law no. 2820, which laid down stricter criteria in the matter, namely those concerning refusal to expel members who had been convicted of criminal offences, had been declared void by a decision of the Constitutional Court

one week before its decision to dissolve Refah. Moreover, the former decision had been published in the Official Gazette after Refah's dissolution.

53. The applicants argued that all of the above had made it impossible to foresee what criteria the Constitutional Court would apply in deciding that Refah had become a centre of anti-constitutional activities. The new version of Law no. 2820 had not been accessible to the applicants before Refah's dissolution. They could not have been expected to organise their political activities in accordance with criteria that did not exist before the party's dissolution. The applicants submitted that the former version of Law no. 2820 should have been applied in their case and that, after Refah's exclusion of its members whose speeches had been cited by Principal State Counsel in his submissions, the Constitutional Court should have discontinued the dissolution proceedings.

*(ii) The Government*

54. The Government asked the Court to reject the applicants' arguments. They observed that the interference in question was clearly prescribed by Articles 68 and 69 of the Constitution, which required political parties constituting centres of anti-constitutional activities, contrary to the principles of equality and of a secular, democratic republic in particular, to be dissolved by the Constitutional Court. They emphasised that one of the conditions for the dissolution of a political party, namely failure on its part to expel those of its members who had been convicted of criminal offences – a condition which had been added by the Law on the regulation of political parties to the definition of a "centre of anti-constitutional activities" – was no longer applicable in the case on account of changes to the Criminal Code. In other words, following the repeal of Article 163 of the Turkish Criminal Code, which concerned the dissemination of anti-secular ideas and the creation of associations for that purpose, the procedure laid down in section 103(2) of the Law on the regulation of political parties had become devoid of purpose. The Government submitted that for that reason section 103(2) was manifestly unconstitutional in that its application would have made it impossible to give full effect to the Constitution, and in particular Article 69 § 6 thereof, which gave the Constitutional Court sole power to rule that a political party constituted a centre of anti-constitutional activities.

55. The Government further submitted that a judgment concerning a review of the constitutionality of the specific rule to be applied in a particular dispute did not need to be published in the Official Gazette before the commencement of that dispute in order to be operative. In such a situation the Constitutional Court adjourned the proceedings until it had settled the question of the constitutionality of a legislative provision it had to apply. That procedure was a well-established practice of the Turkish Constitutional Court and of the higher courts in a number of other European countries.

(b) The Court's assessment

56. The Court must first consider whether the applicants are estopped from submitting this argument, since they accepted in their additional observations to the Chamber and at the hearing before the Chamber that the measures complained of were in accordance with domestic law, and in particular with the Constitution. In its judgment the Chamber noted that the parties agreed "that the interference concerned was 'prescribed by law', the measures imposed by the Constitutional Court being based on Articles 68, 69 and 84 of the Constitution and sections 101 and 107 of Law no. 2820 on the regulation of political parties".

However, the Court points out that the "case" referred to the Grand Chamber embraces in principle all aspects of the application previously examined by the Chamber in its judgment, the scope of its jurisdiction in the "case" being limited only by the Chamber's decision on admissibility. It does not exclude the possibility of estoppel where one of the parties breaks good faith through a radical change of position. However, that has not occurred in the instant case, as the applicants presented in their initial applications the main lines of their argument on this point. They are therefore not estopped from raising the issue now (see, *mutatis mutandis*, *K. and T. v. Finland* [GC], no. 25702/94, §§ 139-41, ECHR 2001-VII; *Kingsley v. the United Kingdom* [GC], no. 35605/97, § 34, ECHR 2002-IV; and *Göç v. Turkey* [GC], no. 36590/97, §§ 35-37, ECHR 2002-V).

57. As regards the accessibility of the provisions in issue and the foreseeability of their effects, the Court reiterates that the expression "prescribed by law" requires firstly that the impugned measure should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons

concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Experience shows, however, that it is impossible to attain absolute precision in the framing of laws, particularly in fields in which the situation changes according to the evolving views of society. A law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see *Müller and Others v. Switzerland*, judgment of 24 May 1988, Series A no. 133, p. 20, § 29; *Ezēlin v. France*, judgment of 26 April 1991, Series A no. 202, pp. 21-22, § 45; and *Margareta and Roger Andersson v. Sweden*, judgment of 25 February 1992, Series A no. 226-A, p. 25, § 75). The Court also accepts that the level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the status of those to whom it is addressed. It is, moreover, primarily for the national authorities to interpret and apply domestic law (see *Vogt v. Germany*, 26 September 1995, Series A no. 323, p. 24, § 48).

58. In the instant case the Court observes that the dispute under domestic law concerned the constitutionality of the activities of a political party and fell within the jurisdiction of the Constitutional Court. The written law most relevant to the question whether the interference was “prescribed by law” is the Turkish Constitution.

59. The parties did not dispute that activities contrary to the principles of equality and respect for a democratic, secular republic were undoubtedly unconstitutional under Article 68 of the Constitution. Nor did they deny that the Constitutional Court had sole jurisdiction, on an application by Principal State Counsel, to dissolve a political party which had become a centre of activities contrary to Article 68 of the Constitution. Moreover, Article 69 of the Constitution (amended in 1995) explicitly confirms that the Constitutional Court alone is empowered to determine whether a political party constitutes a centre of anti-constitutional activities. The Court notes that Refah’s MPs took part in the work of the parliamentary committee concerned and the debate in the Grand National Assembly on the 1995 amendments to the Constitution (see paragraph 11 above).



60. Furthermore, the fact that on 12 April 1991 anti-secular activities ceased to be punishable under the criminal law is not disputed by either party. The Court notes that, as the Turkish Constitutional Court explained in its judgment of 9 January 1998, there thus resulted a divergence between the Law on the regulation of political parties and the Constitution, in that the requirement in section 103(2) of the Law on the regulation of political parties that in order for the political party concerned to constitute a “centre of anti-constitutional activities” it had to have refused to expel those of its members who had been convicted of criminal offences, taken together with the amendments to the Criminal Code of 12 April 1991, had rendered meaningless the Constitutional Court’s power to dissolve political parties which constituted centres of anti-secular activities, even though that power was clearly conferred by Articles 68 § 4 and 69 §§ 4 and 6 of the Constitution.

61. It remains to be determined whether the applicants must have been aware of the possibility of a direct application of the Constitution in their case and could thus have foreseen the risks they ran through their party’s anti-secular activities or through their refusal to distance themselves from that type of activity, without the procedure laid down by section 103(2) of the Law on the regulation of political parties being followed.

In order to be able to answer that question, the Court must first consider the relevant particularities of the legal background against which the facts of the case took place, as set out in the judgment of the Turkish Constitutional Court and not contested by the parties. The Turkish Constitution cannot be amended by ordinary legislation and takes precedence over statute law; a conflict between the Constitution’s provisions and those of ordinary legislation is resolved in the Constitution’s favour. In addition, the Constitutional Court has the power and the duty to review the constitutionality of legislation. Where in a particular case there is a discrepancy between the provisions of the applicable statute law and those of the Constitution, as happened in the instant case, the Constitutional Court is clearly required to give precedence to the provisions of the Constitution, disregarding the unconstitutional provisions of the relevant legislation.

62. The Court next takes into account the applicants’ status as the persons to whom the relevant legal instruments were addressed. Refah was a large political party which had legal advisers conversant with constitutional law and the rules governing political

parties. Mr Necmettin Erbakan, Mr Şevket Kazan and Mr Ahmet Tekdal were also experienced politicians. As members of the Turkish parliament they had taken part in parliamentary discussions and procedures concerning the amendments to the Constitution, during which the Constitutional Court's power to rule that a party had become a centre of anti-constitutional activities and the discrepancy between the new text of the Constitution and Law no. 2820 were mentioned. In addition, Mr Şevket Kazan and Mr Ahmet Tekdal were lawyers by profession (see paragraphs 10-11 above).

63. That being so, the Court considers that the applicants were reasonably able to foresee that they ran the risk of proceedings to dissolve Refah if the party's leaders and members engaged in anti-secular activities, and that the fact that the steps laid down in section 103(2) of Law no. 2820 were not taken, having become inapplicable as a result of the 1991 changes to the Criminal Code's provisions on anti-secular activities, could not prevent implementation of the dissolution procedure required by the Turkish Constitution.

64. Consequently, the interference was "prescribed by law".

## *2. Legitimate aim*

65. The Government submitted that the interference complained of pursued several legitimate aims, namely protection of public safety, national security and the rights and freedoms of others and the prevention of crime.

66. The applicants accepted in principle that protection of public safety and the rights and freedoms of others and the prevention of crime might depend on safeguarding the principle of secularism. However, they submitted that in pleading those aims the Government sought to conceal the underlying reasons which had led to Refah's dissolution. In reality, they argued, this had been the aim of major business concerns and the military, whose interests were threatened by Refah's economic policy, involving a reduction of the national debt to zero.

67. The Court considers that the applicants have not adduced sufficient evidence to establish that Refah was dissolved for reasons other than those cited by the Constitutional Court. Taking into account the importance of the principle of

secularism for the democratic system in Turkey, it considers that Refah's dissolution pursued several of the legitimate aims listed in Article 11, namely protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others.

3. *"Necessary in a democratic society"*

(a) Arguments of the parties

(i) *The applicants*

68. The applicants submitted in the first place that the criticisms that had been levelled at Refah on the basis of speeches made several years before were not nearly sufficient to prove that the party constituted a threat to secularism and democracy in Turkey at the time when the dissolution proceedings were instituted against it.

69. They further observed that Refah had found itself in power thirteen years after its foundation. With its millions of members it had had a long political existence and had taken on many responsibilities in local and central government. In order to determine whether the party's dissolution was necessary, the Court should assess all the factors that had led to the decision and all of the party's activities since it had come into existence.

70. The applicants further emphasised the fact that Refah had been in power for a year, from June 1996 to July 1997, during which time it could have tabled draft legislation to introduce a regime based on Islamic law. But it had done nothing of the sort. The applicants submitted that "rigorous" European supervision on the Court's part would have shown that Refah complied with democratic principles.

71. As regards the imputability to Refah of the statements and acts cited in the dissolution judgment, the applicants maintained that where these acts and speeches were attributable to members who had been expelled from the party for that very reason they could not engage Refah's responsibility. The remarks of Refah's chairman, Mr Necmettin Erbakan, had to be interpreted in context, in the light of

the full text of the speeches from which they had been extracted. No apologia for violence could be discerned in those speeches.

72. With regard to the theory of a plurality of legal systems, the applicants pointed out that Mr Necmettin Erbakan's speeches on that point were isolated and had been made in 1993. It was not the policy of Refah, as a political party, to introduce a plurality of legal systems, but at all events what Mr Necmettin Erbakan had proposed was only the introduction of a "civil-law" system, based on the freedom to enter into contracts, which would not have affected the general sphere of public law. Frustrating such a policy in the name of the special role of secularism in Turkey amounted to discrimination against Muslims who wished to conduct their private lives in accordance with the precepts of their religion.

73. On the question whether Refah sought to introduce a regime based on sharia, the applicants observed in the first place that there was no reference in Refah's constitution or its programme to either sharia or Islam. Secondly, they submitted that analysis of the speeches made by Refah's leaders did not establish that it was the party's policy to introduce sharia in Turkey. The desire to see sharia introduced in Turkey, as expressed by certain MPs who had subsequently been expelled from Refah, could not be attributed to the party as a whole. In any case, the proposal to introduce sharia and the plan to establish a plurality of legal systems were incompatible, and the Constitutional Court had been mistaken in accusing Refah of supporting both proposals simultaneously.

74. Moreover, in the applicants' submission, the concept of a "just order", which had been mentioned in certain speeches by party members, was not a reference to divine order, contrary to what had been stated in the Chamber's judgment. Many theoreticians had used the same term in order to describe their ideal society without giving it any religious connotation.

75. The applicants further disputed the statement in paragraph 72 of the Chamber's judgment that "It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia ...". They submitted that such a statement could lead to a distinction between "Christian democrats" and "Muslim democrats" and constitute discrimination against the 150

million Muslims in a total European population of 800 million. In any event, they considered that the question did not fall within the Court's jurisdiction.

76. As regards recourse to force, the applicants maintained that even though some Refah members had mentioned such a possibility in their speeches, no member of Refah had ever attempted to use force. The inescapable conclusion was that the acts and speeches criticised on this account did not at the time of the party's dissolution represent a real danger for secularism in Turkey. Certain members who had made such speeches had been expelled from Refah. One of them had been convicted just before the dissolution, so that Refah had not had time to expel him before being dissolved. The other speeches for which Refah's leaders had been criticised had been made before the party came to power.

77. Lastly, the applicants submitted that the interference in issue was not proportionate to the aims pursued. They laid particular emphasis on the harshness of dissolving any political party on account of speeches made by some of its members, the scale of the political disabilities imposed on the three applicants, Mr Necmettin Erbakan, Mr Şevket Kazan and Mr Ahmet Tekdal, and the heavy financial losses suffered by Refah following its dissolution.

*(ii) The Government*

78. On the question whether Refah presented a danger at the time of its dissolution, the Government observed that the party had never exercised power alone and had therefore never had an opportunity to put its plan of setting up a theocratic State into practice. They submitted that if Refah had been the sole party in power it would have been quite capable of implementing its policy and thus putting an end to democracy.

79. The Government further submitted that the speeches criticised by the Constitutional Court were imputable to Refah. They pointed out that Article 4 of the party's constitution provided for the exclusion of members responsible for acts contrary to the decisions of its executive organs; under Article 5 of the constitution members who committed acts contrary to the party's constitution and programme were liable to the same penalty. The Government asserted that these provisions had

never been applied to the Refah members guilty of the offending acts and statements.

80. Moreover, the plan to introduce a plurality of legal systems, which had never been abandoned by Refah, was clearly incompatible with the principle of non-discrimination, which was enshrined in the Convention and was one of the fundamental principles of democracy.

81. With regard to the question whether Refah supported the introduction of sharia in Turkey, the Government observed that it was not the party's official programme which caused a problem but the fact that certain aspects of the activities and speeches of Refah's leaders unambiguously indicated that the party would seek to introduce sharia if it held power alone. They pointed out that the concept of a "just order", mentioned by Refah, had formed the basis for its campaign in the 1995 general election. In explaining the concept of a "just order" in the context of that propaganda, Refah's leaders had clearly been referring to an order based on sharia.

82. The Government endorsed the opinion expressed by the Constitutional Court and in paragraph 72 of the Chamber's judgment that sharia is hard to reconcile with democracy and the Convention system. A theocratic State could not be a democratic State, as could be seen from Turkish history during the Ottoman period, among other examples. The Government mentioned a number of instances of incompatibility between the main rules of sharia and the rights and freedoms guaranteed by the Convention.

83. The Government did not believe that Refah was content to interpret the principle of secularism differently. In their submission, the party wished to do away with that principle altogether. This was evidenced by the submissions made on Refah's behalf during the latest debates on amendment of the Constitution, since Refah had quite simply proposed deleting the reference in the Constitution to the principle of secularism.

84. As to the possibility of using force as a method of political struggle, the Government cited the statements of Refah members who advocated the use of violence in order to resist certain government policies or to gain power and retain it. They submitted that a number of acts and speeches by Refah members constituted



incitement to a popular uprising and the generalised violence characterising any “holy war”.

85. The Government further observed that at the material time radical Islamist groups such as Hizbullah were carrying out numerous acts of terrorism in Turkey. It was also at that time that Refah members were advocating Islamic fundamentalism in their speeches, one example being a visit made by one of the applicants, Mr Şevket Kazan, the Minister of Justice at the time, to a mayor who had been arrested for organising a “Jerusalem evening” in a room decorated with posters showing the leaders of the terrorist organisations Hamas and Hizbullah.

(b) The Court’s assessment

*(i) General principles*

(α) Democracy and political parties in the Convention system

86. On the question of the relationship between democracy and the Convention, the Court has already ruled, in *United Communist Party of Turkey and Others v. Turkey* (judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, pp. 21-22, § 45), as follows:

“Democracy is without doubt a fundamental feature of the European public order  
...

That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights ... The Preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention ...; it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society ...

In addition, Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is 'necessary in a democratic society'. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it."

87. The Court has also confirmed on a number of occasions the primordial role played in a democratic regime by political parties enjoying the freedoms and rights enshrined in Article 11 and also in Article 10 of the Convention.

In *United Communist Party of Turkey and Others*, cited above, it stated that it found even more persuasive than the wording of Article 11 the fact that political parties were a form of association essential to the proper functioning of democracy (p. 17, § 25). In view of the role played by political parties, any measure taken against them affected both freedom of association and, consequently, democracy in the State concerned (p. 18, § 31).

It is in the nature of the role they play that political parties, the only bodies which can come to power, also have the capacity to influence the whole of the regime in their countries. By the proposals for an overall societal model which they put before the electorate and by their capacity to implement those proposals once they come to power, political parties differ from other organisations which intervene in the political arena.

88. Moreover, the Court has previously noted that protection of opinions and the freedom to express them within the meaning of Article 10 of the Convention is one of the objectives of the freedoms of assembly and association enshrined in Article 11. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy (*ibid.*, pp. 20-21, §§ 42-43).

89. The Court considers that there can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those

that offend, shock or disturb (see, among many other authorities, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49, and *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, p. 26, § 37). Inasmuch as their activities form part of a collective exercise of the freedom of expression, political parties are also entitled to seek the protection of Article 10 of the Convention (see *United Communist Party of Turkey and Others*, cited above, pp. 20-21, § 43).

### (β) Democracy and religion in the Convention system

90. For the purposes of the present case, the Court also refers to its case-law concerning the place of religion in a democratic society and a democratic State. It reiterates that, as protected by Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 17, § 31, and *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I).

91. Moreover, in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected (see *Kokkinakis*, cited above, p. 18, § 33). The Court has frequently emphasised the State’s role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs (see, *mutatis mutandis*, *Cha’are Shalom Ve Tsedek v. France* [GC], no. 27417/95, § 84, ECHR 2000-VII) and that it requires the State to ensure mutual tolerance between opposing groups (see, *mutatis mutandis*, *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, § 123, ECHR 2001-XII).

92. The Court's established case-law confirms this function of the State. It has held that in a democratic society the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety (see *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V).

While freedom of religion is in the first place a matter of individual conscience, it also implies freedom to manifest one's religion alone and in private or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists a number of forms which manifestation of a religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, it does not protect every act motivated or influenced by a religion or belief (see *Kalaç v. Turkey*, judgment of 1 July 1997, *Reports* 1997-IV, p. 1209, § 27).

The obligation for a teacher to observe normal working hours which, he asserts, clash with his attendance at prayers, may be compatible with the freedom of religion (see *X v. the United Kingdom*, no. 8160/78, Commission decision of 12 March 1981, *Decisions and Reports* (DR) 22, p. 27), as may the obligation requiring a motorcyclist to wear a crash helmet, which in his view is incompatible with his religious duties (see *X v. the United Kingdom*, no. 7992/77, Commission decision of 12 July 1978, DR 14, p. 234).

93. In applying the above principles to Turkey the Convention institutions have expressed the view that the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention (see the opinion of the Commission, expressed in its report of 27 February 1996, in *Kalaç*, cited above, p. 1215, § 44, and, *mutatis mutandis*, p. 1209, §§ 27-31).

94. In order to perform its role as the neutral and impartial organiser of the exercise of religious beliefs, the State may decide to impose on its serving or future civil servants, who will be required to wield a portion of its sovereign power, the duty to refrain from taking part in the Islamic fundamentalist movement, whose goal and

plan of action is to bring about the pre-eminence of religious rules (see, *mutatis mutandis*, *Yanasik v. Turkey*, no. 14524/89, Commission decision of 6 January 1993, DR 74, p. 14, and *Kalaç*, cited above, p. 1209, § 28).

95. In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9 § 2 of the Convention. In that context, secular universities may regulate manifestation of the rites and symbols of the said religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others (see *Karaduman v. Turkey*, no. 16278/90, Commission decision of 3 May 1993, DR 74, p. 93).

(γ) The possibility of imposing restrictions, and rigorous European supervision

96. The freedoms guaranteed by Article 11, and by Articles 9 and 10 of the Convention, cannot deprive the authorities of a State in which an association, through its activities, jeopardises that State's institutions, of the right to protect those institutions. In this connection, the Court points out that it has previously held that some compromise between the requirements of defending democratic society and individual rights is inherent in the Convention system. For there to be a compromise of that sort any intervention by the authorities must be in accordance with paragraph 2 of Article 11 – a matter which the Court considers below. Only when that review is complete will the Court be in a position to decide, in the light of all the circumstances of the case, whether Article 17 of the Convention should be applied (see *United Communist Party of Turkey and Others*, cited above, p. 18, § 32).

97. The Court has also defined as follows the limits within which political organisations can continue to enjoy the protection of the Convention while conducting their activities (*ibid.*, p. 27, § 57):

“... one of the principal characteristics of democracy [is] the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that

point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned."

98. On that point, the Court considers that a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds (see *Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, § 49, ECHR 2002-II, and, *mutatis mutandis*, the following judgments: *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 97, ECHR 2001-IX, and *Socialist Party and Others v. Turkey*, judgment of 25 May 1998, *Reports* 1998-III, pp. 1256-57, §§ 46-47).

99. The possibility cannot be excluded that a political party, in pleading the rights enshrined in Article 11 and also in Articles 9 and 10 of the Convention, might attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention and thus bring about the destruction of democracy (see *Communist Party (KPD) v. Germany*, no. 250/57, Commission decision of 20 July 1957, *Yearbook* 1, p. 222). In view of the very clear link between the Convention and democracy (see paragraphs 86-89 above), no one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society. Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole (see, *mutatis mutandis*, *Petersen v. Germany* (dec.), no. 39793/98, ECHR 2001-XII).

In that context, the Court considers that it is not at all improbable that totalitarian movements, organised in the form of political parties, might do away with democracy, after prospering under the democratic regime, there being examples of this in modern European history.

100. The Court reiterates, however, that the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation. Although it is not for the Court to take the place of the national authorities, which are better placed than an international court to decide, for example, the appropriate timing for interference, it must exercise rigorous supervision embracing both the law and the decisions applying it, including those given by independent courts. Drastic measures, such as the dissolution of an entire political party and a disability barring its leaders from carrying on any similar activity for a specified period, may be taken only in the most serious cases (see the following judgments: *United Communist Party of Turkey and Others*, cited above, p. 22, § 46; *Socialist Party and Others*, cited above, p. 1258, § 50; and *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, § 45, ECHR 1999-VIII). Provided that it satisfies the conditions set out in paragraph 98 above, a political party animated by the moral values imposed by a religion cannot be regarded as intrinsically inimical to the fundamental principles of democracy, as set forth in the Convention.

(δ) Imputability to a political party of the acts and speeches of its members

101. The Court further considers that the constitution and programme of a political party cannot be taken into account as the sole criterion for determining its objectives and intentions. The political experience of the Contracting States has shown that in the past political parties with aims contrary to the fundamental principles of democracy have not revealed such aims in their official publications until after taking power. That is why the Court has always pointed out that a party's political programme may conceal objectives and intentions different from the ones it proclaims. To verify that it does not, the content of the programme must be compared with the actions of the party's leaders and the positions they defend. Taken together, these acts and stances may be relevant in proceedings for the



dissolution of a political party, provided that as a whole they disclose its aims and intentions (see *United Communist Party of Turkey and Others*, cited above, p. 27, § 58, and *Socialist Party and Others*, cited above, pp. 1257-58, § 48).

(e) The appropriate timing for dissolution

102. In addition, the Court considers that a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent. The Court accepts that where the presence of such a danger has been established by the national courts, after detailed scrutiny subjected to rigorous European supervision, a State may “reasonably forestall the execution of such a policy, which is incompatible with the Convention’s provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country’s democratic regime” (see the Chamber’s judgment, § 81).

103. The Court takes the view that such a power of preventive intervention on the State’s part is also consistent with Contracting Parties’ positive obligations under Article 1 of the Convention to secure the rights and freedoms of persons within their jurisdiction. Those obligations relate not only to any interference that may result from acts or omissions imputable to agents of the State or occurring in public establishments but also to interference imputable to private individuals within non-State entities (see, for example, with regard to the State’s obligation to make private hospitals adopt appropriate measures to protect life, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I). A Contracting State may be justified under its positive obligations in imposing on political parties, which are bodies whose *raison d’être* is to accede to power and direct the work of a considerable portion of the State apparatus, the duty to respect and safeguard the rights and freedoms guaranteed by the Convention and the obligation not to put forward a political programme in contradiction with the fundamental principles of democracy.

(ζ) Overall examination

104. In the light of the above considerations, the Court’s overall examination of the question whether the dissolution of a political party on account of a risk of democratic principles being undermined met a “pressing social need” (see, for

example, *Socialist Party and Others*, cited above, p. 1258, § 49) must concentrate on the following points: (i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a “democratic society”.

105. The overall examination of the above points that the Court must conduct also has to take account of the historical context in which the dissolution of the party concerned took place and the general interest in preserving the principle of secularism in that context in the country concerned to ensure the proper functioning of “democratic society” (see, *mutatis mutandis*, *Petersen*, cited above).

*(ii) Application of the above principles to the present case*

106. The Court will devote the first part of its examination to the question whether Refah’s dissolution and the secondary penalties imposed on the other applicants met a “pressing social need”. It will then determine, if the case arises, whether those penalties were “proportionate to the legitimate aims pursued”.

*(α) Pressing social need*

*The appropriate timing for dissolution*

107. The Court will first determine whether Refah could have presented a threat to the democratic regime at the time when it was dissolved.

It observes in that connection that Refah was founded in 1983, took part in a number of general and local election campaigns and obtained approximately 22% of the votes in the 1995 general election, which gave it 158 seats in the Grand National Assembly (out of a total of 450 at the material time). After sharing power in a coalition government, Refah obtained about 35% of the votes in the local elections of November 1996. According to an opinion poll carried out in January 1997, if a general election had been held at that time Refah would have received 38% of the

votes. According to the forecasts of the same opinion poll, Refah could have obtained 67% of the votes in the general election likely to be held about four years' later (see paragraph 11 above). Notwithstanding the uncertain nature of some opinion polls, those figures bear witness to a considerable rise in Refah's influence as a political party and its chances of coming to power alone.

108. The Court accordingly considers that at the time of its dissolution Refah had the real potential to seize political power without being restricted by the compromises inherent in a coalition. If Refah had proposed a programme contrary to democratic principles, its monopoly of political power would have enabled it to establish the model of society envisaged in that programme.

109. As regards the applicants' argument that Refah was punished for speeches by its members made several years before its dissolution, the Court considers that the Turkish courts, when reviewing the constitutionality of Refah's acts, could legitimately take into consideration the progression over time of the real risk that the party's activities represented for the principles of democracy. The same applies to the review of Refah's compliance with the principles set forth in the Convention. Firstly, the programme and policies of a political party may become clear through the accumulation of acts and speeches by its members over a relatively long period. Secondly, the party concerned may, over the years, increase its chances of gaining political power and implementing its policies.

110. While it can be considered, in the present case, that Refah's policies were dangerous for the rights and freedoms guaranteed by the Convention, the real chances that Refah would implement its programme after gaining power made that danger more tangible and more immediate. That being the case, the Court cannot criticise the national courts for not acting earlier, at the risk of intervening prematurely and before the danger concerned had taken shape and become real. Nor can it criticise them for not waiting, at the risk of putting the political regime and civil peace in jeopardy, for Refah to seize power and swing into action, for example by tabling bills in Parliament, in order to implement its plans.

In short, the Court considers that in electing to intervene at the time when they did in the present case the national authorities did not go beyond the margin of appreciation left to them under the Convention.

*Imputability to Refah of the acts and speeches of its members*

111. The parties before the Court agreed that neither in its constitution nor in the coalition programme it had negotiated with another political party, the True Path Party (Doğru Yol Partisi), had Refah proposed altering Turkey's constitutional settlement in a way that would be contrary to the fundamental principles of democracy. Refah was dissolved on the basis of the statements made and stances adopted by its chairman and some of its members.

112. Those statements and stances were made or adopted, according to the Constitutional Court, by seven of Refah's leading figures, namely its chairman, Mr Necmettin Erbakan, its two vice-chairmen, Mr Şevket Kazan and Mr Ahmet Tekdal, three Refah members of Turkey's Grand National Assembly, Mr Şevki Yılmaz, Mr Hasan Hüseyin Ceylan and Mr İbrahim Halil Çelik, and the mayor of the city of Konya, Mr Recai Karatepe, elected on a Refah ticket.

113. The Court considers that the statements and acts of Mr Necmettin Erbakan, in his capacity as chairman of Refah or as the Prime Minister elected on account of his position as the leader of his party, could incontestably be attributed to Refah. The role of a chairman, who is frequently a party's emblematic figure, is different in that respect from that of a simple member. Remarks on politically sensitive subjects or positions taken up by the chairman of a party are perceived by political institutions and by public opinion as acts reflecting the party's views, rather than his personal opinions, unless he declares that this is not the case. The Court observes on that point that Mr Erbakan never made it clear that his statements and stances did not reflect Refah's policy or that he was only expressing his personal opinion.

114. The Court considers that the speeches and stances of Refah's vice-chairmen could be treated in the same way as those of its chairman. Save where otherwise indicated, remarks by such persons on political questions are imputable to the party they represent. That applies in the present case to the remarks of Mr Şevket Kazan and Mr Ahmet Tekdal.

115. Moreover, the Court considers that, inasmuch as the acts and remarks of the other Refah members who were MPs or held local government posts formed a whole which disclosed the party's aims and intentions and projected an image, when

viewed in the aggregate, of the model of society it wished to set up, these could also be imputed to Refah. These acts or remarks were likely to influence potential voters by arousing their hopes, expectations or fears, not because they were attributable to individuals but because they had been done or made on Refah's behalf by MPs and a mayor, all of whom had been elected on a Refah platform. Such acts and speeches were potentially more effective than abstract forms of words written in the party's constitution and programme in achieving any unlawful ends. The Court considers that such acts and speeches are imputable to a party unless it distances itself from them.

But a short time later Refah presented those responsible for these acts and speeches as candidates for important posts, such as member of Parliament or mayor of a large city, and distributed one of the offending speeches to its local branches to serve as material for the political training of its members. Before the proceedings to dissolve Refah were instituted no disciplinary action was taken within the party against those who had made the speeches concerned on account of their activities or public statements and Refah never criticised their remarks. The Court accepts the Turkish Constitutional Court's conclusion on this point to the effect that Refah had decided to expel those responsible for the acts and speeches concerned in the hope of avoiding dissolution and that the decision was not made freely, as the decisions of leaders of associations should be if they are to be recognised under Article 11 (see, *mutatis mutandis*, *Freedom and Democracy Party (ÖZDEP)*, cited above, § 26).

The Court accordingly concludes that the acts and speeches of Refah's members and leaders cited by the Constitutional Court in its dissolution judgment were imputable to the whole party.

*The main grounds for dissolution cited by the Constitutional Court*

116. The Court considers on this point that among the arguments for dissolution pleaded by Principal State Counsel at the Court of Cassation those cited by the Constitutional Court as grounds for its finding that Refah had become a centre of anti-constitutional activities can be classified into three main groups: (i) the arguments that Refah intended to set up a plurality of legal systems, leading to discrimination based on religious beliefs; (ii) the arguments that Refah intended to apply sharia to the internal or external relations of the Muslim community within

the context of this plurality of legal systems; and (iii) the arguments based on the references made by Refah members to the possibility of recourse to force as a political method. The Court must therefore limit its examination to those three groups of arguments cited by the Constitutional Court.

(a) The plan to set up a plurality of legal systems

117. The Court notes that the Constitutional Court took account in this connection of two declarations by the applicant Mr Necmettin Erbakan, Refah's chairman, on 23 March 1993 in Parliament and on 10 October 1993 at a Refah party conference (see paragraph 28 above). In the light of its considerations on the question of the appropriate timing for dissolution of the party (see paragraphs 107-10 above) and on the imputability to Refah of Mr Necmettin Erbakan's speeches (see paragraph 113 above), it takes the view that these two speeches could be regarded as reflecting one of the policies which formed part of Refah's programme, even though the party's constitution said nothing on the subject.

118. With regard to the applicants' argument that when Refah was in power it had never taken any concrete steps to implement the idea behind this proposal, the Court considers that it would not have been realistic to wait until Refah was in a position to include such objectives in the coalition programme it had negotiated with a political party of the centre-right. It merely notes that a plurality of legal systems was a policy which formed part of Refah's programme.

119. The Court sees no reason to depart from the Chamber's conclusion that a plurality of legal systems, as proposed by Refah, cannot be considered to be compatible with the Convention system. In its judgment, the Chamber gave the following reasoning:

"70. ... the Court considers that Refah's proposal that there should be a plurality of legal systems would introduce into all legal relationships a distinction between individuals grounded on religion, would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement.

The Court takes the view that such a societal model cannot be considered compatible with the Convention system, for two reasons.

Firstly, it would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned. But the State has a positive obligation to ensure that everyone within its jurisdiction enjoys in full, and without being able to waive them, the rights and freedoms guaranteed by the Convention (see, *mutatis mutandis*, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 14, § 25).

Secondly, such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination. Such a difference in treatment cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and on the other the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs (see, *mutatis mutandis*, the judgment of 23 July 1968 in the "Belgian linguistic" case, Series A no. 6, pp. 33-35, §§ 9 and 10, and *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, pp. 35-36, § 72).

(b) Sharia

120. The Court observes in the first place that the intention to set up a regime based on sharia was explicitly portended in the following remarks cited by the Constitutional Court, which had been made by certain members of Refah, all of whom were MPs:



– In a television interview broadcast on 24 November 1996 Mr Hasan Hüseyin Ceylan, Refah MP for the province of Ankara, said that sharia was the solution for the country (see paragraph 34 above);

– On 8 May 1997 Mr İbrahim Halil Çelik, Refah MP for the province of Şanlıurfa, said: “I will fight to the end to introduce sharia” (see paragraph 37 above);

– In April 1994 Mr Şevki Yılmaz, Refah MP for the province of Rize, urged believers to “call to account those who turn their backs on the precepts of the Koran and those who deprive Allah’s Messenger of his jurisdiction in their country” and asserted: “Only 39% [of the rules] in the Koran are applied in this country. Six thousand five hundred verses have been quietly forgotten ...” He went on to say: “The condition to be met before prayer is the Islamisation of power. Allah says that, before mosques, it is the path of power which must be Muslim” and “The question Allah will ask you is this: ‘Why, in the time of the blasphemous regime, did you not work for the construction of an Islamic State?’ Erbakan and his friends want to bring Islam to this country in the form of a political party. The prosecutor understood that clearly. If we could understand that as he did, the problem would be solved” (see paragraph 33 above).

121. The Court further notes the following remarks by Refah’s chairman and vice-chairman, on their desire to set up a “just order” or “order of justice” or “God’s order”, which the Constitutional Court took into consideration:

– On 13 April 1994 Mr Necmettin Erbakan said: “Refah will come to power and a just order [*adil düzen*] will be established” (see paragraph 31 above), and in a speech on 7 May 1996 he praised “those who contribute, with conviction, to the supremacy of Allah” (see paragraph 39 above);

– While on pilgrimage in 1993 Mr Ahmet Tekdal said: “If the people ... do not work hard enough to bring about the advent of ‘*hak nizamı*’ [a just order or God’s order], ... they will be tyrannised by [renegades] and will eventually disappear ... they will not be able to give a satisfactory account of themselves to Allah, as they will not have worked to establish ‘*hak nizamı*’ ” (see paragraph 35 above).

122. Even though these last two statements lend themselves to a number of different interpretations, their common denominator is that they both refer to religious or divine rules as the basis for the political regime which the speakers wished to bring into being. They betray ambiguity about those speakers' attachment to any order not based on religious rules. In the light of the context created by the various views attributed to Refah's leaders which the Constitutional Court cited in its judgment, for example on the question of the wearing of Islamic headscarves in the public sector or on the organisation of working hours in the civil service to fit in with the appointed times for prayers, the statements concerned could reasonably have been understood as confirming statements made by Refah MPs which revealed the party's intention of setting up a regime based on sharia. The Court can therefore accept the Constitutional Court's conclusion that these remarks and stances of Refah's leaders formed a whole and gave a clear picture of a model conceived and proposed by the party of a State and society organised according to religious rules.

123. The Court concurs in the Chamber's view that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention:

"72. Like the Constitutional Court, the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. ... In the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention."

124. The Court must not lose sight of the fact that in the past political movements based on religious fundamentalism have been able to seize political power in certain States and have had the opportunity to set up the model of society which they had in mind. It considers that, in accordance with the Convention's provisions, each Contracting State may oppose such political movements in the light of its historical experience.

125. The Court further observes that there was already an Islamic theocratic regime under Ottoman law. When the former theocratic regime was dismantled and the republican regime was being set up, Turkey opted for a form of secularism which confined Islam and other religions to the sphere of private religious practice. Mindful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey, the Court considers that the Constitutional Court was justified in holding that Refah's policy of establishing sharia was incompatible with democracy (see paragraph 40 above).

(c) Sharia and its relationship with the plurality of legal systems proposed by Refah

126. The Court will next examine the applicants' argument that the Chamber contradicted itself in holding that Refah supported introducing both a plurality of legal systems and sharia simultaneously.

It takes note of the Constitutional Court's considerations concerning the part played by a plurality of legal systems in the application of sharia in the history of Islamic law. These showed that sharia is a system of law applicable to relations between Muslims themselves and between Muslims and the adherents of other faiths. In order to enable the communities owing allegiance to other religions to live in a society dominated by sharia, a plurality of legal systems had also been introduced by the Islamic theocratic regime during the Ottoman Empire, before the Republic was founded.

127. The Court is not required to express an opinion in the abstract on the advantages and disadvantages of a plurality of legal systems. It notes, for the purposes of the present case, that – as the Constitutional Court observed – Refah's policy was to apply some of sharia's private-law rules to a large part of the population

in Turkey (namely Muslims), within the framework of a plurality of legal systems. Such a policy goes beyond the freedom of individuals to observe the precepts of their religion, for example by organising religious wedding ceremonies before or after a civil marriage (a common practice in Turkey) and according religious marriage the effect of a civil marriage (see, *mutatis mutandis*, *Serif v. Greece*, no. 38178/97, § 50, ECHR 1999-IX). This Refah policy falls outside the private sphere to which Turkish law confines religion and suffers from the same contradictions with the Convention system as the introduction of sharia (see paragraph 125 above).

128. Pursuing that line of reasoning, the Court rejects the applicants' argument that prohibiting a plurality of private-law systems in the name of the special role of secularism in Turkey amounted to establishing discrimination against Muslims who wished to live their private lives in accordance with the precepts of their religion.

It reiterates that freedom of religion, including the freedom to manifest one's religion by worship and observance, is primarily a matter of individual conscience, and stresses that the sphere of individual conscience is quite different from the field of private law, which concerns the organisation and functioning of society as a whole.

It has not been disputed before the Court that in Turkey everyone can observe in his private life the requirements of his religion. On the other hand, Turkey, like any other Contracting Party, may legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration prejudicial to public order and the values of democracy for Convention purposes (such as rules permitting discrimination based on the gender of the parties concerned, as in polygamy and privileges for the male sex in matters of divorce and succession). The freedom to enter into contracts cannot encroach upon the State's role as the neutral and impartial organiser of the exercise of religions, faiths and beliefs (see paragraphs 91-92 above).

(d) The possibility of recourse to force

129. The Court takes into consideration under this heading the following remarks cited by the Constitutional Court and made by:

- Mr Necmettin Erbakan, on 13 April 1994, on the question whether power would be gained by violence or by peaceful means (whether the change would involve bloodshed or not – see paragraph 31 above);
- Mr Şevki Yılmaz, in April 1994, concerning his interpretation of jihad and the possibility for Muslims of arming themselves after coming to power (see paragraph 33 above);
- Mr Hasan Hüseyin Ceylan, on 14 March 1993, who insulted and threatened the supporters of a regime on the Western model (see paragraph 34 above);
- Mr Şükrü Karatepe, who, in his speech on 10 December 1996, advised believers to keep alive the rancour and hatred they felt in their hearts (see paragraph 36 above); and
- Mr İbrahim Halil Çelik, on 8 May 1997, who said he wanted blood to flow to prevent the closure of the theological colleges (see paragraph 37 above).

The Court also takes into account the visit by Mr Şevket Kazan, who was then the Minister of Justice, to a member of his party charged with incitement to hatred based on religious discrimination (see paragraph 38 above).

130. The Court considers that, whatever meaning is ascribed to the term “jihad” used in most of the speeches mentioned above (whose primary meaning is holy war and the struggle to be waged until the total domination of Islam in society is achieved), there was ambiguity in the terminology used to refer to the method to be employed to gain political power. In all of these speeches the possibility was mentioned of resorting “legitimately” to force in order to overcome various obstacles Refah expected to meet in the political route by which it intended to gain and retain power.

131. Furthermore, the Court endorses the following finding of the Chamber:

“74. ...

While it is true that [Refah's] leaders did not, in government documents, call for the use of force and violence as a political weapon, they did not take prompt practical steps to distance themselves from those members of [Refah] who had publicly referred with approval to the possibility of using force against politicians who opposed them. Consequently, Refah's leaders did not dispel the ambiguity of these statements about the possibility of having recourse to violent methods in order to gain power and retain it (see, *mutatis mutandis*, *Zana v. Turkey*, judgment of 25 November 1997, *Reports* 1997-VII, p. 2549, § 58)."

*Overall examination of "pressing social need"*

132. In making an overall assessment of the points it has just listed above in connection with its examination of the question whether there was a pressing social need for the interference in issue in the present case, the Court finds that the acts and speeches of Refah's members and leaders cited by the Constitutional Court were imputable to the whole of the party, that those acts and speeches revealed Refah's long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems and that Refah did not exclude recourse to force in order to implement its policy and keep the system it envisaged in place. In view of the fact that these plans were incompatible with the concept of a "democratic society" and that the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the Constitutional Court, even in the context of the restricted margin of appreciation left to Contracting States, may reasonably be considered to have met a "pressing social need".

(β) Proportionality of the measure complained of

133. After considering the parties' arguments, the Court sees no good reason to depart from the following considerations in the Chamber's judgment:

"82. ... The Court has previously held that the dissolution of a political party accompanied by a temporary ban prohibiting its leaders from exercising political responsibilities was a drastic measure and that measures of such severity might be applied only in the most serious cases (see the previously cited *Socialist Party and Others v. Turkey* judgment, p. 1258, § 51). In the present case it has just found

that the interference in question met a ‘pressing social need’. It should also be noted that after [Refah’s] dissolution only five of its MPs (including the applicants) temporarily forfeited their parliamentary office and their role as leaders of a political party. The 152 remaining MPs continued to sit in Parliament and pursued their political careers normally. ... The Court considers in that connection that the nature and severity of the interference are also factors to be taken into account when assessing its proportionality (see, for example, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 64, ECHR 1999-IV).”

134. The Court also notes that the pecuniary damage alleged by the applicants was made up largely of a loss of earnings and is speculative in nature. In view of the low value of Refah’s assets, their transfer to the Treasury can have no bearing on the proportionality of the interference in issue. Moreover, the Court observes that the prohibition barring three of the applicants, Mr Necmettin Erbakan, Mr Şevket Kazan and Mr Ahmet Tekdal, from engaging in certain types of political activity for a period of five years was temporary, and that, through their speeches and the stances they adopted in their capacity as the chairman and vice-chairmen of the party, they bear the main responsibility for Refah’s dissolution.

It follows that the interference in issue in the present case cannot be regarded as disproportionate in relation to the aims pursued.

#### *4. The Court’s conclusion regarding Article 11 of the Convention*

135. Consequently, following a rigorous review to verify that there were convincing and compelling reasons justifying Refah’s dissolution and the temporary forfeiture of certain political rights imposed on the other applicants, the Court considers that those interferences met a “pressing social need” and were “proportionate to the aims pursued”. It follows that Refah’s dissolution may be regarded as “necessary in a democratic society” within the meaning of Article 11 § 2.

136. Accordingly, there has been no violation of Article 11 of the Convention.



## II. Alleged violation of articles 9, 10, 14, 17 and 18 of the convention

137. The applicants further alleged the violation of Articles 9, 10, 14, 17 and 18 of the Convention. As their complaints concern the same facts as those examined under Article 11, the Court considers that it is not necessary to examine them separately.

## III. Alleged violation of articles 1 and 3 of protocol no. 1

138. The applicants further submitted that the consequences of Refah's dissolution, namely the confiscation of its assets and their transfer to the Treasury, and the ban preventing its leaders from participating in elections, had entailed breaches of Articles 1 and 3 of Protocol No. 1.

139. The Court notes that the measures complained of by the applicants were only secondary effects of Refah's dissolution, which, as the Court has found, did not breach Article 11. Accordingly, there is no cause to examine separately the complaints in question.

### For these reasons, the court unanimously

1. *Holds* that there has been no violation of Article 11 of the Convention;
2. *Holds* that it is not necessary to examine separately the complaints under Articles 9, 10, 14, 17 and 18 of the Convention and Articles 1 and 3 of Protocol No. 1.

### Smiselno dopolnite s pojmi na koncu besedila:

ESČP je v zadevi *Refah Partisi in drugi proti Turčiji* presojalo, ali je bila razpustitev pomembne politične stranke ter začasna prepoved političnega delovanja nekaterih njenih voditeljev dopusten poseg v pravico do svobode \_\_\_\_\_. Eno izmed uvodnih vprašanj je bilo, ali je bil tak poseg dovolj jasno \_\_\_\_\_ z domačim pravom in ali so pritožniki lahko razumno predvideli, da lahko delovanje stranke privede do njene \_\_\_\_\_. Če naslovniki norme ne morejo z razumno

gotovostjo predvideti pravnih posledic svojega ravnanja, je lahko prizadeto načelo \_\_\_\_\_.

Pritožniki so zatrjevali, da pravna podlaga ni bila dovolj jasna, ker je turško Ustavno sodišče tik pred končno odločitvijo razveljavilo del zakonske ureditve o političnih strankah. ESČP pa je poudarilo, da je bilo že iz turške \_\_\_\_\_ dovolj jasno razvidno, da je mogoče razpustiti stranko, ki postane središče dejavnosti proti temeljnemu načelom republike, zlasti proti načelu sekularnosti. Ob tem je opozorilo, da imajo ustavne določbe prednost pred navadno \_\_\_\_\_ in da so bili pritožniki kot izkušeni politiki, nekateri tudi kot \_\_\_\_\_, sposobni razumeti tveganje, ki ga takšno politično delovanje lahko povzroči.

ESČP je nadalje poudarilo, da so politične stranke osrednji instrument \_\_\_\_\_ demokracije. Prav zato je treba omejitve njihovega delovanja razlagati \_\_\_\_\_ in dopustiti le ob posebej prepričljivih razlogih. Hkrati pa Konvencija ne varuje političnih projektov, katerih cilj je odprava same \_\_\_\_\_ ali uničenje pravic in svoboščin, ki jih ta varuje.

Pomemben del presoje je bil namenjen vprašanju, ali je treba pri ugotavljanju resničnih ciljev politične stranke izhajati le iz njenega formalnega \_\_\_\_\_ in uradnega programa ali tudi iz izjav njenih voditeljev in drugih vidnih članov. ESČP je poudarilo, da politična stranka svojih dejanskih namenov ne more prikriti z navidezno zmernim programom, če njeni voditelji javno zagovarjajo drugačen \_\_\_\_\_ družbe. Zato je bilo treba presoditi, ali so bile sporne izjave posameznikov stranki \_\_\_\_\_ in ali so skupaj razkrivale njene dejanske politične cilje.

Prvi večji očitke se je nanašal na zamisel o \_\_\_\_\_ pravnih sistemov. Po tej ideji bi bili posamezniki glede na svojo \_\_\_\_\_ pripadnost podvrženi različnim pravnim pravilom. ESČP je menilo, da takšna ureditev ni združljiva s sistemom \_\_\_\_\_, ker bi država izgubila vlogo nevtralnega in nepristranskega organizatorja sobivanja različnih prepričanj. Hkrati bi se odprl prostor za \_\_\_\_\_, saj posamezniki pravic in obveznosti ne bi več uživali kot državljani, temveč glede na pripadnost določeni verski skupini.

Drugi ključni element presoje je bilo zagovarjanje uvedbe \_\_\_\_\_. ESČP je poudarilo, da je po njegovem razumevanju tak sistem težko uskladiti s temeljnimi načeli \_\_\_\_\_ družbe, zlasti s političnim pluralizmom, enakostjo posameznikov pred pravom in razvojem svoboščin. Posebej je opozorilo tudi na vprašanje položaja \_\_\_\_\_ ter na širše poseganje verskih norm v javno in zasebno sfero. Zato je presodilo, da politična stranka, katere dejanski cilj je vzpostavitev reda, temelječega na versko določenih pravilih, ne more avtomatično zahtevati enake ravni konvencijskega varstva kot stranka, ki deluje znotraj \_\_\_\_\_ ustavne ureditve.

Posebej zanimiva je bila tudi povezava med idejo pluralnosti pravnih sistemov in uvedbo šeriatskega prava. Pritožniki so trdili, da si ti dve ideji pravzaprav nasprotujeta. Vendar je ESČP sprejelo stališče, da je mogoče pluralnost pravnih sistemov razumeti kot \_\_\_\_\_, znotraj katerega bi se za del prebivalstva uporabljala pravila verskega izvora. Prav zato je menilo, da ne gre za dve ločeni zamisli, temveč za medsebojno povezani sestavini širšega projekta politične in pravne \_\_\_\_\_ družbe.

Tretji pomemben sklop razlogov za prepoved stranke so bile izjave nekaterih članov stranke, ki so omenjale možnost uporabe \_\_\_\_\_, krvavega obračuna ali boja za doseg političnih ciljev. ESČP je poudarilo, da ni odločilno le, ali je stranka nasilje že dejansko uporabila, temveč tudi, ali pušča odprto možnost njegove \_\_\_\_\_ uporabe. Če se vodstvo stranke od takšnih izjav jasno in pravočasno ne \_\_\_\_\_, lahko to potrjuje vtis, da nasilnih metod vsaj načeloma ne izključuje. V obravnavani zadevi je ESČP ocenilo, da je prav takšna \_\_\_\_\_ ostala prisotna.

Pri presoji nujnosti posega je bilo pomembno tudi vprašanje časa državnega ukrepanja. ESČP je poudarilo, da državi ni treba čakati, da politična stranka dejansko prevzame \_\_\_\_\_ in začne izvajati ukrepe, ki bi lahko resno ogrozili demokratični red. Če je nevarnost dovolj konkretna, stvarna in \_\_\_\_\_, je mogoče ukrepati tudi preventivno. To je bilo v zadevi posebej pomembno zato, ker je imela stranka Refah zaradi svoje volilne podpore realne možnosti za pomemben vpliv na izvrševanje \_\_\_\_\_ oblasti.

ESČP je obenem opozorilo, da imajo države pogodbenice na tem področju le \_\_\_\_\_ polje proste presoje in da mora biti evropski nadzor posebej strog, kadar gre za razpustitev politične stranke. Tak ukrep je namreč izrazito \_\_\_\_\_ in dopusten le v najbolj resnih primerih. Kljub temu je ESČP v konkretni zadevi menilo, da so domača sodišča navedla dovolj \_\_\_\_\_ in prepričljive razloge za sklep, da je bila ogrožena sama podstat demokratične ureditve.

Ob celoviti presoji je ESČP ugotovilo, da so izjave in ravnanja, ki jih je bilo mogoče pripisati stranki kot \_\_\_\_\_, kazala na dolgoročni politični projekt, ki ni bil združljiv s pojmom \_\_\_\_\_ družbe v smislu Konvencije. Zato je sklenilo, da je razpustitev stranke odgovarjala \_\_\_\_\_ družbeni potrebi in da je bila glede na zasledovane cilje tudi \_\_\_\_\_. Posledično je odločilo, da v zadevi ni bilo kršitve \_\_\_\_\_ člena EKČP.

**Možni pojmi:** demokratične, nasilja, zakonodajo, celoti, razpustitve, omejeno, versko, sorazmerna, Konvencije, statuta, pravniki, distancira, tehtne, oblast, združevanja, pluralistične, neposredna, predpisan, šeriata, okvir, diskriminacijo, zakonitosti, državne, model, nujni, pripisljive, sekularne, zaupno, drastičen, dvoumnost, ustave, žensk, pluralnosti, 11.

## Vprašanja

- ESČP v sodbi poudari, da državi ni treba čakati, da politična stranka dejansko prevzame oblast in začne izvajati protidemokratski program. Ali je takšna logika preventivnega ukrepanja prepričljiva? Po katerih kriterijih bi bilo treba presoјati, kdaj je nevarnost za demokratični red že dovolj konkretna in neposredna?
- Kako v praksi razlikovati med resnično protidemokratskim projektom in zgolj radikalnim, provokativnim ali neliberalnim političnim programom, ki še vedno ostaja znotraj meja dopustne demokratične razprave?
- Eden osrednjih razlogov za razpustitev Refah Partisi je bila zamisel o pluralnosti pravnih sistemov. Zakaj je ESČP menilo, da tak model ni združljiv z EKČP?
- ESČP je zavzelo zelo odločno stališče, da je šeriat nezdružljiv s temeljnimi načeli demokratične družbe. Ali je takšna formulacija po vašem mnenju preširoka in preveč abstraktna, ali pa je glede na konkretni kontekst zadeve ustrezna?

- Kako pomemben je za razumevanje sodbe turški ustavni in zgodovinski kontekst, zlasti pomen sekularnosti v turškem ustavnem redu? Ali bi morale ESČP enako presoditi tudi v primeru, če država nima enake zgodovinske izkušnje s teokratskim režimom ali z napetim razmerjem med religijo in državo?
- ESČP je med pomembnimi elementi upoštevalo tudi to, da se vodstvo stranke od izjav o nasilju in krvavem obračunu ni jasno in pravočasno distanciralo. Ali je molk oziroma prepozna reakcija vodstva res dovolj močan argument za pripis protidemokratskih ciljev celotni stranki?
- Sodba je klasičen primer koncepta militantne demokracije, torej demokracije, ki se sme braniti pred akterji, ki jo želijo odpraviti. Ali je ta koncept nujen za ohranitev ustavne demokracije? Mar hkrati ne odpira nevarnega prostora za zlorabo, kjer lahko oblast pod pretvezo varovanja demokracije utiša politične nasprotnike?
- Kakšno razmerje med svobodo veroizpovedi, političnim delovanjem versko navdahnjenih strank in načelom sekularnosti vzpostavlja ta sodba?
- Razpustitev politične stranke je eden najstrožjih posegov v politični pluralizem. Ali se vam zdi, da je bil ukrep v tej zadevi res sorazmeren? Katere milejše ukrepe bi bilo mogoče sploh realno uporabiti in ali bi ti lahko učinkovito zavarovali demokratični ustavni red?

# Hirst proti Združenemu kraljestvu z dne 6. oktobra 2005, št. 74025/01

In the case of *Hirst v. the United Kingdom* (no. 2),

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. Wildhaber, President,

Mr C.L. Rozakis,

Mr J.-P. Costa,

Sir Nicolas Bratza,

Mr G. Bonello,

Mr L. Caflisch,

Mrs F. Tulkens,

Mr P. Lorenzen,

Mrs N. Vajić,

Mr K. Traja,

Mr A. Kovler,

Mr V. Zagrebelsky,

Mrs A. Mularoni,

Mrs L. Mijović,

Mr S.E. Jebens,

Mrs D. Jočienė,

Mr J. Šikuta, judges,  
and Mr E. Fribergh, Deputy Registrar,

Having deliberated in private on 27 April and 29 August 2005,

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

### Procedure

1. The case originated in an application (no. 74025/01) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a British national, Mr John Hirst (“the applicant”), on 5 July 2001.
2. The applicant, who had been granted legal aid, was represented by Mr E. Abrahamson, a solicitor practising in Liverpool. The United Kingdom Government (“the Government”) were represented by their Agents, initially by Mr J. Grainger and subsequently by Ms E. Willmott, both of the Foreign and Commonwealth Office.
3. The applicant alleged that as a convicted prisoner in detention he had been subject to a blanket ban on voting in elections. He relied on Article 3 of Protocol No. 1 taken alone and in conjunction with Article 14 of the Convention, and on Article 10 of the Convention.
4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 8 July 2003 it was declared partly admissible by a Chamber of that Section, composed of Mr M. Pellonpää, President, Sir Nicolas Bratza, Mrs V. Strážnická, Mr R. Maruste, Mr S. Pavlovski, Mr L. Garlicki, Mr J. Borrego Borrego, judges, and Mr M. O’Boyle, Section Registrar.
5. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 December 2003 (Rule 59 § 3). In its judgment of 30 March 2004 (“the Chamber judgment”), the Chamber held unanimously that there had been a violation of Article 3 of Protocol No. 1 and that no separate issues arose under Articles 14 and 10 of the Convention. It also held that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

6. On 23 June 2004 the Government requested that the case be referred to the Grand Chamber (Article 43 of the Convention).

7. On 10 November 2004 a panel of the Grand Chamber decided to accept the request for a referral (Rule 73).

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

9. The applicant and the Government each filed a memorial. Observations were also received from the AIRE Centre and the Government of Latvia, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The parties replied to those comments at the hearing mentioned below (Rule 44 § 5).

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 27 April 2005 (Rule 59 § 3).

## **The facts**

### **I. The circumstances of the case**

11. The applicant was born in 1950.

12. On 11 February 1980 the applicant pleaded guilty to manslaughter on the ground of diminished responsibility. His guilty plea was accepted on the basis of medical evidence that he was a man with a severe personality disorder to such a degree that he was amoral. He was sentenced to a term of discretionary life imprisonment.

13. The applicant's tariff (that part of the sentence relating to retribution and deterrence) expired on 25 June 1994. His continued detention was based on considerations of risk and dangerousness, the Parole Board considering that he continued to present a risk of serious harm to the public.

14. The applicant, who is barred by section 3 of the Representation of the People Act 1983 from voting in parliamentary or local elections, issued proceedings in the High Court under section 4 of the Human Rights Act 1998, seeking a declaration



that this provision was incompatible with the European Convention on Human Rights.

15. The applicant's application was heard by the Divisional Court on 21 and 22 March 2001, together with an application for judicial review by two other prisoners, Mr Pearson and Mr Feal-Martinez, who had applied for registration as electors and been refused by the Registration Officer and who also sought a declaration of incompatibility.

16. In the Divisional Court judgment dated 4 April 2001, Lord Justice Kennedy noted that section 3 had a long history and cited the Secretary of State's reasons, given in the proceedings, for maintaining the current policy:

"By committing offences which by themselves or taken with any aggravating circumstances including the offender's character and previous criminal record require a custodial sentence, such prisoners have forfeited the right to have a say in the way the country is governed for that period. There is more than one element to punishment than forcible detention. Removal from society means removal from the privileges of society, amongst which is the right to vote for one's representative."

Examining the state of practice in other jurisdictions, he observed that in Europe only eight countries, including the United Kingdom, did not give convicted prisoners a vote, while twenty did not disenfranchise prisoners and eight imposed a more restricted disenfranchisement. Reference was made to the United States Supreme Court which had rejected a challenge to the Californian Constitution's disenfranchisement of convicted prisoners (see *Richardson v. Ramirez* [1974] 418 United States: Supreme Court Reports 24). Some considerable attention was given to Canadian precedents, which were relied on by both parties, in particular that of the Canadian Supreme Court which, in *Sauvé v. Canada* (no. 1) ([1992] 2 Supreme Court Reports 438), struck down the disenfranchisement of all prisoners as too widely drawn and infringing the minimum impairment rule, and that of the Federal Court of Appeal which, in *Sauvé* (no. 2) ([2000] 2 Federal Court Reports 117), upheld the subsequent legislative provision restricting the ban to prisoners serving a sentence of two years or more in a correctional institution. While it was noted that the Canadian courts were applying a differently phrased provision in their Charter of Rights and Freedoms, the Divisional Court commented that the judgment of Linden JA in the second case in the Federal Court of Appeal contained helpful

observations, in particular as regards the danger of the courts usurping the role of Parliament. The cases before the European Commission of Human Rights and this Court were also reviewed, the Divisional Court noting that the Commission had been consistent in its approach in accepting restrictions on persons convicted and detained.

Lord Justice Kennedy concluded:

“... I return to what was said by the European Court in paragraph 52 of its judgment in *Mathieu-Mohin*. Of course as far as an individual prisoner is concerned disenfranchisement does impair the very essence of his right to vote, but that is too simplistic an approach, because what Article 3 of the First Protocol is really concerned with is the wider question of universal franchise, and ‘the free expression of the opinion of the people in the choice of the legislature’. If an individual is to be disenfranchised that must be in the pursuit of a legitimate aim. In the case of a convicted prisoner serving his sentence the aim may not be easy to articulate. Clearly there is an element of punishment, and also an element of electoral law. As the Home Secretary said, Parliament has taken the view that for the period during which they are in custody convicted prisoners have forfeited their right to have a say in the way the country is governed. The Working Group said that such prisoners had lost the moral authority to vote. Perhaps the best course is that suggested by Linden JA, namely to leave to philosophers the true nature of this disenfranchisement whilst recognising that the legislation does different things.

The European Court also requires that the means employed to restrict the implied Convention rights to vote are not disproportionate, and that is the point at which, as it seems to me, it is appropriate for this Court to defer to the legislature. It is easy to be critical of a law which operates against a wide spectrum (e.g. in relation to its effect on post-tariff discretionary life prisoners, and those detained under some provision of the Mental Health Act 1983), but, as is clear from the authorities, those States which disenfranchise following conviction do not all limit the period of disenfranchisement to the period in custody. Parliament in this country could have provided differently in order to meet the objectives which it discerned, and like *McLachlin J* in Canada, I would accept that the tailoring process seldom admits of perfection, so the courts must afford some leeway to the legislator. As [counsel for the Secretary of State] submits, there is a broad spectrum of approaches among democratic societies, and the United Kingdom falls into the middle of the spectrum.

In course of time this position may move, either by way of further fine tuning, as was recently done in relation to remand prisoners and others, or more radically, but its position in the spectrum is plainly a matter for Parliament not for the courts. That applies even to the 'hard cases' of post-tariff discretionary life sentence prisoners ... They have all been convicted and if, for example, Parliament were to have said that all those sentenced to life imprisonment lose the franchise for life the apparent anomaly of their position would disappear. ...

If section 3(1) of the 1983 Act can meet the challenge of Article 3 [of the First Protocol] then Article 14 has nothing to offer, any more than Article 10."

17. The applicant's claims were accordingly dismissed as were those of the other prisoners.

18. On 2 May 2001 an application for permission to appeal was filed on behalf of Mr Pearson and Mr Feal-Martinez, together with a forty-three-page skeleton argument. On 15 May 2001 Lord Justice Buxton considered the application on the papers and refused permission on the ground that the appeal had no real prospect of success.

19. On 19 May 2001 the applicant filed an application for permission to appeal. On 7 June 2001, his application was considered on the papers by Lord Justice Simon Brown who refused permission for the same reasons as Lord Justice Buxton in relation to the earlier applications. The applicant's renewed application, together with the renewed applications of Mr Pearson and Mr Feal-Martinez, were refused on 18 June 2001, after oral argument, by Lord Justice Simon Brown.

20. On 25 May 2004 the applicant was released from prison on licence.

## **II. Relevant domestic law and practice**

21. Section 3 of the Representation of the People Act 1983 ("the 1983 Act") provides:

"(1) A convicted person during the time that he is detained in a penal institution in pursuance of his sentence ... is legally incapable of voting at any parliamentary or local election."

22. This section re-enacted without debate the provisions of section 4 of the Representation of the People Act 1969, the substance of which dated back to the Forfeiture Act 1870 of the previous century, which in turn reflected earlier rules of law relating to the forfeiture of certain rights by a convicted “felon” (the so-called “civic death” of the times of King Edward III).

23. The disqualification does not apply to persons imprisoned for contempt of court (section 3(2)(a) or to those imprisoned only for default in, for example, paying a fine (section 3(2)(c)).

24. During the passage through Parliament of the Representation of the People Act 2000 (“the 2000 Act”), which allowed remand prisoners and unconvicted mental patients to vote, Mr Howarth MP, speaking for the government, maintained the view that “it should be part of a convicted prisoner’s punishment that he loses rights and one of them is the right to vote”. The Act was accompanied by a statement of compatibility under section 19 of the Human Rights Act 1998, namely, indicating that, in introducing the measure in Parliament, the Secretary of State considered its provisions to be compatible with the Convention.

25. Section 4 of the Human Rights Act 1998 provides:

“(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.”

### **III. Relevant international materials**

#### **A. The International Covenant on Civil and Political Rights**

26. The relevant provisions of the International Covenant on Civil and Political Rights provide:

Article 25

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:

(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) to vote ...”

#### Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

...

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. ...”

27. In General Comment no. 25(57) adopted by the Human Rights Committee under Article 40 § 4 of the International Covenant on Civil and Political Rights on 12 July 1996, the Committee stated, inter alia, concerning the right guaranteed under Article 25:

“14. In their reports, State parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.”

B. The European Prison Rules (Recommendation No. R (87) 3 of the Committee of Ministers of the Council of Europe)

28. These rules set out the minimum standards to be applied to conditions of imprisonment, including the following principle:

“64. Imprisonment is by the deprivation of liberty a punishment in itself. The conditions of imprisonment and the prison regimes shall not, therefore, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in this.”

C. Recommendation Rec(2003)23 of the Committee of Ministers to member States on the management by prison administrations of life sentence and other long-term prisoners

29. This recommendation, adopted on 9 October 2003, noted the increase in life sentences and aimed to give guidance to member States on the management of long-term prisoners.

30. The aims of the management of such prisoners should be:

“2. ...

- to ensure that prisons are safe and secure places for these prisoners ...;
- to counteract the damaging effects of life and long-term imprisonment;
- to increase and improve the possibilities of these prisoners to be successfully resettled and to lead a law-abiding life following their release.”

31. General principles included the following:

“3. Consideration should be given to the diversity of personal characteristics to be found among life sentence and long-term prisoners and account taken of them to make individual plans for the implementation of the sentence (individualisation principle).

4. Prison life should be arranged so as to approximate as closely as possible to the realities of life in the community (normalisation principle).

5. Prisoners should be given opportunities to exercise personal responsibility in daily prison life (responsibility principle).”

#### D. Code of Good Practice in Electoral Matters

32. This document adopted by the European Commission for Democracy through Law (the Venice Commission) at its 51st Plenary Session (5-6 July 2002) and submitted to the Parliamentary Assembly of the Council of Europe on 6 November 2002 includes the Commission’s guidelines as to the circumstances in which there may be a deprivation of the right to vote or to be elected:

i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:

ii. it must be provided for by law;

iii. the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;

iv. the deprivation must be based on mental incapacity or a criminal conviction for a serious offence;

v. furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.”

#### E. Law and practice in Contracting States

33. According to the Government’s survey based on information obtained from its diplomatic representation, eighteen countries allowed prisoners to vote without restriction (Albania, Azerbaijan, Croatia, the Czech Republic, Denmark, Finland, “the former Yugoslav Republic of Macedonia”, Germany, Iceland, Lithuania, Moldova, Montenegro, the Netherlands, Portugal, Slovenia, Sweden, Switzerland and Ukraine), in thirteen countries all prisoners were barred from voting or unable to vote (Armenia, Belgium, Bulgaria, Cyprus, Estonia, Georgia, Hungary, Ireland, Russia, Serbia, Slovakia, Turkey and the United Kingdom), while in twelve countries prisoners’ right to vote could be limited in some other way (Austria, Bosnia and

Herzegovina, France, Greece, Italy, Luxembourg, Malta, Norway, Poland, Romania and Spain).

34. Other material before the Court indicates that in Romania prisoners may be debarred from voting if the principal sentence exceeds two years, while in Latvia prisoners serving a sentence in penitentiaries are not entitled to vote; nor are prisoners in Liechtenstein.

F. Relevant case-law from other States

(izbrisano)

## **The law**

### **I. Alleged violation of article 3 of protocol no. 1**

40. The applicant complained that he had been disenfranchised. He relied on Article 3 of Protocol No. 1 which provides:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A. The Chamber judgment

41. The Chamber found that the exclusion from voting imposed on convicted prisoners in detention was disproportionate. It had regard to the fact that it stripped a large group of people of the vote; that it applied automatically irrespective of the length of the sentence or the gravity of the offence; and that the results were arbitrary and anomalous, depending on the timing of elections. It further noted that, in so far as the disqualification from voting was to be seen as part of a prisoner’s punishment, there was no logical justification for the disqualification to continue in the case of the present applicant, who had completed that part of his sentence relating to punishment and deterrence. It concluded at paragraph 51:



“The Court accepts that this is an area in which a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on prisoners’ right to vote can still be justified in modern times and if so how a fair balance is to be struck. In particular, it should be for the legislature to decide whether any restriction on the right to vote should be tailored to particular offences, or offences of a particular gravity or whether, for instance, the sentencing court should be left with an overriding discretion to deprive a convicted person of his right to vote. The Court would observe that there is no evidence that the legislature in the United Kingdom has ever sought to weigh the competing interests or to assess the proportionality of the ban as it affects convicted prisoners. It cannot accept however that an absolute bar on voting by any serving prisoner in any circumstances falls within an acceptable margin of appreciation. The applicant in the present case lost his right to vote as the result of the imposition of an automatic and blanket restriction on convicted prisoners’ franchise and may therefore claim to be a victim of the measure. The Court cannot speculate as to whether the applicant would still have been deprived of the vote even if a more limited restriction on the right of prisoners to vote had been imposed, which was such as to comply with the requirements of Article 3 of Protocol No. 1.”

## B. The parties’ submissions

### 1. The applicant

42. The applicant adopted the terms of the Chamber judgment, submitting that the Government’s allegation that it would require the radical revision of the laws of many Contracting States was misconceived as the judgment was based on the specific situation in the United Kingdom and directed at a blanket disenfranchisement of convicted persons which arose not out of a reasoned and properly justified decision following thorough debate but out of adherence to historical tradition. He also rejected the argument that the Chamber had not given appropriate weight to the margin of appreciation, submitting that on the facts of this case the concept had little bearing.

43. The applicant emphasised that there was a presumption in favour of enfranchisement, which was in harmony with the fundamental nature of democracy. It was not a privilege, as was sometimes asserted, even for prisoners, who continued to enjoy their inviolable rights which could only be derogated from in very

exceptional circumstances. The restriction on voting rights did not pursue any legitimate aim. Little thought, if any, had in fact been given to the disenfranchisement of prisoners by the legislature, the 1983 Act being a consolidating Act adopted without debate on the point; nor had any thorough debate occurred during the passage of the 2000 Act. The domestic court did not examine the lawfulness of the ban either but decided the applicant's case on the basis of deference to Parliament.

44. The reason relied on in Parliament was that the disenfranchisement of a convicted prisoner was considered part of his punishment. The applicant disputed, however, that punishment could legitimately remove fundamental rights other than the right to liberty and argued that this was inconsistent with the stated rehabilitative aim of prison. There was no evidence that the ban pursued the purported aims nor had any link been shown between the removal of the right to vote and the prevention of crime or respect for the rule of law. Most courts and citizens were totally unaware that loss of voting rights accompanied the imposition of a sentence of imprisonment. The purported aim of enhancing civic responsibility was raised *ex post facto* and was to be treated with circumspection. Indeed, the applicant argued that the ban took away civic responsibility and eroded respect for the rule of law, serving to alienate prisoners further from society.

45. The blanket ban was also disproportionate, arbitrary and impaired the essence of the right. It was unrelated to the nature or seriousness of the offence and varied in its effects on prisoners depending on whether their imprisonment coincided with an election. It potentially deprived a significant proportion of the population (over 48,000) of a voice or the possibility of challenging, electorally, the penal policy which affected them. In addition, the applicant submitted that, as he was a post-tariff prisoner, the punishment element of his sentence had expired and he was held on grounds of risk, in which case there could no longer be any punishment-based justification. He pointed to the recently introduced sentence of "intermittent" custody, whereby a person was able to vote during periods of release in the community while being unable to vote while in prison, as undermining the alleged aims of preventing other convicted prisoners from voting.

46. He further referred to a trend in Canada, South Africa and various European States to enfranchise prisoners, claiming that nineteen countries operated no ban while eight had only a partial or specific ban. He concluded that there was no

convincing reason, beyond punishment, to remove the vote from convicted prisoners and that this additional sanction was not in keeping with the idea that the punishment of imprisonment was the deprivation of liberty and that the prisoner did not thereby forfeit any other of his fundamental rights save in so far as this was necessitated by, for example, considerations of security. In his view, the ban was simply concerned with moral judgment and it was unacceptable, as tantamount to the elected choosing the electorate, for the right to vote to be made subject to moral judgments imposed by the persons who had been elected.

## 2. The Government

47. The Government submitted that under Article 3 of Protocol No. 1 the right to vote was not absolute and that a wide margin of appreciation was to be allowed to Contracting States in determining the conditions under which the right to vote was exercised. They argued that the Chamber judgment failed to give due weight to this consideration. In their view, it wrongly thought that the law on voting by prisoners was the product of passive adherence to a historic tradition. They asserted that the policy had been adhered to over many years with the explicit approval of Parliament, most recently in the Representation of the People Act 2000, which was accompanied by a statement of compatibility under the Human Rights Act. The Chamber also failed to give due regard to the extensive variation between Contracting States on the issue of voting by convicted prisoners, ranging from no prohibition to bans extending beyond the term of the sentence. In some thirteen countries prisoners were unable to vote. A variety of approaches were also taken by democratic States outside Europe. The Chamber's judgment was inconsistent with the settled approach of the Convention organs and there was no prior hint of any problem with the kind of restriction adopted by the United Kingdom.

48. Furthermore, the matter had been considered fully by the national courts applying the principles of the Convention under the Human Rights Act 1998, yet the Chamber paid little attention to this fact while concentrating on the views of a court in another country (see *Sauvé* (no. 2), cited in paragraphs 35-37 above). As regards the Canadian precedent, they pointed out that *Sauvé* (no. 2) was decided by a narrow majority of five votes to four, concerned a law which was different in text and structure and was interpreted by domestic courts to which the doctrine of the margin of appreciation did not apply and that there was a strong dissent which was more in accord with the Convention organs' case-law. The South African case

(August and Another, cited in paragraphs 38-39 above) was not relevant as it concerned practical obstacles to voting, not a statutory prohibition.

49. The Government also considered that the Chamber had erred in effectively assessing the compatibility of national law in abstracto, overlooking that on the facts of this case, if the United Kingdom were to reform the law and only ban those who had committed the most serious offences, the applicant, convicted of an offence of homicide and sentenced to life imprisonment, would still have been barred. Thus, the finding of a violation was a surprising result, and offensive to many people. The Chamber had furthermore misstated the number of prisoners disenfranchised, including those who were on remand and not affected.

50. The Government argued that the disqualification in this case pursued the intertwined legitimate aims of preventing crime and punishing offenders and enhancing civic responsibility and respect for the rule of law by depriving those who had breached the basic rules of society of the right to have a say in the way such rules were made for the duration of their sentence. Convicted prisoners had breached the social contract and so could be regarded as (temporarily) forfeiting the right to take part in the government of the country. The Council of Europe recommendation concerning the management of life prisoners relied on by the AIRE Centre in its intervention was not binding and made no reference to voting and in any event the legislation was not incompatible with its principles.

51. The measure was also proportionate as it only affected those who had been convicted of crimes sufficiently serious, in the individual circumstances, to warrant an immediate custodial sentence, excluding those subject to fines, suspended sentences, community service or detention for contempt of court as well as fine defaulters and remand prisoners. Moreover, as soon as prisoners ceased to be detained, the legal incapacity was removed. The duration was accordingly fixed by the court at the time of sentencing.

52. As regards the allegedly arbitrary effects, the Government argued that, unless the Court were to hold that there was no margin of appreciation at all in this context, it had to be accepted that a line must be drawn somewhere. Finally, the impact on this particular applicant was not disproportionate since he was imprisoned for life and would not, in any event, have benefited from a more tailored ban, such as that in Austria, affecting those sentenced to a term of over one year. They concluded

with their concern that the Chamber had failed to give any explanation as to what steps the United Kingdom would have to take to render its regime compatible with Article 3 of Protocol No. 1 and urged that in the interests of legal certainty Contracting States receive detailed guidance.

### 3. Third-party interveners

53. The Prison Reform Trust submitted that the disenfranchisement of sentenced prisoners was a relic from the nineteenth century which dated back to the Forfeiture Act 1870, the origins of which were rooted in a notion of civic death. It argued that social exclusion was a major cause of crime and reoffending, and that the ban on voting militated against ideas of rehabilitation and civic responsibility by further excluding those already on the margins of society and further isolating them from the communities to which they would return on release. It neither deterred crime nor acted as an appropriate punishment. Its recently launched campaign for restoring the vote to prisoners had received wide cross-party support and the idea was also backed by the Anglican and Catholic Churches, penal reform groups and the current and former Chief Inspectors of Prisons for England and Wales, the President of the Prison Governors' Association, as well as many senior managers in the Prison Service.

54. The AIRE Centre drew attention to the Council of Europe recommendation on the management by prison administrations of life sentence and other long-term prisoners (see paragraphs 29-31 above), which aimed to give guidance to member States in counteracting the negative effects of long-term imprisonment and preparing prisoners for life in the community on release. It referred to three principles contained in the recommendation: the "normalisation principle", the "responsibility principle" and the "individualisation principle" (see paragraph 31 above). It argued that, although there was no express reference to the right of prisoners to vote, these principles supported the extension of the vote to prisoners by fostering their connection with society, increasing awareness of their stake in society and taking into account their personal circumstances and characteristics.

55. The Latvian Government were concerned that the Chamber's judgment would have a horizontal effect on other countries which imposed a blanket ban on convicted prisoners voting in elections. They submitted that, in this area, States should be afforded a wide margin of appreciation, in particular taking into account

the historical and political evolution of the country and that the Court was not competent to replace the view of a democratic country with its own view as to what was in the best interests of democracy. In their view, the Chamber had failed to pay enough attention to the preventive aspect of the voting ban, namely in the general sense of combating criminality and in avoiding the situation whereby those who had committed serious offences could participate in decision-making that might result in bringing to power individuals or groups that were in some way related to criminal structures. Moreover, the Chamber had failed to appreciate that in modern systems of criminal justice imprisonment was used as a last resort and that although the voting ban was automatic it still related to the assessment of the crime itself and the convict's personality.

## B. The Court's assessment

### 1. General principles

56. Article 3 of Protocol No. 1 appears at first sight to differ from the other rights guaranteed in the Convention and Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom.

57. However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that it guarantees individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, pp. 22-23, §§ 46-51). Indeed, it was considered that the unique phrasing was intended to give greater solemnity to the Contracting States' commitment and to emphasise that this was an area where they were required to take positive measures as opposed to merely refraining from interference (*ibid.*, § 50).

58. The Court has had frequent occasion to highlight the importance of democratic principles underlying the interpretation and application of the Convention (see, among other authorities, *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, Reports of Judgments and Decisions 1998-I, pp. 21-

22, § 45), and it would take this opportunity to emphasise that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see also the importance of these rights as recognised internationally in “Relevant international materials”, paragraphs 26-39 above).

59. As pointed out by the applicant, the right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion, as may be illustrated, for example, by the parliamentary history of the United Kingdom and other countries where the franchise was gradually extended over the centuries from select individuals, elite groupings or sections of the population approved of by those in power. Universal suffrage has become the basic principle (see Mathieu-Mohin and Clerfayt, cited above, p. 23, § 51, citing *X v. Germany*, no. 2728/66, Commission decision of 6 October 1967, Collection 25, pp. 38-41).

60. Nonetheless, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere.

61. There has been much discussion of the breadth of this margin in the present case. The Court reaffirms that the margin in this area is wide (see Mathieu-Mohin and Clerfayt, cited above, p. 23, § 52, and, more recently, *Matthews v. the United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I; see also *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV, and *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II). There are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision.

62. It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see Mathieu-Mohin and Clerfayt, p. 23, § 52). In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the

concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. For example, the imposition of a minimum age may be envisaged with a view to ensuring the maturity of those participating in the electoral process or, in some circumstances, eligibility may be geared to criteria, such as residence, to identify those with sufficiently continuous or close links to, or a stake in, the country concerned (see *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI, and *Melnychenko v. Ukraine*, no. 17707/02, § 56, ECHR 2004-X). Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, *mutatis mutandis*, *Aziz v. Cyprus*, no. 69949/01, § 28, ECHR 2004-V).

## 2. Prisoners

63. The present case highlights the status of the right to vote of convicted prisoners who are detained.

64. The case-law of the Convention organs has, in the past, accepted various restrictions on certain convicted persons.

65. In some early cases, the Commission considered that it was open to the legislature to remove political rights from persons convicted of “uncitizen-like conduct” (gross abuse in their exercise of public life during the Second World War) and from a person sentenced to eight months’ imprisonment for refusing to report for military service, where reference was made to the notion of dishonour that certain convictions carried with them for a specific period and which might be taken into account by the legislature in respect of the exercise of political rights (see *X v. the Netherlands*, no. 6573/74, Commission decision of 19 December 1974, Decisions and Reports (DR) 1, p. 87, and *H. v. the Netherlands*, no. 9914/82, Commission decision of 4 July 1983, DR 33, p. 246). In *Patrick Holland v. Ireland* (no. 24827/94, Commission decision of 14 April 1998, DR 93-A, p. 15), where, since there was no provision permitting a serving prisoner to vote in prison, the applicant, who was sentenced to seven years for possessing explosives, was *de facto* deprived of the right to vote, the Commission found that the suspension of the right to vote



did not thwart the free expression of the opinion of the people in the choice of the legislature and could not be considered arbitrary in the circumstances of the case.

66. The Court itself rejected complaints about a judge-imposed bar on voting on a member of Parliament convicted of fiscal fraud offences and sentenced to three years' imprisonment with the additional penalty of being barred from exercising public functions for two years (see *M.D.U. v. Italy* (dec.), no. 58540/00, 28 January 2003).

67. The Government argued that the Chamber judgment finding a violation in respect of the bar on this applicant, a prisoner sentenced to life imprisonment, was an unexpected reversal of the tenor of the above cases.

68. This is, however, the first time that the Court has had occasion to consider a general and automatic disenfranchisement of convicted prisoners. It would note that in *Patrick Holland* (cited above), the case closest to the facts of the present application, the Commission confined itself to the question of whether the bar was arbitrary and omitted to give attention to other elements of the test laid down by the Court in *Mathieu-Mohin and Clerfayt* (cited above), namely, the legitimacy of the aim and the proportionality of the measure. In consequence, the Court cannot attach decisive weight to the decision. The Chamber's finding of a violation did not, therefore, contradict a previous judgment of the Court; on the contrary, the Chamber sought to apply the precedent of *Mathieu-Mohin and Clerfayt* to the facts before it.

69. In this case, the Court would begin by underlining that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention (see, among many authorities, *Kalashnikov v. Russia*, no. 47095/99, ECHR 2002-VI, and *Van der Ven v. the Netherlands*, no. 50901/99, ECHR 2003-II); they continue to enjoy the right to respect for family life (*Płoski v. Poland*, no. 26761/95, 12 November 2002, and *X v. the United Kingdom*, no. 9054/80, Commission decision of 8 October 1982, DR 30, p. 113); the right to freedom of expression (*Yankov v. Bulgaria*, no. 39084/97, §§ 126-45, ECHR

2003-XII, and *T. v. the United Kingdom*, no. 8231/78, Commission's report of 12 October 1983, DR 49, p. 5,

§§ 44-84); the right to practise their religion (*Poltoratskiy v. Ukraine*, no. 38812/97, §§ 167-71, ECHR 2003-V); the right of effective access to a lawyer or to a court for the purposes of Article 6 (*Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A no. 80, and *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18); the right to respect for correspondence (*Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A no. 61); and the right to marry (*Hamer v. the United Kingdom*, no. 7114/75, Commission's report of 13 December 1979, DR 24, p. 5, and *Draper v. the United Kingdom*, no. 8186/78, Commission's report of 10 July 1980, DR 24, p. 72). Any restrictions on these other rights must be justified, although such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment (see, for example, *Silver and Others*, cited above, pp. 38-41, §§ 99-105, where broad restrictions on the right of prisoners to correspond fell foul of Article 8, but the stopping of specific letters containing threats or other objectionable references was justifiable in the interests of the prevention of disorder or crime).

70. There is no question, therefore, that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion.

71. This standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights could be imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations (see, for example, *X v. the Netherlands*, cited above, and, *mutatis mutandis*, *Glimmerveen and Hagenbeek v. the Netherlands*, nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, DR 18, p. 187, where the Commission declared inadmissible two applications

concerning the refusal to allow the applicants, who were the leaders of a proscribed organisation with racist and xenophobic traits, to stand for election). The severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. The Court notes in this regard the recommendation of the Venice Commission that the withdrawal of political rights should only be carried out by express judicial decision (see paragraph 32 above). As in other contexts, an independent court, applying an adversarial procedure, provides a strong safeguard against arbitrariness.

### 3. Application in the present case

72. Turning to this application, the Court observes that the applicant, sentenced to life imprisonment for manslaughter, was disenfranchised during his period of detention by section 3 of the 1983 Act which applied to persons convicted and serving a custodial sentence. The Government argued that the Chamber had erred in its approach, claiming that it had assessed the compatibility of the legislation with the Convention in the abstract without consideration of whether removal of the right to vote from the applicant as a person convicted of a serious offence and sentenced to life imprisonment disclosed a violation. The Court does not accept this criticism. The applicant's complaint was in no sense an *actio popularis*. He was directly and immediately affected by the legislative provision of which he complained, and in these circumstances the Chamber was justified in examining the compatibility with the Convention of such a measure, without regard to the question whether, had the measure been drafted differently and in a way which was compatible with the Convention, the applicant might still have been deprived of the vote. The Divisional Court similarly examined the compatibility with the Convention of the measure in question. It would not in any event be right for the Court to assume that, if Parliament were to amend the current law, restrictions on the right to vote would necessarily still apply to post-tariff life prisoners or to conclude that such an amendment would necessarily be compatible with Article 3 of Protocol No. 1.

73. The Court will therefore determine whether the measure in question pursued a legitimate aim in a proportionate manner having regard to the principles identified above.

(a) Legitimate aim

74. The Court points out that Article 3 of Protocol No. 1 does not, like other provisions of the Convention, specify or limit the aims which a restriction must pursue. A wide range of purposes may therefore be compatible with Article 3 (see, for example, *Podkolzina*, cited above, § 34). The Government have submitted that the measure pursues the aim of preventing crime by sanctioning the conduct of convicted prisoners and also of enhancing civic responsibility and respect for the rule of law. The Court notes that, at the time of the passage of the latest legislation, the Government stated that the aim of the bar on convicted prisoners was to confer an additional punishment. This was also the position espoused by the Secretary of State in the domestic proceedings brought by the applicant. While the primary emphasis at the domestic level may have been the idea of punishment, it may nevertheless be considered as implied in the references to the forfeiting of rights that the measure is meant to act as an incentive for citizen-like conduct.

75. Although rejecting the notion that imprisonment after conviction involves the forfeiture of rights beyond the right to liberty, and especially the assertion that voting is a privilege not a right (see paragraph 59 above), the Court accepts that section 3 may be regarded as pursuing the aims identified by the Government. It observes that, in its judgment, the Chamber expressed reservations as to the validity of these aims, citing the majority opinion of the Canadian Supreme Court in *Sauvé* (no. 2) (see paragraphs 44-47 of the Chamber judgment). However, whatever doubt there may be as to the efficacy of achieving these aims through a bar on voting, the Court finds no reason in the circumstances of this application to exclude these aims as untenable or incompatible per se with the right guaranteed under Article 3 of Protocol No. 1.

(b) Proportionality

76. The Court notes that the Chamber found that the measure lacked proportionality, essentially as it was an automatic blanket ban imposed on all convicted prisoners which was arbitrary in its effects and could no longer be said to serve the aim of punishing the applicant once his tariff (that period representing retribution and deterrence) had expired.

77. The Government have argued that the measure was proportionate, pointing out, *inter alia*, that it only affected some 48,000 prisoners (not the 70,000 stated in the Chamber judgment which omitted to take into account that prisoners on remand were no longer under any ban) and submitting that the ban was in fact restricted in its application as it affected only those convicted of crimes serious enough to warrant a custodial sentence and did not apply to those detained on remand, for contempt of court or for default in payment of fines. On the latter point, the Latvian Government have also placed emphasis on the fact that, in Contracting States, imprisonment is the last resort of criminal justice (see paragraph 55 above). Firstly, the Court does not regard the difference in numbers identified above to be decisive. The fact remains that it is a significant figure and it cannot be claimed that the bar is negligible in its effects. Secondly, while it is true that there are categories of detained persons unaffected by the bar, it nonetheless concerns a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity. Further, the Court observes that, even in the case of offenders whose offences are sufficiently serious to attract an immediate custodial sentence, whether the offender is in fact deprived of the right to vote will depend on whether the sentencing judge imposes such a sentence or opts for some other form of sanction, such as a community sentence. In this regard, it may be noted that, when sentencing, the criminal courts in England and Wales make no reference to disenfranchisement and it is not apparent, beyond the fact that a court considered it appropriate to impose a sentence of imprisonment, that there is any direct link between the facts of any individual case and the removal of the right to vote.

78. The breadth of the margin of appreciation has been emphasised by the Government who argued that, where the legislature and domestic courts have considered the matter and there is no clear consensus among Contracting States, it must be within the range of possible approaches to remove the right to vote from any person whose conduct was so serious as to merit imprisonment.

79. As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. It is true that the question was considered by the multi-party Speaker's Conference on Electoral Law in 1968 which unanimously recommended that a convicted prisoner should not be entitled to vote. It is also true that the working party which recommended the amendment to the law

to allow unconvicted prisoners to vote recorded that successive governments had taken the view that convicted prisoners had lost the moral authority to vote and did not therefore argue for a change in the legislation. It may be said that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners. Nonetheless, it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote.

80. It is also evident from the judgment of the Divisional Court that the nature of the restrictions, if any, to be imposed on the right of a convicted prisoner to vote was generally seen as a matter for Parliament and not for the national courts. The court did not, therefore, undertake any assessment of proportionality of the measure itself. It may also be noted that the court found support in the decision of the Federal Court of Appeal in *Sauvé* (no. 2), which was later overturned by the Canadian Supreme Court.

81. As regards the existence or not of any consensus among Contracting States, the Court notes that, although there is some disagreement about the legal position in certain States, it is undisputed that the United Kingdom is not alone among Convention countries in depriving all convicted prisoners of the right to vote. It may also be said that the law in the United Kingdom is less far-reaching than in certain other States. Not only are exceptions made for persons committed to prison for contempt of court or for default in paying fines, but unlike the position in some countries, the legal incapacity to vote is removed as soon as the person ceases to be detained. However, the fact remains that it is a minority of Contracting States in which a blanket restriction on the right of convicted prisoners to vote is imposed or in which there is no provision allowing prisoners to vote. Even according to the Government's own figures, the number of such States does not exceed thirteen. Moreover, and even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue.

82. Therefore, while the Court reiterates that the margin of appreciation is wide, it is not all-embracing. Further, although the situation was somewhat improved by the 2000 Act which for the first time granted the vote to persons detained on remand, section 3 of the 1983 Act remains a blunt instrument. It strips of their Convention

right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.

83. Turning to the Government's comments concerning the lack of guidance from the Chamber as to what, if any, restrictions on the right of convicted prisoners to vote would be compatible with the Convention, the Court notes that its function is in principle to rule on the compatibility with the Convention of the existing measures. It is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention (see, among other authorities, *Assanidze v. Georgia* [GC], no. 71503/01, § 202, ECHR 2004-II, and *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV). In cases where a systemic violation has been found the Court has, with a view to assisting the respondent State in fulfilling its obligations under Article 46, indicated the type of measure that might be taken to put an end to the situation found to exist (see, for example, *Broniowski v. Poland* [GC], no. 31443/96, §§ 193-94, ECHR 2004-V). In other exceptional cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure (see *Assanidze*, cited above, § 202).

84. In a case such as the present one, where Contracting States have adopted a number of different ways of addressing the question of the right of convicted prisoners to vote, the Court must confine itself to determining whether the restriction affecting all convicted prisoners in custody exceeds any acceptable margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1 (see, for example, the cases concerning procedures governing the continued detention of life prisoners, where Court case-law and domestic legislation have evolved progressively: *Thynne, Wilson and Gunnell v. the United Kingdom*, judgment of 25 October 1990, Series

A no. 190-A; Singh v. the United Kingdom, judgment of 21 February 1996, Reports 1996-I; and Stafford v. the United Kingdom [GC], no. 46295/99, ECHR 2002-IV).

85. The Court concludes that there has been a violation of Article 3 of Protocol No. 1.

## **II. Alleged violation of article 14 of the convention**

86. The applicant complained that he had been discriminated against as a convicted prisoner, relying on Article 14 of the Convention which provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

87. Having regard to the conclusion above under Article 3 of Protocol No. 1, the Grand Chamber, like the Chamber, considers that no separate issue arises under Article 14 of the Convention.

## **III. Alleged violation of article 10 of the convention**

88. The applicant complained that the disenfranchisement prevented him from exercising his right to freedom of expression through voting, relying on Article 10 of the Convention, the relevant parts of which provide:

“1. Everyone has the right to freedom of expression. ...

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



89. The Court considers that Article 3 of Protocol No. 1 is to be seen as the *lex specialis* as regards the exercise of the right to vote and, like the Chamber, finds that no separate issue arises under Article 10 of the Convention in the present case.

#### **IV. Application of article 41 of the convention**

90. Article 41 of the Convention provides:

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

##### **A. Damage**

91. The applicant claimed 5,000 pounds sterling (GBP) for suffering and distress caused by the violation.

92. The Government were of the view that any finding of a violation would in itself constitute just satisfaction for the applicant. In the alternative, they considered that, if the Court were to make an award, the amount should not be more than GBP 1,000.

93. The Chamber found as follows (see paragraph 60 of the Chamber judgment):

“The Court has considered below the applicant’s claims for his own costs in the proceedings. As regards non-pecuniary damage, the Court notes that it will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfil its obligations to secure the right to vote in compliance with this judgment. In the circumstances, it considers that this may be regarded as providing the applicant with just satisfaction for the breach in this case.”

94. Like the Chamber, the Grand Chamber does not make any award under this head.

##### **B. Costs and expenses**

95. The applicant claimed the costs incurred in the High Court and Court of Appeal in seeking redress in the domestic system in relation to the breach of his rights, namely his solicitors' and counsel's fees and expenses in the High Court of GBP 26,115.82 and in the Court of Appeal of GBP 13,203.64. For costs in Strasbourg, the applicant had claimed before the Chamber GBP 18,212.50 for solicitors' and counsel's fees and expenses. For proceedings before the Grand Chamber since the Chamber judgment, the applicant claimed additional reimbursement of GBP 20,503.75 for his solicitors' and counsel's fees and expenses broken down as GBP 7,800 for twenty-six hours of work (at GBP 300 an hour), GBP 1,650 for fifty-five letters and phone calls (at GBP 30 each), GBP 1,653.75 for value-added tax (VAT), GBP 8,000 for counsel's fees during two days in connection with the hearing and twenty hours of work plus GBP 1,400 for value-added tax. He also claimed GBP 300 as out of pocket expenses (the cost of telephone calls etc.).

96. The Government submitted that, as the applicant had received legal aid during the domestic proceedings, he did not actually incur any costs. To the extent that the applicant appeared to be claiming that further sums should be awarded that were not covered by legal aid, they submitted that any such further costs should not be regarded as necessarily incurred or reasonable as to quantum and that they should be disallowed. As regards the additional costs claimed for the Grand Chamber proceedings in Strasbourg, the Government submitted that the hourly rate (GBP 300) charged by the solicitor was excessive, as was the flat rate for correspondence. No more than GBP 4,000 should be awarded in respect of solicitors' fees. As regards counsel's fees, the hourly rate was also excessive, as was the number of hours charged for the preparation of a very short pleading. No more than GBP 3,000 should be recoverable.

97. The Chamber found as follows (see paragraphs 63 and 64 of the Chamber judgment):

“The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II, and *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, § 28, ECHR 2000-IX). This may include domestic legal costs actually and necessarily incurred to prevent or redress the breach of the Convention (see, for example, *I.J.L. and Others*

v. the United Kingdom (just satisfaction), nos. 29522/95, 30056/96 and 30574/96, § 18, 25 September 2001). Since however in the present case the costs of the applicant's legal representation in his application to the High Court and Court of Appeal contesting his disenfranchisement were paid by the legal aid authorities, it cannot be said that he incurred those expenses and he has not shown that he was required, or remains liable, to pay his representatives any further sums in that regard. This application before the Court cannot be used as a retrospective opportunity to charge fees above the rates allowed by domestic legal aid scales.

As regards the costs claimed for the proceedings in Strasbourg, the Court notes the Government's objections and finds that the claims may be regarded as unduly high, in particular as regards the claim for three days for a hearing which lasted one morning and the lack of itemisation of work done by the solicitor. While some complaints were declared inadmissible, the applicant's essential concern and the bulk of the argument centred on the bar on his right to vote, on which point he was successful under Article 3 of Protocol No. 1. No deduction has therefore been made on that account. Taking into account the amount of legal aid paid by the Council of Europe and in light of the circumstances of the case, the Court awards 12,000 euros (EUR) inclusive of VAT for legal costs and expenses. In respect of the applicant's own claim for expenses in pursuing his application, the Court notes the lack of any itemisation but accepts that some costs have been incurred by him. It awards to the applicant himself EUR 144."

98. The Court maintains the Chamber's finding that no award for costs in domestic proceedings is appropriate. Although significant work was necessarily involved in preparation for and attendance at the Grand Chamber hearing, it finds the amount claimed for the period after the Chamber judgment excessive and unreasonable as to quantum. Taking into account the amount paid by way of legal aid by the Council of Europe, it increases the award for legal costs and expenses to a total of 23,000 euros (EUR), inclusive of VAT. For the applicant's own out of pocket expenses, which are largely unitemised, it awards EUR 200.

### C. Default interest

99. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**For these reasons, the court**

1. Holds by twelve votes to five that there has been a violation of Article 3 of Protocol No. 1;
2. Holds unanimously that no separate issue arises under Article 14 of the Convention;
3. Holds inanimously that no separate issue arises under Article 10 of the Convention;
4. Holds unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
5. Holds by twelve votes to five
  - (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into pounds sterling at the rate applicable at the date of settlement:
    - (i) EUR 23,000 (twenty three thousand euros) in respect of costs and expenses incurred by the applicant's legal representatives in the Strasbourg proceedings;
    - (ii) EUR 200 (two hundred euros) in respect of his own costs and expenses;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. Dismisses unanimously the remainder of the applicant's claim for just satisfaction.

**Smiselno dopolnite s pojmi na koncu besedila:**

V zadevi *Hirst proti Združenemu kraljestvu* je ESČP presojalo, ali je splošna zakonska prepoved glasovanja za obsojence, ki prestajajo zaporno kazen, skladna z zahtevami demokratične družbe. ESČP je poudarilo, da pravica do \_\_\_\_\_ ni privilegij,

ampak ena izmed temeljnih političnih pravic v demokratični državi. Izhodišče mora biti zato \_\_\_\_\_ v korist vključevanja, ne pa izključevanja.

Čeprav pravica do volitev ni \_\_\_\_\_ in države uživajo določeno polje proste presoje, to polje ni neomejeno. Vsaka omejitev mora slediti \_\_\_\_\_ cilju in biti tudi \_\_\_\_\_. Pri tem je treba paziti, da omejitev ne prizadene samega \_\_\_\_\_ pravice.

Združeno kraljestvo je ohranjalo ureditev, po kateri so bili vsi obsojenci, ki so bili v času volitev v \_\_\_\_\_, avtomatično prikrajšani za pravico do glasovanja na volitvah. ESČP je ugotovilo, da je taka ureditev preveč \_\_\_\_\_, saj je veljala ne glede na dolžino kazni, težo kaznivega dejanja ali posebne okoliščine posameznega primera. Zato je šlo za \_\_\_\_\_, avtomatično in nediferencirano omejitev.

ESČP je sprejelo, da lahko država zasleduje cilje, kot so \_\_\_\_\_ kaznivih dejanj, kaznovanje storilcev in krepitev spoštovanja \_\_\_\_\_ prava. Vendar sama navedba teh ciljev še ne zadostuje. Potrebno je tudi preveriti, ali je konkretna ureditev med ciljem in posegom vzpostavila razumno in dovolj tesno \_\_\_\_\_. Prav v tem delu je bila britanska ureditev po presoji ESČP problematična. O prepovedi glasovanja ni odločalo \_\_\_\_\_ v posameznem primeru, ampak je omejitev nastopila avtomatično že na podlagi samega dejstva, da je oseba prestajala zaporno kazen. Tako med konkretnim dejanjem, osebnostjo storilca in izgubo volilne pravice ni bilo dovolj jasno razvidne \_\_\_\_\_ povezave.

ESČP je opozorilo tudi, da britanski parlament v resnici ni opravil poglobljene presoje, ali je tako široka prepoved še vedno upravičena z vidika sodobnih standardov varstva človekovih pravic. Ni šlo torej za rezultat tehtnega iskanja ravnotežja med splošnim interesom in pravicami \_\_\_\_\_, ampak bolj za ohranjanje zgodovinske tradicije.

Posebej pomembno je bilo stališče ESČP, da tudi osebe v zaporu praviloma ohranijo svoje \_\_\_\_\_ pravice, ki so omejene le v delu, ki je povezan z odvzemom prostosti ali z legitimnimi zahtevami varnosti in reda. Samo dejstvo, da je nekdo zaprt, še ne pomeni njegove politične ali državljanske \_\_\_\_\_.

ESČP je zato zaključilo, da splošna prepoved glasovanja presega dopustno polje proste presoje države. Ker je šlo za zelo pomembno konvencijsko pravico, je morala biti omejitev bolj \_\_\_\_\_, bolj individualizirana in tesneje povezana z okoliščinami posameznega primera.

Ob tem pa ESČP ni samo določilo natančne nove ureditve, ki bi jo morala sprejeti država. Poudarilo je, da je izbira konkretnih rešitev najprej naloga domačega \_\_\_\_\_, ki mora ob upoštevanju sodbe urediti sistem tako, da bo skladen z EKČP. ESČP je torej ugotovilo kršitev, ni pa državi predpisalo ene same možne \_\_\_\_\_.

**Možni pojmi:** preprečevanje, bistva, sodišče, blanketno, smrti, glasovanja, zapornikov, zakonodajalca, absolutna, povezavo, legitimnemu, vladavine, domneva, prilagojena, splošna, sorazmerna, zaporu, rešitve, temeljne, individualizirane

## Vprašanja

- Kako ESČP razume naravo volilne pravice v okviru člena 3 Protokola št. 1? Ali gre za pravico ali privilegij? Kakšne so posledice te opredelitve za omejevanje te pravice?
- Kakšno vlogo ima načelo univerzalne volilne pravice v presoji ESČP in kako vpliva na dopustnost izključevanja določenih skupin (npr. zapornikov) iz volilnega telesa?
- Kako ESČP uporablja doktrino polja proste presoje (margin of appreciation) v tej zadevi in zakaj meni, da v konkretnem primeru država to mejo preseže?
- Kateri so legitimni cilji, ki jih lahko država zasleduje z omejitvijo volilne pravice zapornikov?
- Zakaj je po mnenju ESČP splošna in avtomatična (blanketna) prepoved glasovanja za vse zapornike problematična?
- Kako ESČP razume razmerje med kaznovanjem (punishment) in ohranitvijo temeljnih pravic zapornikov? Ali lahko izguba volilne pravice predstavlja legitimen del kazni?
- Kakšen pomen ima sorazmernost pri omejevanju volilne pravice in zakaj bi bila individualizirana presoja (npr. glede na težo kaznivega dejanja ali odločitev sodišča) bolj skladna z EKČP?

- Kako odločba vpliva na razumevanje demokracije in vladavine prava v okviru EKČP, zlasti glede vključevanja marginaliziranih skupin, kot so zaporniki?

# Lukenda proti Sloveniji z dne 6. januarja 2006, št. 23032/02

In the case of *Lukenda v. Slovenia*, the European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J. Hedigan, *President*,  
Mr B. Zupančič,  
Mrs M. Tsatsa-Nikolovska,  
Mr V. Zagrebelsky,  
Mr E. Myjer,  
Mr David  
Thór Björgvinsson,  
Mrs I. Ziemele, *judges*,  
and Mr V. Berger, *Section Registrar*,

Having deliberated in private on 15 September 2005,

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

## Procedure

1. The case originated in an application (no. 23032/02) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Slovenian national, Mr Franjo Lukenda (“the applicant”), on 30 May 2002.



2. The applicant was represented by the Verstovšek lawyers. The Slovenian Government (“the Government”) were represented by their Agent, Mr L. Bembič, State Attorney-General.
3. The applicant alleged under Article 6 § 1 of the Convention that the length of the proceedings before the domestic courts to which he had been a party had been excessive. In substance, he also complained about the lack of an effective domestic remedy in respect of the excessive length of the proceedings (Article 13 of the Convention).
4. On 7 September 2004 the Court decided to communicate the application to the Government. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

## The facts

### I. The circumstances of the case

5. The applicant was born in 1952 and lives in Slovenia.
6. On 6 January 1994 the applicant was injured at work in a lignite mine. Since then, he has been disabled and in receipt of disability benefits. His employer had taken out accident insurance for him with an insurance company, T. (“ZT”). His disability was assessed at 13%. In the years 1994, 1995 and 1996 ZT paid partial disability benefits.
7. On 30 December 1998 the applicant instituted civil proceedings in the Celje Local Court (*Okrajno sodišče v Celju*) against ZT claiming a 7% increase in his disability benefits on the basis of an expert medical opinion. He also sought an exemption from court fees. On 26 August 1999 the applicant lodged pleadings and additional evidence and requested the court to assign an independent medical expert to determine the extent of his disability. He submitted additional documents and pleadings on 13 October 1999, 16 November 2000, 27 February, 9 and 17 April and 30 May 2002. On 7 November 2000 a hearing was held to consider the applicant's request for the appointment of a medical expert. Although the request was granted, the appointment was not made. On 23 November 2000 the applicant submitted documents and requested the court to issue the order appointing the medical expert.

On 28 November 2000 the court appointed a medical expert to determine the extent of the applicant's disability. He submitted his report on 26 April 2001. On 25 May 2001 the applicant filed pleadings and increased his claim by 2.5%. On 10 July 2001 the applicant filed pleadings and requested that an additional opinion be sought from the appointed expert. On 16 October 2001 a hearing was held and the court decided that additional clarifications were required from the expert. On 23 November 2001 the court reappointed the same expert with instructions to submit an additional opinion. On 11 February 2002 the expert submitted an additional opinion, which was served on the parties. On 9 April and 30 May 2002 the applicant made requests for a hearing. On 25 September 2002 the court held a hearing and decided to deliver a written judgment. On 30 December 2002 the applicant's lawyers received the judgment, which upheld the applicant's claim in part.

8. On 31 December 2002 the applicant appealed. ZT cross-appealed. On 19 February 2004 the Celje Higher Court (*Višje sodišče v Celju*) allowed the applicant's appeal in part. It increased the level of his disability benefits and awarded the applicant costs and expenses. The decision became final the same day. On 8 April 2004 the judgment was served on the applicant's lawyers.

## II. Relevant domestic law and practice

...

## The law

### I. Alleged violation of article 6 § 1 of the convention

29. The applicant complained that the length of the proceedings had been incompatible with the “reasonable time” requirement provided in Article 6 § 1 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ...”

#### A. Admissibility

##### 1. *The parties' submissions*

(a) The Government

30. The Government pleaded a failure to exhaust domestic remedies with regard to the complaint under Article 6 § 1 of the Convention, arguing that the applicant had not availed himself of the remedies at his disposal for the purpose of expediting the judicial proceedings and/or claiming compensation.

31. The Slovenian legal system provided adequate and effective preventive domestic remedies while the proceedings were still pending, namely an action in the administrative courts and/or a request for supervision (*nadzorstvena pritožba*), backed up by a civil action for compensation after the proceedings had terminated. In addition, the applicant also had the possibility of lodging a constitutional appeal. Those remedies were available both in theory and in practice, and were accessible to the applicant.

32. The right to a trial within a reasonable time was guaranteed by Article 23 of the Constitution. However, while the proceedings were pending the applicant had failed to assert this right, on the basis of Article 157 § 2 of the Constitution, by bringing an application under the Administrative Disputes Act 1997, which provided for judicial protection of the constitutional right to a trial within a reasonable time. Claimants in administrative proceedings could also seek damages. Proceedings in the administrative courts were within the jurisdiction of the administrative court at first instance and of the Supreme Court on appeal.

33. In their observations, the Government cited in support of their arguments the new case-law of the administrative courts (see paragraphs 15-18 above).

34. The Government further submitted that, as far as proceedings that had ended were concerned, Article 26 of the Constitution guaranteed the right to compensation for damage caused by the unlawful acts of a person when performing a function or engaged in an activity on behalf of a State authority. As the proceedings had ended, the applicant could have brought civil proceedings against the State. Besides that, he could have claimed compensation directly from the person or body responsible.

35. The Government submitted that a number of claims in tort were currently under consideration. So far, damages for unduly lengthy proceedings had been paid in two cases (see paragraphs 20-21 above).

36. Furthermore, referring to the Commission's decision that the request for supervision could not be regarded as an effective legal remedy within the meaning of the Convention (see *Majarič v. Slovenia*, no. 28400/95, Commission decision of 3 December 1997, unreported), the Government submitted that further to the amendments that had been made to the Judicature Act 1994 and which had come into force in 2000, the request for supervision had now attained the required level of effectiveness.

37. Moreover, the Government pointed out that the applicant had not lodged a constitutional appeal with the Constitutional Court under Article 160 of the Constitution after the exhaustion of domestic remedies. A constitutional appeal could, in principle, be lodged only after the termination of administrative proceedings or civil proceedings.

38. Referring to *Silver and Others v. the United Kingdom* (judgment of 25 March 1983, Series A no. 61, p. 42, § 113), the Government argued that, although no single remedy might itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law might do so. The aggregate of legal remedies available to the applicant should therefore be considered effective.

39. The Government finally argued that, by failing to avail himself of any of the above-mentioned legal avenues, the applicant had not exhausted the domestic remedies as required by Article 35 of the Convention.

(b) The applicant

40. The applicant's lawyers, who are also representing other applicants in nearly 400 length of proceedings cases currently pending before the Court, disputed the Government's arguments. They submitted some examples of cases in which parties to judicial proceedings had made use of all the available legal remedies, namely a request for supervision, an action in the administrative courts, a claim for damages and a constitutional appeal alleging a violation of their right to due process. They argued that the length of the proceedings had been excessive in all the cases concerned (for instance, in one case civil proceedings had lasted nearly nine years for two levels of jurisdiction) and that the legal remedies available had been of no avail because the claims were dismissed or no violation was found. Furthermore, they claimed that the majority of proceedings in the Slovenian courts were

excessively long, including all the judicial proceedings the Government claimed were effective legal remedies.

## 2. *The Court's assessment*

### (a) General considerations

41. The Court reiterates, firstly, that by virtue of Article 1 (which provides: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention”) the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is reflected in Articles 13 and 35 § 1 of the Convention.

42. The purpose of Article 35 § 1, which sets out the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. The rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V, and *Kudla v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

43. Under Article 35, normal recourse should be had by an applicant to remedies that are available and sufficient to afford redress in respect of the breaches alleged. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Belinger v. Slovenia* (dec.), no. 42320/98, 2 October 2001, and *Vernillo v. France*, judgment of 20 February 1991, Series A no. 198, pp. 11-12, § 27).

44. It is incumbent on the Government pleading non-exhaustion to demonstrate to the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments*

and *Decisions* 1996-IV, p. 1211, § 68). Although each of the available remedies may not prove to be effective, the aggregate of the available remedies may satisfy the criteria set forth by the Convention (see *Silber and Others*, cited above, p. 42, § 113, and *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, pp. 1869-70, § 145). Once this burden of proof has been discharged, it falls to the applicant to establish that the remedies or the aggregate remedies advanced by the Government were in fact exhausted or were for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see *Horvat v. Croatia*, no. 51585/99, § 39, ECHR 2001-VIII).

45. Finally, the Court has previously held that the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism (see *Cardot v. France*, judgment of 19 March 1991, Series A no. 200, p. 18, § 34).

46. In the case at hand the Court has to determine whether or not an administrative action, a claim for damages in civil proceedings, a request for supervision and a constitutional appeal, taken separately or together, can be considered effective legal remedies within the meaning of Article 35 of the Convention.

#### (b) Administrative action

47. The Court notes, firstly, that the Government's arguments concerning the effectiveness of an action under the 1997 Administrative Disputes Act have already been largely rejected (see *Belinger*, cited above). In dismissing the Government's plea of non-exhaustion of domestic remedies, the Court remarked on the significant backlog of cases before the relevant courts and queried whether preventive relief was truly available. It noted that, given the lack of relevant examples, uncertainty remained as to the effectiveness of the domestic remedies (*ibid.*).

48. In the Court's view, the case-law relied on by the Government still fails to provide a sound foundation on which to assess the effectiveness of this domestic remedy.

49. It is noted, however, that in two recent cases mentioned above (see paragraphs 17-18), the administrative courts reached a decision in a comparatively short space of time (just over ten months for two levels of jurisdiction in one case and less than a year before one level of jurisdiction in the other case), dismissing the claim in one case and finding a violation in the other. It was not specified whether or not in the latter case the ruling of the administrative court had any effect on the length of the original proceedings or merely awarded compensation for damage. These cases might be seen as a step in the right direction so far as proceedings that are still pending are concerned.

50. However, in two other cases cited by the Government, the first-instance judgments finding a breach of the right to due process and awarding compensation were subsequently overturned on appeal on the ground that the proceedings had ended by the time the judgments were delivered.

51. So far, the Government have failed to show clearly, to the Court's satisfaction, that the judgments and decisions of the administrative courts do in fact speed up unduly protracted proceedings or award reparation for violations of the right to a speedy trial that have already occurred.

52. Observing, further, that no significant changes have been made to the Administrative Disputes Act since the decision in *Belinger* and bearing in mind the backlog that has accumulated in the Slovenian courts, the Court sees no reason for the time being to depart from its conclusion in *Belinger* regarding the effectiveness of an action in the administrative courts.

53. The Slovenian case-law that has been produced does not suffice to alter the Court's view that, as matters stand, an action in the administrative courts does not provide effective redress in length of proceedings cases.

(c) Claim for damages

54. The Court also acknowledges that, once the proceedings had ended, the applicant would have had the possibility of claiming damages for a violation of the right to a trial within a reasonable time under Article 26 of the Constitution.

55. However, as far as the admissibility of this application is concerned, the Court notes that the proceedings in question were still pending at the domestic level at the date the application was lodged with the Court. Therefore, the applicant would not have been able to bring an action in tort at that point (see, *mutatis mutandis*, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 17, ECHR 2002-VIII.). Nonetheless, the Court will examine this domestic remedy in order to address the Government's arguments regarding the effectiveness of all existing remedies.

56. The Court reiterates that it has previously dismissed the Government's plea of non-exhaustion of domestic remedies concerning the effectiveness of an action in tort because of a lack of any examples (see *Predojević and Others* (dec.), nos. 43445/98, 49740/99, 49747/99 and 54217/00, 9 December 2004).

57. It is noted that the case-law submitted by the Government shows that in two cases compensation was awarded on the basis of Article 26 of the Constitution because of the excessive duration of proceedings that had ended.

58. However, under the Code of Obligations, an individual seeking compensation has to prove, firstly, that there has been a delay in the proceedings, secondly, that damage has occurred, and, thirdly, that there is a causal link between the damage and the conduct of the court.

59. Therefore, in an action in tort a court can in principle find that unduly long proceedings that have already been concluded are the cause of the damage sustained by the claimant and may accordingly award compensation. However, the Government have failed to indicate clearly whether or not compensation for non-pecuniary damage can be awarded in such proceedings. In any event, a claim in tort will have no effect on the length of proceedings that are still pending when the claim is lodged.

60. Although it notes signs of positive developments in the case-law submitted by the Government, the Court remains unconvinced that a claim in tort can in fact provide effective redress when the main proceedings have already ended.

(d) Request for supervision



61. The Court has also already dealt with the question of the effectiveness of the request for supervision under section 72 of the Judicature Act and found that it is a remedy in the framework of judicial administration and not within court proceedings (see *Majarič* and *Belinger*, both cited above).

62. Nonetheless, the Court acknowledges the changes to the supervisory appeal procedure made by the 2000 and 2004 amendments and finds that, in theory at least, the revised supervisory procedure may contribute to expediting court proceedings.

63. Although the Government claimed that such a remedy was also effective in practice, they have failed to provide a single example of an applicant having succeeded in speeding up court proceedings by using the procedure. In addition, it appears that requests for supervision proceedings have no binding effect on the court concerned (see *Hartman v. the Czech Republic*, no. 53341/99, § 83, ECHR 2003-VIII). Moreover, since there is no right of appeal, this remedy cannot have any significant effect on expediting the proceedings as a whole (see, *mutatis mutandis*, *Holzinger v. Austria* (no. 1), no. 23459/94, § 22, ECHR 2001-I).

64. Therefore, like an action in the administrative courts and a claim in tort, a request for supervision cannot be regarded as an effective remedy within the meaning of the Convention.

#### (e) Constitutional appeal

65. Finally, the Court reiterates that a constitutional appeal, in principle, can only be lodged after domestic remedies have been exhausted, that is, an action in the administrative courts or a claim in tort. In *Belinger*, cited above, the Court found that the efficiency of the constitutional appeal was already problematic in view of the probable length of the combined proceedings. Since the Government have not submitted any new material concerning constitutional appeals, the Court considers that, at present, it cannot be regarded as an effective remedy (see also *Hartman*, cited above, § 83).

#### (f) Conclusion

66. In the light of the foregoing, the Court must now consider whether or not the aggregate of these procedures constitutes an effective legal remedy requiring exhaustion under Article 35 § 1.

67. The Court acknowledges the Government's argument that, even if a single remedy does not by itself entirely satisfy the requirement of “effectiveness”, the aggregate of remedies afforded by domestic law may do so. It is therefore necessary to determine in each case whether the means available to litigants in domestic law are “effective” in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that has already occurred (see *Kudła*, cited above, § 158).

68. The Convention therefore offers an alternative: a remedy is effective if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred (see *Mijfsud*, cited above, § 17, and *Hartman*, cited above, § 81).

69. As already stated, within the framework of domestic remedies relied on by the Government, it is possible that a request for supervision lodged in conjunction with, or followed by, an action in the administrative courts, will not suffice to redress delays in the proceedings. In addition, as stated above, the Government have not shown that an action in tort can provide compensation for non-pecuniary damage, while a constitutional appeal can only be lodged after all other remedies have been exhausted. Lastly, the Government have failed to demonstrate how the combined use of the above-mentioned remedies would boost their effectiveness.

70. A further issue arises where an individual first brings an action in the administrative courts, which is subsequently dismissed on the ground that the original proceedings have ended, and is then required to lodge a claim in tort in order to obtain compensation. Over and above the fact that the claimant is required to institute two sets of proceedings, a more serious problem which may occur in such cases is the probable excessive duration of the combined proceedings. Particular attention should be paid to, among other things, the speediness of the remedial action itself, as the possibility that a remedy may be deemed inadequate because of its excessive duration cannot be excluded (see *Doran v. Ireland*, no. 50389/99, § 57, ECHR 2003-X). It would be putting an unreasonable burden on the applicant to require him to make use of both remedies. Consequently, the Court concludes that

to find the aggregate of the remedies effective in the circumstances of these cases would run counter to the principles and spirit of the Convention.

71. Accordingly, the Court is not satisfied that the aforementioned remedies or the aggregate remedies can amount to an effective legal remedy in the circumstances of the instant case, and the Government's preliminary objection must be dismissed.

## B. Merits

72. The Government submitted that the proceedings had been complicated by the fact that it had been necessary to appoint a medical expert to determine the level of the applicant's disability. The courts had conducted the proceedings throughout in compliance with their statutory jurisdiction and, considering what was at stake – namely, a minor increase in disability benefits – the case had not required priority treatment.

73. The proceedings began on 30 December 1998, when the applicant lodged his claim with the Celje Local Court, and ended on 8 April 2004, when the Celje Higher Court's decision was served on the applicant's lawyers. The total duration of the proceedings was thus five years, three months and nine days for two levels of jurisdiction, including four years and a day at first instance.

74. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

75. Although the opinion of a medical expert was required to decide the case, the Court finds that it was neither procedurally nor factually of exceptional complexity. Therefore, the Government's argument that the case was of some complexity cannot justify the proceedings at first instance taking four years and a day. Moreover, the Government's argument that the courts proceeded at all stages in accordance with the domestic law cannot be accepted as, for example, the proceedings came to a standstill for a period of more than one year and ten months between 30 December

1998, when the complaint was lodged, and 7 November 2000, when the first hearing was held.

76. As to the applicant's conduct, while there were some periods of delay that could be attributed to him, there is no evidence before the Court to suggest that the applicant contributed in any significant way to prolonging the proceedings.

77. It is, however, true that the amount at stake for the applicant was relatively small.

78. Having examined all the material before it, the Court considers that the Government have not put forward any fact or argument capable of persuading it that the case was heard within a reasonable time.

79. In the Court's view, the overall length of the proceedings in the instant case was excessive and failed to meet the "reasonable time" requirement. In particular, the duration of the proceedings before the first-instance court, which exceeded four years, is not compatible with the standards set by the Court's case-law (see, for example, *A.P. v. Italy* [GC], no. 35265/97, 28 July 1999).

There has accordingly been a breach of Article 6 § 1 of the Convention.

## **II. Alleged violation of article 13 of the convention**

80. The applicant complained that the remedies available in Slovenia in length of proceedings cases were ineffective. In substance, he relied on Article 13 of the Convention, which provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

### **A. Admissibility**

81. The Court reiterates that in *Kudła* it decided that Article 13 of the Convention "guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time" (see *Kudła*, cited above, § 156).

82. The Court considers that this part of the application raises issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

83. No other ground for declaring the complaint inadmissible has been established.

#### B. Merits

84. The Government submitted that, under the Slovenian system of legal remedies in length of proceedings cases, it was possible not only to expedite the proceedings but also to make good any damage suffered (see paragraphs 30-39 above). Those remedies were and remained effective both in theory and in practice.

85. The applicant disputed that argument.

86. The Court reiterates that the standards of Article 13 require a party to the Convention to guarantee a domestic remedy allowing the competent domestic authority to address the substance of the relevant Convention complaint and to award appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see *Chahal*, cited above, pp. 1869-70, § 145).

87. In the present case the Government have failed to establish that an administrative action, a claim in tort, a request for supervision or a constitutional appeal can be regarded as effective remedies (see paragraphs 47-65 above). For example, when an individual lodges an administrative action alleging a violation of his or her right to a trial within a reasonable time while the proceedings in question are still pending, he or she can reasonably expect the administrative court to deal with the substance of the complaint. However, if the main proceedings end before it has had time to do so, it dismisses the action. Finally, the Court also concluded that the aggregate of legal remedies in the circumstances of these cases is not an effective remedy (see paragraphs 69-71 above).

88. Accordingly, there has been a violation of Article 13 of the Convention.

### **III. Application of article 46 of the convention**

89. Article 46 of the Convention provides:

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

90. The Court notes the applicant's allegation that judicial proceedings in the respondent State regularly fail to comply with the “reasonable time” requirement. The Court's concern is based on the observations it made in the decision in *Belinger* concerning delays in court proceedings in Slovenia (see paragraph 47 above).

91. In view of the persistent backlog in the Slovenian courts in general, as reported in the latest statistics published by the Ministry of Justice of the respondent State, it is clear that the length of judicial proceedings remains a major problem in Slovenia. In addition, the Government, with the aid of the Supreme Court, produced a document in 2002 in which it conceded that there were delays in judicial proceedings. The European Commission reached similar conclusions in its last report on the readiness of Slovenia to accede to the European Union published in November 2003. Furthermore, the Slovenian Human Rights Ombudsman observed in his report for the year 2004 that the most serious problem facing the Slovenian legal system was the length of court proceedings.

92. Lastly, the Court cannot ignore the fact that there are approximately 500 length of proceedings cases currently pending before the Court against Slovenia.

93. It is intrinsic to the Court's findings that the violation of the applicant's right to a trial within a reasonable time is not an isolated incident, but rather a systemic problem that has resulted from inadequate legislation and inefficiency in the administration of justice. The problem continues to present a danger affecting every person seeking judicial protection of their rights.

94. By becoming a High Contracting Party to the European Convention on Human Rights, the respondent State assumed the obligation to secure to everyone within its jurisdiction the rights and freedoms defined in Section 1 of the Convention. In fact, the States have a general obligation to solve the problems that have led to the Court finding a violation of the Convention. This should therefore be the primary goal of the respondent State.

95. Should violations of the Convention rights still occur, the respondent States must provide mechanisms within their respective legal systems for the effective redress of violations of the Convention rights (see paragraphs 41-42 above).

96. The Court has determined in the instant case that the respondent State failed to comply with its Convention obligations to secure the applicant a trial within a reasonable time and to provide him with an effective legal remedy for that violation.

97. As regards the financial repercussions a finding of a violation in the instant case may have on the respondent State, the Court reiterates that by virtue of Article 46 the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, with execution being supervised by the Committee of Ministers of the Council of Europe. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII, and *Broniowski v. Poland* [GC], no. 31443/96, § 192, ECHR 2004-V).

98. The Court has identified some of the weaknesses of the established legal remedies guaranteed by the respondent State (see paragraphs 47-71 and 87-88 above), while acknowledging that certain recent developments show reassuring improvements. To prevent future violations of the right to a trial within a reasonable

time, the Court encourages the respondent State to either amend the existing range of legal remedies or add new remedies so as to secure genuinely effective redress for violations of that right. The characteristics of an effective remedy are to be found in the Court's case-law cited in this judgment.

#### **IV. Application of article 41 of the convention**

99. Article 41 of the Convention provides:

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

##### **A. Damage**

100. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

101. The Government contested the claim.

102. The Court considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards him EUR 3,200 under that head.

##### **B. Costs and expenses**

103. The applicant, who is represented by a practising lawyer, also claimed approximately EUR 965 for the costs and expenses incurred before the Court in filing the application and the reply to the Government's observations.

104. The Government contested the claim, but left the matter to the Court's discretion in the event of the Court finding a violation of any of the Convention rights.

105. Under the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case,



having regard to the information in its possession and the above criteria, the Court considers it reasonable to award the full sum requested.

### C. Default interest

106. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

### **For these reasons, the court**

1. *Declares* unanimously the application admissible;
2. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* unanimously that there has been a violation of Article 13 of the Convention;
4. *Holds* by six votes to one that the above violations have originated in the malfunctioning of domestic legislation and practice;
5. *Holds* by six votes to one that the respondent State must, through appropriate legal measures and administrative practices, secure the right to a trial within a reasonable time;
6. *Holds* unanimously
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention:
    - (i) EUR 3,200 (three thousand two hundred euros) in respect of non-pecuniary damage;
    - (ii) EUR 965 (nine hundred and sixty-five euros) in respect of costs and expenses;
    - (iii) any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

### **Smiselno dopolnite s pojmi na koncu besedila:**

V zadevi *Lukenda proti Sloveniji* je ESČP presoјalo, ali je bilo trajanje civilnega postopka skladno z zahtevo po sojenju v \_\_\_\_\_ roku. Pritožnik je poleg tega zatrjeval, da v slovenskem pravnem sistemu ni imel na voljo \_\_\_\_\_ pravnega sredstva, s katerim bi lahko pospešil postopek ali dosegel ustrezno zadoščenje zaradi nastalih zamud.

Postopek se je nanašal na spor zaradi zvišanja invalidnine, zato ni šlo za posebej \_\_\_\_\_ zadevo. Čeprav je bilo treba pridobiti izvedensko mnenje, to po presoji ESČP samo po sebi ni moglo upravičiti dejstva, da je postopek na prvi stopnji trajal več kot \_\_\_\_\_ leta. ESČP je posebej opozorilo na obdobje, ko je postopek praktično \_\_\_\_\_ in se dalj časa ni premaknil.

Pri presoji razumnosti trajanja postopka ESČP praviloma upošteva več meril: zapletenost zadeve, ravnanje \_\_\_\_\_, ravnanje državnih organov in pomen zadeve za samega \_\_\_\_\_. V tej zadevi ni bilo ugotovljeno, da bi pritožnik s svojim ravnanjem bistveno prispeval k trajanju postopka. Glavni razlog za zamude je bil zato na strani \_\_\_\_\_ oblasti.

Glede 13. člena EKČP je bilo bistveno vprašanje, ali je imel pritožnik v Sloveniji na voljo resnično \_\_\_\_\_ pravno sredstvo. Vlada se je sklicevala na več možnosti, med drugim na upravni spor, odškodninsko tožbo, nadzorstveno pritožbo in ustavno \_\_\_\_\_. Vendar je ESČP ugotovilo, da nobeno od teh sredstev, niti v povezavi z drugimi, ni bilo dovolj učinkovito, da bi posamezniku zagotovilo \_\_\_\_\_ postopka ali ustrezno odškodnino.

ESČP je posebej poudarilo, da pravno sredstvo ni učinkovito le zato, ker formalno \_\_\_\_\_ v zakonu. Učinkovito mora biti tudi v \_\_\_\_\_, kar pomeni, da mora biti dostopno, uporabno in mora ponujati razumno možnost uspeha. Če

pravno sredstvo obstaja samo na papirju, vendar posamezniku v resnici ne pomaga, ne izpolnjuje standardov Konvencije.

Pomemben del sodbe je bil tudi v tem, da ESČP zadeve ni razumelo le kot posamično kršitev v enem postopku, ampak je opozorilo na širši, \_\_\_\_\_ problem slovenskega sodstva. Preobremenjenost sodišč, neučinkovitost pravnih sredstev in dolgotrajnost postopkov niso pomenili zgolj naključne napake v posameznem primeru, ampak so kazali na pomanjkljivosti v \_\_\_\_\_ in v delovanju pravosodnega sistema.

Zato je ESČP ugotovilo ne le kršitev 6. in 13. člena Konvencije, ampak je poudarilo tudi, da mora država sprejeti ustrezne \_\_\_\_\_ in organizacijske ukrepe, s katerimi bo zagotovila pravico do sojenja v razumnem roku. Sodba tako ni bila pomembna samo za konkretnega pritožnika, ampak je imela tudi širši pomen za reformo slovenskega \_\_\_\_\_ sistema.

**Možni pojmi:** pritožnika, sistemski, učinkovitega, zakonodaji, obstaja, štiri, pravosodnega, pritožbo, kompleksno, pravne, strank, učinkovito, državnih, razumnem, pospešitev, obstal, praksi

## Vprašanja

- Zakaj ESČP presodilo, da postopka v zadevi Lukenda ni mogoče šteti za »razumno dolgega« v smislu 6. člena EKČP?
- Kako je v zadevi Lukenda povezano vprašanje izčrpanja domačih pravnih sredstev z vprašanjem njihove dejanske učinkovitosti? Ali mora posameznik uporabiti tudi pravna sredstva, ki so zgolj teoretično dostopna, vendar v praksi ne delujejo?
- V čem je pomen ugotovitve ESČP, da kršitev v zadevi Lukenda ni bila osamljen primer, ampak del širšega, sistemskega, problema slovenskega sodstva?
- Ali je mogoče zadevo Lukenda razumeti kot primer, v katerem ESČP preseže zgolj individualno varstvo pritožnika in poseže tudi na raven splošne reforme pravnega sistema? Utemeljite.
- Kakšen je širši ustavnopravni pomen zadeve Lukenda za slovenski pravni red, zlasti glede pravice do sodnega varstva brez nepotrebnega odlašanja in dolžnosti države, da zagotovi učinkovita pravna sredstva?

- Menite, da dolgotrajnost sodnih postopkov ogroža ne le pravico posameznika do učinkovitega sodnega varstva, ampak tudi širše zaupanje javnosti v pravno državo?
- Ali je mogoče govoriti o poštenem sojenju, če je odločitev sicer pravno pravilna, vendar pride prepozno?





# Jalloh proti Nemčiji z dne 11. julija 2006, št. 54810/00

In the case of Jalloh v. Germany, The European Court of Human Rights, sitting as a Grand Chamber composed of:

Luzius Wildhaber, *President*,  
Christos Rozakis,  
Nicolas Bratza,  
Boštjan M. Zupančič,  
Georg Ress,  
Giovanni Bonello,  
Lucius Caflisch,  
Ireneu Cabral Barreto,  
Matti Pellonpää,  
András Baka,  
Rait Maruste,  
Snejana Botoucharova,  
Javier Borrego Borrego,  
Elisabet Fura-Sandström,  
Alvina Gyulumyan,  
Khanlar Hajiyev,  
Ján Šikuta, *judges*,  
and Lawrence Early, *Section Registrar*,

Having deliberated in private on 23 November 2005 and on 10 May 2006,



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

### Procedure

1. The case originated in an application (no. 54810/00) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Sierra Leonean national, Mr Abu Bakah Jalloh (“the applicant”), on 30 January 2000.
2. The applicant was represented by Mr U. Busch, a lawyer practising in Ratingen. The German Government (“the Government”) were represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent*, and, subsequently, Mrs A. Wittling-Vogel, *Ministerialdirigentin*.
3. The applicant alleged, in particular, that the forcible administration of emetics in order to obtain evidence of a drugs offence constituted inhuman and degrading treatment prohibited by Article 3 of the Convention. He further claimed that the use of this illegally obtained evidence at his trial breached his right to a fair trial guaranteed by Article 6 of the Convention.
4. The application was allocated to the Third Section of the Court. By a decision of 26 October 2004, it was declared partly admissible by a Chamber of that Section, composed of Ireneu Cabral Barreto, President, Georg Ress, Lucius Caflisch, Rıza Türmen, Boštjan M. Zupančič, Margarita Tsatsa-Nikolovska and Alvina Gyulumyan, judges, and Vincent Berger, Section Registrar.
5. On 1 February 2005 the Chamber relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72 of the Rules of Court).
6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. Georg Ress, whose term of office expired on 31 October 2004, continued to sit in the case (Article 23 § 7 of the Convention and Rule 24 § 4). Jean-Paul Costa, Rıza Türmen and Margarita Tsatsa-Nikolovska, who were unable to take part in the hearing, were replaced by András Baka, Giovanni Bonello and Ján Šikuta (Rule 24 § 2 (a) and § 3). At the final deliberations, Snejana Botoucharova, substitute judge,

replaced Ljiljana Mijović, who was unable to take part in the further consideration of the case (Rule 24 § 3).

7. The applicant and the Government each filed observations on the merits.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 23 November 2005 (Rule 59 § 3).

## **The facts**

### **I. The circumstances of the case**

9. The applicant was born in 1965 and lives in Cologne (Germany).

10. The facts of the case, as submitted by the parties, may be summarised as follows.

### **A. Investigation proceedings**

11. On 29 October 1993 four plain-clothes policemen observed the applicant on at least two different occasions take a tiny plastic bag (a so-called “bubble”) out of his mouth and hand it over to another person in exchange for money. Believing that these bags contained drugs, the police officers went to arrest the applicant, whereupon he swallowed another bubble he still had in his mouth.

12. The police officers did not find any drugs on the applicant. Since further delay might have frustrated the conduct of the investigation, the public prosecutor ordered that emetics (*Brechmittel*) be administered to the applicant by a doctor in order to provoke the regurgitation of the bag (*Exkorporation*).

13. The applicant was taken to a hospital in Wuppertal-Elberfeld. According to the Government, the doctor who was to administer the emetics questioned the applicant about his medical history (a procedure known as obtaining an anamnesis). This was disputed by the applicant, who claimed that he had not been questioned by a doctor. As the applicant refused to take the medication necessary to provoke vomiting, he was held down and immobilised by four police officers. The doctor then forcibly administered to him a salt solution and the emetic ipecacuanha syrup through a tube introduced into his stomach through the nose. In addition, the doctor injected him



with apomorphine, another emetic that is a derivative of morphine. As a result, the applicant regurgitated one bubble containing 0.2182 grams of cocaine. Approximately an hour and a half after being arrested and taken to the hospital, the applicant was examined by a doctor and declared fit for detention.

14. When visited by the police in his cell two hours after being given the emetics, the applicant, who was found not to speak German, said in broken English that he was too tired to make a statement about the alleged offence.

15. Pursuant to an arrest warrant that had been issued by the Wuppertal District Court, the applicant was remanded in custody on 30 October 1993.

16. The applicant maintained that for three days following the treatment to which he was subjected he was only able to drink soup and that his nose repeatedly bled for two weeks because of wounds he had received when the tube was inserted. This was disputed by the Government, who stressed that the applicant had failed to submit a medical report to prove his allegation.

17. Two and a half months after the administration of the emetics, the applicant underwent a gastroscopy in the prison hospital after complaining of continuous pain in the upper region of his stomach. He was diagnosed as suffering from irritation in the lower area of the oesophagus caused by the reflux of gastric acid. The medical report did not expressly associate this condition with the forced administration of the emetics.

18. The applicant was released from prison on 23 March 1994. He claimed that he had had to undergo further medical treatment for the stomach troubles he had suffered as a result of the forcible administration of the emetics. He did not submit any documents to confirm that he had received medical treatment. The Government, for their part, maintained that the applicant had not received any medical treatment.

## **B. Domestic court proceedings**

19. In his submissions dated 20 December 1993 to the Wuppertal District Court, the applicant, who was represented by counsel throughout the proceedings, objected to the use at his trial of the evidence obtained through the administration of emetics,

a method he considered to be illegal. By using force to provoke the regurgitation of the bubble of cocaine, the police officers and the doctor concerned were guilty of causing him bodily harm in the course of their duties (*Körperverletzung im Amt*). The administration of toxic substances was prohibited by Article 136a of the Code of Criminal Procedure (see paragraph 34 below). His bodily functions had been manipulated, since bodily activity had been provoked by suppressing the control reactions of the brain and the body. In any event, administering emetics was a disproportionate measure and therefore not authorised by Article 81a of the Code of Criminal Procedure (see paragraphs 33 and 35-40 below). It would have been possible to obtain evidence of the alleged offence by waiting for the bubble to pass through his system naturally. The applicant further argued that the only other method authorised by Article 81a of the Code of Criminal Procedure would have been irrigation of the stomach.

20. On 23 March 1994 the Wuppertal District Court convicted the applicant of drug trafficking and sentenced him to one year's imprisonment, suspended, and probation. It rejected the defence's argument that the administration of emetics under Article 81a of the Code of Criminal Procedure was a disproportionate means of recovering a bubble containing just 0.2 g of cocaine.

21. The applicant appealed against the judgment.

22. On 17 May 1995 the Wuppertal Regional Court upheld the applicant's conviction but reduced the length of the suspended prison sentence to six months. It further ordered the forfeiture (*Verfall*) of 100 German marks that had been found on the applicant at the time of his arrest on the ground that it was the proceeds of sale of two drug bubbles.

23. The Regional Court found that the evidence obtained following the public prosecutor's order to provoke the regurgitation of the bubble of cocaine was admissible. The measure had been carried out because further delay might have frustrated the conduct of the investigation. Pursuant to Article 81a of the Code of Criminal Procedure, the administration of the substances in question, even if effected against the suspect's will, was legal. The procedure had been necessary to secure evidence of drug trafficking. It had been carried out by a doctor and in compliance with the rules of medical science. The defendant's health had not been put at risk and the principle of proportionality had been adhered to.

24. The applicant appealed against this judgment on points of law. He argued in particular that Article 81a of the Code of Criminal Procedure did not authorise the administration of emetics, as it did not permit the administration of life-threatening substances by dangerous methods. Furthermore, Article 81a prohibited measures such as the one in question that resulted in a suspect effectively being forced to contribute actively to his own conviction. He further submitted that the impugned measure had violated Articles 1 and 2 of the Basic Law (*Grundgesetz* – see paragraphs 31-32 below), and disregarded in particular the right to respect for human dignity.

25. On 19 September 1995 the Düsseldorf Court of Appeal dismissed the applicant's appeal. It found that the Regional Court's judgment did not contain any error of law that was detrimental to the accused.

26. The applicant lodged a complaint with the Federal Constitutional Court. He reiterated that the administration of emetics was a disproportionate measure under Article 81a of the Code of Criminal Procedure.

27. On 15 September 1999 the Federal Constitutional Court declared the applicant's constitutional complaint inadmissible under the principle of subsidiarity.

28. It considered that the administration of emetics, including apomorphine, a morphine derivative, raised serious constitutional issues with respect to the right to physical integrity (Article 2 § 2 of the Basic Law – see paragraph 32 below) and to the principle of proportionality which the criminal courts had not yet addressed.

29. The Federal Constitutional Court found that the applicant had not availed himself of all the remedies at his disposal (*alle prozessualen Möglichkeiten*) to contest the measure before the criminal courts in order to avoid any underestimation of the importance and scope of the fundamental right laid down in Article 2 § 2, first sentence, of the Basic Law (*um eine Verkenennung von Bedeutung und Tragweite des Grundrechts des Art. 2 Abs. 2 Satz 1 GG zu verhindern*).

30. It further stated that the administration of emetics did not give rise to any constitutional objections of principle either with respect to human dignity protected by Article 1 § 1 of the Basic Law or the principle against self-incrimination guaranteed by Article 2 § 1 read in conjunction with Article 1 § 1 of the Basic Law.

## **II. Relevant domestic, comparative and international law and practice**

...

### **The law**

#### **I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION**

56. The applicant claimed that he had been subjected to inhuman and degrading treatment as a result of having been forcibly administered emetics. He relied on Article 3 of the Convention, which provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

57. The Government contested this allegation.

#### **A. The parties' submissions**

##### *1. The applicant*

58. According to the applicant, the administration of emetics by force had constituted a serious interference with his physical integrity and posed a serious threat to his health, and even life, since the emetics used – ipecacuanha syrup and apomorphine – could have provoked life-threatening side effects. The insertion of a tube by force through the nose of a suspect who did not cooperate in the procedure could have caused damage to the nose, throat and gullet and even burst drug bubbles in the stomach. The danger of administering emetics by force was illustrated by the fact that it had already resulted in the deaths of two suspects in Germany. The vast majority of the member States of the Council of Europe as well as the United States considered this method to be illegal. The interference could not be justified on grounds of medical assistance. On the contrary, it merely increased the risk of the suspect being poisoned by the drugs he had swallowed. A suspect's express opposition to undergoing medical treatment had to be respected in a democratic society as part of the individual's right to self-determination.

59. The applicant further argued that the administration of emetics had been aimed at intimidating and debasing him in disregard of his human dignity. The manner in which he had been forced to undergo a life-threatening medical intervention had

been violent, agonising and humiliating. He had been degraded to the point of having to vomit while being observed by several police officers. Being in police custody, he had found himself in a particularly vulnerable position.

60. Moreover, the applicant maintained that no anamnesis to establish his medical history and physical condition had been obtained by a doctor prior to the execution of the impugned measure. Nor had he been given any medical care and supervision in prison afterwards.

61. The applicant also stressed that he had sustained bodily injury, notably to his stomach, as was proved by a gastroscopy that had been performed in the prison hospital. Furthermore, he had been subjected to intense physical and mental suffering during the process of the administration of the emetics and by the chemical effects of the substances concerned.

## *2. The Government*

62. According to the Government, the forcible administration of emetics entailed merely negligible risks to health. Ipecacuanha syrup was not a dangerous substance. In fact, it was given to children who had been poisoned. The introduction of a very flexible tube through the applicant's nose had not put him at risk, even though he had resisted the procedure. The injection of apomorphine had not been dangerous either. The side effects and dangers described by the applicant could only be caused by chronic abuse or misuse of the emetics in question. The fact that two suspected drug dealers had died following the forcible administration of emetics in Hamburg and Bremen did not warrant the conclusion that the measure in general posed health risks. The method had been used on numerous occasions without giving rise to complications. The authorities resorted to the administration of emetics in those *Länder* where drug trafficking was a serious problem. In the vast majority of cases suspects chose to swallow the emetics after being informed that force would be used if they refused to do so. In the Hamburg case the defendant had suffered from an undetected heart condition and would have been equally at risk if he had resisted a different kind of enforcement measure. In the Bremen case the possibility that the defendant was poisoned by the drugs he had swallowed could not be excluded.

63. The Government pointed out that there had been a real, immediate risk that the drug bubble, which had not been packaged for long-term transport inside the body, would leak and poison the applicant. Even though the emetics had been administered primarily to obtain evidence rather than for medical reasons, the removal of the drugs from the applicant's stomach could still be considered to be required on medical grounds. It was part of the State's positive obligation to protect the applicant by provoking the regurgitation of the drugs. Awaiting the natural excretion of the drugs would not have been as effective a method of investigation or any less humiliating and may, in fact, have posed risks to his health. It was significant in this connection that the administration of emetics to a juvenile was only considered an option if he or she was suspected of selling drugs on a commercial basis.

64. In the Government's view, the impugned measure had not gone beyond what had been necessary to secure evidence of the commission of a drugs offence. The applicant had been administered harmless emetics in a hospital by a doctor acting *lege artis*. Such a measure could not be considered humiliating in the circumstances.

65. The Government further maintained that the emetics were administered to the applicant only after an anamnesis had been obtained by a doctor at the hospital. The same doctor had duly supervised the administration of the emetics to the applicant.

66. The Government stressed that there was no evidence that the applicant had suffered any injuries or lasting damage as a result of the administration of the emetics. He had merely been tired for several hours after the execution of the measure, either because of the effects of the apomorphine or because of the resistance he had put up. In the proceedings before the Court the applicant had claimed for the first time that he had suffered further damage to his health. However, he had not produced any documentary evidence to support his allegations.

## **B. The Court's assessment**

### *1. Relevant principles*

67. According to the Court's well-established case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of

the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, *inter alia*, *Price v. the United Kingdom*, no. 33394/96, § 24, ECHR 2001-VII; *Mouisel v. France*, no. 67263/01, § 37, ECHR 2002-IX; and *Naumenko v. Ukraine*, no. 42023/98, § 108, 10 February 2004). Allegations of ill-treatment must be supported by appropriate evidence (see, *mutatis mutandis*, *Klaas v. Germany*, 22 September 1993, § 30, Series A no. 269). To assess this evidence, the Court adopts the standard of proof “beyond reasonable doubt” but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ireland v. the United Kingdom*, 18 January 1978, § 161 *in fine*, Series A no. 25, and *Labita v. Italy* [GC], no. 26772/95, § 121, ECHR 2000-IV).

68. Treatment has been held by the Court to be “inhuman” because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see *Labita*, cited above, § 120). Treatment has been considered “degrading” when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (see *Hurtado v. Switzerland*, 28 January 1994, opinion of the Commission, § 67, Series A no. 280), or when it was such as to drive the victim to act against his will or conscience (see, for example, *Denmark, Norway, Sweden and the Netherlands v. Greece* (the “Greek case”), nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission’s report of 5 November 1969, Yearbook 12, p. 186, and *Keenan v. the United Kingdom*, no. 27229/95, § 110, ECHR 2001-III). Furthermore, in considering whether treatment is “degrading” within the meaning of Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (see *Raninen v. Finland*, 16 December 1997, § 55, *Reports of Judgments and Decisions* 1997-VIII; *Peers v. Greece*, no. 28524/95, §§ 68 and 74, ECHR 2001-III; and *Price*, cited above, § 24). In order for a punishment or treatment associated with it to be “inhuman” or “degrading”, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labita*, cited above, § 120).

69. With respect to medical interventions to which a detained person is subjected against his or her will, Article 3 of the Convention imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. The persons concerned nevertheless remain under the protection of Article 3, whose requirements permit of no derogation (*Mouisel*, cited above, § 40, and *Naumenko*, cited above, § 112). A measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading (see, in particular, *Herzegfalvy v. Austria*, 24 September 1992, § 82, Series A no. 244, and *Naumenko*, cited above, § 112). This can be said, for instance, about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Court must nevertheless satisfy itself that a medical necessity has been convincingly shown to exist and that procedural guarantees for the decision, for example to force-feed, exist and are complied with (see *Nermerzhitsky v. Ukraine*, no. 54825/00, § 94, ECHR 2005-II).

70. Even where it is not motivated by reasons of medical necessity, Articles 3 and 8 of the Convention do not as such prohibit recourse to a medical procedure in defiance of the will of a suspect in order to obtain from him evidence of his involvement in the commission of a criminal offence. Thus, the Convention institutions have found on several occasions that the taking of blood or saliva samples against a suspect's will in order to investigate an offence did not breach these Articles in the circumstances of the cases examined by them (see, *inter alia*, *X v. the Netherlands*, no. 8239/78, Commission decision of 4 December 1978, Decisions and Reports (DR) 16, pp. 187-89, and *Schmidt v. Germany* (dec.), no. 32352/02, 5 January 2006).

71. However, any recourse to a forcible medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case. This is especially true where the procedure is intended to retrieve from inside the individual's body real evidence of the very crime of which he is suspected. The particularly intrusive nature of such an act requires a strict scrutiny of all the surrounding circumstances. In this connection, due regard must be had to the seriousness of the offence in issue. The authorities must also demonstrate that they took into consideration alternative methods of recovering the evidence. Furthermore, the procedure must not entail any risk of lasting detriment to a



suspect's health (see, *mutatis mutandis*, *Nevmerzhitsky*, cited above, §§ 94 and 97, and *Schmidt*, cited above).

72. Moreover, as with interventions carried out for therapeutic purposes, the manner in which a person is subjected to a forcible medical procedure in order to retrieve evidence from his body must not exceed the minimum level of severity prescribed by the Court's case-law on Article 3 of the Convention. In particular, account has to be taken of whether the person concerned experienced serious physical pain or suffering as a result of the forcible medical intervention (see *Peters v. the Netherlands*, no. 21132/93, Commission decision of 6 April 1994, DR 77-B; *Schmidt*, cited above; and *Nevmerzhitsky*, cited above, §§ 94 and 97).

73. Another material consideration in such cases is whether the forcible medical procedure was ordered and administered by medical doctors and whether the person concerned was placed under constant medical supervision (see, for example, *Ilykov v. Bulgaria*, no. 33977/96, Commission decision of 20 October 1997, unreported).

74. A further relevant factor is whether the forcible medical intervention resulted in any aggravation of his or her state of health and had lasting consequences for his or her health (see *Ilykov*, cited above, and, *mutatis mutandis*, *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004).

## 2. *Application of those principles to the present case*

75. At the outset the Court notes that in the Government's view the removal of the drugs from the applicant's stomach by the administration of emetics could be considered to be required on medical grounds, as he risked death through poisoning. However, it is to be observed that the domestic courts all accepted that, when ordering the administration of emetics, the authorities had acted on the basis of Article 81a of the Code of Criminal Procedure. This provision entitles the prosecuting authorities to order a bodily intrusion to be effected by a doctor without the suspect's consent in order to obtain evidence, provided that there is no risk of damage to the suspect's health. However, Article 81a does not cover measures taken to avert an imminent danger to a person's health. Furthermore, it is undisputed that the emetics were administered in the absence of any prior assessment of the dangers involved in leaving the drug bubble in the applicant's body. The Government also stated that emetics are never administered to juvenile dealers unless they are

suspected of selling drugs on a commercial basis. Juvenile dealers are, however, in no less need of medical treatment than adults. Adult dealers, for their part, run the same risks to their health as juvenile dealers when administered emetics. Consequently, the Court is not satisfied that the prosecuting authorities' decision to order the impugned measure was based on and required by medical reasons, that is, the need to protect the applicant's health. Instead, it was aimed at securing evidence of a drugs offence.

76. This finding does not by itself warrant the conclusion that the impugned intervention contravenes Article 3. As noted above (see paragraph 70 above), the Court has found on several occasions that the Convention does not, in principle, prohibit recourse to a forcible medical intervention that will assist in the investigation of an offence. However, any interference with a person's physical integrity carried out with the aim of obtaining evidence must be the subject of rigorous scrutiny, with the following factors being of particular importance: the extent to which forcible medical intervention was necessary to obtain the evidence, the health risks for the suspect, the manner in which the procedure was carried out and the physical pain and mental suffering it caused, the degree of medical supervision available and the effects on the suspect's health (compare and contrast also the criteria established by the United States courts in similar cases – see paragraphs 51-52 above). In the light of all the circumstances of the individual case, the intervention must not attain the minimum level of severity that would bring it within the scope of Article 3. The Court will now examine each of these elements in turn.

77. As regards the extent to which the forcible medical intervention was necessary to obtain the evidence, the Court notes that drug trafficking is a serious offence. It is acutely aware of the problem confronting Contracting States in their efforts to combat the harm caused to their societies through the supply of drugs (see, in particular, *D. v. the United Kingdom*, 2 May 1997, § 46, *Reports* 1997-III). However, in the present case it was clear before the impugned measure was ordered and implemented that the street dealer on whom it was imposed had been storing the drugs in his mouth and could not, therefore, have been offering drugs for sale on a large scale. This is reflected in the sentence (a six-month suspended prison sentence and probation), which is at the lower end of the range of possible sentences. The Court accepts that it was vital for the investigators to be able to determine the exact amount and quality of the drugs that were being offered for sale. However, it is not

satisfied that the forcible administration of emetics was indispensable in the instant case to obtain the evidence. The prosecuting authorities could simply have waited for the drugs to pass through his system naturally. It is significant in this connection that many other member States of the Council of Europe use this method to investigate drugs offences.

78. As regards the health risks attendant on the forcible medical intervention, the Court notes that it is a matter of dispute between the parties whether and to what extent the administration of ipecacuanha syrup through a tube introduced into the applicant's nose and the injection of apomorphine posed a risk to his health. Whether or not such measures are dangerous is, as has been noted above (see paragraphs 41-44), also a matter of dispute among medical experts. While some consider it to be entirely harmless and in the suspect's best interest, others argue that in particular the use of a nasogastric tube to administer emetics by force entails serious risks to life and limb and should therefore be prohibited. The Court is not satisfied that the forcible administration of emetics, a procedure that has to date resulted in the deaths of two people in the respondent State, entails merely negligible health risks. It also observes in this respect that the actual use of force – as opposed to the mere threat of force – has been found to be necessary in the respondent State in only a small proportion of the cases in which emetics have been administered. However, the fatalities occurred in cases in which force was used. Furthermore, the fact that in the majority of the German *Länder* and in at least a large majority of the other member States of the Council of Europe the authorities refrain from forcibly administering emetics does tend to suggest that such a measure is considered to pose health risks.

79. As to the manner in which the emetics were administered, the Court notes that, after refusing to take the emetics voluntarily, the applicant was pinned down by four police officers, which shows that force verging on brutality was used against him. A tube was then fed through his nose into his stomach to overcome his physical and mental resistance. This must have caused him pain and anxiety. He was subjected to a further bodily intrusion against his will through the injection of another emetic. Account must also be taken of the applicant's mental suffering while he waited for the emetics to take effect. During this time he was restrained and kept under observation by police officers and a doctor. Being forced to regurgitate under these conditions must have been humiliating for him. The Court does not share the Government's view that waiting for the drugs to pass through his body naturally

would have been just as humiliating. Although it would have entailed some invasion of privacy because of the need for supervision, such a measure nevertheless involves a natural bodily function and so causes considerably less interference with a person's physical and mental integrity than forcible medical intervention (see, *mutatis mutandis*, *Petery*, cited above, and *Schmidt*, cited above).

80. As regards the medical supervision of the administration of the emetics, the Court notes that the impugned measure was carried out by a doctor in a hospital. In addition, after the measure was executed the applicant was examined by a doctor and declared fit for detention. However, it is a matter of dispute between the parties whether an anamnesis of the applicant was obtained prior to the execution of the measure in order to ascertain whether his health might be at risk if emetics were administered to him against his will. Since the applicant violently resisted the administration of the emetics and spoke no German and only broken English, the assumption must be that he was either unable or unwilling to answer any questions that were put by the doctor or to submit to a prior medical examination. The Government have not submitted any documentary or other evidence to show otherwise.

81. As to the effects of the impugned measure on the suspect's health, the Court notes that the parties disagree about whether the applicant has suffered any lasting damage to his health, notably to his stomach. Having regard to the material before it, it finds that it has not been established that either his treatment for stomach troubles in the prison hospital two and a half months after his arrest or any subsequent medical treatment he received was caused by the forcible administration of the emetics. This conclusion does not, of course, call into question the Court's above finding that the forcible medical intervention was not without possible risk to the applicant's health.

82. Having regard to all the circumstances of the case, the Court finds that the impugned measure attained the minimum level of severity required to bring it within the scope of Article 3. The authorities subjected the applicant to a grave interference with his physical and mental integrity against his will. They forced him to regurgitate, not for therapeutic reasons, but in order to retrieve evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Furthermore, the

procedure entailed risks to the applicant's health, not least because of the failure to obtain a proper anamnesis beforehand. Although this was not the intention, the measure was implemented in a way which caused the applicant both physical pain and mental suffering. He has therefore been subjected to inhuman and degrading treatment contrary to Article 3.

83. Accordingly, the Court concludes that there has been a violation of Article 3 of the Convention.

## **II. Alleged violation of article 8 of the convention**

84. In the applicant's submission, the administration of emetics by force also amounted to a disproportionate interference with his right to respect for his private life. He relied on Article 8 of the Convention, the relevant parts of which read:

"1. Everyone has the right to respect for his private ... life ...

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

85. The Government disagreed with that submission.

86. The Court has already examined the applicant's complaint concerning the forcible administration of emetics to him under Article 3 of the Convention. In view of its conclusion that there has been a violation of that provision, it finds that no separate issue arises under Article 8.

## **III. Alleged violation of article 6 of the convention**

87. The applicant further considered that his right to a fair trial guaranteed by Article 6 of the Convention had been infringed by the use at his trial of the evidence obtained by the administration of the emetics. He claimed in particular that his right not to incriminate himself had been violated. The relevant part of Article 6 provides:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

88. The Government contested this view.

## **A. The parties' submissions**

### *1. The applicant*

89. In the applicant's view, the administration of the emetics was illegal and violated Articles 3 and 8 of the Convention. As the evidence thereby obtained had formed the sole basis for his conviction, the criminal proceedings against him had been unfair.

90. The applicant further argued that by forcing him against his will to produce evidence of an offence the authorities had violated his right not to incriminate himself and therefore his right to a fair trial. The principle against self-incrimination was not limited to statements obtained by coercion, but extended to objects so obtained. Moreover, the facts of his case were distinguishable from those in *Saunders v. the United Kingdom* (17 December 1996, *Reports* 1996-VI). Unlike the cases of blood or DNA testing referred to by the Court in its judgment in that case, the administration of emetics entailed the use of chemical substances that provoked an unnatural and involuntary activity of the body in order to obtain the evidence. His refusal to swallow the emetics was overcome by the use of considerable force. Therefore, the evidence that had been obtained had not existed independently of his will and he had been forced to contribute actively to his own conviction. The administration of emetics was comparable to the administration of a truth serum to obtain a confession, a practice which was expressly forbidden by Article 136a of the Code of Criminal Procedure. He referred to the judgment of the Frankfurt (Main) Court of Appeal of 11 October 1996 in support of his contention.

### *2. The Government*

91. In the Government's view, the administration of the emetics to the applicant had not contravened either Article 3 or Article 8 of the Convention. Consequently, the use of the drug bubble thereby obtained as evidence in the criminal proceedings against the applicant had not rendered his trial unfair. Determining the exact nature,

amount and quality of the drugs being sold by the applicant had been a crucial factor in securing the applicant's conviction and passing sentence.

92. The Government further submitted that the right not to incriminate oneself only prohibited forcing a person to act against his or her will. Provoking an emesis was a mere reaction of the body which could not be controlled by a person's will, and was therefore not prohibited by the principle against self-incrimination. The suspect was not thereby forced to contribute actively to securing the evidence. The accused's initial refusal to take the emetics could not be relevant, as otherwise all investigative measures aimed at breaking a suspect's will to conceal evidence, such as taking blood samples by force or searching houses, would be prohibited.

93. Moreover, the Government argued that according to the Court's judgment in *Saunders*, cited above, drugs obtained by the forcible administration of emetics were admissible in evidence. If it was possible to use bodily fluids or cells as evidence, then *a fortiori* it had to be possible to use objects which were not part of the defendant's body. Furthermore, the administration of emetics, which the applicant merely had to endure passively, was not comparable to the administration of a truth serum as prohibited by Article 136a of the Code of Criminal Procedure, which broke the suspect's will not to testify.

## **B. The Court's assessment**

### *1. General principles established under the Court's case-law*

94. The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140, and *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, Reports 1998-IV).

95. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the “unlawfulness” in question and, where violation of another Convention right is concerned, the nature of the violation found (see, *inter alia*, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX; and *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX).

96. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, *inter alia*, *Khan*, cited above, §§ 35 and 37, and *Allan*, cited above, § 43).

97. The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence in issue. Nevertheless, when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and be weighed against the individual interest that the evidence against him be gathered lawfully. However, public interest concerns cannot justify measures which extinguish the very essence of an applicant’s defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention (see, *mutatis mutandis*, *Heaney and McGuinness v. Ireland*, no. 34720/97, §§ 57-58, ECHR 2000-XII).

98. As regards, in particular, the examination of the nature of the Convention violation found the Court observes that notably in the cases of *Khan* (cited above, §§ 25-28) and *P.G. and J.H. v. the United Kingdom* (cited above, §§ 37-38) it has found the



use of covert listening devices to be in breach of Article 8 since recourse to such devices lacked a legal basis in domestic law and the interferences with those applicants' right to respect for private life were not "in accordance with the law". Nonetheless, the admission in evidence of information obtained thereby did not in the circumstances of the cases conflict with the requirements of fairness guaranteed by Article 6 § 1.

99. However, different considerations apply to evidence recovered by a measure found to violate Article 3. An issue may arise under Article 6 § 1 in respect of evidence obtained in violation of Article 3 of the Convention, even if the admission of such evidence was not decisive in securing the conviction (see *İçöz v. Turkey* (dec.), no. 54919/00, 9 January 2003, and *Koç v. Turkey* (dec.), no. 32580/96, 23 September 2003). The Court reiterates in this connection that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see, *inter alia*, *Chahal v. the United Kingdom*, 15 November 1996, § 79, *Reports* 1996-V, and *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V).

100. As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court observes that these are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, *inter alia*, *Saunders*, cited above, § 68; *Heaney and McGuinness*, cited above, § 40; *J.B. v. Switzerland*, no. 31827/96, § 64, ECHR 2001-III; and *Allan*, cited above, § 44).

101. In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will have regard, in particular, to the following elements: the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put (see, for example, *Tirado Ortiz and Lozano Martin v. Spain* (dec.), no. 43486/98, ECHR 1999-V; *Heaney and McGuinness*, cited above, §§ 51-55; and *Allan*, cited above, § 44).

102. The Court has consistently held, however, that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood, urine, hair or voice samples and bodily tissue for the purpose of DNA testing (see *Saunders*, cited above, § 69; *Choudhary v. the United Kingdom* (dec.), no. 40084/98, 4 May 1999; *J.B. v. Switzerland*, cited above, § 68; and *P.G. and J.H. v. the United Kingdom*, cited above, § 80).

## 2. *Application of those principles to the present case*

103. In determining whether in the light of these principles the criminal proceedings against the applicant can be considered fair, the Court notes at the outset that the evidence secured through the administration of emetics to the applicant was not obtained “unlawfully” in breach of domestic law. It recalls in this connection that the national courts found that Article 81a of the Code of Criminal Procedure permitted the impugned measure.

104. The Court held above that the applicant was subjected to inhuman and degrading treatment contrary to the substantive provisions of Article 3 when emetics were administered to him in order to force him to regurgitate the drugs he had swallowed. The evidence used in the criminal proceedings against the applicant was thus obtained as a direct result of a violation of one of the core rights guaranteed by the Convention.

105. As noted above, the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. The Court has not found in the instant case that the applicant was subjected to torture. In its view, incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim’s guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the United States Supreme Court’s judgment in the *Rochin* case (see paragraph 50 above), to “afford brutality the cloak of law”. It notes in this connection that Article 15 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that statements which are established to have been made as a result of torture shall not be used in evidence in proceedings against the victim of torture.

106. Although the treatment to which the applicant was subjected did not attract the special stigma reserved to acts of torture, it did attain in the circumstances the minimum level of severity covered by the ambit of the Article 3 prohibition. It cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair, irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial.

107. In the present case, the general question whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders a trial unfair can be left open. The Court notes that, even if it was not the intention of the authorities to inflict pain and suffering on the applicant, the evidence was obtained by a measure which breached one of the core rights guaranteed by the Convention. Furthermore, it was common ground between the parties that the drugs obtained by the impugned measure were the decisive element in securing the applicant’s conviction. It is true that, as was equally uncontested, the applicant was given the opportunity, which he took, of challenging the use of the drugs obtained by the impugned measure. However, any discretion on the part of the national courts to exclude that evidence could not come into play as they considered the administration of emetics to be authorised by domestic law. Moreover, the public interest in

securing the applicant's conviction cannot be considered to have been of such weight as to warrant allowing that evidence to be used at the trial. As noted above, the measure targeted a street dealer selling drugs on a relatively small scale who was eventually given a six-month suspended prison sentence and probation.

108. In these circumstances, the Court finds that the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair.

109. This finding is of itself a sufficient basis on which to conclude that the applicant was denied a fair trial in breach of Article 6. However, the Court considers it appropriate to address also the applicant's argument that the manner in which the evidence was obtained and the use made of it undermined his right not to incriminate himself. To that end, it will examine, firstly, whether this particular right was relevant to the circumstances of the applicant's case and, in the affirmative, whether it has been breached.

110. As regards the applicability of the principle against self-incrimination in this case, the Court observes that the use at the trial of "real" evidence – as opposed to a confession – obtained by forcible interference with the applicant's bodily integrity is in issue. It notes that the privilege against self-incrimination is commonly understood in the Contracting States and elsewhere to be primarily concerned with respecting the will of the defendant to remain silent in the face of questioning and not to be compelled to provide a statement.

111. However, the Court has on occasion given the principle of self-incrimination as protected under Article 6 § 1 a broader meaning so as to encompass cases in which coercion to hand over real evidence to the authorities was in issue. In *Funke v. France* (25 February 1993, § 44, Series A no. 256-A), for instance, the Court found that an attempt to compel the applicant to disclose documents, and thereby to provide evidence of offences he had allegedly committed, violated his right not to incriminate himself. Similarly, in *J.B. v. Switzerland* (cited above, §§ 63-71) the Court considered the State authorities' attempt to compel the applicant to submit documents which might have provided information about tax evasion to be in breach of the principle against self-incrimination (in its broader sense).

112. In *Saunders*, the Court considered that the principle against self-incrimination did not cover “material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing” (cited above, § 69).

113. In the Court’s view, the evidence in issue in the present case, namely, drugs hidden in the applicant’s body which were obtained by the forcible administration of emetics, could be considered to fall into the category of material having an existence independent of the will of the suspect, the use of which is generally not prohibited in criminal proceedings. However, there are several elements which distinguish the present case from the examples listed in *Saunders*. Firstly, as with the impugned measures in *Funke* and *J.B. v. Switzerland*, the administration of emetics was used to retrieve real evidence in defiance of the applicant’s will. Conversely, the bodily material listed in *Saunders* concerned material obtained by coercion for forensic examination with a view to detecting, for example, the presence of alcohol or drugs.

114. Secondly, the degree of force used in the present case differs significantly from the degree of compulsion normally required to obtain the types of material referred to in the *Saunders* case. To obtain such material, a defendant is requested to endure passively a minor interference with his physical integrity (for example when blood or hair samples or bodily tissue are taken). Even if the defendant’s active participation is required, it can be seen from *Saunders* that this concerns material produced by the normal functioning of the body (such as, for example, breath, urine or voice samples). In contrast, compelling the applicant in the instant case to regurgitate the evidence sought required the forcible introduction of a tube through his nose and the administration of a substance so as to provoke a pathological reaction in his body. As noted earlier, this procedure was not without risk to the applicant’s health.

115. Thirdly, the evidence in the present case was obtained by means of a procedure which violated Article 3. The procedure used in the applicant’s case is in striking contrast to procedures for obtaining, for example, a breath test or a blood sample. Procedures of the latter kind do not, unless in exceptional circumstances, attain the minimum level of severity to contravene Article 3. Moreover, though constituting

an interference with the suspect's right to respect for private life, these procedures are, in general, justified under Article 8 § 2 as being necessary for the prevention of criminal offences (see, *inter alia*, *Tirado Ortiz and Lozano Martin*, cited above).

116. Consequently, the principle against self-incrimination is applicable to the present proceedings.

117. In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.

118. As regards the nature and degree of compulsion used to obtain the evidence in the present case, the Court reiterates that forcing the applicant to regurgitate the drugs significantly interfered with his physical and mental integrity. The applicant had to be immobilised by four policemen, a tube was fed through his nose into his stomach and chemical substances were administered to him in order to force him to surrender up the evidence sought by means of a pathological reaction of his body. This treatment was found to be inhuman and degrading and therefore to violate Article 3.

119. As regards the weight of the public interest in using the evidence to secure the applicant's conviction, the Court observes that, as noted above, the impugned measure targeted a street dealer who was offering drugs for sale on a comparatively small scale and who was eventually given a six-month suspended prison sentence and probation. In the circumstances of the instant case, the public interest in securing the applicant's conviction could not justify recourse to such a grave interference with his physical and mental integrity.

120. Turning to the existence of relevant safeguards in the procedure, the Court observes that Article 81a of the Code of Criminal Procedure prescribed that bodily intrusions had to be carried out *lege artis* by a doctor in a hospital and only if there was no risk of damage to the defendant's health. Although it can be said that domestic law did in general provide for safeguards against arbitrary or improper use of the measure, the applicant, relying on his right to remain silent, refused to submit

to a prior medical examination. He could only communicate in broken English, which meant that he was subjected to the procedure without a full examination of his physical aptitude to withstand it.

121. As to the use to which the evidence obtained was put, the Court reiterates that the drugs obtained following the administration of the emetics were the decisive evidence in his conviction for drug trafficking. It is true that the applicant was given and took the opportunity to oppose the use at his trial of this evidence. However, and as noted above, any possible discretion the national courts may have had to exclude the evidence could not come into play, as they considered the impugned treatment to be authorised by national law.

122. Having regard to the foregoing, the Court would also have been prepared to find that allowing the use at the applicant's trial of evidence obtained by the forcible administration of emetics infringed his right not to incriminate himself and therefore rendered his trial as a whole unfair.

123. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

#### **IV. Application of article 41 of the convention**

124. Article 41 of the Convention provides:

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

125. The applicant claimed compensation for pecuniary and non-pecuniary damage and the reimbursement of his costs and expenses.

##### **A. Damage**

126. The applicant claimed a total of 51.12 euros (EUR) in pecuniary damage, this being the amount he had forfeited as a result of the judgment of the Wuppertal Regional Court. He also sought compensation for non-pecuniary damage. He made reference to his physical injuries and the mental distress and feelings of helplessness he had suffered as a result of the lengthy administration of emetics, which he

considered to have been life-threatening and obviously illegal. Furthermore, he had been remanded in custody for five months before being convicted and given a six-month suspended prison sentence and probation because of this illegal measure. He claimed a minimum amount of EUR 30,000 under this head.

127. The Government did not comment on the applicant's claim for pecuniary damage, but maintained that the sum claimed by him for non-pecuniary damage was excessive. As regards the damage allegedly sustained due to the applicant's pre-trial detention, his prosecution and conviction, an award of compensation was not required since full reparation could be made under German law. Should the Court find violations of the applicant's Convention rights, he would be entitled to request the reopening of the criminal proceedings and could, if acquitted, claim damages, notably for the period he had spent in custody.

128. As regards the pecuniary damage claimed, the Court notes that the Wuppertal Regional Court ordered the forfeiture of 100 German marks (approximately EUR 51.12), this being the proceeds of the offence of which he had been found guilty. However, it cannot speculate as to what the outcome of the proceedings might have been if the violation of the Convention had not occurred (see, *inter alia*, *Schmautzer v. Austria*, 23 October 1995, § 44, Series A no. 328-A, and *Findlay v. the United Kingdom*, 25 February 1997, § 85, *Reports* 1997-I). The drug bubble obtained by the impugned measure was a decisive factor in the applicant's conviction. However, since that evidence could have been obtained without any breach of Article 3 (by waiting for the drug bubble to be passed naturally) and, therefore, used without any breach of Article 6, the Court finds that there is insufficient proof of a causal connection between the violation of those provisions and the pecuniary damage sustained by the applicant. There is, therefore, no ground for an award under this head.

129. As to the non-pecuniary damage claimed, the Court notes that according to the Government, it would be possible for the applicant to seek compensation in the national courts if he was acquitted following a reopening of the criminal proceedings against him. It considers, however, that if, having exhausted domestic remedies without success before complaining in Strasbourg of a violation of his rights, then doing so a second time, successfully, to secure the setting aside of the conviction, and finally going through a new trial, the applicant was required to exhaust domestic remedies a third time in order to be able to obtain just satisfaction from the Court, the total duration of the proceedings would hardly be consistent with the effective



protection of human rights and would lead to a situation incompatible with the aim and object of the Convention (see, for example, *Barberà, Messegue and Jabardo v. Spain* (Article 50), 13 June 1994, § 17, Series A no. 285-C, and *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 40, Series A no. 330-B). Consequently, it may make an award.

130. Having regard to all the elements before it, the Court finds that the applicant suffered non-pecuniary damage in the form of pain and mental distress as a result of the treatment to which he was subjected to obtain the evidence that was later used against him at the trial. Ruling on an equitable basis, it therefore awards the applicant EUR 10,000 under this head.

## **B. Costs and expenses**

...

## **C. Default interest**

...

## **For these reasons, the court**

1. *Holds* by ten votes to seven that there has been a violation of Article 3 of the Convention;
2. *Holds* by twelve votes to five that no separate issue arises under Article 8 of the Convention;
3. *Holds* by eleven votes to six that there has been a violation of Article 6 of the Convention;
4. *Holds* by eleven votes to six
  - (a) that the respondent State is to pay the applicant, within three months, the following amounts:
    - (i) EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage;
    - (ii) EUR 5,868.88 (five thousand eight hundred and sixty-eight euros eighty-eight cents) in respect of costs and expenses;
    - (iii) any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction. Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 11 July 2006.

### Smiselno dopolnite s pojmi na koncu besedila:

ESČP je v zadevi Jalloh proti Nemčiji presoјalo, ali je prisilna uporaba \_\_\_\_\_ z namenom pridobitve dokaza o kaznivem dejanju trgovine s prepovedanimi drogami pomenila nečloveško in ponižujoče ravnanje po \_\_\_\_\_ EKČP. Pritožnik je bil osumljen ulične prodaje drog. Policisti v civilu so ga namreč opazili, kako je iz ust v zameno za denar izročal majhne plastične vrečke. Ko so ga želeli prijeti, je eno izmed takšnih vrečk \_\_\_\_\_.

Ker policisti pri njem niso našli drog, je državni tožilec odredil, naj se pritožniku pod zdravniškim nadzorom dajo sredstva za povzročitev \_\_\_\_\_. Pritožnik se s tem ni strinjal. Ker zdravila ni hotel vzeti prostovoljno, so ga štirje policisti fizično \_\_\_\_\_, zdravnik pa mu je skozi nos v želodec uvedel \_\_\_\_\_ ter mu dal ipekakuanin sirup in injekcijo \_\_\_\_\_. Pritožnik je nato izbruhal vrečko, v kateri je bila majhna količina \_\_\_\_\_.

Nemška sodišča so štela, da je bil ukrep dopusten na podlagi določbe nemškega Zakona o kazenskem postopku, ki dovoljuje telesne posege zaradi pridobivanja \_\_\_\_\_, če jih opravi zdravnik in če ne pomenijo nevarnosti za zdravje obdolženca. Po njihovem mnenju je bil ukrep potreben za dokazovanje trgovine s \_\_\_\_\_ drogami, izveden v skladu s pravili medicinske stroke in sorazmeren. Pritožnik pa je zatrjeval, da je šlo za nevaren, ponižujoč in nesorazmeren poseg v njegovo telesno \_\_\_\_\_.

Pritožnik je posebej poudaril, da bi bilo mogoče dokaz pridobiti tudi z manj invazivno metodo. Organi pregona bi lahko počakali, da bi vrečka telo zapustila po \_\_\_\_\_ poti. Po njegovem mnenju zato prisilna uporaba emetikov ni bila nujna, temveč je pomenila pretiran poseg v njegovo telesno in duševno celovitost.

ESČP je poudarilo, da osebe, ki jim je odvzeta prostost, ostajajo pod varstvom \_\_\_\_\_ EKČP. Država jim mora zagotoviti potrebno zdravstveno oskrbo, vendar je prisilni medicinski poseg praviloma dopusten le, kadar je njegova \_\_\_\_\_ nujnost prepričljivo dokazana. V obravnavani zadevi ESČP ni sprejelo argumenta države, da je bil ukrep namenjen predvsem varovanju pritožnikovega \_\_\_\_\_. Ukrep je bil namreč odrejen predvsem zato, da bi se pridobil \_\_\_\_\_ za kazenski postopek.

Pri presoji kršitve 3. člena je ESČP upoštevalo več okoliščin. Pomembni so bili resnost kaznivega dejanja, nujnost ukrepa, možnost uporabe \_\_\_\_\_ metod, zdravstvena tveganja, način izvedbe posega, stopnja zdravniškega nadzora in posledice za zdravje pritožnika. Čeprav je trgovina s prepovedanimi drogami resno kaznivo dejanje, je šlo v tej zadevi za \_\_\_\_\_ prodajalca in za majhno količino droge. Zato po presoji ESČP prisilna uporaba emetikov ni bila \_\_\_\_\_ za pridobitev dokaza.

Posebej pomembno je bilo, da so pritožnika fizično obvladali štirje policisti, da mu je bila skozi nos v želodec vstavljena cevka in da je bil prisiljen izbruhati dokaz. Takšen način izvedbe je bil po presoji ESČP zmožen pri njem povzročiti občutke \_\_\_\_\_, tesnobe, manjvrednosti in ponižanja. Čeprav namen organov ni bil neposredno povzročiti trpljenja, je bil ukrep izveden na način, ki je povzročil telesno bolečino in \_\_\_\_\_ trpljenje.

Sodišče je opozorilo tudi na zdravstvena tveganja. Prisilna uporaba emetikov ni bila brez nevarnosti, še posebej zato, ker ni bilo dokazano, da je bila pred posegom opravljena ustrezna \_\_\_\_\_. Pritožnik ni govoril nemško, komuniciral je le v polomljeni angleščini, hkrati pa se je posegu upiral. Zato ni bilo mogoče zanesljivo ugotoviti, ali je bil sploh sposoben prestati tak poseg brez tveganja za zdravje. ESČP je zato ugotovilo, da je bil pritožnik izpostavljen \_\_\_\_\_ in ponižujočemu ravnanju.

V zvezi s 6. členom EKČP je ESČP presojalo, ali je uporaba tako pridobljenega dokaza na sojenju pomenila kršitev pravice do \_\_\_\_\_ sojenja. Poudarilo je, da EKČP sama po sebi ne določa pravil o dopustnosti dokazov, vendar mora biti postopek kot celota \_\_\_\_\_. Posebna teža je bila v tem, da je bil dokaz pridobljen z ravnanjem, ki je pomenilo kršitev enega izmed temeljnih jamstev EKČP, namreč \_\_\_\_\_ člena.

Droga, pridobljena s prisilnim bruhanjem, je bila odločilni dokaz za pritožnikovo \_\_\_\_\_. Čeprav je pritožnik lahko ugovarjal uporabi tega dokaza, domača sodišča niso opravila resnične presoje njegove izključitve. Izhajala so namreč iz tega, da je bil ukrep po domačem pravu \_\_\_\_\_. ESČP je zato ugotovilo, da je uporaba tega dokaza povzročila, da postopek kot celota ni bil pošten.

Sodišče je obravnavalo tudi vprašanje privilegija zoper \_\_\_\_\_. Načeloma ta privilegij ne preprečuje uporabe dokazov, ki obstajajo neodvisno od volje obdolženca, kot so kri, urin, lasje ali tkivo za DNK analizo. Toda v tej zadevi je bila stopnja prisile bistveno večja. Pritožnik ni bil zgolj pasivno izpostavljen manjšemu telesnemu posegu, temveč je bil prisiljen v \_\_\_\_\_ reakcijo telesa, s katero je moral iz sebe izločiti dokaz.

ESČP je zato ugotovilo kršitev \_\_\_\_\_ člena EKČP zaradi nečloveškega in ponižujočega ravnanja ter kršitev \_\_\_\_\_ člena EKČP zaradi nepoštenosti kazenskega postopka.

**Možni pojmi:** alternativnih, kokaina, duševno, 3., cevko, poštenega, terapijska, imobilizirali, dokazov, pogoltnil, 6., zdravja, nečloveškemu, uličnega, apomorfina, 3. členu, samoobtožbo, bruhanja, integriteto, obsodbo, nujna, patološko, strahu, dokaz, prepovedanimi, zakonit, emetikov, naravni, 3. člena, pošten, anamneza, 3

## Vprašanja

- Mislite, da bi ESČP odločilo enako, če bi šlo za večjo količino droge ali za hujše kaznivo dejanje? Kje je meja, pri kateri bi javni interes pregona lahko upravičil intenzivnejši poseg v telo osumljenca?
- Ali je prisilno čakanje na naravno izločitev droge res bistveno milejši ukrep, ali gre tudi tam za resen poseg v zasebnost in dostojanstvo posameznika?
- Ali bi morala biti presoja po 3. členu EKČP drugačna, če bi bil poseg res izveden iz zdravstvenih razlogov, ne pa zaradi pridobivanja dokaza?
- Ali je namen državnih organov pri presoji ponižujočega ravnanja pomemben, ali zadostuje že objektivni učinek ukrepa na posameznika?
- Ali bi moral biti dokaz, pridobljen s kršitvijo 3. člena EKČP, vedno izločen iz kazenskega postopka, ne glede na njegovo dokazno vrednost?

- Ali je uporaba emetikov res primerljiva s prisilno samoobtožbo, če droga kot materialni dokaz obstaja neodvisno od volje obdolženca?
- Kako bi morali organi ravnati v podobnem primeru, da bi hkrati zavarovali dokaz, preprečili morebitno zdravstveno tveganje in spoštovali pravice osumljenca?

# Gäfgen proti Nemčiji z dne 1. junija 2010, št. 22978/05

In the case of Gäfgen v. Germany, The European Court of Human Rights, sitting  
as a Grand Chamber composed of:

Jean-Paul Costa, *President*,  
Christos Rozakis,  
Nicolas Bratza,  
Françoise Tulkens,  
Josep Casadevall,  
Anatoly Kovler,  
Ljiljana Mijović,  
Renate Jaeger,  
Sverre Erik Jebens,  
Danutė Jočienė,  
Ján Šikuta,  
Ineta Ziemele,  
George Nicolaou,  
Luis López Guerra,  
Ledi Bianku,  
Ann Power,  
Nebojša Vučinić, *judges*,  
and Erik Fribergh, *Registrar*,

Having deliberated in private on 18 March 2009 and on 24 March 2010, Delivers the following judgment, which was adopted on the last-mentioned date:

### Procedure

1. The case originated in an application (no. 22978/05) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a German national, Mr Magnus Gäfgen (“the applicant”), on 15 June 2005. The applicant was granted legal aid.
2. The applicant alleged that the treatment to which he had been subjected during police interrogation concerning the whereabouts of a boy, J., on 1 October 2002 constituted torture prohibited by Article 3 of the Convention. He claimed that he remained a victim of this violation. He further alleged that his right to a fair trial as guaranteed by Article 6 of the Convention, comprising a right to defend himself effectively and a right not to incriminate himself, had been violated in that evidence which had been obtained in violation of Article 3 had been admitted at his criminal trial.
3. The application was allocated to the Third Section and, subsequently, to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). By a decision of 10 April 2007, it was declared partly admissible by a Chamber of the latter Section, composed of Peer Lorenzen, President, Snežana Botoucharova, Volodymyr Butkevych, Margarita Tsatsa-Nikolovska, Rait Maruste, Javier Borrego Borrego, Renate Jaeger, judges, and Claudia Westerdiek, Section Registrar.
4. On 30 June 2008 a Chamber of the Fifth Section, composed of Peer Lorenzen, President, Rait Maruste, Volodymyr Butkevych, Renate Jaeger, Isabelle Berro-Lefèvre, Mirjana Lazarova Trajkovska, Zdravka Kalaydjieva, judges, and Claudia Westerdiek, Section Registrar, delivered its judgment. The Chamber decided unanimously that it was not necessary to rule on the Government’s preliminary objection of non-exhaustion of domestic remedies. It held, by six votes to one, that the applicant could no longer claim to be the victim of a violation of Article 3 of the Convention. It further held, by six votes to one, that there had been no violation of Article 6 of the Convention.

5. By submissions dated 19 September 2008, received at the Court's Registry on 26 September 2008, the applicant requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention and Rule 73, maintaining his claim that there had been a violation of both Article 3 and Article 6 of the Convention. On 1 December 2008 a panel of the Grand Chamber accepted that request.

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

7. The applicant and the German Government ("the Government") each filed a memorial on the merits and replied in writing to each other's memorials. In addition, third-party comments were received from Mr Friedrich von Metzler and Mrs Sylvia von Metzler, the parents of J., who had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2) and who were represented by Mr E. Kempf and Ms H. Schilling, lawyers practising in Frankfurt am Main. Additional third-party submissions were received from the Redress Trust, a London-based international human rights non-governmental organisation, which had been granted leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 §§ 2 and 3) and which was represented by Ms C. Ferstman, Director, and Mr L. Oette, Adviser. The parties replied to those submissions (Rule 44 § 5).

## **The facts**

### **I. The circumstances of the case**

9. The applicant was born in 1975 and is currently detained in Schwalmstadt Prison, Germany.

#### **A. The kidnapping of J. and the police investigation**

10. J. was the youngest son of a banking family in Frankfurt am Main. He got to know the applicant, a law student, as an acquaintance of his sister.



11. On 27 September 2002 the applicant lured J., aged 11, into his flat in Frankfurt am Main by pretending that the child's sister had left a jacket there. He then killed the boy by suffocating him.

12. Subsequently, the applicant deposited a ransom note at J.'s parents' place of residence stating that J. had been kidnapped and demanding one million euros. The note further stated that if the kidnappers received the ransom and managed to leave the country, then the child's parents would see their son again. The applicant then drove to a pond located on a private property near Birstein, approximately one hour's drive from Frankfurt, and hid J.'s corpse under a jetty.

13. On 30 September 2002 at around 1 a.m. the applicant picked up the ransom at a tram station. From then on he was under police surveillance. He paid part of the ransom money into his bank accounts and hid the remainder of the money in his flat. That afternoon, he was arrested at Frankfurt am Main airport with the police pinning him face down on the ground.

14. After having been examined by a doctor at the airport's hospital on account of shock and skin lesions, the applicant was taken to the Frankfurt am Main police headquarters. He was informed by detective officer M. that he was suspected of having kidnapped J. and was instructed about his rights as a defendant, notably the right to remain silent and to consult a lawyer. He was then questioned by M. with a view to finding J. Meanwhile, the police, having searched the applicant's flat, found half of the ransom money and a note concerning the planning of the crime. The applicant intimated that the child was being held by another kidnapper. At 11.30 p.m. he was allowed to consult a lawyer, Z., for thirty minutes at his request. He subsequently indicated that F.R. and M.R. had kidnapped the boy and had hidden him in a hut by a lake.

15. Early in the morning of 1 October 2002, before M. came to work, Mr Daschner ("D."), deputy chief of the Frankfurt police, ordered another officer, Mr Ennigkeit ("E."), to threaten the applicant with considerable physical pain, and, if necessary, to subject him to such pain in order to make him reveal the boy's whereabouts. D.'s subordinate heads of department had previously and repeatedly opposed such a measure (see also paragraph 47 below). Detective officer E. thereupon threatened the applicant with subjection to considerable pain at the hands of a person specially trained for such purposes if he did not disclose the child's whereabouts. According

to the applicant, the officer further threatened to lock him in a cell with two huge black men who would sexually abuse him. The officer also hit him several times on the chest with his hand and shook him so that, on one occasion, his head hit the wall. The Government disputed that the applicant had been threatened with sexual abuse or had been physically assaulted during the questioning.

16. For fear of being exposed to the measures he was threatened with, the applicant disclosed the whereabouts of J.'s body after approximately ten minutes.

17. The applicant was then driven with M. and numerous other police officers to Birstein. He had refused to go with detective officer E. The police waited for a video camera to be brought to the scene. Then, the applicant, on the communicated order of the police officer in command and while being filmed, pointed out the precise location of the body. The police found J.'s corpse under the jetty at the pond near Birstein as indicated by the applicant. The applicant claimed that he had been obliged to walk without shoes through woods to where he had left the corpse and, on the orders of the police, he had had to point out its precise location. The Government disputed that the applicant had had to walk without shoes.

18. Upon forensic examination of the scene, the police discovered tyre tracks left by the applicant's car near the pond near Birstein. Under questioning by detective officer M. on the return journey from Birstein the applicant confessed to having kidnapped and killed J. He was then taken by the police to various other locations indicated by him where they secured J.'s school exercise books, a backpack, J.'s clothes and a typewriter used for the blackmail letter in containers. An autopsy carried out on J.'s corpse on 2 October 2002 confirmed that J. had died of suffocation.

19. Having returned to the police station, the applicant was then permitted to consult his lawyer, En., who had been instructed to act on his behalf by his mother and who had tried, in vain, to contact and advise the applicant earlier that morning.

20. In a note for the police file dated 1 October 2002, the deputy chief of the Frankfurt police, D., stated that he believed that that morning J.'s life had been in great danger, if he was still alive at all, given his lack of food and the temperature outside. In order to save the child's life, he had therefore ordered the applicant to be threatened by detective officer E. with considerable pain which would not leave

any trace of injury. He confirmed that the treatment itself was to be carried out under medical supervision. D. further admitted that he had ordered another police officer to obtain a “truth serum” to be administered to the applicant. According to the note, the threat to the applicant was exclusively aimed at saving the child’s life rather than furthering the criminal proceedings concerning the kidnapping. As the applicant had disclosed the whereabouts of J.’s body, having been threatened with pain, no measures had in fact been carried out.

21. A medical certificate issued by a police doctor on 4 October 2002 confirmed that the applicant had a haematoma (7 cm x 5 cm) below his left collarbone, skin lesions and blood scabs on his left arm and his knees and swellings on his feet. A further medical certificate dated 7 October 2002 noted that, following an examination of the applicant on 2 October 2002, two haematomas on the left-hand side of the applicant’s chest of a diameter of around 5 cm and 4 cm were confirmed, together with superficial skin lesions or blood scabs on his left arm, his knees and his right leg and closed blisters on his feet. According to the certificate, these discreet traces of injuries indicated that the injuries had been caused a few days before the examination. The precise cause of the injuries could not be diagnosed.

22. During subsequent questioning by the police on 4 October 2002, by a public prosecutor on 4, 14 and 17 October 2002, and by a district court judge on 30 January 2003 the applicant confirmed the confession he had made on 1 October 2002.

23. In January 2003 the Frankfurt am Main public prosecutor’s office opened criminal investigation proceedings against the deputy chief of the Frankfurt police, D., and detective officer E. on the basis of the applicant’s allegations that he had been threatened on 1 October 2002.

## **B. The criminal proceedings against the applicant**

### *1. The proceedings in the Frankfurt am Main Regional Court*

#### **(a) The preliminary applications concerning the discontinuation of the proceedings and the inadmissibility of evidence**

24. On 9 April 2003, the first day of the hearing, the applicant, represented by counsel, lodged a preliminary application for the proceedings to be discontinued. The basis of his claim was that during interrogation and prior to confessing he had been threatened by detective officer E. with being subjected to severe pain and sexual abuse. He argued that this treatment had been in breach of Article 136a of the Code of Criminal Procedure (see paragraph 61 below) and Article 3 of the Convention and warranted the discontinuation of the proceedings against him.

25. The applicant also lodged an alternative preliminary application seeking a declaration that, owing to the continuous effect (*Fortwirkung*) of the threat of violence against him on 1 October 2002, all statements which he had made to the investigation authorities should not be relied upon in the criminal proceedings. Moreover, the applicant sought a declaration that on account of the violation of Article 136a of the Code of Criminal Procedure, the use in the criminal proceedings of all items of evidence, such as the child's corpse, which had become known to the investigation authorities because of the confession extracted – the so-called “fruit of the poisonous tree” – was prohibited (*Fernwirkung*).

26. On 9 April 2003, in response to the first preliminary application, the Frankfurt am Main Regional Court dismissed the applicant's application for the discontinuation of the criminal proceedings. The court noted that in the applicant's submission, detective officer E. had threatened that a specialist was on his way to the police station by helicopter who, without leaving any traces, would inflict on him intolerable pain the likes of which he had never before experienced, if he continued to refuse to disclose J.'s whereabouts. To underpin the threat, E. had imitated the sound of the rotating blades of a helicopter. E. had further threatened that the applicant would be locked up in a cell with two big “Negroes” who would anally assault him. He would wish that he had never been born. The court found as a fact that the applicant had been threatened with the infliction of considerable pain if he refused to disclose the victim's whereabouts. However, the court did not find it established that the applicant had also been threatened with sexual abuse or had been otherwise influenced. The threat to inflict pain upon the applicant had been illegal pursuant to Article 136a of the Code of Criminal Procedure, and also pursuant to Article 1 and Article 104 § 1 of the Basic Law (see paragraphs 59-60 below) and in violation of Article 3 of the Convention.

27. However, notwithstanding this breach of the applicant's constitutional rights, the court found that the criminal proceedings were not, in consequence, barred and could proceed. It found that the use of the investigation methods in question, though prohibited in law, had not so restricted the rights of the defence that the criminal proceedings could not be pursued. In view of the seriousness of the charges against the applicant on the one hand, and the severity of the unlawful conduct during investigation on the other, there had not been such an exceptional and intolerable violation of the rule of law as to bar the continuation of the criminal proceedings.

28. In response to the applicant's second preliminary application, the Frankfurt am Main Regional Court found that, in accordance with Article 136a § 3 of the Code of Criminal Procedure, all confessions and statements hitherto made by the applicant before the police, a public prosecutor and a district court judge were inadmissible as evidence in the criminal proceedings because they had been obtained through the use of prohibited methods of interrogation.

29. The court found that on 1 October 2002 detective officer E. had used prohibited methods of interrogation within the meaning of Article 136a § 1 of the Code of Criminal Procedure by threatening the applicant with intolerable pain if he did not disclose the child's whereabouts. Therefore, any statements which the applicant had made as a consequence of this forbidden investigative measure were inadmissible as evidence. This exclusion of evidence (*Beweisverwertungsverbot*) did not only comprise the statements made immediately after the unlawful threat. It covered all further statements which the applicant had made to the investigation authorities since that date in view of the continuous effect of the violation of Article 136a of the Code of Criminal Procedure.

30. The procedural irregularity caused by the use of a prohibited method of investigation could only have been remedied if the applicant had been informed before his subsequent questioning that his earlier statements made as a consequence of the threat of pain could not be used as evidence against him. However, the applicant had only been instructed about his right not to testify, without having been informed about the inadmissibility of the evidence that had been improperly obtained. He had therefore not been given the necessary "qualified instruction" (*qualifizierte Belehrung*) before making further statements.

31. However, the court limited the inadmissible evidence to the above-mentioned statements. It went on to dismiss the applicant's application for a declaration that, on account of the prohibited investigation methods, the use in the criminal proceedings of all items of evidence, such as the child's corpse, which had become known to the investigation authorities as a consequence of the statements extracted from the applicant ought to be excluded from trial (*Fernwirkung*). The court found as follows:

"... there is no *long-range effect* of the breach of Article 136a of the Code of Criminal Procedure meaning that the items of evidence which have become known as a result of the statement may likewise not be used [as evidence]. The Chamber agrees in this respect with the conciliatory view (*Mittelmeinung*) taken by scholars and in court rulings ... according to which a balancing [of interests] in the particular circumstances of the case had to be carried out, taking into account, in particular, whether there had been a flagrant violation of the legal order, notably of provisions on fundamental rights, and according to which the seriousness of the offence investigated also had to be considered. Balancing the severity of the interference with the defendant's fundamental rights – in the present case the *threat* of physical violence – and the seriousness of the offence he was charged with and which had to be investigated – the *completed murder* of a child – makes the exclusion of evidence which has become known as a result of the defendant's statement – in particular the discovery of the dead child and the results of the autopsy – appear disproportionate."

### **(b) The Regional Court's judgment**

32. Following the above ruling on the applicant's preliminary applications lodged on the opening day of the trial, the proceedings continued. The next day, in his statement on the charges, the applicant admitted having killed J., but stated that he had not initially intended to do so. His defence counsel submitted that by confessing, the applicant wanted to take responsibility for his offence notwithstanding the interrogation methods used on 1 October 2002. As the trial proceeded, all further items of evidence found as a consequence of the applicant's original statement and which the applicant sought to have excluded were adduced. At the close of the trial on 28 July 2003 the applicant admitted that he had also intended from the outset to kill the child. He described his second confession as "the only way to accept his deep guilt" and as the "greatest possible apology for the murder of the child".

33. On 28 July 2003 the Frankfurt am Main Regional Court convicted the applicant, *inter alia*, of murder and kidnapping with extortion causing the death of the victim. It sentenced him to life imprisonment and declared that his guilt was of particular gravity, warranting a maximum sentence (see paragraph 63 below).

34. The court found that at the hearing the applicant had been instructed anew about his right to remain silent and about the fact that none of his earlier statements could be used as evidence against him and had thereby been given the necessary qualified instruction. However, the applicant had, following the qualified instruction, confessed that he had kidnapped and killed J. His statements at the trial concerning the planning of his offence formed the essential, if not the only, basis for the court's findings of fact. They were corroborated by the testimony of J.'s sister, the blackmail letter and the note concerning the planning of the crime found in the applicant's flat. The findings of fact concerning the execution of the crime were exclusively based on the applicant's confession at the trial. Further items of evidence showed that he had told the truth also in this respect. These included the findings of the autopsy as to the cause of the child's death, the tyre tracks left by the applicant's car near the pond where the child's corpse had been found, and the discovery of money from the ransom which had been found in his flat or paid into his accounts.

35. In assessing the gravity of the applicant's guilt, the court observed that he had killed his 11-year-old victim and demanded one million euros in ransom in order to preserve his self-created image of a rich and successful young lawyer. It did not share the views expressed by the public prosecutor's office and the private accessory prosecutors that the applicant's confession "was worth nothing" as the applicant had only confessed to what had in any event already been proven. The fact that the applicant had volunteered a full confession at the trial, even though all his earlier confessions could not be used as evidence pursuant to Article 136a § 3 of the Code of Criminal Procedure, was a mitigating factor. However, even without his confession, the applicant would have been found guilty of kidnapping with extortion causing the death of the victim. The applicant had been kept under police surveillance after he had collected the ransom, which had later been found in his flat or paid into his accounts. Furthermore, it had been proved by the autopsy on J.'s corpse that the boy had been suffocated, and tyre tracks left by the applicant's car had been detected at the place where J.'s body had been found.

36. The court further observed that in questioning the applicant, methods of interrogation prohibited under Article 136a of the Code of Criminal Procedure had been employed. Whether and to what extent detective officer E. and the deputy chief of the Frankfurt police, D., were guilty of an offence because of these threats had to be determined in the criminal investigations then pending against them. However, their allegedly illegal acts did not mitigate the applicant's own guilt. The misconduct of police officers, belonging to the executive power, could not prevent the judiciary from assessing findings of fact in accordance with the law.

## 2. *The proceedings in the Federal Court of Justice*

37. On the day following his conviction, the applicant lodged an appeal on points of law with the Federal Court of Justice. He complained that the Regional Court, in its decision of 9 April 2003, had refused his preliminary application to discontinue the criminal proceedings against him. It had further refused to declare that the use in the criminal proceedings of all other items of evidence, such as the child's corpse, which had become known to the investigation authorities because of the statements unlawfully extracted was prohibited. The applicant included a full copy of these applications of 9 April 2003, including the grounds given for them. He further included a copy of the Regional Court's decision of 9 April 2003 dismissing his application for the proceedings to be discontinued and argued in respect of the police's threats of torture against him that, developing the case-law of the Federal Court of Justice, such conduct "leapt beyond" the exclusion of evidence and led to an impediment to the proceedings (*dass ein derartiges Verhalten das Verwertungsverbot "überspringt" und ein Verfahrenshindernis begründet*).

38. In his observations dated 9 March 2004 the Federal Public Prosecutor objected that the applicant's appeal on points of law was manifestly ill-founded. He argued that the use of prohibited methods of interrogation did not lead to an impediment to the criminal proceedings. Article 136a of the Code of Criminal Procedure expressly provided that the use of any of the prohibited methods enumerated entailed only the exclusion of evidence. The applicant had not complained of a breach of Article 136a § 3 of the Code of Criminal Procedure. In any event, there would be no grounds for such a complaint as the Regional Court had only used the applicant's confession at the trial, which he had made after having been informed that his previous statements had not been admitted as evidence.



39. On 21 May 2004 the Federal Court of Justice, without giving further reasons, dismissed the applicant's appeal on points of law as ill-founded.

*3. The proceedings in the Federal Constitutional Court*

40. On 23 June 2004 the applicant lodged a complaint with the Federal Constitutional Court. Summarising the facts underlying the case and the content of the impugned decisions, he complained under Article 1 § 1 and Article 104 § 1, second sentence, of the Basic Law about the way in which he had been questioned by the police on the morning of 1 October 2002. He argued that he had been threatened with being subjected to torture and sexual abuse if he did not disclose the child's whereabouts. In the circumstances of the case, this treatment amounted to torture within the meaning of Article 3 of the Convention and infringed Article 104 § 1 of the Basic Law. It also violated his absolute right to human dignity under Article 1 of the Basic Law, which lay at the heart of the provisions in question. These unjustifiable human rights violations ought to have been a bar to the criminal proceedings for murder and a prohibition on using the evidence obtained as a consequence of the confession extracted from him by means of prohibited measures.

41. On 14 December 2004 the Federal Constitutional Court, sitting as a panel of three judges, held that the applicant's constitutional complaint was inadmissible.

42. Firstly, in so far as the applicant complained of the failure of the criminal courts to discontinue the proceedings against him, the court found that he had not sufficiently substantiated his complaint. It observed that the Regional Court had already stated that the police's threat to inflict pain on the applicant had violated Article 136a of the Code of Criminal Procedure and Article 3 of the Convention and that the applicant's rights under Article 1 § 1 and Article 104 § 1, second sentence, of the Basic Law had been disregarded.

43. However, the violation of fundamental rights outside the trial did not necessarily warrant the conclusion that the judgment delivered by a criminal court, which was based on the findings made during the trial, breached constitutional law. In the present case, the criminal courts had found that the methods of investigation used by the police had been prohibited, but had differed from the applicant as to the legal consequences that flowed from that finding. They had taken the view that the

statements obtained as a result of the measures in question could not be used but that there was no bar to the specific criminal proceedings being pursued.

44. According to the Federal Constitutional Court, the procedural flaw of having used prohibited investigation measures could be regarded as having been remedied by the criminal courts, because they had prohibited the admission of the statements obtained thereby. Such a prohibition was prescribed by Article 136a § 3 of the Code of Criminal Procedure in order to compensate for a prior infringement of the rights of the person concerned. However, the circumstances in which substantial procedural irregularities might entail a bar to criminal proceedings were not laid down in law. In these circumstances, the applicant had failed to explain why the contested methods of investigation had not only required a prohibition on using the statements obtained thereby as evidence, but should also lead to a bar to criminal proceedings against him.

45. Secondly, the Federal Constitutional Court found that, in so far as the applicant complained that the Regional Court had refused to exclude the use in the proceedings of all items of evidence obtained as a result of the confession extracted under duress, his constitutional complaint was likewise inadmissible. It held that the applicant had failed to raise this issue in the proceedings before the Federal Court of Justice.

46. The decision was served on the applicant's lawyer on 22 December 2004.

### **C. Subsequent events**

#### *1. The criminal proceedings against the police officers*

47. On 20 December 2004 the Frankfurt am Main Regional Court delivered judgments against the deputy chief of the Frankfurt police, D., and detective officer E. The court found that on the morning of 1 October 2002 D. had ordered that the applicant was to be questioned while being subjected to pain in the manner set out in his subsequent note for the police file (see paragraph 20 above). By doing so, he had acted against the advice of all his subordinate heads of department entrusted with the investigation into J.'s kidnapping. The heads of department had opposed this measure, which D. had previously ordered on the evening of 30 September 2002 and then twice on the morning of 1 October 2002. The heads of department had

resisted the orders, proposing instead further questioning and confrontation of the applicant with J.'s family. D. had then issued an order to detective officer E. directing him to comply with his instructions that the applicant should be threatened with torture and, if necessary, subjected thereto. The subjection to pain was to be carried out under medical supervision, without any traces being left, by another specially trained police officer, who would be brought to the police station by helicopter. A police doctor had agreed to supervise the execution of D.'s order. The court noted that the measure had been aimed at finding out where the applicant had hidden J., whose life D. believed was at great risk. Therefore, E. had threatened the applicant in the manner ordered by D. and had also informed him that a "truth serum" would be administered. After approximately ten minutes, the applicant confessed that he had hidden J.'s body under a jetty at a pond near Birstein.

48. The Regional Court observed that the method of investigation had not been justified. It rejected the defence of "necessity" because the method in question violated human dignity, as codified in Article 1 of the Basic Law. Respect for human dignity also lay at the heart of Article 104 § 1, second sentence, of the Basic Law and Article 3 of the Convention. The protection of human dignity was absolute, allowing of no exceptions or any balancing of interests.

49. The Frankfurt am Main Regional Court convicted detective officer E. of coercion committed by an official in the course of his duties. However, in terms of penalty, it cautioned the defendant and imposed a suspended fine of 60 euros (EUR) per diem for 60 days, which the defendant would be required to pay if he committed another offence during the probation period. Furthermore, the court convicted the deputy chief of the Frankfurt police, D., of having incited E., a subordinate, to commit coercion in the course of his duties. It also cautioned D. and imposed on him a suspended fine of EUR 120 per diem for 90 days. The applicant had given evidence as a witness in these proceedings.

50. In determining the sentences, the Regional Court considered that there were significant mitigating factors to be taken into account. It took into consideration that the defendants' sole concern had been to save J.'s life and that they had been under extreme pressure because of their respective responsibilities *vis-à-vis* the superior authority and the public. They had been exhausted at the relevant time and had acted in a very tense and hectic situation. They did not have any previous convictions. Moreover, D. had taken responsibility for his acts by admitting and explaining them

in a note for the police file on the same day. The proceedings had lasted a long time and had attracted immense media attention. The defendants had suffered prejudice in their professional career: D. had been transferred to the Hessian Ministry of the Interior, and E. had been prohibited from acting in the prosecution of criminal offences. Furthermore, it was the first time that a conflict situation such as the one in the defendants' case had been assessed by a German criminal court. The court took into consideration as aggravating factors that D. had not acted spontaneously as he had already directed the use of force on the evening before he had given the order to E. Moreover, by their acts, the defendants had risked compromising the applicant's conviction for murder. The court further found that the preservation of the legal order did not warrant the enforcement of the fines imposed. Through the defendants' criminal conviction it had been made clear that an order by a State agent to use force to obtain information was illegal.

51. The judgment became final on 20 December 2004.

52. Subsequently, D. was appointed chief of the Police Headquarters for Technology, Logistics and Administration.

*2. The official liability proceedings brought by the applicant*

53. On 28 December 2005 the applicant applied to the Frankfurt am Main Regional Court for legal aid for bringing official liability proceedings against the *Land* of Hesse for the payment of compensation. He claimed that he had been traumatised and in need of psychological treatment because of the methods deployed during the police investigation.

54. In its submissions dated 27 March 2006 the Frankfurt am Main police headquarters contested that E.'s conduct when questioning the applicant in the morning of 1 October 2002 was to be legally classified as coercion and amounted to a breach of official duties.

55. On 28 August 2006 the Frankfurt am Main Regional Court dismissed the applicant's application for legal aid and the applicant appealed.

56. On 28 February 2007 the Frankfurt am Main Court of Appeal dismissed the applicant's appeal. Endorsing the reasons given by the Regional Court, it confirmed, in particular, that police officers D. and E., when threatening the applicant, had infringed human dignity, which was inviolable, and had thus breached their official duties. However, the applicant would face difficulties establishing causation between the threats of torture and alleged mental damage allegedly necessitating psychological treatment. The officers' threat was negligible compared to the traumatisation caused by the fact of having killed a child. Moreover, even assuming that the applicant would be able to prove that detective officer E. had shaken him, causing him to hit his head against a wall, or had once hit him on the chest, allegedly causing a haematoma, such physical damage would be too minor to necessitate the payment of compensation. Furthermore, the violation of his human dignity by the threat of torture did not warrant the payment of compensation since the applicant had obtained sufficient satisfaction for this by the exclusion of his statements as evidence and the criminal conviction of the police officers.

57. On 19 January 2008 the Federal Constitutional Court, allowing a constitutional complaint by the applicant, quashed the Court of Appeal's decision and remitted the case to that court. It found that in refusing to grant the applicant legal aid, the Court of Appeal had violated the principle of equal access to court. In particular, that court had speculated that the applicant would not be able to prove that the threat to torture him had led to mental damage. In addition to that, it was not obvious that the physical injuries the applicant claimed to have suffered in the course of the interrogation, during which he had been handcuffed, could be considered to be of minor importance. Moreover, the question whether the violation of the applicant's human dignity necessitated the payment of damages despite the satisfaction he had already obtained was a difficult legal question on which no precedent existed in a judgment of a court of final instance. It should, therefore, not be determined in an application for legal-aid proceedings.

58. The remitted proceedings are still pending before the Frankfurt am Main Regional Court.

## **II. Relevant domestic, public international and comparative law and practice**

...

## The law

### I. Alleged violation of article 3 of the convention

75. The applicant complained that he had been subjected to torture contrary to Article 3 of the Convention in the context of his police interrogation on 1 October 2002. He argued that he was still a victim of that breach of Article 3, which provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

76. The Government contested that view, arguing that the applicant could no longer claim to be the victim of a violation of Article 3.

#### A. The applicant’s victim status

77. Article 34 of the Convention provides, where relevant:

“The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. ...”

78. The Court considers that in the present case it cannot answer the question whether the applicant subsequently lost his initial status as the victim of a breach of Article 3 of the Convention within the meaning of Article 34 of the Convention without having first established how the applicant was treated in the context of his questioning, and without having assessed the severity of that treatment in the light of Article 3. Thereafter, the adequacy or otherwise of the authorities’ response thereto can be considered.

#### 1. *Whether the impugned treatment was contrary to Article 3*

##### (a) The Chamber judgment

79. The Chamber considered that the applicant had been threatened by detective officer E. on the instructions of the deputy chief of the Frankfurt am Main police, D., with physical violence causing considerable pain in order to make him disclose J.’s whereabouts. It found that further threats alleged by the applicant or alleged physical injuries inflicted during the interrogation had not been proved beyond

reasonable doubt. Having regard to all the circumstances of the case, the Chamber characterised this threat of violence as inhuman treatment prohibited by Article 3.

**(b) The parties' submissions**

*(i) The applicant*

80. The applicant claimed that during his interrogation by detective officer E. on 1 October 2002, he had been subjected to treatment prohibited by Article 3. Detective officer E. had threatened that “intolerable pain the likes of which he had never before experienced” would be inflicted on him if he did not disclose J.’s whereabouts. He had threatened that this pain would be inflicted without leaving any traces and that an officer, specially trained in such techniques, was en route to the police station in a helicopter. To underpin the threat, E. had imitated the sound of the rotating blades of a helicopter and had described the pain of the torture in graphic detail. The applicant alleged that concrete measures had in fact been taken at that time in that a police doctor had subsequently confirmed that she had been prepared to be present during the torture so as to prevent the applicant from losing consciousness or the procedure from leaving any traces.

81. The applicant further alleged that he had been threatened with sexual abuse in that he would be locked up in a cell with two large “Negroes” who would anally assault him. Physical injuries had also been inflicted on him during the interrogation. E. had hit him several times on the chest, causing bruising, and on one occasion had pushed him, causing his head to hit the wall. He produced two medical certificates of 4 and 7 October 2002 issued by police doctors to support this claim (see paragraph 21 above). He claimed that, afterwards, he had been taken to Birstein against his will and had been obliged to walk without shoes through woods to where he had left the corpse and, at the command of the police, he had had to point out its precise location. He had also been forced to disclose other evidence on the return journey from Birstein. He claimed that he had been threatened by the police at a time when they had already been aware that J. was dead and had therefore been forced to incriminate himself solely in order to further the criminal investigations against him.

82. Referring, in particular, to Articles 1 and 15 of the United Nations Convention against Torture (see paragraph 64 above), the applicant argued that the treatment to which he had been subjected in order to force him to confess should be characterised as torture.

*(ii) The Government*

83. As in their submissions before the Chamber, the Government recognised that, regrettably, Article 3 had been violated during the applicant's questioning on 1 October 2002. They stressed, however, that the applicant had only been threatened with severe pain if he did not inform the police about J.'s whereabouts. They contested that there had been additional threats of sexual assault upon the applicant. They further contested that the injuries the applicant had suffered had been caused during the interrogation in question and that he had been forced to walk without shoes at Birstein. He had suffered skin lesions when he was arrested at Frankfurt am Main airport. They underlined that until now, the applicant had claimed that E. had hit him only once on the chest and that his head had only once hit the wall. The domestic courts had not found the additional threats or injuries to have been established.

84. The Government further pointed out that police officers D. and E. had resorted to the method of interrogation in question in order to save the life of J., which they had considered to be at great risk. They had not known that J. had already been killed at that time.

*(iii) The third-party interveners*

...

**(c) The Court's assessment**

*(i) Recapitulation of the relevant principles*

87. The Court reiterates that Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see *Selmouni v. France* [GC], no. 25803/94, § 95,



ECHR 1999-V, and *Labita*, cited above, § 119). The Court has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (see *Chahal v. the United Kingdom*, 15 November 1996, § 79, *Reports of Judgments and Decisions* 1996-V, and *Labita*, cited above, § 119). The nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (see *V. v. the United Kingdom* [GC], no. 24888/94, § 69, ECHR 1999-IX; *Ramirez Sanchez v. France* [GC], no. 59450/00, § 116, ECHR 2006-IX; and *Saadi v. Italy* [GC], no. 37201/06, § 127, ECHR 2008).

88. In order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25, and *Jalloh v. Germany* [GC], no. 54810/00, § 67, ECHR 2006-IX). Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it (compare, *inter alia*, *Aksoy v. Turkey*, 18 December 1996, § 64, *Reports* 1996-VI; *Egmez v. Cyprus*, no. 30873/96, § 78, ECHR 2000-XII; and *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004), as well as its context, such as an atmosphere of heightened tension and emotions (compare, for instance, *Selmouni*, cited above, § 104, and *Egmez*, loc. cit.).

89. The Court has considered treatment to be “inhuman” because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see *Labita*, cited above, § 120, and *Ramirez Sanchez*, cited above, § 118). Treatment has been held to be “degrading” when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience (see, *inter alia*, *Keenan v. the United Kingdom*, no. 27229/95, § 110, ECHR 2001-III, and *Jalloh*, cited above, § 68).

90. In determining whether a particular form of ill-treatment should be classified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in

previous cases, it appears that it was the intention that the Convention should, by means of such a distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see *Ireland v. the United Kingdom*, cited above, § 167; *Aksoy*, cited above, § 63; and *Selmouni*, cited above, § 96). In addition to the severity of the treatment, there is a purposive element to torture, as recognised in the United Nations Convention against Torture, which in Article 1 defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (see *Akkoç*, cited above, § 115).

91. The Court further reiterates that a threat of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may fall foul of that provision. Thus, to threaten an individual with torture may constitute at least inhuman treatment (compare *Campbell and Cosans*, cited above, § 26).

92. In assessing the evidence on which to base the decision as to whether there has been a violation of Article 3, the Court adopts the standard of proof “beyond reasonable doubt”. However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Jalloh*, cited above, § 67, and *Ramirez Sanchez*, cited above, § 117). The Court has held, in particular, that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention (compare *Tomasi v. France*, 27 August 1992, § 110, Series A no. 241-A; *Ribitsch v. Austria*, 4 December 1995, § 34, Series A no. 336; *Aksoy*, cited above, § 61; and *Selmouni*, cited above, § 87).

93. Where allegations are made under Article 3 of the Convention the Court must apply a particularly thorough scrutiny (see *Matko v. Slovenia*, no. 43393/98, § 100, 2 November 2006, and *Vladimir Romanov v. Russia*, no. 41461/02, § 59, 24 July 2008). Where domestic proceedings have taken place, however, it is not the Court’s task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them (see *Klaas v. Germany*, 22 September 1993, § 29, Series A no. 269, and *Jasar v. “the former Yugoslav Republic of Macedonia”*, no. 69908/01, § 49, 15 February 2007). Although the Court is

not bound by the findings of domestic courts, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts.

*(ii) Application of these principles to the present case*

(α) The Court's assessment of the facts

94. In assessing the treatment to which the applicant was subjected on 1 October 2002, the Court notes that it is uncontested between the parties that during the interrogation that morning, the applicant was threatened by detective officer E., on the instructions of the deputy chief of the Frankfurt am Main police, D., with intolerable pain if he refused to disclose J.'s whereabouts. The process, which would not leave any traces, was to be carried out by a police officer specially trained for that purpose, who was already on his way to the police station by helicopter. It was to be conducted under medical supervision. This was, indeed, established by the Frankfurt am Main Regional Court both in the criminal proceedings against the applicant (see paragraph 26 above) and in the criminal proceedings against the police officers (see paragraph 47 above). Furthermore, it is clear both from D.'s note for the police file (see paragraph 20 above) and from the Regional Court's finding in the criminal proceedings against D. (see paragraph 47 above) that D. intended, if necessary, to carry out that threat with the help of a "truth serum" and that the applicant had been warned that the execution of the threat was imminent.

95. As D. had ordered his subordinate heads of department on several occasions to use force against the applicant, if necessary, before finally ordering E. to threaten the applicant with torture (see paragraph 47 above), his order cannot be regarded as a spontaneous act and a clear element of intention was present. It further appears that the applicant, while detained, was handcuffed in the interrogation room (see paragraph 57 above) and was therefore in a situation of particular vulnerability and constraint. The Court, having regard to the findings of the domestic courts and to the material before it, is persuaded that the police officers resorted to the method of interrogation in question in the belief that J.'s life might be saved.

96. The Court further observes that the applicant alleged that he had also been physically assaulted and injured and threatened with sexual abuse during interrogation. In assessing whether these allegations, which were contested by the Government, have been proven beyond reasonable doubt, the Court finds that in

view of the medical certificates furnished by the applicant, his assertion of assault during his interrogation is not wholly without foundation. These certificates indicate that the applicant had indeed sustained bruising to his chest in the days prior to the medical examinations.

97. However, the Court also notes the Government's explanation as to the cause of the applicant's injuries, together with the submissions of J.'s parents on this point. They argued, by reference to the applicant's own statements in his book published in 2005, that all of the injuries, including lesions to his skin, which the applicant had incontestably sustained had been caused during his arrest when he was pinned, face down, on the ground (see paragraphs 13 and 14 above). The Court further notes that the domestic courts did not find any of the applicant's additional allegations to have been established. It would appear that before the domestic courts, which heard and evaluated the evidence, the applicant had not made the allegations of physical injuries having been sustained during interrogation, at least not to the same extent as the way in which he did before this Court (see, in particular, paragraph 26 above). Moreover, the medical certificates contain no indication as to the probable causation of injuries (see paragraph 21 above).

98. In view of the foregoing, the Court is unable to conclude that the applicant's complaints concerning physical assaults and injuries together with the alleged threat of sexual abuse during interrogation have been established beyond reasonable doubt.

99. The Court further observes that in the applicant's submission, he was again subjected to treatment prohibited by Article 3 in that he was obliged to walk without shoes through woods in Birstein and was directly forced to point out the precise location of the corpse and to disclose other items of evidence. These allegations are likewise contested by the Government. The Court notes that, according to the findings of the domestic authorities, the applicant, following his interrogation, had agreed to accompany the police officers to the pond where he had hidden J.'s corpse (see paragraph 17 above). There is nothing to indicate that the applicant was verbally threatened en route to Birstein by any of the police officers present in order to make him indicate the precise location of the corpse. However, the question as to whether and to what extent the disclosure of evidence by the applicant in Birstein was causally connected to the threats issued at the police station remains a question to be determined under Article 6. In view of the fact that the medical certificates contained a diagnosis of swellings and blisters on the applicant's feet (see paragraph 21 above),

the Court finds that his allegation that he had been obliged to walk without shoes is not entirely without foundation. However, the domestic courts, having examined the evidence before them, did not consider this allegation – which the applicant does not appear to have mentioned from the outset in the domestic proceedings either – to have been proven (see, in particular, paragraph 26 above). The cause of the injuries was not established by the examining doctors. In these circumstances, the Court does not consider the applicant's allegations in this regard to have been proven beyond reasonable doubt.

100. In view of the foregoing, the Court considers it established that the applicant was threatened in the morning of 1 October 2002 by the police with being subjected to intolerable pain in the manner set out in paragraphs 94 to 95 above in order to make him disclose J.'s whereabouts.

(β) Legal qualification of the treatment

101. The Court notes the Government's acknowledgment that the treatment the applicant was subjected to by E. violated Article 3 of the Convention. However, having regard to the serious allegations of torture made by the applicant and the Government's claim of loss of victim status, the Court considers it necessary to make its own assessment of whether this treatment can be said to have attained the minimum level of severity to bring it within the scope of Article 3 and, if so, how it is to be classified. Having regard to the relevant factors indicated in the Court's case-law (see paragraphs 88-91 above), it will examine, in turn, the duration of the treatment to which the applicant was subjected, its physical or mental effects on him, whether it was intentional or otherwise, its purpose and the context in which it was inflicted.

102. In so far as the duration of the impugned conduct is concerned, the Court notes that the interrogation under threat of ill-treatment lasted for approximately ten minutes.

103. As to its physical and mental effects, the Court notes that the applicant, who had previously refused to disclose J.'s whereabouts, confessed under threat as to where he had hidden the body. Thereafter, he continued to elaborate in detail on J.'s death throughout the investigation proceedings. The Court therefore considers that the real and immediate threats of deliberate and imminent ill-treatment to which the

applicant was subjected during his interrogation must be regarded as having caused him considerable fear, anguish and mental suffering. The applicant, however, did not submit medical certificates to establish any long-term adverse psychological consequences suffered or sustained as a result.

104. The Court further observes that the threat was not a spontaneous act but was premeditated and calculated in a deliberate and intentional manner.

105. As regards the purpose of the threats, the Court is satisfied that the applicant was intentionally subjected to such treatment in order to extract information on J.'s whereabouts.

106. The Court further notes that the threats of deliberate and imminent ill-treatment were made in the context of the applicant being in the custody of law-enforcement officials, apparently handcuffed, and thus in a state of vulnerability. It is clear that D. and E. acted in the performance of their duties as State agents and that they intended, if necessary, to carry out that threat under medical supervision and by a specially trained officer. Moreover, D.'s order to threaten the applicant was not a spontaneous decision, since he had given such an order on a number of earlier occasions and had become increasingly impatient at the non-compliance of his subordinates with his directions. The threat took place in an atmosphere of heightened tension and emotions in circumstances where the police officers were under intense pressure, believing that J.'s life was in considerable danger.

107. In this connection, the Court accepts the motivation for the police officers' conduct and that they acted in an attempt to save a child's life. However, it is necessary to underline that, having regard to the provision of Article 3 and to its long-established case-law (see paragraph 87 above), the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of the nation. Article 3, which has been framed in unambiguous terms, recognises that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult. The philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue.

108. Having regard to the relevant factors for characterising the treatment to which the applicant was subjected, the Court is satisfied that the real and immediate threats against the applicant for the purpose of extracting information from him attained the minimum level of severity to bring the impugned conduct within the scope of Article 3. It reiterates that according to its own case-law (see paragraph 91 above), which also refers to the definition of torture in Article 1 of the United Nations Convention against Torture (see paragraphs 64 and 90 above), and according to the views taken by other international human rights monitoring bodies (see paragraphs 66-68 above), to which the Redress Trust likewise referred, a threat of torture can amount to torture, as the nature of torture covers both physical pain and mental suffering. In particular, the fear of physical torture may itself constitute mental torture. However, there appears to be broad agreement, and the Court likewise considers, that the classification of whether a given threat of physical torture amounted to psychological torture or to inhuman or degrading treatment depends upon all the circumstances of a given case, including, notably, the severity of the pressure exerted and the intensity of the mental suffering caused. Contrasting the applicant's case to those in which torture has been found to be established in its case-law, the Court considers that the method of interrogation to which he was subjected in the circumstances of this case was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but that it did not reach the level of cruelty required to attain the threshold of torture.

## *2. Whether the applicant lost his victim status*

### **(a) The Chamber judgment**

109. The Chamber considered that the applicant could no longer claim to be the victim of a violation of Article 3. It found that the domestic courts had expressly acknowledged, both in the criminal proceedings against the applicant and in the criminal proceedings against police officers D. and E., that the applicant's treatment during his interrogation by E. had violated Article 3. Moreover, the applicant had been afforded sufficient redress for this breach at national level. The two police officers involved in threatening him had been convicted and punished and had suffered prejudice in their careers. In the circumstances of the present case, these convictions had to be considered sufficient in affording redress in a manner other than by way of monetary compensation. Furthermore, the use of the proscribed

methods of investigation had resulted in sanctions in that none of the applicant's pre-trial statements had been admitted as evidence at his trial.

**(b) The parties' submissions**

*(i) The applicant*

110. The applicant argued that he had not lost his status as the victim of a breach of Article 3. The domestic courts had failed to acknowledge clearly a breach of his Convention right in a legally binding manner. They had merely mentioned Article 3 in their decisions dismissing the applicant's applications and complaints.

111. Furthermore, the applicant claimed that he had not received adequate redress for the breach of the prohibition of torture. He had not derived any personal benefit from the convictions of D. and E., who, in any event, had been sentenced to very modest, suspended fines and who had otherwise suffered no disciplinary consequences for their conduct. D. had even been promoted following his conviction. The official liability proceedings, in which the applicant had claimed compensation for the damage resulting from his treatment in breach of Article 3, were still pending before the civil courts and, to date, he had not received any compensation. Furthermore, he argued that the status quo ante could only have been restored by the exclusion, at trial, of all items of evidence which had been obtained as a direct result of the violation of Article 3. This evidence, the admissibility of which had been determined at the outset of his trial, had secured his conviction and, by implication, the imposition of the maximum applicable penalty. The exclusion only of the pre-trial statements he had made as a result of coercion was not sufficient redress as such statements were not necessary for the prosecution's case against him once the real evidence had been admitted.

*(ii) The Government*

112. The Government asked the Grand Chamber to confirm the Chamber's finding that the applicant had lost his status as the victim of a violation of Article 3. Three German courts – namely the Regional Court and the Federal Constitutional Court in the criminal proceedings against the applicant and the Regional Court in the criminal proceedings against the police officers – had expressly acknowledged the



breach of Article 3. These courts had underlined that human dignity was inviolable and that torture was prohibited even if the life of a person were at stake.

113. In the Government's submission, the applicant had also been afforded sufficient redress. The two police officers involved had been convicted in criminal proceedings and sentenced. The Government stressed that for a police officer to be tried and convicted of coercion was a very serious matter. Moreover, both police officers had been removed from their posts. The Government admitted that the applicant had not yet received compensation, but argued that since he had brought official liability proceedings before the domestic courts only after lodging his application with the Court, the fact that those proceedings were still pending could not be taken into consideration as far as the loss of his victim status was concerned. Moreover, the Frankfurt am Main Regional Court had excluded the admissibility not only of the confession of 1 October 2002, but also of all subsequent confessions made by the applicant before the police, the prosecution and a judge prior to his trial. However, the applicant, after having been instructed that his previous confessions could not be used in evidence, had nevertheless made a new full confession on the second day of his trial, before any other evidence had been introduced.

*(iii) The third-party interveners (the Redress Trust)*

114. In the Redress Trust's submission, international jurisprudence had recognised that adequate and sufficient remedies in cases of torture and other prohibited ill-treatment included, in particular, the following forms of reparation which could be relevant cumulatively in a particular case. Firstly, an investigation capable of leading to the identification and punishment of those responsible for any ill-treatment was required (it cited, *inter alia*, *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports* 1998-VIII). Secondly, States were obliged to have an effective criminal justice system capable of effectively punishing those who perpetrated torture and other prohibited ill-treatment and of deterring the commission of future offences. The punishment for a violation of Article 3 should reflect the gravity of the offence and the State's obligation to punish the agents responsible had to be complied with seriously and not as a mere formality (by way of comparison, it cited *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 63, 20 December 2007). Thirdly, adequate and sufficient remedies for torture and other forms of ill-treatment included effective civil remedies; in particular, compensation for pecuniary and non-

pecuniary damage. The Court itself had repeatedly found that a judgment *per se* was not sufficient to constitute just satisfaction in cases of serious violations, such as those of Article 3, and had made an award for non-pecuniary damage (it cited, for instance, *Selçuk and Asker v. Turkey*, 24 April 1998, §§ 117-18, *Reports* 1998-II). Fourthly, a restoration of rights addressing the continuing impact of the torture, such as the exclusion of involuntary confessions, was required. Fifthly, the State had to provide for measures guaranteeing the non-recurrence of the prohibited conduct.

### (c) The Court's assessment

#### (i) Recapitulation of the relevant principles

115. The Court reiterates that it falls, firstly, to the national authorities to redress any violation of the Convention. In this regard, the question whether an applicant can claim to be the victim of the violation alleged is relevant at all stages of the proceedings under the Convention (see, *inter alia*, *Siliadin v. France*, no. 73316/01, § 61, ECHR 2005-VII, and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 179, ECHR 2006-V). A decision or measure favourable to the applicant is not, in principle, sufficient to deprive him of his status as a “victim” for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see, *inter alia*, *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; *Siliadin*, cited above, § 62; and *Scordino (no. 1)*, cited above, § 180).

116. As to the redress which is appropriate and sufficient in order to remedy a breach of a Convention right at national level, the Court has generally considered this to be dependent on all the circumstances of the case, having regard, in particular, to the nature of the Convention violation at stake (compare, for instance, *Scordino (no. 1)*, cited above, § 186). In cases of willful ill-treatment by State agents in breach of Article 3, the Court has repeatedly found that two measures are necessary to provide sufficient redress. Firstly, the State authorities must have conducted a thorough and effective investigation capable of leading to the identification and punishment of those responsible (see, *inter alia*, *Krastanov*, cited above, § 48; *Çamdereli v. Turkey*, no. 28433/02, §§ 28-29, 17 July 2008; and *Vladimir Romanov*, cited above, §§ 79 and 81). Secondly, an award of compensation to the applicant is required where appropriate (see *Vladimir Romanov*, cited above, § 79,

and, *mutatis mutandis*, *Aksoy*, cited above, § 98, and *Abdülşamet Yaman v. Turkey*, no. 32446/96, § 53, 2 November 2004 (both in the context of Article 13)) or, at least, the possibility of seeking and obtaining compensation for the damage which the applicant sustained as a result of the ill-treatment (compare, *mutatis mutandis*, *Nikolova and Velichkova*, cited above, § 56 (concerning a breach of Article 2); *Çamdereli*, cited above, § 29; and *Yeter v. Turkey*, no. 33750/03, § 58, 13 January 2009).

117. As regards the requirement of a thorough and effective investigation, the Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. Such an investigation, as with one under Article 2, should be capable of leading to the identification and punishment of those responsible (see, *inter alia*, *Asenov and Others*, cited above, § 102; *Labita*, cited above, § 131; *Çamdereli*, cited above, §§ 36-37; and *Vladimir Romanov*, cited above, § 81). For an investigation to be effective in practice it is a prerequisite that the State has enacted criminal-law provisions penalising practices that are contrary to Article 3 (compare, *mutatis mutandis*, *M.C. v. Bulgaria*, no. 39272/98, §§ 150, 153 and 166, ECHR 2003-XII; *Nikolova and Velichkova*, cited above, § 57; and *Çamdereli*, cited above, § 38).

118. With regard to the requirement for compensation to remedy a breach of Article 3 at national level, the Court has repeatedly found that, in addition to a thorough and effective investigation, it is necessary for the State to have made an award of compensation to the applicant, where appropriate, or at least to have given him or her the possibility of seeking and obtaining compensation for the damage he or she sustained as a result of the ill-treatment (see, in detail, the references in paragraph 116 above). The Court has already had occasion to indicate in the context of other Convention Articles that an applicant's victim status may depend on the level of compensation awarded at domestic level, having regard to the facts about which he or she complains before the Court (see, for instance, *Normann v. Denmark* (dec.), no. 44704/98, 14 June 2001, and *Scordino (no. 1)*, cited above, § 202, in respect of a complaint under Article 6, or *Jensen and Rasmussen v. Denmark* (dec.), no. 52620/99, 20 March 2003, in respect of a complaint under Article 11). This finding applies, *mutatis mutandis*, to complaints concerning a breach of Article 3.

119. In cases of willful ill-treatment the breach of Article 3 cannot be remedied only by an award of compensation to the victim. This is so because, if the authorities could confine their reaction to incidents of willful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice (see, among many other authorities, *Krastanov*, cited above, § 60; *Çamdereli*, cited above, § 29; and *Vladimir Romanov*, cited above, § 78).

*(ii) Application of these principles to the present case*

120. The Court thus has to examine, firstly, whether the national authorities have acknowledged, either expressly or in substance, the breach of the Convention. It notes in this connection that in the criminal proceedings against the applicant, the Frankfurt am Main Regional Court, in its decision dated 9 April 2003, expressly stated that the threat to cause the applicant pain in order to extract a statement from him had not only constituted a prohibited method of interrogation under Article 136a of the Code of Criminal Procedure; the threat had also disregarded Article 3 of the Convention, which underlay that provision of the Code (see paragraph 26 above). Likewise, the Federal Constitutional Court, referring to the Regional Court's finding of a violation of Article 3, observed that the applicant's human dignity and the prohibition on subjecting prisoners to ill-treatment (Article 1 and Article 104 § 1, second sentence, of the Basic Law) had been disregarded (see paragraph 42 above). In addition to that, in its judgment of 20 December 2004 convicting police officers D. and E., the Frankfurt am Main Regional Court found that such methods of investigation could not be justified as an act of necessity because "necessity" was not a defence to a violation of the absolute protection of human dignity under Article 1 of the Basic Law, which also lay at the heart of Article 3 of the Convention (see paragraph 48 above). In view of this, the Grand Chamber, which agrees with the findings of the Chamber in this respect, is satisfied that the domestic courts which were called upon to rule on this issue acknowledged expressly and in an unequivocal manner that the applicant's interrogation had violated Article 3 of the Convention.

121. In assessing whether the national authorities further afforded the applicant appropriate and sufficient redress for the breach of Article 3, the Court must determine, in the first place, whether they carried out a thorough and effective investigation against those responsible in compliance with the requirements of its case-law. In doing so, the Court has previously taken into account several criteria. Firstly, important factors for an effective investigation, viewed as a gauge of the authorities' determination to identify and prosecute those responsible, are its promptness (compare, *inter alia*, *Selmouni*, cited above, §§ 78-79; *Nikolova and Velichkova*, cited above, § 59; and *Vladimir Romanov*, cited above, §§ 85 et seq.) and its expedition (compare *Mikheyev v. Russia*, no. 77617/01, § 109, 26 January 2006, and *Dedovskiy and Others v. Russia*, no. 7178/03, § 89, 15 May 2008). Furthermore, the outcome of the investigations and of the ensuing criminal proceedings, including the sanction imposed as well as disciplinary measures taken, have been considered decisive. It is vital in ensuring that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the prohibition of ill-treatment are not undermined (compare *Ali and Ayşe Duran v. Turkey*, no. 42942/02, § 62, 8 April 2008; *Çamdereli*, cited above, § 38; and *Nikolova and Velichkova*, cited above, §§ 60 et seq.).

122. The Court notes in the present case that criminal investigations against police officers D. and E. were opened some three to four months after the applicant's questioning on 1 October 2002 (see paragraph 23 above) and that the officers were convicted in a final judgment some two years and three months after that date. Even though the Court notes that the Frankfurt am Main Regional Court mitigated their sentence in view of, among many other factors, the long duration of the proceedings (see paragraph 50 above), it is prepared to accept that the investigation and the criminal proceedings were, nevertheless, sufficiently prompt and expeditious to meet the standards set by the Convention.

123. The Court further observes that the police officers were found guilty of coercion and incitement to coercion respectively, under the provisions of German criminal law, for their conduct in their interrogation of the applicant which was in contravention of Article 3. However, the Court notes that they were sentenced for this contravention only to very modest and suspended fines. The Court reiterates in this connection that it is not its task to rule on the degree of individual guilt (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 116, ECHR 2004-XII, and *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII),

or to determine the appropriate sentence of an offender, those being matters falling within the exclusive jurisdiction of the national criminal courts. However, under Article 19 of the Convention and in accordance with the principle that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective, the Court has to ensure that a State's obligation to protect the rights of those under its jurisdiction is adequately discharged (see *Nikolova and Velichkova*, cited above, § 61, with further references). It follows that while the Court acknowledges the role of the national courts in the choice of appropriate sanctions for ill-treatment by State agents, it must retain its supervisory function and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed. Otherwise, the State's duty to carry out an effective investigation would lose much of its meaning (see *Nikolova and Velichkova*, cited above, § 62; compare also *Ali and Ayşe Duran*, cited above, § 66).

124. The Court does not overlook the fact that the Frankfurt am Main Regional Court, in determining D.'s and E.'s sentences, took into consideration a number of mitigating circumstances (see paragraph 50 above). It accepts that the present application is not comparable to other cases concerning arbitrary and serious acts of brutality by State agents which the latter then attempted to conceal, and in which the Court considered that the imposition of enforceable prison sentences would have been more appropriate (compare, for instance, *Nikolova and Velichkova*, cited above, § 63, and *Ali and Ayşe Duran*, cited above, §§ 67-72). Nevertheless, imposing almost token fines of 60 and 90 daily payments of EUR 60 and EUR 120 respectively, and, furthermore, opting to suspend them, cannot be considered an adequate response to a breach of Article 3, even seen in the context of the sentencing practice in the respondent State. Such punishment, which is manifestly disproportionate to a breach of one of the core rights of the Convention, does not have the necessary deterrent effect in order to prevent further violations of the prohibition of ill-treatment in future difficult situations.

125. As to the disciplinary sanctions imposed, the Court notes that during the investigation and trial of D. and E., both were transferred to posts which no longer involved direct association with the investigation of criminal offences (see paragraph 50 above). D. was later transferred to the Police Headquarters for Technology, Logistics and Administration and was appointed its chief (see paragraph 52 above). In this connection, the Court refers to its repeated finding that where State agents have been charged with offences involving ill-treatment, it is important that they

should be suspended from duty while being investigated or tried and should be dismissed if convicted (see, for instance, *Abdiisamet Yaman*, cited above, § 55; *Nikolova and Velichkova*, cited above, § 63; and *Ali and Ayşe Duran*, cited above, § 64). Even if the Court accepts that the facts of the present case are not comparable to those at issue in the cases cited herein, it nevertheless finds that D.'s subsequent appointment as chief of a police authority raises serious doubts as to whether the authorities' reaction reflected, adequately, the seriousness involved in a breach of Article 3 – of which he had been found guilty.

126. As to the additional requirement of compensation in order to remedy a breach of Article 3 at national level, the Court observes that the applicant availed himself of the possibility of seeking compensation for the damage sustained as a result of the violation of Article 3. However, his application for legal aid to bring such official liability proceedings, following a remittal, has itself, apparently, been pending for more than three years and, consequently, no hearing has yet been held and no judgment given on the merits of his claim. The Court would observe that, in practice, it has made awards under Article 41 of the Convention in respect of non-pecuniary damage in view of the seriousness involved in a violation of Article 3 (see, among many other authorities, *Selçuk and Asker*, cited above, §§ 117-18).

127. In any event, it considers that appropriate and sufficient redress for a Convention violation can only be afforded on condition that an application for compensation remains itself an effective, adequate and accessible remedy. Excessive delays in an action for compensation, in particular, will render the remedy ineffective (compare, *mutatis mutandis*, *Scordino (no. 1)*, cited above, § 195, in respect of compensation for non-compliance with the “reasonable time” requirement of Article 6). It finds that the domestic courts' failure to decide on the merits of the applicant's compensation claim for more than three years raises serious doubts as to the effectiveness of the official liability proceedings in the circumstances of the present case. The authorities do not appear to be determined to decide on the appropriate redress to be awarded to the applicant and thus have not reacted adequately and efficiently to the breach of Article 3 at issue.

128. The Court further notes that in the applicant's submission, redress for the authorities' breach of Article 3 could only have been granted by also excluding, at his trial, all items of evidence obtained as a direct result of the violation of that Article. It observes that in its case-law as it stands, it has generally considered

compliance with the requirements of an investigation and compensation both necessary and sufficient in order for a respondent State to provide adequate redress at national level in cases of ill-treatment by its agents breaching Article 3 (see paragraphs 116-19 above). However, it has also found that the question as to what measures of redress are appropriate and sufficient in order to remedy a breach of a Convention right depends on all the circumstances of the case (see paragraph 116 above). It would not, therefore, exclude the possibility that in cases in which the deployment of a method of investigation prohibited by Article 3 led to disadvantages for an applicant in criminal proceedings against him, appropriate and sufficient redress for that breach may have to entail, in addition to the above-mentioned requirements, measures of restitution addressing the issue of the continuing impact of that prohibited method of investigation on the trial, in particular the exclusion of evidence obtained by breaching Article 3.

129. In the present case, the Court does not, however, have to determine that issue and does not, therefore, have to examine at this stage whether the prohibited method of interrogation in the investigation proceedings can be said to have had a continuing impact on the applicant's trial and to have entailed disadvantages for him. Having regard to its above findings, it considers that, in any event, the different measures taken by the domestic authorities failed to comply fully with the requirement of redress as established in its case-law. The respondent State therefore did not afford the applicant sufficient redress for his treatment in breach of Article 3.

130. It follows that the applicant may still claim to be the victim of a violation of Article 3 within the meaning of Article 34 of the Convention.

## **B. Compliance with Article 3**

131. The Court refers to its above finding (see paragraphs 94-108) that while being interrogated by the police on 1 October 2002 the applicant was threatened with torture in order to make him disclose J.'s whereabouts and that this method of interrogation constituted inhuman treatment as prohibited by Article 3.

132. There has therefore been a violation of Article 3 of the Convention.



## **II. Alleged violation of article 6 of the convention**

...

## **III. Application of article 41 of the convention**

189. Article 41 of the Convention provides:

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

### **A. Damage**

190. The applicant did not claim any award for pecuniary or non-pecuniary damage, stressing that the objective of his application was to obtain a retrial before the domestic courts. The Government did not comment on this issue.

191. The Court accordingly does not make an award in respect of damage. As to the specific measure requested by the applicant in compensation, the Court considers, in view of the conclusion reached under Article 6, that there is no basis for the applicant to request a retrial or the reopening of the case before the domestic courts.

### **B. Costs and expenses**

192. Submitting documentary evidence, the applicant upheld his claims made before the Chamber and requested the payment of the costs of the criminal proceedings which the Regional Court had directed him to pay following his conviction. These amounted to 72,855.60 euros (EUR). He left it to the Court's discretion to decide which of these costs (which included, *inter alia*, expert and other witness costs together with counsel's fees) had to be regarded as having been caused by violations of his Convention rights. He argued that the costs of lodging an appeal on points of law and a constitutional complaint to the Federal Constitutional Court (the amount of which has not been further specified) had been incurred solely in an attempt to rectify the violations of the Convention.

193. The applicant, who had been granted legal aid, further claimed a total of EUR 22,647.85 in costs and expenses incurred in the proceedings before the Court. These vouched or invoiced costs included legal fees, fees for accessing case files from the domestic proceedings and for legal experts' reports, copying costs, and travel, subsistence and accommodation expenses, together with the costs of further proceedings pending before the domestic courts.

194. The Government did not comment on the applicant's claims before the Grand Chamber. Before the Chamber, they had argued that the costs awarded against the applicant by the Regional Court had not been incurred in order to prevent or redress a violation of his Convention rights. The applicant had not specified any costs incurred in the proceedings before the Federal Court of Justice or before the Federal Constitutional Court. If the proceedings were to be reopened before the domestic courts following a finding of a violation of the applicant's Convention rights and if the applicant were to be acquitted, then the decision on the costs of the proceedings before the Regional Court would be reviewed.

195. The Government further left it to the Court's discretion to decide on the reasonableness or otherwise of the lawyers' fees, as claimed.

196. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred and were reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see, for example, *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002; *Kafkaris v. Cyprus* [GC], no. 21906/04, § 176, ECHR 2008; and *Sahin v. Germany* [GC], no. 30943/96, § 105, ECHR 2003-VIII).

197. As to the costs and expenses incurred in the proceedings before the domestic courts, the Court notes that the applicant left it to its discretion to assess what portion of the costs of the criminal proceedings against him before the Regional Court could be attributed to his attempt at preventing a violation of the Convention. It notes, however, that, whereas it has found that Article 3 was disregarded in the investigation proceedings, it has concluded that the criminal proceedings against the applicant complied with the requirements of the Convention. As the applicant failed to specify the costs incurred in all proceedings before the domestic authorities which

were aimed at remedying the breach of Article 3, the Court cannot make an award of costs under this head.

198. As to the costs and expenses incurred in the proceedings before it, the Court considers that the amounts claimed by the applicant were in part not necessarily incurred and are as a whole excessive. Moreover, the applicant's claims before the Court were only partly successful. It therefore considers it reasonable to award the applicant EUR 4,000 under this head, less EUR 2,276.60 received by way of legal aid from the Council of Europe, making a total of EUR 1,723.40, plus any tax that may be chargeable to the applicant on that amount.

### **C. Default interest**

199. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

### **For these reasons, the court**

1. *Dismisses* unanimously the Government's preliminary objection in respect of the applicant's complaint under Article 6 of the Convention;
2. *Holds* by eleven votes to six that the applicant may still claim to be the "victim" of a violation of Article 3 of the Convention for the purposes of Article 34 of the Convention;
3. *Holds* by eleven votes to six that there has been a violation of Article 3 of the Convention;
4. *Holds* by eleven votes to six that there has been no violation of Article 6 §§ 1 and 3 of the Convention;
5. *Holds* by ten votes to seven
  - (a) that the respondent State is to pay the applicant, within three months, EUR 1,723.40 (one thousand seven hundred and twenty-three euros and forty cents) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction. Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 1 June 2010.

### Smiselno dopolnite s pojmi na koncu besedila:

V zadevi *Gäffen proti Nemčiji* je ESČP obravnavalo položaj, v katerem je policija osumljencu med zaslišanjem zagrozila s prizadejanjem \_\_\_\_\_, da bi od njega pridobila podatek o tem, kje se nahaja ugrabljeni otrok. Policisti so verjeli, da je otrok še \_\_\_\_\_ in da ga je mogoče s hitro pridobljeno informacijo rešiti. Kljub temu je ESČP poudarilo, da je prepoved ravnanj iz \_\_\_\_\_ člena EKČP ena temeljnih vrednot demokratične družbe.

Ta prepoved je \_\_\_\_\_, kar pomeni, da ne dopušča izjem niti v posebej težkih primerih. Zato ni dopustno trditi, da bi bilo grožnjo z mučenjem mogoče opravičiti zaradi reševanja življenja, preprečevanja hudega kaznivega dejanja ali varovanja \_\_\_\_\_ interesa. ESČP je posebej poudarilo, da se človekovega \_\_\_\_\_ ne sme podrediti koristnosti ali nujnosti policijskega ukrepanja.

V konkretnem primeru po presoji ESČP ni bilo dokazano, da bi bil pritožnik dejansko podvržen izvršenemu mučenju, je pa bilo ugotovljeno, da mu je bila izrečena resna in neposredna grožnja. Takšna grožnja je pri njem povzročila močan občutek \_\_\_\_\_, stiske in duševnega trpljenja. Zato je ESČP odločilo, da je šlo za \_\_\_\_\_ ravnanje v smislu 3. člena Konvencije.

Pomembno je, da ESČP ni sledilo argumentu, da bi bilo takšno ravnanje mogoče opravičiti zaradi posebnih okoliščin primera. Ravno nasprotno: poudarilo je, da je bistvo 3. člena v tem, da država posameznika ne sme namenoma izpostaviti \_\_\_\_\_ ali grožnji s takšnim ravnanjem, tudi če deluje v situaciji velike napetosti in pod časovnim pritiskom. Prepoved iz 3. člena je torej vezana na samo naravo ravnanja, ne pa na \_\_\_\_\_ osebe ali na dobre namene državnih organov.

Drugo pomembno vprašanje v tej zadevi je bilo, ali je pritožnik kljub odzivu nemških sodišč še vedno ostal \_\_\_\_\_ kršitve. Nemška sodišča so namreč ugotovila, da je bilo ravnanje policije protipravno, odgovorna policista pa sta bila v kazenskem postopku tudi \_\_\_\_\_. Kljub temu pa je ESČP presodilo, da zgolj formalno priznanje kršitve in simboličen odziv države še ne zadostujeta za izgubo statusa žrtve.

ESČP je poudarilo, da mora biti odziv države na kršitev 3. člena dovolj \_\_\_\_\_ in učinkovit. Sankcije zoper odgovorna policista so bile po njegovi presoji preveč \_\_\_\_\_, saj niso izražale resnosti posega v eno najbolj temeljnih konvencijskih pravic. Poleg tega je bilo pomembno tudi, da vprašanje odškodnine za pritožnika na domači ravni še ni bilo pravočasno in dokončno \_\_\_\_\_.

Sodba pa ni zadevala le 3. člena, temveč tudi vprašanje \_\_\_\_\_ postopka po 6. členu EKČP. Pritožnik je trdil, da je bila njegova obsodba zgrajena na dokazih, ki so bili pridobljeni na podlagi nedopustnega pritiska policistov. Pri tem je opozarjal na problem tako imenovanih sadežev zastrupljenega drevesa, torej dokazov, do katerih organi pridejo zaradi \_\_\_\_\_ kršitve.

ESČP je tukaj poudarilo, da vsaka kršitev 3. člena še ne pomeni samodejno tudi kršitve \_\_\_\_\_ člena EKČP. Presoditi je treba, ali je bila zaradi take kršitve omajana \_\_\_\_\_ poštenost kazenskega postopka. V Gäfgenovem primeru je bilo odločilno, da njegove prvotne izjave, pridobljene pod nedopustno grožnjo, niso bile neposredno uporabljene kot dokaz na glavni obravnavi.

Domače sodišče je namreč odločilo, da je uporaba teh izjav kot dokaza \_\_\_\_\_. Poleg tega je pritožnik pozneje, na glavni obravnavi, podal novo priznanje, potem ko je bil pravilno poučen o svojih \_\_\_\_\_ pravicah in o tem, da prejšnjih izjav ni mogoče uporabiti proti njemu. Prav ta poznejša izjava je bila za ESČP eden ključnih razlogov, da ni ugotovilo kršitve \_\_\_\_\_ člena EKČP.

Zadevna sodba pokaže dvoje. Prvič, prepoved mučenja in nečloveškega ravnanja je \_\_\_\_\_ in ne dopušča izjem, niti v položajih, ko oblast ravna z namenom zaščititi življenje drugega človeka. Drugič, pri presoji poštenosti kazenskega postopka ESČP ne izhaja iz vnaprej določenega, avtomatičnega, pravila, temveč presoja \_\_\_\_\_ postopka kot celoto, način uporabe dokazov in pomen posameznih procesnih jamstev.

Na splošni ravni sodba opozarja, da v pravni državi tudi najhujši storilec kaznivega dejanja ostaja nosilec \_\_\_\_\_ pravic. Država se zato ne sme spustiti na raven ravnanja, ki zanika temeljno dostojanstvo posameznika. Prav v tem je po sporočilu sodbe ena bistvenih razlik med \_\_\_\_\_ državo in golo logiko učinkovitega prisilnega ukrepanja.

**Možni pojmi:** poštenosti, 6., javnega, žrtev, absolutna, rešeno, nečloveško, človekovih, hudih bolečin, postopkovnih, celotna, mučenju, dostojanstva, pravno, začetne, 3., obsojena, strahu, pravičnost, ravnanje, mile, nedopustna, živ, resen, 6., absolutna

### Vprašanja

- Ali lahko grožnja z mučenjem sama po sebi predstavlja kršitev 3. člena EKČP? Kakšna merila uporablja ESČP za razlikovanje med mučenjem in nečloveškim ravnanjem?
- Zakaj je ESČP ravnanje policije kvalificiralo kot nečloveško ravnanje in ne kot mučenje? Ali se s tem strinjate?
- Analizirajte kaznovanje policistov. Menite, da so »mile« kazni skladne z zahtevami učinkovitega varstva pravic?
- Kako ESČP obravnava doktrino sadeža zastrupljenega drevesa? Menite, da bi morali biti izločeni vsi materialni dokazi, pridobljeni na podlagi nedovoljenih metod?
- Menite, da je absolutna prepoved mučenja in nečloveškega ravnanja vzdržna tudi v najbolj skrajnih situacijah?
- Ali bi bila odločitev drugačna, če bi bilo gotovo, da je bil otrok v času zaslišanja še živ?
- Je človekovo dostojanstvo vrednota, ki jo država varuje tudi pri osebi, ki je sama grobo poteptala dostojanstvo drugega?
- Je po vašem mnenju večja vrednost te sodbe v varstvu posameznega pritožnika ali v sporočilu državi, česa ne sme storiti niti v najtežjih okoliščinah?
- Ali je mogoče zagovarjati stališče, da je bilo ravnanje policistov moralno razumljivo, pravno pa nedopustno? Je takšna ločitev prepričljiva?





# Lautsi proti Italiji z dne 18. marca 2011, št. 30814/06

In the case of *Lautsi and Others v. Italy* The European Court of Human Rights,  
sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,  
Christos Rozakis,  
Nicolas Bratza,  
Peer Lorenzen,  
Josep Casadevall,  
Giovanni Bonello,  
Nina Vajić,  
Rait Maruste,  
Anatoly Kovler,  
Sverre Erik Jebens,  
Päivi Hirvelä,  
Giorgio Malinverni,  
George Nicolaou,  
Ann Power,  
Zdravka Kalaydjieva,  
Mihai Poalelungi,  
Guido Raimondi, *judges*,  
and Erik Fribergh, *Registrar*,

Having deliberated in private on 30 June 2010 and on 16 February 2011,



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

### Procedure

1. The case originated in an application (no. 30814/06) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian national, Ms Soile Lautsi (“the first applicant”) on 27 July 2006. In her application she stated that she was acting in her own name and on behalf of her children Dataico and Sami Albertin, then minors. The latter, who have subsequently come of age, confirmed that they wished to remain applicants (“the second and third applicants”).
2. The applicants were represented by Mr N. Paoletti, a lawyer practising in Rome. The Italian Government (“the Government”) were represented by their Agent, Ms E. Spatafora, and their deputy co-Agents, Mr N. Lettieri and Ms P. Accardo.
3. The application was allocated to the Court's Second Section (Rule 52 § 1 of the Rules of Court). On 1 July 2008 a Chamber of that Section, composed of the following judges: Françoise Tulkens, Antonella Mularoni, Vladimiro Zagrebelsky, Danutė Jočienė, Dragoljub Popović, András Sajó and Işıl Karakaş, decided to give notice of the application to the Government; applying the provisions of Article 29 § 3 of the Convention, it also decided to rule on the admissibility and merits of the application at the same time.
4. On 3 November 2009 a Chamber of the same Section, composed of the following judges: Françoise Tulkens, President, Ireneu Cabral Barreto, Vladimiro Zagrebelsky, Danutė Jočienė, Dragoljub Popović, András Sajó and Işıl Karakaş, declared the application admissible and held unanimously that there had been a violation of Article 2 of Protocol No. 1, taken together with Article 9 of the Convention, and that it was not necessary to examine the complaint under Article 14 of the Convention.
5. On 28 January 2010 the Government asked for the case to be referred to the Grand Chamber by virtue of Article 43 of the Convention and Rule 73. On 1 March 2010 a panel of the Grand Chamber granted that request.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicants and the Government each filed further written observations on the merits.

8. Leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2) was given to thirty-three members of the European Parliament acting collectively, the non-governmental organisation Greek Helsinki Monitor, which had previously intervened before the Chamber, the non-governmental organisation *Associazione nazionale del libero Pensiero*, the non-governmental organisation European Centre for Law and Justice, the non-governmental organisation Eurojuris, the non-governmental organisations International Committee of Jurists, Interights and Human Rights Watch, acting collectively, the non-governmental organisations *Zentralkomitee der deutschen Katholiken*, *Semaines sociales de France* and *Associazioni cristiane lavoratori italiani*, acting collectively, and the Governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, Monaco, Romania and the Republic of San Marino.

The Governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, and the Republic of San Marino were also given leave to intervene collectively in the oral procedure.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 30 June 2010 (Rule 59 § 3).

...

## The facts

### I. The circumstances of the case

10. The first applicant and her two sons, Dataico and Sami Albertin, also applicants, were born in 1957, 1988 and 1990 respectively. They are resident in Italy. In the school year 2001-2002 Dataico and Sami attended the Istituto comprensivo statale Vittorino da Feltre, a State school in Abano Terme. A crucifix was fixed to the wall in each of the school's classrooms.

11. On 22 April 2002, during a meeting of the school's governors, the first applicant's husband raised the question of the presence of religious symbols in the classrooms, particularly mentioning crucifixes, and asked whether they ought to be removed. On 27 May 2002, by ten votes to two with one abstention, the school's governors decided to keep religious symbols in classrooms.

12. On 23 July 2002 the first applicant contested that decision in the Veneto Administrative Court, complaining of an infringement of the principle of secularism, relying in that connection on Articles 3 (principle of equality) and 19 (religious freedom) of the Italian Constitution and Article 9 of the Convention, and on the principle of the impartiality of public administrative authorities (Article 97 of the Constitution).

13. On 3 October 2002 the Minister of Education, Universities and Research adopted Directive no. 2666, instructing the competent services of his Ministry to take the necessary measures to see to it that school governors ensured the presence of crucifixes in classrooms (see paragraph 24 below).

On 30 October 2003 the Minister joined the proceedings brought by the first applicant. He argued that her application was ill-founded since the presence of crucifixes in the classrooms of publicly run schools was based on Article 118 of royal decree no. 965 of 30 April 1924 (internal regulations of middle schools) and Article 119 of royal decree no. 1297 of 26 April 1928 (approval of the general regulations governing primary education; see paragraph 19 below).

14. By a decision of 14 January 2004 the Administrative Court referred to the Constitutional Court the question of the constitutionality, with regard to the principle of the secular character of the State and Articles 2, 3, 7, 8, 19 and 20 of the Constitution, of Articles 159 and 190 of legislative decree no. 297 of 16 April 1994 (approving the single text bringing together the legislative provisions in force regarding education and schools), in their "specifications" resulting from Articles 118 and 119 of the above-mentioned royal decrees, and of Article 676 of the same legislative decree.

Articles 159 and 190 make municipalities responsible for purchasing and supplying the furniture of primary and middle schools. Article 119 of the 1928 decree specifies that each classroom must have a crucifix and Article 118 of the 1924 decree that

each classroom must have a portrait of the king and a crucifix. Article 676 of legislative decree no. 297 stipulates that provisions not included in the single text remain in force, “with the exception of provisions contrary to or incompatible with the single text, which are repealed”.

By a decision of 15 December 2004 (no. 389), the Constitutional Court declared the question as to constitutionality manifestly inadmissible, on the ground that it was in reality directed towards texts which, not having the status of law, but only that of regulations (the above-mentioned Articles 118 and 119), could not form the subject of a review of constitutionality.

15. On 17 March 2005 the Administrative Court dismissed the application. After ruling that Article 118 of the royal decree of 30 April 1924 and Article 119 of the royal decree of 26 April 1928 were still in force and emphasising that “the principle of the secular nature of the State [was] now part of the legal heritage of Europe and the western democracies”, it held that the presence of crucifixes in State-school classrooms, regard being had to the meaning it should be understood to convey, did not offend against that principle. It took the view, in particular, that although the crucifix was undeniably a religious symbol, it was a symbol of Christianity in general rather than of Catholicism alone, so that it served as a point of reference for other creeds. It went on to say that the crucifix was a historical and cultural symbol, possessing on that account an “identity-linked value” for the Italian people, in that it “represent[ed] in a way the historical and cultural development characteristic of [Italy] and in general of the whole of Europe, and [was] a good synthesis of that development”. The Administrative Court further held that the crucifix should also be considered a symbol of a value system underpinning the Italian Constitution. It gave the following reasons:

“... 11.1. At this stage, the Court must observe, although it is aware that it is setting out along a rough and in places slippery path, that Christianity, and its older brother Judaism – at least since Moses and certainly in the Talmudic interpretation – have placed tolerance towards others and protection of human dignity at the centre of their faith.

Singularly, Christianity – for example through the well-known and often misunderstood “Render unto Caesar the things which are Caesar's, and unto ...” – through its strong emphasis placed on love for one's neighbour, and even more

through the explicit predominance given to charity over faith itself, contains in substance those ideas of tolerance, equality and liberty which form the basis of the modern secular State, and of the Italian State in particular.

11.2 Looking beyond appearances makes it possible to discern a thread linking the Christian revolution of two thousand years ago to the affirmation in Europe of the right to liberty of the person and to the key elements in the Enlightenment (even though that movement, historically speaking, strongly opposed religion), namely the liberty and freedom of every person, the declaration of the rights of man, and ultimately the modern secular State. All the historic phenomena mentioned are based to a significant extent – though certainly not exclusively – on the Christian conception of the world. It has been observed – judiciously – that the rallying call “liberty, equality, fraternity” can easily be endorsed by a Christian, albeit with a clear emphasis on the third word.

In conclusion, it does not seem to be going too far to assert that, through the various twists and turns of European history, the secular nature of the modern State has been achieved at a high price, and was prompted in part, though of course not exclusively so, by a more or less conscious reference to the founding values of Christianity. That explains why in Europe and in Italy many jurists belonging to the Christian faith have featured among the strongest supporters of the secular State. ...

11.5 The link between Christianity and liberty implies a logical historical coherence which is not immediately obvious – like a river in a karst landscape which has only recently been explored, precisely because for most of its course it flows underground – partly because in the constantly changing relations between the States and Churches of Europe it is much easier to see the numerous attempts by the Churches to meddle in matters of State, and vice versa, just like the frequent occasions on which Christian ideals have been abandoned, though officially proclaimed, in the quest for power, or on which governments and religious authorities have clashed, sometimes violently.

11.6 Moreover, with the benefit of hindsight, it is easy to identify in the constant central core of Christian faith, despite the inquisition, despite anti-Semitism and despite the crusades, the principles of human dignity, tolerance and freedom, including religious freedom, and therefore, in the last analysis, the foundations of the secular State.

11.7 By studying history carefully, from a suitable distance, not from up close, we can clearly perceive an affinity between (but not the identity of) the “hard core” of Christianity, which, placing charity above everything else, including faith, emphasises the acceptance of difference, and the “hard core” of the republican Constitution, which, in a spirit of solidarity, attaches value to the freedom of all, and therefore constitutes the legal guarantee of respect for others. The harmony remains, even though around those cores – both centred on human dignity – there have been numerous accretions of extraneous elements with the passage of time, some of them so thick as to obscure the core, particularly the core of Christianity. ...

11.9 It can therefore be contended that in the present-day social reality the crucifix should be regarded not only as a symbol of a historical and cultural development, and therefore of the identity of our people, but also as a symbol of a value system: liberty, equality, human dignity and religious toleration, and accordingly also of the secular nature of the State – principles which underpin our Constitution.

In other words, the constitutional principles of freedom have many roots, which undeniably include Christianity, in its very essence. It would therefore be something of a paradox to exclude a Christian sign from a public institution in the name of secularism, one of whose distant sources is precisely the Christian religion.

12.1 This court is admittedly not unaware of the fact that, in the past, other values have been attributed to the symbol of the crucifix, such as, at the time of the Albertine Statute, the sign of Catholicism understood as the State religion, and therefore used to Christianise and consolidate power and authority.

The court is well aware, moreover, that it is still possible today to give various interpretations of the sign of the cross, and above all a strictly religious meaning referring to Christianity in general and Catholicism in particular. It is also aware that some pupils attending State schools might freely and legitimately attribute to the cross values which are different again, such as the sign of an unacceptable preference for one religion in relation to others, or an infringement of individual freedom and accordingly of the secular nature of the State, or at the extreme limit a reference to temporal political control over a State religion, or the inquisition, or even a free catechism voucher tacitly distributed even to non-believers in an inappropriate place, or subliminal propaganda in favour of Christian creeds. Although all those points of view are respectable, they are ultimately irrelevant in the present case. ...

12.6 It must be emphasised that the symbol of the crucifix, thus understood, now possesses, through its references to the values of tolerance, a particular scope in consideration of the fact that at present Italian State schools are attended by numerous pupils from outside the European Union, to whom it is relatively important to transmit the principles of openness to diversity and the refusal of any form of fundamentalism – whether religious or secular – which permeate our system. Our era is marked by the ferment resulting from the meeting of different cultures with our own, and to prevent that meeting from turning into a collision it is indispensable to reaffirm our identity, even symbolically, especially as it is characterised precisely by the values of respect for the dignity of each human being and of universal solidarity. ...

13.2 In fact, religious symbols in general imply a logical exclusion mechanism, as the point of departure of any religious faith is precisely the belief in a superior entity, which is why its adherents, the faithful, see themselves by definition and by conviction as part of the truth. Consequently, and inevitably, the attitude of the believer, faced with someone who does not believe, and who is therefore implicitly opposed to the supreme being, is an attitude of exclusion. ...

13.3 The logical mechanism of exclusion of the unbeliever is inherent in any religious conviction, even if those concerned are not aware of it, the sole exception being Christianity – where it is properly understood, which of course has not always been and still is not always the case, not even thanks to those who call themselves Christian. In Christianity even the faith in an omniscient god is secondary in relation to charity, meaning respect for one's fellow human beings. It follows that the rejection of a non-Christian by a Christian implies a radical negation of Christianity itself, a substantive abjuration; but that is not true of other religious faiths, for which such an attitude amounts at most to the infringement of an important precept.

13.4 The cross, as the symbol of Christianity, can therefore not exclude anyone without denying itself; it even constitutes in a sense the universal sign of the acceptance of and respect for every human being as such, irrespective of any belief, religious or other, which he or she may hold. ...

14.1 It is hardly necessary to add that the sign of the cross in a classroom, when correctly understood, is not concerned with the freely held convictions of anyone, excludes no one and of course does not impose or prescribe anything, but merely

implies, in the heart of the aims set for education and teaching in a publicly run school, a reflection – necessarily guided by the teaching staff – on Italian history and the common values of our society legally retranscribed in the Constitution, among which the secular nature of the State has pride of place. ...”

16. The first applicant appealed to the *Consiglio di Stato* (Supreme Administrative Court), which confirmed that the presence of crucifixes in State-school classrooms had its legal basis in Article 118 of the royal decree of 30 April 1924 and Article 119 of the royal decree of 26 April 1928 and, regard being had to the meaning that should be attached to it, was compatible with the principle of secularism. On that point it found in particular that in Italy the crucifix symbolised the religious origin of values (tolerance, mutual respect, valorisation of the person, affirmation of one's rights, consideration for one's freedom, the autonomy of one's moral conscience vis-à-vis authority, human solidarity and the refusal of any form of discrimination) which characterised Italian civilisation. In that sense, when displayed in classrooms, the crucifix could fulfil – even in a “secular” perspective distinct from the religious perspective to which it specifically referred – a highly educational symbolic function, irrespective of the religion professed by the pupils. The *Consiglio di Stato* held that the crucifix had to be seen as a symbol capable of reflecting the remarkable sources of the above-mentioned values, the values which defined secularism in the State's present legal order.

In its judgment (no. 556) dated 13 April 2006 the *Consiglio di Stato* gave the following reasoning:

“... the Constitutional Court has accepted on a number of occasions that secularism is a supreme principle of our constitutional order, capable of resolving certain questions of constitutional legitimacy (among numerous judgments, see those which concern the provisions relating to the compulsory nature of religious teaching in school or the jurisdiction of the courts over cases concerning the validity of marriages contracted according to canon law and recorded in the registers of marriages).

This is a principle which is not proclaimed in express terms in our Constitution, a principle which is rich with ideological resonances and has a history full of controversy, but one nevertheless which has a legal importance that can be deduced



from the fundamental norms of our system. In reality the Court derives this principle specifically from Articles 2, 3, 7, 8, 19 and 20 of the Constitution.

The principle uses a linguistic symbol ("secularism") which indicates in abridged form certain significant aspects of the above-mentioned provisions, the content of which established the operating conditions under which this symbol should be understood and function. If these specific operating conditions had not been established, the principle of "secularism" would remain confined to ideological conflicts and could be used only with difficulty in a legal framework.

In that framework, the operating conditions are of course determined by reference to the cultural traditions and the customs of each people, in so far as these traditions and customs are reflected in the legal order, and this differs from one nation to another. ...

In the context of this court and the problem placed before it, namely the legitimacy of displaying the crucifix in classrooms, on the part of the competent authorities acting pursuant to the regulations, what has to be done in practice is the simpler task of verifying whether that requirement does or does not infringe the content of the fundamental norms of our constitutional order, that give form and substance to the principle of "secularism" which now characterises the Italian State and to which the Constitutional Court has referred on a number of occasions.

Quite clearly, the crucifix is in itself a symbol that may have various meanings and serve various purposes, above all for the place in which it has been displayed.

In a place of worship the crucifix is properly and exclusively a "religious symbol", since it is intended to foster respectful adherence to the founder of the Christian religion.

In a non-religious context like a school, used for the education of young people, the crucifix may still convey the above-mentioned values to believers, but for them and for non-believers its display is justified and possesses a non-discriminatory meaning from the religious point of view if it is capable of representing and evoking synthetically and in an immediately perceptible and foreseeable manner (like any symbol) values which are important for civil society, in particular the values which underpin and inspire our constitutional order, the foundation of our civil life. In that

sense the crucifix can perform – even in a “secular” perspective distinct from the religious perspective specific to it – a highly educational symbolic function, irrespective of the religion professed by the pupils.

Now it is obvious that in Italy the crucifix is capable of expressing, symbolically of course, but appropriately, the religious origin of those values – tolerance, mutual respect, valorisation of the person, affirmation of one's rights, consideration for one's freedom, the autonomy of one's moral conscience vis-à-vis authority, human solidarity and the refusal of any form of discrimination – which characterise Italian civilisation.

Those values, which have pervaded traditions, a way of life, the culture of the Italian people, form the basis for and spring from the fundamental norms of our founding charter – contained in the “Fundamental Principles” and the first part – and especially from those which the Constitutional Court referred to and which delimit the form of secularism appropriate to the Italian State.

The reference, via the crucifix, to the religious origin of these values and their full and complete correspondence with Christian teachings accordingly makes plain the transcendent sources of the values concerned, without calling into question, rather indeed confirming the autonomy of the temporal power vis-à-vis the spiritual power (but not their opposition, implicit in an ideological interpretation of secularism which has no equivalent in the Constitution), and without taking anything away from their particular “secular” nature, adapted to the cultural context specific to the fundamental order of the Italian State and manifested by it. Those values are therefore experienced in civil society autonomously (and not contradictorily) in relation to religious society, so that they may be endorsed “secularly” by all, irrespective of adhesion to the creed which inspired and defended them.

As with any symbol, one can impose on or attribute to the crucifix various contrasting meanings; one can even deny its symbolic value and make it a simple trinket having artistic value at the most. However, a crucifix displayed in a classroom cannot be considered a trinket, a decorative feature, nor as an adjunct to worship. Rather, it should be seen as a symbol capable of reflecting the remarkable sources of the civil values referred to above, values which define secularism in the State's present legal order. ...”

## II. Development of the relevant domestic law and practice

17. The obligation to hang crucifixes in primary school classrooms was laid down in Article 140 of royal decree no. 4336 of 15 September 1860 of the Kingdom of Piedmont-Sardinia, promulgated in accordance with Law no. 3725 of 13 November 1859, which provided: “each school must without fail be equipped with ... a crucifix” (Article 140).

In 1861, the year which saw the birth of the Italian State, the 1848 Statute of the Kingdom of Piedmont-Sardinia became the Constitution of the Kingdom of Italy; it provided in particular: “the Roman Catholic Apostolic religion shall be the only religion of the State [and] other existing creeds shall be tolerated in conformity with the law”.

18. The capture of Rome by the Italian army on 20 September 1870, following which the city was annexed and proclaimed capital of the new Kingdom of Italy, caused a crisis in relations between the State and the Catholic Church. By Law no. 214 of 13 May 1871 the Italian State unilaterally regulated relations with the Church, granting the Pope a number of privileges for the orderly conduct of religious activity. According to the applicants, the display of crucifixes in schools fell little by little into disuse.

19. During the fascist period the State took a series of measures aimed at ensuring compliance with the obligation to display the crucifix in classrooms.

For instance, on 22 November 1922 the Ministry of Education sent out a circular (no. 68) with the following wording: “... in the last few years in many of the Kingdom's primary schools the image of Christ and the portrait of the King have been removed. That is a manifest and intolerable breach of the regulations and especially an attack on the dominant religion of the State and the unity of the Nation. We therefore order all municipal administrative authorities in the Kingdom to restore, to those schools which lack them, the two sacred symbols of the faith and the consciousness of nationhood.”

On 30 April 1924 royal decree no. 965 of 30 April 1924 was adopted. This decree laid down the internal regulations governing middle schools (*ordinamento interno delle giunte e dei regi istituti di istruzione media*). Article 118 provided:

“Each school must have the national flag and each classroom must have a crucifix and a portrait of the King”.

Article 119 of royal decree no. 1297 of 26 April 1928, approving the general regulations governing the provision of primary education (*approvazione del regolamento generale sui servizi dell'istruzione elementare*), provides that the crucifix must form part of the “necessary equipment and supplies in school classrooms”.

20. The Lateran Pacts, signed on 11 February 1929, marked the “Conciliation” of the Italian State and the Catholic Church. Catholicism was confirmed as Italy's official religion, Article 1 of the Conciliation Treaty being worded as follows:

“Italy recognizes and reaffirms the principle established in the first Article of the Italian Constitution dated March 4 1848, according to which the Roman Catholic Apostolic religion is the only State religion.”

21. In 1948 Italy adopted its republican Constitution, Article 7 of which provides: “The State and the Catholic Church, each in its own order, shall be independent and sovereign ... their relations shall be regulated by the Lateran Pacts [and] amendments to the Pacts accepted by both parties shall not require proceedings to revise the Constitution.” Article 8 provides: “All religious creeds shall be equally free before the law ... religious creeds other than Catholicism shall have the right to organise in accordance with their own statutes, in so far as these are not incompatible with the Italian legal order [and] their relations with the State shall be determined by the law on the basis of agreements with their respective representatives”.

22. The Protocol to the new concordat, of 18 February 1984, ratified by Law no. 121 of 25 March 1985, states that the principle laid down in the Lateran Pacts, that the Catholic religion is the only State religion, is no longer in force.

23. In a judgment of 12 April 1989 (no. 203), rendered in a case which raised the question of the non-compulsory nature of Catholic religious instruction in State schools, the Constitutional Court held that the principle of secularism was derived from the Constitution, ruling that it implied not that the State should be indifferent to religions but that it should guarantee the protection of the freedom of religion in a context of confessional and cultural pluralism.

Dealing in the present case with an application concerning the conformity of the presence of crucifixes in State-school classrooms with the principle of secularism, the Constitutional Court ruled that it did not have jurisdiction, since the texts which required the presence of the crucifix were only regulations (decision of 15 December 2004, no. 389; see paragraph 14 above). When called upon to examine this question, the *Consiglio di Stato* held that, regard being had to the meaning that should be attached to it, the presence of the crucifix in State-school classrooms was compatible with the principle of secularism (judgment of 13 February 2006, no. 556; see paragraph 16 above).

In a different case, the Court of Cassation had taken the contrary view to that of the *Consiglio di Stato* in the context of a prosecution for refusing to serve as a scrutineer in a polling station on the ground that a crucifix was displayed there. In its judgment of 1 March 2000 (no. 439), it held that the presence of the crucifix infringed the principles of secularism and the impartiality of the State, and the principle of the freedom of conscience of those who did not accept any allegiance to that symbol. It expressly rejected the argument that displaying the crucifix was justified in that it was the symbol of “an entire civilisation or the collective ethical conscience” and – here the Court of Cassation cited the terms used by the *Consiglio di Stato* in an opinion of 27 April 1988 (no. 63) – also symbolised “a universal value independent of any specific religious creed”.

24. On 3 October 2002 the Minister of Education, Universities and Research issued the following instruction (no. 2666):

“... The Minister

... Considering that the presence of crucifixes in classrooms is founded on the provisions in force, that it offends neither against religious pluralism nor against the objectives of multicultural education of Italian schools and that it cannot be considered a limitation of the freedom of conscience guaranteed by the Constitution, since it does not refer to a specific creed but constitutes only an expression of Christian civilisation and culture, and that it therefore forms part of the universal heritage of mankind;

Having assessed, with respect for different allegiances, convictions and beliefs, the desirability of requiring all schools, within the limits of their own autonomy and by decision of their competent collegiate organs, to set aside part of their premises to be used, without any obligation and without any fixed hours being appointed, for contemplation and meditation by those members of the school community who so wish;

Issues the following instruction:

The Ministry's competent service ... shall take the necessary measures to see to it that:

- 1) school governors ensure the presence of crucifixes in classrooms;
- 2) all schools, within the limits of their own autonomy, and by decision of the members of their collegiate organs, set aside part of their premises to be used, without any obligation and without any fixed hours being appointed, for contemplation and meditation by those members of the school community who so wish ...”.

25. Articles 19, 33 and 34 of the Constitution are worded as follows:

#### **Article 19**

“Everyone is entitled to freely profess their religious beliefs in any form, individually or with others, and to promote them and celebrate rites in public or in private, provided that they are not offensive to public morality.”

#### **Article 33**

“The Republic guarantees the freedom of the arts and sciences, which may be freely taught.

The Republic lays down general rules for education and establishes State schools of all branches and grades. ...”

## Article 34

“Schools are open to everyone.

Elementary education, given for at least eight years, is compulsory and free. ...”

### III. Overview of law and practice in the member states of the council of europe with regard to the presence of religious symbols in state schools

26. In the great majority of member States of the Council of Europe the question of the presence of religious symbols in State schools is not governed by any specific regulations.

27. The presence of religious symbols in State schools is expressly forbidden only in a small number of member States: the former Yugoslav Republic of Macedonia, France (except in Alsace and the *département* of Moselle) and Georgia.

It is only expressly prescribed – in addition to Italy – in a few member States, namely: Austria, certain administrative regions of Germany (*Länder*) and Switzerland (*communes*), and Poland. Nevertheless, such symbols are found in the State schools of some member States where the question is not specifically regulated, such as Spain, Greece, Ireland, Malta, San Marino and Romania.

28. The question has been brought before the supreme courts of a number of member States.

In Switzerland the Federal Court has held a communal ordinance prescribing the presence of crucifixes in primary school classrooms to be incompatible with the requirements of confessional neutrality enshrined in the Federal Constitution, but without criticising such a presence in other parts of the school premises (26 September 1990; ATF 116 1a 252).

In Germany the Federal Constitutional Court has ruled that a similar Bavarian ordinance was contrary to the principle of the State's neutrality and difficult to reconcile with the freedom of religion of children who were not Catholics (16 May 1995; BVerfGE 93,1). The Bavarian parliament then issued a new ordinance maintaining the previous measure, but enabling parents to cite their religious or

secular convictions in challenging the presence of crucifixes in the classrooms attended by their children and introducing a mechanism whereby, if necessary, a compromise or a personalised solution could be reached.

In Poland the Ombudsman referred to the Constitutional Court an ordinance of 14 April 1992 issued by the Minister of Education prescribing in particular the possibility of displaying crucifixes in State-school classrooms. The Constitutional Court ruled that the measure was compatible with the freedom of conscience and religion and the principle of the separation of Church and State guaranteed by Article 82 of the Constitution, given that it did not make such display compulsory (20 April 1993; no. U 12/32).

In Romania the Supreme Court set aside a decision of the National Council for the Prevention of Discrimination of 21 November 2006 recommending to the Ministry of Education that it should regulate the question of the presence of religious symbols in publicly run educational establishments and, in particular, authorise the display of such symbols only during religious studies lessons or in rooms used for religious instruction. The Supreme Court held in particular that the decision to display such symbols in educational establishments should be a matter for the community formed by teachers, pupils and pupils' parents (11 June 2008; no. 2393).

In Spain the High Court of Justice of Castile and Leon, ruling in a case brought by an association militating in favour of secular schooling which had unsuccessfully requested the removal of religious symbols from schools, held that the schools concerned should remove them if they received an explicit request from the parents of a pupil (14 December 2009; no. 3250).

## **The law**

### **I. Alleged violation of article 2 of protocol no. 1 and article 9 of the convention**

29. The applicants complained of the fact that crucifixes were affixed to the wall in the classrooms of the State school attended by the second and third applicants. They argued that this infringed the right to education, guaranteed by Article 2 of Protocol No. 1 in the following terms:



“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

They also contended that these facts infringed their right to the freedom of thought, conscience and religion enshrined in Article 9 of the Convention, which provides as follows:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

#### A. The Chamber's judgment

30. In its judgment of 3 November 2009 the Chamber held that there had been a violation of Article 2 of Protocol No. 1 taken together with Article 9 of the Convention.

31. First of all, the Chamber derived from the principles relating to the interpretation of Article 2 of Protocol No. 1 established in the Court's case-law an obligation on the State to refrain from imposing beliefs, even indirectly, in places where persons were dependent on it or in places where they were particularly vulnerable, emphasising that the schooling of children was a particularly sensitive area in that respect.

The Court went on to say that among the plurality of meanings the crucifix might have the religious meaning was predominant. It accordingly considered that the compulsory and highly visible presence of crucifixes in classrooms was capable not only of clashing with the secular convictions of the first applicant, whose children attended at that time a State school, but also of being emotionally disturbing for

pupils of non-Christian religions or those who professed no religion. On that last point, the Chamber emphasised that the “negative” freedom of religion was not limited to the absence of religious services or religious education: it extended to practices and symbols expressing, in particular or in general, a belief, a religion or atheism. It added that this “negative right” deserved special protection if it was the State which expressed a belief and dissenters were placed in a situation from which they could not extract themselves if not by making disproportionate efforts and sacrifices.

According to the Chamber, the State had a duty to uphold confessional neutrality in public education, where school attendance was compulsory regardless of religion, and which had to seek to inculcate in pupils the habit of critical thought. It observed in addition that it could not see how the display in State-school classrooms of a symbol that it was reasonable to associate with the majority religion in Italy could serve the educational pluralism which was essential for the preservation of “democratic society” within the Convention meaning of that term.

32. The Chamber concluded that “the compulsory display of a symbol of a particular faith in the exercise of public authority in relation to specific situations subject to governmental supervision, particularly in classrooms, restrict[ed] the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe”. The practice infringed those rights because “the restrictions [were] incompatible with the State's duty to respect neutrality in the exercise of public authority, particularly in the field of education” (§ 57 of the judgment).

## B. Arguments of the parties

### 1. *The Government*

33. The Government did not raise an objection of inadmissibility.

34. They regretted that the Chamber had not had available to it a comparative law study of relations between the State and religions and on the question of the display of religious symbols in State schools. They asserted that the Chamber had thus deprived itself of an essential element, since such a study would have shown that there was no common approach in Europe in these fields, and would accordingly

have led it to the finding that the member States had a particularly wide margin of appreciation; consequently, the Chamber, in its judgment, had failed to take that margin of appreciation into consideration, thus ignoring one fundamental aspect of the problem.

35. The Government also criticised the Chamber's judgment for deriving from the concept of confessional "neutrality" a principle excluding any relations between the State and a particular religion, whereas neutrality required the public administrative authorities to take all religions into account. The judgment was accordingly based on confusion between "neutrality" (an "inclusive concept") and "secularism" (an "exclusive concept"). Moreover, in the Government's view, neutrality meant that States should refrain from promoting not only a particular religion but also atheism, "secularism" on the State's part being no less problematic than proselytising by the State. The Chamber's judgment was thus based on a misunderstanding and amounted to favouring an irreligious or antireligious approach of which the applicant, as a member of the Union of atheists and rationalist agnostics, was asserted to be a militant supporter.

36. The Government went on to argue that it was necessary to take account of the fact that a single symbol could be interpreted differently from one person to another. That applied in particular to the sign of the cross, which could be perceived not only as a religious symbol, but also as a cultural and identity-linked symbol, the symbol of the principles and values which formed the basis of democracy and western civilisation; it appeared, for instance, on the flags of a number of European countries. Whatever the evocative power of an "image" might be, in the Government's view, it was a "passive symbol", whose impact on individuals was not comparable with the impact of "active conduct", and no one had asserted in the present case that the content of the teaching provided in Italy was influenced by the presence of crucifixes in classrooms.

That presence was the expression of a "national particularity", characterised notably by close relations between the State, the people and Catholicism attributable to the historical, cultural and territorial development of Italy and to a deeply rooted and long-standing attachment to the values of Catholicism. Keeping crucifixes in schools was therefore a matter of preserving a centuries-old tradition. The Government argued that the right of parents to respect for their "family culture" ought not to infringe the community's right to transmit its culture or the right of children to

discover it. Moreover, by contenting itself with a “potential risk” of emotional disturbance in finding a breach of the rights to education and freedom of thought, conscience and religion, the Chamber had considerably widened the scope of those provisions.

37. Referring in particular to the *Otto-Preminger-Institut v. Austria* judgment of 20 September 1994 (Series A no. 295-A), the Government contended that, although account should be taken of the fact that the Catholic religion was that of a large majority of Italians, this was not in order to make that fact into an aggravating circumstance, as the Chamber had done. On the contrary, the Court should acknowledge and protect national traditions and the prevailing popular feeling, and leave each State to maintain a balance between opposing interests. Moreover, it was the Court's case-law that school curricula or provisions establishing the preponderance of the majority religion did not in themselves point to undue influence on the part of the State or attempted indoctrination, and that the Court should respect constitutional traditions and principles relating to relations between the State and religions – including in the present case the particular approach to secularism which prevailed in Italy – and take into account the context of each State.

38. Considering in addition that the second sentence of Article 2 of Protocol No. 1 was applicable only to school curricula, the Government criticised the Chamber's judgment for the finding of a violation without any indication of how the mere presence of a crucifix in the classrooms where the first applicant's children were taught was capable of substantially reducing her ability to bring them up in conformity with her convictions, the only reason given being that pupils would feel that they were being educated in a school environment marked by a particular religion. That reason was erroneous when judged by the yardstick of the Court's case-law, from which it could be seen in particular, firstly that the Convention did not prevent member States from having a State religion, or from showing a preference for a particular religion, or from providing pupils with more extensive religious teaching in relation to the dominant religion, and secondly that account had to be taken of the fact that the educational influence of parents was much greater than the school's.

39. In the Government's view, the presence of crucifixes in classrooms made a legitimate contribution to enabling children to understand the national community in which they were expected to integrate. An “environmental influence” was all the

more improbable because children in Italy received an education which helped them to develop a critical outlook on the question of religion, in a dispassionate atmosphere from which any form of proselytising was excluded. Moreover, Italy had opted for a benevolent approach to minority religions in the school environment: Italian law currently conferred the right to wear Islamic headscarves and other apparel or symbols with a religious connotation; the beginning and end of Ramadan were often celebrated in schools; religious instruction was permitted for all recognised creeds; and the needs of pupils belonging to minority faiths were taken into account, with Jewish pupils, for example, being entitled not to sit examinations on Saturdays.

40. Lastly, the Government emphasised the need to take into account the right of parents who wanted crucifixes to be kept in classrooms. That was the wish of the majority in Italy and was also the wish democratically expressed in the present case by almost all the members of the school's governing body. Removing crucifixes from classrooms in such circumstances would amount to "abuse of a minority position" and would be in contradiction with the State's duty to help individuals satisfy their religious needs.

## *2. The applicants*

41. The applicants submitted that the display of crucifixes in the classrooms of the State school attended by the second and third applicants constituted an illegitimate interference with their right to the freedom of thought and conscience and infringed the principle of educational pluralism in that it was the expression of the State's preference for a particular religion in a place where conscience was formed. By expressing that preference the State was also disregarding its obligation to give special protection to minors against any form of propaganda or indoctrination. Moreover, according to the applicants, since the educational environment was thus marked by a symbol of the dominant religion, the display of the crucifix which they complained of infringed the second and third applicants' right to receive an open and pluralistic education aimed at the development of a capacity for critical judgement. Lastly, as the first applicant was in favour of secularism, it infringed her right to have her children educated in conformity with her own philosophical convictions.

42. The applicants argued that the crucifix was without a shadow of a doubt a religious symbol and trying to attribute a cultural value to it savoured of an attempt to maintain a hopeless last-ditch defence. Nor did anything in the Italian legal system justify the assertion that it was a symbol of national identity: according to the Constitution, it was the flag which symbolised that identity.

Moreover, as the German Federal Constitutional Court had pointed out in its judgment of 16 May 1995 (see paragraph 28 above), giving the crucifix a profane meaning would move it away from its original meaning and help divest it of its sacred nature. As to the assertion that it was merely a “passive symbol”, this ignored the fact that like all symbols – and more than all others – it gave material form to a cognitive, intuitive and emotional reality which went beyond the immediately perceptible. The German Federal Constitutional Court had, moreover, made that finding, holding in the judgment cited above that the presence of crucifixes in classrooms had an evocative character in that it represented the content of the faith it symbolised and served as “publicity material” for it. Lastly, the applicants pointed out that in the *Dahlab v. Switzerland* decision of 15 February 2001 (no. 42393/98, ECHR 2001-V), the Court had noted the particular power that religious symbols exerted in the school environment.

43. The applicants contended that every democratic State had a duty to guarantee the freedom of conscience, pluralism, equal treatment of beliefs and the secular nature of institutions. The principle of secularism required above all neutrality on the part of the State, which should keep out of the religious sphere and adopt the same attitude with regard to all religious currents. In other words, neutrality obliged the State to establish a neutral space within which everyone could freely live according to his own beliefs. By imposing religious symbols, namely crucifixes, in classrooms, the Italian State was doing the opposite.

44. The approach advocated by the applicants was thus clearly distinct from State atheism, which amounted to denying the freedom of religion by imposing a secular viewpoint in an authoritarian manner. Seen in terms of the State's impartiality and neutrality, secularism was on the contrary a means of securing the religious and philosophical freedom of conscience of all.

45. The applicants further contended that it was essential to give special protection to minority beliefs and convictions, in order to preserve those who held them from a “despotism of the majority”, and that too was a reason for removing crucifixes from classrooms.

46. In conclusion, the applicants argued that although, as the Government maintained, removing crucifixes from State-school classrooms would take away part of Italian cultural identity, keeping them there was incompatible with the foundations of western political thought, the principles of the liberal State and a pluralist, open democracy, and respect for the individual rights and freedoms enshrined in the Italian Constitution and the Convention.

### **C. Submissions of the third-party interveners**

#### *1. The Governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta and the Republic of San Marino*

47. In their joint observations submitted at the hearing, the Governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta and the Republic of San Marino indicated that in their view the Chamber's reasoning had been based on a misunderstanding of the concept of “neutrality”, which the Chamber had confused with “secularism”. They pointed out that there was a huge diversity of Church-State arrangements in Europe and that more than half the population of Europe lived in non-secular States. They added that State symbols inevitably had a place in state education and that many of these had a religious origin, the Cross – which was both a national and a religious symbol – being the most visible example. In their view, in non-secular European States the presence of religious symbols in the public space was widely tolerated by the secular population as part of national identity. States should not have to divest themselves of part of their cultural identity simply because that identity was of religious origin. The position adopted by the Chamber was not an expression of the pluralism manifest in the Convention system, but an expression of the values of a secular State. To extend it to the whole of Europe would represent the “Americanisation” of Europe in that a single and unique rule and a rigid separation of Church and State would be binding on everyone.

In their submission, favouring secularism was a political position that, whilst respectable, was not neutral. Accordingly, in the educational sphere a State that supported the secular as opposed to the religious was not being neutral. Similarly, removing crucifixes from classrooms where they had always been would not be devoid of educational consequences. In reality, whether the State opted to allow or prohibit the presence of crucifixes in classrooms, the important factor was the degree to which the curriculum contextualised and taught children tolerance and pluralism.

The intervening Governments acknowledged that there might be circumstances where the arrangements by the State were unacceptable. The burden of proof should remain on the individual, however, and the Court should intervene only in extreme cases.

## *2. The Government of the Principality of Monaco*

48. The intervening Government declared that they shared the viewpoint of the respondent Government according to which the crucifix was a “passive symbol” that was found on the coats of arms and flags of many States and in the instant case reflected a national identity rooted in history. Furthermore, being indivisible, the principle of State neutrality required the authorities to refrain from imposing a religious symbol where there had never been one and from withdrawing one that had always been there.

## *3. The Government of Romania*

49. The intervening Government submitted that the Chamber had taken insufficient account of the wide margin of appreciation available to the Contracting States where sensitive issues were involved and that there was no European-wide consensus. They pointed out that the Court's case-law recognised in particular that the States enjoyed a wide margin of appreciation regarding the wearing of religious symbols in State schools; in their submission, the same should apply to the display of religious symbols in such schools. They also pointed out that the Chamber judgment had been based on the premise that the display of religious symbols in State schools breached Article 9 of the Convention and Article 2 of Protocol No. 1, which conflicted with the principle of neutrality because, where applicable, Contracting States were compelled to intervene with a view to removing those



symbols. In their view, that principle was better served where decisions of this type were taken jointly by teachers, pupils and parents. In any event, as it was not associated with particular religious obligations, the presence of the crucifix in classrooms did not sufficiently affect the religious feelings of those concerned for there to be a violation of the aforementioned provisions.

4. *The non-governmental organisation Greek Helsinki Monitor*

50. According to the intervening organisation, the crucifix could not be perceived as anything other than a religious symbol, so that displaying it in State-school classrooms could be seen as an institutional message advocating a particular religion. It pointed out that in the case of *Folgerø* the Court had held that the participation of pupils in religious activities could in fact influence them, and considered that the same was true where they were taught in classrooms where a religious symbol was displayed. It also drew the Court's attention to the fact that children or parents who were bothered by this might refrain from protesting for fear of reprisals.

5. *The non-governmental organisation Associazione nazionale del libero Pensiero*

51. The intervening organisation, which considered that the presence of religious symbols in State-school classrooms was incompatible with Article 9 of the Convention and Article 2 of Protocol No. 1, submitted that the restrictions imposed on the applicants' rights were not "prescribed by law" within the meaning of the Court's case-law. It pointed out in that connection that displaying the crucifix in State-school classrooms was prescribed not by law but by regulations adopted during the fascist era. It added that those regulations had in any event been implicitly repealed by the Constitution of 1947 and the Law of 1985 ratifying the agreements amending the Lateran Pacts of 1929. It pointed out that the Criminal Division of the Court of Cassation had ruled accordingly in a judgment of 1 March 2000 (no. 4273) in a similar case relating to crucifixes displayed in polling stations and that it had confirmed that approach in a judgment of 17 February 2009 concerning crucifixes displayed in courtrooms (without, however, ruling on the merits). There was therefore a conflict of case-law between the *Consiglio di Stato* – which, on the contrary, held that the relevant regulations were applicable – and the Court of Cassation that affected the principle of legal security, which was the pillar of a State governed by the rule of law. As the Constitutional Court had declined jurisdiction, there was no mechanism in Italy whereby this conflict could be resolved.

6. *The non-governmental organisation European Centre for Law and Justice*

52. The intervening organisation submitted that the Chamber had wrongly addressed the question raised by the case, which was whether the Convention rights invoked by the first applicant had been violated merely on account of the presence of the crucifix in classrooms. Its view was that they had not. Firstly, the “personal convictions” of the first applicant's children had not been violated because they had neither been compelled to act against their conscience nor prevented from acting according to their conscience. Secondly, their “innermost convictions” and the first applicant's right to ensure their education in conformity with her own philosophical convictions had not been violated because her children had neither been forced to believe nor prevented from not believing. They had not been indoctrinated; nor had they been the subject of misplaced proselytism. The intervening organisation submitted that the Chamber had been mistaken in holding that a State's decision to display crucifixes in classrooms was contrary to the Convention (which was not the question that had been submitted to it). In doing so, the Chamber had created “a new obligation relating not to the first applicant's rights, but to the nature of the “educational environment”. In the intervening organisation's submission, it was because it had been unable to establish that the first applicant's children's “innermost or personal convictions” had been violated on account of the presence of the crucifix in the classrooms that the Chamber had created a new obligation to ensure that the educational environment was entirely secular, thus exceeding the scope of the application and the limits of its jurisdiction.

7. *The non-governmental organisation Eurojuris*

53. The intervening organisation agreed with the Chamber's conclusions. After reiterating the relevant provisions of Italian positive law – and underscoring the constitutional value of the principle of secularism – it referred to the principle established in the Court's case-law to the effect that school should not be a place for proselytism or preaching. It also referred to cases in which the Court had examined the question of the wearing of Islamic veils in educational establishments. It went on to point out that the presence of crucifixes in Italian State-school classrooms had been prescribed not by law but by regulations inherited from the fascist era which reflected a confessional conception of the State today that was incompatible with the principle of secularism laid down in positive constitutional law. It firmly rejected the reasoning of the Italian Administrative Court, according to which prescribing

the presence of crucifixes in State-school classrooms was still compatible with that principle because they symbolised secular values. In its submission, it was a religious symbol with which non-Christians did not identify. Moreover, by obliging schools to display it in State-school classrooms the State conferred a particular dimension on a given religion, to the detriment of pluralism.

*8. The non-governmental organisations International Commission of Jurists, Interights and Human Rights Watch*

54. The intervening organisations submitted that the compulsory display of religious symbols such as the crucifix in State-school classrooms was incompatible with the principle of neutrality and the rights guaranteed to pupils and their parents under Article 9 of the Convention and Article 2 of Protocol No. 1. In their submission, educational pluralism was an established principle, upheld not only in the Court's case-law but also in the case-law of a number of supreme courts and in various international instruments. Furthermore, the Court's case-law supported a duty of State neutrality and impartiality as among religious beliefs in the provision of public services, including education. They pointed out that this principle of impartiality was recognised not only by the Italian, Spanish and German Constitutional Courts but also, in particular, by the French *Conseil d'Etat* and the Swiss Federal Court. They added that, as several supreme courts had held, State neutrality as among religious beliefs was particularly important in the classroom because, school being compulsory, children were vulnerable to indoctrination at school. They went on to reiterate the Court's finding that, although the Convention did not prevent States from imparting through teaching or education information or knowledge of a religious or philosophical kind, they had to ensure that this was done in an objective, critical and pluralistic manner, and free of any indoctrination. They stressed that the same applied to all functions carried out in the area of education and teaching, including the organisation of the school environment.

*9. The non-governmental organisations Zentralkomitee der deutschen Katholiken, Semaines sociales de France and Associazioni cristiane lavoratori italiani*

55. The intervening organisations stated that they agreed with the Chamber that, whilst the crucifix had a plural meaning, it was primarily the central symbol of Christianity. They added, however, that they disagreed with its conclusion, and found it difficult to understand how the presence of crucifixes in classrooms could

be “emotionally disturbing” for some pupils or hinder the development of their critical thinking. In their submission, that presence alone could not be equated with a religious or philosophical message; it should rather be interpreted as a passive way of conveying basic moral values. The question accordingly had to be regarded as one that fell within the competence of the State when deciding on the curriculum in schools; parents had to accept that certain aspects of State-school education could not be entirely in keeping with their convictions. They added that a State's decision to display crucifixes in State-school classrooms did not mean that it pursued an aim of indoctrination prohibited by Article 2 of Protocol No. 1. They maintained that a balance had to be found in the present case between the rights and interests of believers and non-believers, between the fundamental rights of individuals and the legitimate interests of society, and between the formulation of standards relating to fundamental rights and maintaining the diversity existing in Europe. In their submission, the Court should leave a wide margin of appreciation to the States in this area because the organisation of the relationship between the State and religion varied from one country to another and – in particular regarding the place of religion in State schools – was deeply rooted in the history, tradition and culture of a country.

*10. Thirty-three members of the European Parliament acting collectively*

56. The interveners pointed out that the Court was not a constitutional court and had to respect the principle of subsidiarity and recognise a particularly broad margin of appreciation in favour of Contracting States not only regarding the relationship between the State and religion but also where they carried out their functions in the area of education and teaching. In their view, by taking a decision whose effect would be to make it compulsory to remove religious symbols from State schools, the Grand Chamber would be sending a radical ideological message. They added that it was clear from the Court's case-law that a State which, for reasons deriving from its history or its tradition, showed a preference for a particular religion did not exceed that margin. Accordingly, in their opinion, the display of crucifixes in public buildings did not conflict with the Convention, and the presence of religious symbols in the public space should not be seen as a form of indoctrination but the expression of a cultural unity and identity. They added that in this specific context religious symbols had a secular dimension and should therefore not be removed.

D. The Court's assessment

57. In the first place, the Court observes that the only question before it concerns the compatibility, in the light of the circumstances of the case, of the presence of crucifixes in Italian State-school classrooms with the requirements of Article 2 of Protocol No. 1 and Article 9 of the Convention.

Thus it is not required in this case to examine the question of the presence of crucifixes in places other than State schools. Nor is it for the Court to rule on the compatibility of the presence of crucifixes in State-school classrooms with the principle of secularism as enshrined in Italian law.

58. Secondly, the Court emphasises that the supporters of secularism are able to lay claim to views attaining the “level of cogency, seriousness, cohesion and importance” required for them to be considered “convictions” within the meaning of Articles 9 of the Convention and 2 of Protocol No. 1 (see *Campbell and Cosans v. the United Kingdom*, 25 February 1982, § 36, Series A no. 48). More precisely, their views must be regarded as “philosophical convictions”, within the meaning of the second sentence of Article 2 of Protocol No. 1, given that they are worthy of “respect” in a democratic society”, are not incompatible with human dignity and do not conflict with the fundamental right of the child to education (*ibid.*).

### *1. The case of the first applicant*

#### *a. General principles*

59. The Court reiterates that in the area of education and teaching Article 2 of Protocol No. 1 is in principle the *lex specialis* in relation to Article 9 of the Convention. That is so at least where, as in the present case, the dispute concerns the obligation laid on Contracting States by the second sentence of Article 2 to respect, when exercising the functions they assume in that area, the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions (see *Folgerø and Others v. Norway* [GC], no. 15472/02, § 84, ECHR 2007-VIII, § 84).

The complaint in question should therefore be examined mainly from the standpoint of the second sentence of Article 2 of Protocol No. 1 (see also *Appel-Irrgang and Others v. Germany* (dec.), no. 45216/07, ECHR 2009-...).

60. Nevertheless, that provision should be read in the light not only of the first sentence of the same Article, but also, in particular, of Article 9 of the Convention (see, for example, *Folgerø*, cited above, § 84), which guarantees freedom of thought, conscience and religion, including the freedom not to belong to a religion, and which imposes on Contracting States a “duty of neutrality and impartiality”.

In that connection, it should be pointed out that States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups (see, for example, *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 107, ECHR 2005-XI). That concerns both relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs.

61. The word “respect” in Article 2 of Protocol No. 1 means more than “acknowledge” or “take into account”; in addition to a primarily negative undertaking, it implies some positive obligation on the part of the State (see *Campbell and Cosans*, cited above, § 37).

Nevertheless, the requirements of the notion of “respect”, which appears also in Article 8 of the Convention, vary considerably from case to case, given the diversity of the practices followed and the situations obtaining in the Contracting States. As a result, the Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals. In the context of Article 2 of Protocol No. 1 that concept implies in particular that this provision cannot be interpreted to mean that parents can require the State to provide a particular form of teaching (see *Bulski v. Poland* (dec.), nos. 46254/99 and 31888/02).

62. The Court would also refer to its case-law on the place of religion in the school curriculum (see essentially *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, §§ 50-53, Series A no. 23; *Folgerø*, cited above, § 84; and *Hasan and Eylem Zengin v. Turkey*, no. 1448/04, §§ 51 and 52, ECHR 2007-XI).

According to those authorities, the setting and planning of the curriculum fall within the competence of the Contracting States. In principle it is not for the Court to rule on such questions, as the solutions may legitimately vary according to the country and the era.

In particular, the second sentence of Article 2 of Protocol No. 1 does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum.

On the other hand, as its aim is to safeguard the possibility of pluralism in education, it requires the State, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that the States must not exceed (see judgments cited above in this paragraph, §§ 53, 84 (h) and 52 respectively).

b. Assessment of the facts of the case in the light of the above principles

63. The Court does not accept the Government's argument that the obligation laid on Contracting States by the second sentence of Article 2 of Protocol No. 1 concerns only the content of school curricula, so that the question of the presence of crucifixes in State-school classrooms would fall outside its scope.

It is true that a number of cases in which the Court has examined this provision concerned the content and implementation of the school curriculum. Nevertheless, as the Court has already emphasised, the obligation on Contracting States to respect the religious and philosophical convictions of parents does not apply only to the content of teaching and the way it is provided; it binds them “in the exercise” of all the “functions” – in the terms of the second sentence of Article 2 of Protocol No. 1 – which they assume in relation to education and teaching (see essentially *Kjeldsen, Busk Madsen and Pedersen*, cited above, § 50; *Valsamis v. Greece*, 18 December 1996, § 27, *Reports of Judgments and Decisions* 1996-VI; *Hasan and Eylem Zengin*, cited above, §

49; and *Folgerø*, cited above, § 84). That includes without any doubt the organisation of the school environment where domestic law attributes that function to the public authorities.

It is in that context that the presence of crucifixes in Italian State-school classrooms is to be placed (see Article 118 of royal decree no. 965 of 30 April 1924, Article 119 of royal decree no. 1297 of 26 April 1928 and Articles 159 and 190 of legislative decree no. 297 of 16 April 1994 – paragraphs 14 and 19 above).

64. In general, the Court considers that where the organisation of the school environment is a matter for the public authorities, that task must be seen as a function assumed by the State in relation to education and teaching, within the meaning of the second sentence of Article 2 of Protocol No. 1.

65. It follows that the decision whether crucifixes should be present in State-school classrooms forms part of the functions assumed by the respondent State in relation to education and teaching and, accordingly, falls within the scope of the second sentence of Article 2 of Protocol No. 1. That makes it an area in which the State's obligation to respect the right of parents to ensure the education and teaching of their children in conformity with their own religious and philosophical convictions comes into play.

66. The Court further considers that the crucifix is above all a religious symbol. The domestic courts came to the same conclusion and in any event the Government have not contested this. The question whether the crucifix is charged with any other meaning beyond its religious symbolism is not decisive at this stage of the Court's reasoning.

There is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed.

However, it is understandable that the first applicant might see in the display of crucifixes in the classrooms of the State school formerly attended by her children a lack of respect on the State's part for her right to ensure their education and teaching in conformity with her own philosophical convictions. Be that as it may, the



applicant's subjective perception is not in itself sufficient to establish a breach of Article 2 of Protocol No. 1.

67. The Government, for their part, explained that the presence of crucifixes in State-school classrooms, being the result of Italy's historical development, a fact which gave it not only a religious connotation but also an identity-linked one, now corresponded to a tradition which they considered it important to perpetuate. They added that, beyond its religious meaning, the crucifix symbolised the principles and values which formed the foundation of democracy and western civilisation, and that its presence in classrooms was justifiable on that account.

68. The Court takes the view that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State. The Court must moreover take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development. It emphasises, however, that the reference to a tradition cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols.

As regards the Government's opinion on the meaning of the crucifix, the Court notes that the *Consiglio di Stato* and the Court of Cassation have diverging views in that regard and that the Constitutional Court has not given a ruling (see paragraphs 16 and 23 above). It is not for the Court to take a position regarding a domestic debate among domestic courts.

69. The fact remains that the Contracting States enjoy a margin of appreciation in their efforts to reconcile exercise of the functions they assume in relation to education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions (see paragraphs 61-62 above).

That applies to organisation of the school environment and to the setting and planning of the curriculum (as the Court has already pointed out: see essentially the judgments cited above in the cases of *Kjeldsen, Busk Madsen and Pedersen*, §§ 50-53; *Folgerø*, § 84; and *Zengin*, §§ 51-52; paragraph 62 above). The Court therefore has a duty in principle to respect the Contracting States' decisions in these matters,

including the place they accord to religion, provided that those decisions do not lead to a form of indoctrination (ibid.).

70. The Court concludes in the present case that the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools (see paragraphs 26-28 above) speaks in favour of that approach.

This margin of appreciation, however, goes hand in hand with European supervision (see, for example, *mutatis mutandis*, *Leyla Şahin*, cited above, § 110), the Court's task in the present case being to determine whether the limit mentioned in paragraph 69 above has been exceeded.

71. In that connection, it is true that by prescribing the presence of crucifixes in State-school classrooms – a sign which, whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity – the regulations confer on the country's majority religion preponderant visibility in the school environment.

That is not in itself sufficient, however, to denote a process of indoctrination on the respondent State's part and establish a breach of the requirements of Article 2 of Protocol No. 1.

The Court refers on this point, *mutatis mutandis*, to the previously cited *Folgerø* and *Zengin* judgments. In the *Folgerø* case, in which it was called upon to examine the content of “Christianity, religion and philosophy” (KRL) lessons, it found that the fact that the syllabus gave a larger share to knowledge of the Christian religion than to that of other religions and philosophies could not in itself be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination. It explained that in view of the place occupied by Christianity in the history and tradition of the respondent State – Norway – this question had to be regarded as falling within the margin of appreciation left to it in planning and setting the curriculum (see *Folgerø*, cited above, § 89). It reached a similar conclusion in the context of “religious culture and ethics” classes in Turkish schools, where the syllabus gave greater prominence to knowledge of Islam on the ground that, notwithstanding the State's secular nature, Islam was the majority religion practised in Turkey (see *Zengin*, cited above, § 63).

72. Furthermore, a crucifix on a wall is an essentially passive symbol and this point is of importance in the Court's view, particularly having regard to the principle of neutrality (see paragraph 60 above). It cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities (see on these points *Folgero* and *Zengin*, cited above, § 94 and § 64 respectively).

73. The Court observes that, in its judgment of 3 November 2009, the Chamber agreed with the submission that the display of crucifixes in classrooms would have a significant impact on the second and third applicants, aged eleven and thirteen at the time. The Chamber found that, in the context of public education, crucifixes, which it was impossible not to notice in classrooms, were necessarily perceived as an integral part of the school environment and could therefore be considered “powerful external symbols” within the meaning of the decision in *Dahlab*, cited above (see §§ 54 and 55 of the judgment).

The Grand Chamber does not agree with that approach. It considers that that decision cannot serve as a basis in this case because the facts of the two cases are entirely different.

It points out that the case of *Dahlab* concerned the measure prohibiting the applicant from wearing the Islamic headscarf while teaching, which was intended to protect the religious beliefs of the pupils and their parents and to apply the principle of denominational neutrality in schools enshrined in domestic law. After observing that the authorities had duly weighed the competing interests involved, the Court held, having regard above all to the tender age of the children for whom the applicant was responsible, that the authorities had not exceeded their margin of appreciation.

74. Moreover, the effects of the greater visibility which the presence of the crucifix gives to Christianity in schools needs to be further placed in perspective by consideration of the following points. Firstly, the presence of crucifixes is not associated with compulsory teaching about Christianity (see the comparative-law information set out in *Zengin*, cited above, § 33). Secondly, according to the indications provided by the Government, Italy opens up the school environment in parallel to other religions. The Government indicated in this connection that it was not forbidden for pupils to wear Islamic headscarves or other symbols or apparel having a religious connotation; alternative arrangements were possible to help schooling fit in with non-majority religious practices; the beginning and end of

Ramadan were “often celebrated” in schools; and optional religious education could be organised in schools for “all recognised religious creeds” (see paragraph 39 above). Moreover, there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.

In addition, the applicants did not assert that the presence of the crucifix in classrooms had encouraged the development of teaching practices with a proselytising tendency, or claim that the second and third applicants had ever experienced a tendentious reference to that presence by a teacher in the exercise of his or her functions.

75. Lastly, the Court notes that the first applicant retained in full her right as a parent to enlighten and advise her children, to exercise in their regard her natural functions as educator and to guide them on a path in line with her own philosophical convictions (see, in particular, *Kjeldsen, Busk Madsen and Pedersen* and *Valsamis*, cited above, §§ 54 and 31 respectively).

76. It follows from the foregoing that, in deciding to keep crucifixes in the classrooms of the State school attended by the first applicant's children, the authorities acted within the limits of the margin of appreciation left to the respondent State in the context of its obligation to respect, in the exercise of the functions it assumes in relation to education and teaching, the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

77. The Court accordingly concludes that there has been no violation of Article 2 of Protocol No. 1 in respect of the first applicant. It further considers that no separate issue arises under Article 9 of the Convention.

## *2. The case of the second and third applicants*

78. The Court considers that, when read as it should be in the light of Article 9 of the Convention and the second sentence of Article 2 of Protocol No. 1, the first sentence of that provision guarantees schoolchildren the right to education in a form which respects their right to believe or not to believe. It therefore understands why pupils who are in favour of secularism may see in the presence of crucifixes in the

classrooms of the State school they attend an infringement of the rights they derive from those provisions.

However, it considers, for the reasons given in connection with its examination of the first applicant's case, that there has been no violation of Article 2 of Protocol No. 1 in respect of the second and third applicants. It further considers that no separate issue arises in the case under Article 9 of the Convention.

## **II. Alleged violation of article 14 of the convention**

79. The applicants submitted that because the second and third applicants had been exposed to the crucifixes displayed in the classrooms of the State school they attended, all three of them, not being Catholics, had suffered a discriminatory difference in treatment in relation to Catholic parents and their children. Arguing that “the principles enshrined in Article 9 of the Convention and Article 2 of Protocol No. 1 are reinforced by the provisions of Article 14 de la Convention”, they complained of a violation of the latter Article, which provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

80. The Chamber held that, regard being had to the circumstances of the case and the reasoning which had led it to find a violation of Article 2 of Protocol No. 1 taken together with Article 9 of the Convention, there was no cause to examine the case under Article 14 also, whether taken separately or in conjunction with those provisions.

81. The Court, which notes that little argument has been presented in support of this complaint, reiterates that Article 14 of the Convention has no independent existence, since it has effect solely in relation to the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols.

Proceeding on the assumption that the applicants wished to complain of discrimination regarding their enjoyment of the rights guaranteed by Article 9 of the Convention and Article 2 of Protocol No. 1 on account of the fact that they were not adherents of the Catholic religion and that the second and third of them had been exposed to the sight of crucifixes in the classrooms of the State school they attended, the Court does not see in those complaints any issue distinct from those it has already determined under Article 2 of Protocol No. 1. There is accordingly no cause to examine this part of the application.

### For these reasons, the court

1. *Holds*, by fifteen votes to two, that there has been no violation of Article 2 of Protocol No. 1 and that no separate issue arises under Article 9 of the Convention;
2. *Holds* unanimously that there is no cause to examine the complaint under Article 14 of the Convention.

### Smiselno dopolnite s pojmi na koncu besedila:

V zadevi *Lautsi in drugi proti Italiji* je ESČP obravnavalo vprašanje, ali obvezna prisotnost \_\_\_\_\_ v učilnicah italijanskih javnih šol krši pravice staršev in otrok po EKČP. Prva pritožnica, Soile Lautsi, je nasprotovala temu, da sta njena sinova v šolskem letu 2001/2002 obiskovala \_\_\_\_\_ šolo, v kateri je bil v vsaki učilnici nameščen križ.

Pritožnica je pred italijanskimi sodišči zatrjevala, da takšna ureditev nasprotuje načelu \_\_\_\_\_ države, verski svobodi in nepristranskosti javnih oblasti. Italijanska sodišča so njeno zahtevo zavrnila. \_\_\_\_\_ je presodil, da križ v italijanskem kontekstu ni le verski simbol, temveč tudi simbol zgodovinskega, kulturnega in ustavnega izročila Italije.

Pred ESČP so pritožniki zatrjevali kršitev \_\_\_\_\_ člena Protokola št. 1, ki državi nalaga, da pri izobraževanju spoštuje pravico staršev do vzgoje otrok v skladu z njihovimi verskimi in filozofskimi prepričanji. Sklicevali so se tudi na \_\_\_\_\_ člen EKČP, ki varuje svobodo mišljenja, vesti in vere, ter zaradi zatrjevane diskriminacije na \_\_\_\_\_ člen EKČP.

Senat ESČP je leta 2009 odločil, da je Italija kršila EKČP. Izhajal je iz stališča, da je križ predvsem \_\_\_\_\_ simbol in da njegova obvezna ter vidna prisotnost v učilnici lahko ustvarja vtis, da država podpira določeno veroizpoved. Po presoji senata mora biti javna šola prostor \_\_\_\_\_ nevtralnosti, saj so učenci v šolskem okolju posebej občutljivi za sporočila javne oblasti.

Veliki senat je leta 2011 odločil drugače. Najprej je poudaril, da je treba zadevo presojati predvsem po \_\_\_\_\_ členu Protokola št. 1. Po mnenju Velikega senata vprašanje organizacije šolskega prostora spada med funkcije države na področju \_\_\_\_\_ in izobraževanja.

Veliki senat je zaključil, da je križ predvsem \_\_\_\_\_ simbol. Vendar je poudaril, da subjektivni občutek pritožnice, da država s tem ne spoštuje njenih prepričanj, sam po sebi še ne zadošča za ugotovitev \_\_\_\_\_ EKČP. Presoditi je treba, ali ureditev predstavlja obliko državne \_\_\_\_\_ ali prozelitizma.

Odločilno je bilo, da med državami članicami Sveta Evrope ni bilo \_\_\_\_\_ o vprašanju verskih simbolov v javnih šolah. Nekatere države takšne simbole prepovedujejo, nekatere jih dopuščajo ali celo predpisujejo, v večini držav pa to vprašanje ni posebej urejeno. Zato je ESČP Italiji priznalo široko \_\_\_\_\_.

Veliki senat je poudaril, da križ na steni učilnice predstavlja predvsem \_\_\_\_\_ simbol. To pomeni, da njegovega vpliva ni mogoče enačiti z obveznim verskim poukom, molitvijo, udeležbo pri verskih obredih ali neposrednim verskim nagovarjanjem učencev. Sama večja \_\_\_\_\_ krščanstva v šolskem prostoru zato še ne pomeni indoktrinacije.

Za presojo je bilo pomembno tudi, da pritožniki niso zatrjevali, da bi učitelji križ uporabljali za \_\_\_\_\_ ravnanje ali da bi bili otroci izpostavljeni pritisku, naj sprejmejo katoliško vero. Prav tako ni bilo ugotovljeno, da bi šola zavračala učence drugih veroizpovedi ali neverne učence. Vlada je nasprotno poudarjala, da šolski prostor dopušča tudi nekatere izraze \_\_\_\_\_ verskih prepričanj.

Veliki senat je zato odločil, da Italija z ohranitvijo križev v učilnicah ni prekoračila svojega \_\_\_\_\_ presoje. ESČP je s petnajstimi glasovi proti dvema ugotovilo, da ni prišlo do kršitve \_\_\_\_\_ člena Protokola št. 1.

Pritožniki so zatrjevali tudi kršitev \_\_\_\_\_ člena EKČP, ker naj bi bili kot nekristjani postavljeni v slabši položaj od katoliških staršev in otrok. ESČP tega očitka ni posebej obravnavalo, saj ni odpiral vprašanja, ločenega od že presojene pravice do izobraževanja in spoštovanja starševskih prepričanj.

Posebnost zadeve je bila zelo velika vloga \_\_\_\_\_. V postopku pred Velikim senatom so sodelovale številne države, nevladne organizacije in skupina članov Evropskega parlamenta. Države intervenientke so večinoma poudarjale pomen nacionalne tradicije, kulturne identitete in širokega polja proste presoje. Nekatere nevladne organizacije pa so nasprotno opozarjale, da obvezna prisotnost križa v javni šoli ogroža načelo \_\_\_\_\_ in verske nevtralnosti države.

**Možni pojmi:** sekularnosti, 14., verski, polje proste presoje, križev, indoktrinacije, 2., soglasja, drugih, 9., državno, Consiglio di Stato, verske, pasivni, intervenientov, vzgoje, 2., prozelitistično, kršitve, sekularne, vidnost, 14., verski, polja proste presoje, 9., 2

## Vprašanja

- Kaj je bilo osrednje pravno vprašanje v obravnavani zadevi?
- Kako sta se razlikovali odločitvi senata iz leta 2009 in Velikega senata iz leta 2011?
- Zakaj je Veliki senat priznal, da je križ predvsem verski simbol, vendar kljub temu ni ugotovil kršitve EKČP?
- Menite, da je oznaka križa kot »pasivnega simbola« prepričljiva, če upoštevamo, da je prisotnost v šolskem prostoru obvezna, učenci pa so v njem posebej dovzetni za simbolna sporočila države?
- Kje je po sodbi meja med dopustno prisotnostjo verskega simbola in nedopustno indoktrinacijo?
- Zakaj je bilo pomembno, da pritožniki niso zatrjevali konkretnega prozelitističnega ravnanja učiteljev?
- Kako je ESČP povežalo načelo državne nevtralnosti z idejo širokega polja proste presoje držav?
- Kakšna je bila vloga intervenientov v postopku pred Velikim senatom in katere glavne usmeritve argumentov so zastopali?





# Mladina proti Sloveniji z dne 17. aprila 2014, št. 20981/10

V zadevi Mladina d.d. proti Sloveniji Evropsko sodišče za človekove pravice (peti oddelek) kot senat v sestavi:

Mark Villiger, *predsednik*,  
Angelika Nußberger,  
Boštjan M. Zupančič,  
Ann Power-Forde,  
Ganna Yudkivska,  
Helena Jäderblom,  
Aleš Pejchal, *sodniki*,  
in Claudia Westerdiek, *sodna tajnica oddelka*,

po razpravi, zaprti za javnost, ki je bila 25. marca 2014,  
izreka to sodbo, sprejeto navedenega dne:

## Postopek

1. Zadeva se je začela s pritožbo (št. 20981/10) proti Republiki Sloveniji, ki jo je na podlagi 34. člena Konvencije o varstvu človekovih pravic in temeljnih svoboščin (v nadaljnjem besedilu: konvencija) pri Sodišču 8. aprila 2010 vložila slovenska družba Mladina d.d. Ljubljana (v nadaljnjem besedilu: pritožnica).



2. Pritožnico je zastopala Nina Zidar Klemenčič, odvetnica iz Ljubljane. Slovensko vlado (v nadaljnjem besedilu: vlada) je zastopala Nataša Pintar Gosenca, državna pravobranilka.

3. Pritožnica je trdila, da ji je bila kršena njena pravica do svobode izražanja zaradi naložitve plačila odškodnine s strani domačih sodišč za izjave, ki jih je objavila v svoji reviji.

4. Vlada je bila o pritožbi obveščena 10. oktobra 2012.

## Dejstva

### I. Okoliščine zadeve

5. Pritožnica, zasebna družba Mladina d.d. Ljubljana, z registriranim sedežem v Ljubljani, je izdajateljica tednika *Mladina*.

6. Državni zbor RS (v nadaljnjem besedilu: Državni zbor) je 16. in 22. junija 2005 obravnaval predlog zakona o istospolnih partnerskih skupnostih. Na zadnji navedeni datum je sprejel Zakon o registraciji istospolne partnerske skupnosti (v nadaljnjem besedilu: zakon). Med parlamentarno razpravo o tem vprašanju so nekateri poslanci Slovenske nacionalne stranke (v nadaljnjem besedilu: SNS), ki je nasprotovala zakonskemu priznanju istospolnih partnerstev, prevzeli besedo, da bi izrazili svoje nestrinjanje s predlaganim predlogom zakona.

7. 27. junija 2005 je revija *Mladina* objavila članek, dolg eno stran, z naslovom "Sprejeta registracija istospolne partnerske skupnosti" in uvodnim odstavkom: "Desnica je vsa ponosna, za nevladne organizacije pa je zakon v nesoglasju z ustavo", ter s tem povzela parlamentarno razpravo pred sprejetjem zakona. Prvi trije odstavki članka so se glasili:

"Druga obravnava predloga zakona o registraciji istospolne partnerske skupnosti je prejšnji teden v parlamentu izzvenela predvsem kot mala šola ozkosrčnosti in kamene dobe stanja duha. Naši izvoljeni reprezentativci so bili glede zavračanja amandmajev/konkretnih pravic istospolno usmerjenih državljanov tako marljivi, da so sklenili zakon v tretjič dokončno izglasovati kar v sklopu iste seje. V sredo se je to z rezultatom 44 proti 3 tudi zgodilo..."

SNS-ovi gunslingerji so ... najbolj blesteli med obrazložitvijo svojih glasov. [B.Z.] je v imenu poslanske skupine še enkrat natrosil vse neumnosti iz prejšnje obravnave (zakon je povsem nepotreben, izsilili so ga marginalci, poskrbimo prej raje za koga drugega) in se dotaknil očitkov na to, da je prejšnji teden uporabljal izraz pedri in lezbijke: *‘Iz okolja, iz katerega prihajam, jim pač pravimo "pedri" in pa "lezbijke". Na Primorskem [pokrajina v Sloveniji] so to "kulotini", v Ljubljani pa "geji". Sem pač človek, ki, ko pride v Ljubljano, ne spremeni svojega jezičenja. Pač na Štajerskem [druga slovenska pokrajina] mam pedre in lezbijke.*

[S.P.], tudi SNS, je z igrivim nasmeškom zastavil, da ni v celi dvorani verjetno nikogar, ki bi želel imeti *‘svoj plod ljubezni, ki bi bil tako opredeljen, kot danes glasujemo s pravicami... Z drugimi besedami, nihče od nas ne bi želel imeti sina ali pa hčerke, ki bi se opredelil za tako zakonsko zvezo’*. Če grejo naši brezdomci s trebuhom za kruhom na Finsko ali še dalj, pa naj se grejo tja poročat tudi te gospe in gospodje. Najbolj bi bili oškodovani otroci tega zakona, kajti: *‘Predstavljajte si otroka v šoli, po katerega bi prišel oče, ki bi ga pozdravil: ‘Čavčiii! Prišel sem poteeee! Si že oblečen?’* Svojo imenitno domislico je pospremil s kavarniško mimiko, ki naj bi verjetno nazorno ilustrirala pravoverno pojmovanje nekega tipičnega poženščenega in prenaresenega pederuharja, v resnici pa je izpadla zgolj kot [prikazovala je] normalni domet cerebralnega bankrotiranca, ki ima srečo, da živi v državi s tako omejenim bazenom kadrov, da se lahko človek njegovih karakteristik znajde celo v parlamentu, ko pa ne bi mogel biti v neki nominalnega spoštovanja vredni deželi niti hišnik povprečno urbane osnovne šole."

8. V drugi polovici članka je avtor najprej opisal odziv drugih poslancev na govore članov SNS in zadnja dva odstavka sklenil s stališči, ki so jih o novem zakonu izrazile nevladne organizacije, ki so v glavnem obžalovale dejstvo, da je zakon istospolnim parom dodelil zelo omejen nabor pravic. Zaključil je s sporočilom predstavnikov teh organizacij, da bodo novi zakon izpodbijali pred ustavnim sodiščem.

9. 26. avgusta 2005 je S.P., član SNS, na Okrožno sodišče v Ljubljani proti pritožnici vložil tožbo zaradi razžalitve časti in ugleda in trdil, da je zaradi napadalnosti članka utrpel hude duševne bolečine. Trdil je, da je upodobitev njega kot "cerebralnega bankrotiranca" bila objektivno in subjektivno žaljiva z edinim namenom njegovega omalovaževanja.

10. 20. septembra 2005 je pritožnica odgovorila, da je njeno ravnanje bilo zakonito, saj je bilo treba doseči ravnovesje med pravico S.P. do časti in ugleda in njeno pravico do svobode izražanja. Sklicevala se je na standarde in sodno prakso Evropskega sodišča za človekove pravice v zvezi s pravico tiskanih medijev do poročanja o zadevah javnega interesa. Pritožnica je menila, da so izjave S.P. v parlamentarni razpravi dosegle raven žaljivega napada, ki je poniževal istospolno usmerjene ljudi in posledica katerega je bil kritični odziv, objavljen v *Mladini*. Kljub vsemu namen kritičnega članka ni bil omalovaževanje S.P. kot osebe, temveč je članek predstavljal odziv na njegove skrajne izjave s podobnimi izrazi.

11. 28. februarja 2006 je Okrožno sodišče v Ljubljani opravilo poravnalni narok, ki ni bil uspešen.

12. 16. maja 2006 je bil opravljen še en narok, na katerem je sodišče zaslišalo S.P., ki je trdil, da s svojimi pripombami ni užalil nikogar in da kaj takega tudi ni želel storiti. Žaljive pripombe iz *Mladine* je razumel kot napad na njegovo osebo in so ga zelo prizadele, zlasti zaradi tega, ker je postal predmet posmeha v svoji lokalni skupnosti.

13. Istega dne je Okrožno sodišče v Ljubljani izdalo sodbo, v kateri je delno ugodilo zahtevku S.P. in odredilo, da mu mora pritožnica plačati odškodnino v znesku 700.000 slovenskih tolarjev (2.921,05 evrov (EUR)). Pritožnici je bilo tudi odrejeno, da mora v *Mladini* objaviti uvod in izrek sodbe. Preostali del zahtevka S.P. je bil zavrnjen. Sodišče je priznalo, da je pritožnica imela pravico do objave kritičnih pripomb glede obnašanja S.P. v parlamentarni razpravi. Vendar se je izraz "cerebralni bankrotiranec" nanašal na njegove osebne lastnosti in je bil zaradi tega žaljiv. Po mnenju sodišča raba takega žaljivega jezika ni bila namenjena samo posredovanju informacij javnosti. Poleg tega opis iz članka ni predstavljal resnega kritičnega obravnavanja dela S.P.

14. Glede obnašanja S.P. je sodišče presodilo, da so kretnje, ki jih je uprizoril pri posnemanju istospolno usmerjenega moškega, preprosto spominjale na kretnje, ki jih uporabijo igralci za prikaz homoseksualnosti. Sodišče govora in vedenja S.P. ni prepoznalo kot žaljivega za istospolno usmerjene ljudi in ni menilo, da bi bil njegov cilj spodbujanje predsodkov in nestrpnosti proti njim. Presodilo je, da je S.P. samo izrazil svoje mnenje, ki ga – čeprav morda napačno – ni bilo mogoče šteti za skrajno in s katerim bi bilo mogoče utemeljevati obravnavanje v spornem članku.

15. Obe stranki sta se proti tej sodbi pritožili na Višje sodišče v Ljubljani.

16. Višje sodišče v Ljubljani je 24. januarja 2007 zavrnilo pritožbo pritožnice. Ugodilo je pritožbi S.P. glede besedila, ki bi ga *Mladina* morala objaviti, da obvesti javnost o sodbi, njegov zahtevek za višjo odškodnino pa je zavrnilo. Višje sodišče je potrdilo ugotovitev Okrožnega sodišča, da izjave v spornem članku predstavljajo žaljivo oceno osebnosti S.P., česar ni bil dolžan prenašati. Nadalje je sodišče presodilo, da tudi če bi govor S.P. bil žaljiv do istospolno usmerjenih, to ne bi moglo upravičiti grobega odziva pritožnice, ki je bil uperjen na nanj osebno.

17. 10. novembra 2007 je pritožnica vložila ustavno pritožbo na Ustavno sodišče. Med drugim je trdila, da je sporni članek treba upoštevati kot politično satiro, v kateri je avtor izrazil svoje mnenje o obnašanju S.P. v javni parlamentarni razpravi. Trdila je tudi, da besede "normalni domet cerebralnega bankrotiranca" niso bile uperjene proti S.P. kot osebi, temveč proti njegovi upodobitvi kretenj, domnevno značilnih za istospolno usmerjene moške.

18. 10. septembra 2009 je Ustavno sodišče z večino šestih glasov proti trem zavrnilo ustavno pritožbo pritožnice in presodilo, da so nižja sodišča dosegla pravično ravnovesje med pritožnično pravico do svobode izražanja in osebnim dostojanstvom S.P. Sodišče je priznalo velik obseg varstva pravice do svobode tiska zlasti pri poročanju o stvareh širokega javnega interesa, vendar je na podlagi dejstev iz obravnavane zadeve ugotovilo, da so nižja sodišča primerno uporabila merila iz svoje lastne sodne prakse in sodne prakse Evropskega sodišča za človekove pravice. Sodišče je zavrnilo trditve pritožnice, po kateri naj cilj zadevne kritike ne bi bil S.P. kot oseba, temveč njegovo oponašanje istospolno usmerjenih posameznikov, in sklenilo, da bi povprečni bralec zadevno pripombo razumel kot oceno inteligentnosti in osebnih lastnosti S.P.

19. Ustavno sodišče je zavrnilo tudi pritožničin argument, da bi članek bilo treba obravnavati kot satiro, saj je iz besedila bilo razvidno, da je bil namenjen obveščanju javnosti o vsebini parlamentarne razprave in izražanju kritičnega mnenja o govorih posameznih poslancev. Glede trditve pritožnice, da je žaljiva navedba bila odziv na žaljive pripombe S.P., je Ustavno sodišče priznalo, da je ostrejša kritika v takih primerih sicer lahko dovoljena, vendar samo takrat, če je za to na voljo dovolj podlage v dejstvih. Ker sodišče ni ugotovilo pomenske povezave med govorom S.P. in oceno njegovih intelektualnih sposobnosti, je sklenilo, da kritika ni bila upravičena. Sporni članek in avtorjeva žaljiva karakterizacija S.P. po mnenju Ustavnega sodišča nista prispevala k boljši obveščenosti ljudi ali k družbeno odgovorni javni razpravi o položaju istospolno usmerjenih posameznikov.

20. Ustavni sodnik C.R. je podal odklonilno ločeno mnenje, v katerem se je skliceval na vzdušje splošne strpnosti proti nestrpnim in žaljivim izjavam zoper istospolno usmerjene ljudi. Izrazil je mnenje, da so nižja sodišča bila pristranska in tudi, da Ustavno sodišče ni primerno uporabilo standardov glede svobode tiska, ki so se izoblikovali v sodni praksi Evropskega sodišča za človekove pravice.

## **II. Upoštevana domača zakonodaja**

### **A. Ustava**

21. Upoštrevane ustavne določbe se glasijo:

15. člen

(uresničevanje in omejevanje pravic)

"...

Človekove pravice in temeljne svoboščine so omejene samo s pravicami drugih in v primerih, ki jih določa ta ustava.

..."

34. člen

(pravica do osebnega dostojanstva in varnosti)

"Vsakdo ima pravico do osebnega dostojanstva in varnosti."

35. člen

(varstvo pravic zasebnosti in osebnostnih pravic)

"Zagotovljena je nedotakljivost človekove telesne in duševne celovitosti, njegove zasebnosti ter osebnostnih pravic."

39. člen

(svoboda izražanja)

"Zagotovljena je svoboda izražanja misli, govora in javnega nastopanja, tiska in drugih oblik javnega obveščanja in izražanja. Vsakdo lahko svobodno zbira, sprejema in širi vesti in mnenja.

..."

## B. Veljavno civilno pravo

22. 179. člen Obligacijskega zakonika, ki predstavlja zakonsko podlago za dodelitev odškodnine za nepremoženjsko škodo, določa, da se odškodnina lahko dodeli v primeru kršitve osebnostnih pravic posameznika, če okoliščine primera, zlasti pa stopnja in trajanje s tem povzročene bolečine in strahu, opravičujejo dodelitev. Poleg tega lahko sodišče, če gre za kršitev osebnostne pravice, kot je ugled, na podlagi 178. člena Obligacijskega zakonika na stroške tožene stranke odredi objavo sodbe oziroma popravka ali popravo ali umik sporne izjave.

## Pravo

### I. Zatrjevana kršitev 10. člena konvencije

23. Pritožnica se je pritožila, da so odločitve domačih sodišč kršile njeno pravico do svobode izražanja, ki jo določa 10. člen konvencije, ki se glasi:

"1. Vsakdo ima pravico do svobode izražanja. Ta pravica obsega svobodo mišljenja ter sprejemanja in sporočanja informacij in idej brez vmešavanja javne oblasti in ne glede na meje...

2. Izvrševanje teh svoboščin vključuje tudi dolžnosti in odgovornosti in je zato lahko podrejeno obličnosti in pogojem, omejitvam ali kaznim, ki jih določa zakon, in ki so nujne v demokratični družbi ... za varovanje ugleda ali pravic drugih ljudi..."

### A. Sprejemljivost

24. Sodišče ugotavlja, da pritožba ni očitno neutemeljena v smislu točke a tretjega odstavka 35. člena konvencije. Prav tako ugotavlja, da ni nesprejemljiva niti iz katerih koli drugih razlogov. Torej jo je treba razglasiti za sprejemljivo.

### B. Utemeljenost

#### 1. Navedbe strank

#### a) Pritožnica



25. Pritožnica je navedla, da je Sodišče že ugotovilo, da so na splošno žaljivi izrazi kot "idiot" ali "fašist" sprejemljivi kot kritika v nekaterih okoliščinah. Glede tega je poudarila, da je bil S.P., takratni poslanec, javna osebnost in da je sporni članek, ki se je nanašal na zakonsko ureditev istospolnih razmerij, nedvomno prispeval k razpravi o pomembni zadevi javnega interesa.

26. V zvezi s kontekstom sporne izjave je pritožnica trdila, da je, prvič, javna razprava o zakonskem priznavanju istospolnih razmerij bila izpostavljena nenehnim nenaklonjenim in pogosto diskriminacijskim pripombam desnih strank, med katerimi je bila tudi SNS. Po mnenju pritožnice je sporna navedba bila odziv na diskriminacijski jezik in homofobične stereotipe, ki so jih uporabljali S.P. in njegovi kolegi. Pritožnica je menila, da je nesprejemljivo, da domača sodišča niso bila pripravljena razkriti dejanskega pomena škodljivih stereotipov in so jih namesto tega uporabila kot opravičilo za poseg v njeno pravico do svobode izražanja. Po njenem mnenju se je S.P. gotovo zavedal tega, da bi ga njegovo ravnanje lahko izpostavilo hudi kritiki velikega dela javnosti. Poleg tega je glede na celoten kontekst članka pritožnica menila, da je sporna vrednostna sodba kljub vsemu imela zadostno podlago v dejstvih.

27. Nadalje je trdila, da tudi če bi sporna navedba lahko bila obravnavana kot objektivno žaljiva, je bila izraz avtorjevega satiričnega sloga, kar je priznala tudi vlada. Satirične upodobitve dogodkov, ljudi in njihovih izjav so uporabljene v mnogih delih članka in ne samo v odstavku o S.P. Po pritožničinem mnenju se je zaradi tega sleherni bralec zavedal, da so avtorjeve navedbe vsebovale določeno stopnjo pretiravanja. Na koncu je pritožnica trdila, da domača sodišča niso primerno ocenila konteksta, v katerem je bila zapisana sporna navedba in da niso upoštevala spornega vedenja S.P. Po pritožničinem mnenju zato niso vzpostavila pravičnega ravnovesja med njeno pravico do svobode izražanja in pravico S.P. do njegovega ugleda.

## **b) Vlada**

28. Vlada je priznala, da je naložitev plačila odškodnine pritožnici pomenila poseg v njeno pravico do svobode izražanja in poudarila, da je ta poseg imel zakonsko podlago – 178. in 179. člen Obligacijskega zakonika – in je pri tem sledil enemu od legitimnih ciljev iz drugega odstavka 10. člena konvencije, namreč varovanju ugleda ali pravic drugih ljudi. Glede nujnosti posega je vlada trdila, da so domača sodišča pazljivo pretehtala obe nasprotujoči si pravici, namreč pritožnično pravico do

svobode izražanja in pravico S.P. do njegovega ugleda, ob upoštevanju dejstva, da je izvajanje obeh pravic bilo mogoče le v omejenem obsegu.

29. Glede dejavnikov, ki so jih upoštevala domača sodišča pri iskanju zgoraj omenjenega ravnovesja, je vlada najprej navedla, da je sporni članek vseboval nekaj netočnih in zavajajočih informacij. Med drugim je novinar izpustil navedbo, da je posnemanje istospolno usmerjenega moškega, ki v šolo pride iskat svojega otroka, spremljala razlaga, da bi se tak otrok počutil zasmehovanega in ponižanega. Po mnenju vlade bi omenjeni zadnji del izjave S.P. prispeval k uravnoteženju uvodnega dela in zadevo predstavil v drugačni luči.

30. Vlada je poudarila, da je nepopolna predstavitev govora S.P. v Državnem zboru šla še dlje, saj je članek vseboval grobe in objektivno žaljive pripombe o osebnosti S.P. in o njegovih osebnostnih in intelektualnih lastnostih. V tej zvezi je trdila, da bi celo vrednostne sodbe morale imeti zadostno podlago v dejstvih. V obravnavani zadevi take podlage ni bilo. Zato samo dejstvo, da je S.P. nasprotoval predlaganemu zakonu, četudi morebiti na nesprejemljiv način, ni omogočalo izoblikovanje kakršnega koli posebnega zaključka o njegovih osebnostnih ali intelektualnih sposobnostih, čeprav je bil politik in javna osebnost in se je kot tak moral zavedati, da bo izpostavljen večji kritiki svojega dela kot običajni posameznik.

31. Glede trditve pritožnice, da je bil kritični članek reakcija na neprimerno ravnanje S.P., kar domača sodišča niso upoštevala, je vlada poudarila, da so sodišča govorni nastop S.P. dejansko preučila. Prvostopenjsko sodišče je pregledalo video posnetke govora S.P. v Državnem zboru in ga ocenilo kot posnemanje kretenj in govorjenja istospolno usmerjenega moškega. Po mnenju tega sodišča njegovih besed ni bilo razumeti, kot da spodbujajo predsodke in ljudi hujskajo proti istospolno usmerjenim ljudem, temveč tako, da preprosto izražajo njegove lastne, četudi negativne poglede o takih posameznikih. Poleg tega je bil članek objavljen pet dni po razpravi v Državnem zboru, tako da je imel avtor na voljo dovolj časa, da bi se distanciral od dogodka in da bi o razpravi poročal na način, ki se od njega pričakuje.

32. V nadaljevanju se je vlada glede pritožnične trditve, da je bil njen članek napisan v satiričnem slogu, sklicevala na odločbo Ustavnega sodišča, po kateri je bil, čeprav so nekateri deli bili napisani satirično, članek kot celota namenjen obveščanju javnosti o parlamentarni razpravi v zvezi s predlaganim zakonom, o udeležencih v razpravi, glasovanju, in tako naprej.

33. Ob koncu je vlada poudarila, da v tej zadevi ni bilo kazenskega pregona, temveč samo odškodninski zahtevek. S.P. je bila prisojena odškodnina v znesku 2.921,05 EUR, pritožnici pa je bilo odrejeno, da mora v svoji reviji objaviti uvod in izrek sodbe. Po vladinem mnenju plačilo odškodnine in objavo sodbe ni mogoče šteti kot preveliko breme za pritožnico.

## **2. Presoja Sodišča**

34. Sodišče ocenjuje, in to med strankama ni sporno, da so odločitve domačih sodišč, zoper katere je pritožnica vložila pritožbo, pomenile "poseg" v izvrševanje njene pravice do svobode izražanja.

35. Tak poseg pomeni kršitev konvencije, če ne izpolnjuje zahtev iz drugega odstavka 10. člena konvencije. Zato je treba ugotoviti, ali je poseg bil "predpisan z zakonom", ali je sledil enemu ali več legitimnim ciljem iz drugega odstavka 10. člena in ali je bil "nujen v demokratični družbi" zaradi doseganja teh ciljev.

### **a) Zakonitost in legitimni cilj**

36. Sodišče ugotavlja, da je bil očitani poseg predpisan z zakonom, namreč s 178. in 179. členom Obligacijskega zakonika, in da je bil namenjen doseganju legitimnega cilja, navedenega v drugem odstavku 10. člena konvencije, namreč "varovanju ugleda ali pravic drugih ljudi".

### **b) Nujnost posega**

37. Sodišče mora preučiti, ali je bil poseg "nujen v demokratični družbi".

38. Naloga Sodišča pri opravljanju nadzorne funkcije ni nadomestiti domače organe, temveč glede na 10. člen konvencije oceniti odločbe, ki so jih ti sprejeli v mejah njihove proste presoje (glej *Fressoz in Roire proti Franciji* [VS], št. 29183/95, 45. odstavek, ESČP 1999-I). Sodišče mora odločiti, ali so bili razlogi, ki so jih zaradi upravičenja posega navedli domači organi, "ustrezni in zadostni" in ali je bil sprejeti ukrep "sorazmeren z legitimnimi cilji" (glej *Chauny in drugi proti Franciji*, št. 64915/01, 70. odstavek, ESČP 2004-VI). Pri tem se mora Sodišče prepričati, da so domači organi uporabili standarde, ki so skladni z načeli iz 10. člena konvencije, poleg tega

pa še, da imajo njihove odločitve podlago na sprejemljivi oceni relevantnih dejstev (med številnimi drugimi zadevami glej *Zana proti Turčiji*, 25. november 1997, 51. odstavek, *Poročila o sodbah in sklepih* 1997-VII).

39. V obravnavani zadevi je pritožnica v svoji reviji objavila članek, ki je ostro kritiziral S.P., takrat poslanca Državnega zbora, zaradi njegovih pripomb in zlasti njegovega obnašanja med parlamentarno razpravo o zakonski ureditvi istospolnih razmerij. Sporna izjava je bila objavljena v tisku, ki ima po mnenju Sodišča ključno vlogo v demokratični družbi. Čeprav se od novinarjev zahteva spoštovanje nekaterih omejitev, zlasti v zvezi z ugledom in pravicami drugih ljudi, je njihova naloga sporočanje – na način, ki je skladen z njihovimi obveznostmi in odgovornostjo – informacij in misli o vseh zadevah javnega interesa (med številnimi drugimi zadevami glej *Scharsach in News Verlagsgesellschaft proti Avstriji*, št. 39394/98, 30. odstavek, ESČP 2003-XI).

40. Poleg tega je bila sporna izjava dana v okviru politične razprave o vprašanju, ki je v javnem interesu, kjer je glede na drugi odstavek 10. člena konvencije sprejemljivih le malo omejitev (med številnimi drugimi zadevami glej *Süreke proti Turčiji* (št. 1) [VS], št. 26682/95, 61. odstavek, ESČP 1999-IV), in je bila uperjena proti politiku. Sodišče je ob številnih priložnostih poudarilo, da mora politik v tem pogledu pokazati večjo stopnjo strpnosti kot običajni posameznik, še zlasti kadar sam daje javne izjave, ki utegnejo biti podvržene kritiki (med številnimi drugimi zadevami glej *Lingens proti Avstriji*, 8. julij 1986, 42. odstavek, Serija A št. 103; *Oberschlick proti Avstriji* (št. 2), 1. julij 1997, 29. odstavek, *Poročila* 1997-IV; in *Lopes Gomes da Silva proti Portugalski*, št. 37698/97, 30. odstavek, ESČP 2000-X). V tej povezavi Sodišče ponovno poudarja, da novinarska svoboda vključuje tudi uporabo določene stopnje pretiravanja ali celo provokacije ali, z drugimi besedami, določeno čezmernost navedb (glej *Lopes Gomes da Silva*, navedeno zgoraj, 34. odstavek, in *Mamčre proti Franciji*, št. 12697/02, 25. odstavek, ESČP 2006-XIII).

41. Sodišče ugotavlja, da so domača sodišča sicer priznala pomembnost pritožnične svobode izražanja in njene pravice do objavljanja kritičnih pripomb o S.P. (glej 12. in 17. odstavek zgoraj). Kljub temu so zagovarjala stališče, da je označitev parlamentarnega izvajanja S.P. kot "normalni domet cerebralnega bankrotiranja" predstavljala žaljivo oceno njegove osebnosti in da je ta preseгла meje dovoljene kritike.

42. Po mnenju Sodišča so bili razlogi, ki so jih navedla domača sodišča, relevantni za preizkus nujnosti, ki se opravi v skladu z drugim odstavkom 10. člena konvencije. V nadaljevanju bo preučilo, ali so bili tudi zadostni.

43. Sodišče v zvezi s tem ponovno poudarja, da je treba odločitve domačih sodišč preučiti v luči zadeve kot celote, vključno z vsebino pripomb proti pritožnici in v kontekstu, v katerem so nastale (glej *News Verlags GmbH & Co. KG proti Avstriji*, št. 31457/96, 52. odstavek, ESČP 2000-I). Sodišče soglaša, da je bil opis ravnanja S.P. kot "cerebralnega bankrotiranca", ki v državi z manj omejenimi človeškimi viri ne bi mogel dobiti dela niti kot hišnik osnovne šole, vsekakor skrajn in ga je legitimno šteti za žaljivega. Vendar je ugotoviti, da sporna pripomba predstavlja vrednostno sodbo, kar priznava tudi vlada. Res je, da je ob odsotnosti kakršnih koli dejstev tudi vrednostne sodbe mogoče šteti za skrajne. Vendar so bila v tej zadevi dejstva, na katerih temelji sporna izjava, precej podrobno opisana: razen zaključne pripombe je bil govor S.P. v Državnem zboru naveden skoraj v celoti skupaj z omembo spremljajočega posnemanja kretenj istospolno usmerjenega moškega. Temu opisu je sledila avtorjeva pripomba, ki po mnenju Sodišča ni bila samo vrednostna sodba, temveč je imela tudi značaj metafore. V okviru tega, kar je bilo videti kot intenzivna razprava, v kateri so bila mnenja izražena z le malo omejitvami (glej 7. in 8. odstavek zgoraj), si Sodišče sporno izjavo bolj kot dejansko oceno intelektualnih sposobnosti S.P. razlaga kot izraz močnega nestrinjanja in celo prezira do njegovih stališč. V tej luči je opis govora v Državnem zboru in poslančevo obnašanje mogoče šteti za zadosten temelj, na katerem ima podlago avtorjeva izjava.

44. Poleg tega je bila sporna izjava oblikovana kot protiutež pripombam S.P. V svojem govoru je S.P. sledil usmeritvi drugih članov svoje stranke in istospolne ljudi opisoval kot splošno nezaželeni del prebivalstva, najsi gre pri tem za otroke, istospolne pare ali starše. Za podkrepitev svojega stališča je posnemal istospolno usmerjenega moškega s prikazom značilnih kretenj, ki so po mnenju domačih sodišč spominjale na kretnje, ki jih uporabljajo igralci pri upodabljanju istospolno usmerjenih posameznikov. Sodišče kljub vsemu meni, da je posnemanje S.P. mogoče šteti za smešenje, ki spodbuja negativne stereotipe.

45. Na koncu Sodišče ugotavlja, da je bil članek vsaj v delu, ki vsebuje sporno izjavo, uperjeno zoper S.P., ne samo enakovreden njegovim izzivalnim pripombam, temveč jim je ustrezal tudi po slogu, s katerim so bile izražene. Avtorjeva kritična stališča so

bila obarvana s številnimi pomenljivimi in pretiranimi izrazi. Sodišče je že odločilo, da 10. člen varuje tako vsebino kot obliko izražanja (glej *Oberschlick proti Avstriji* (št. 1), 23. maj 1991, 57. odstavek, Serija A št. 204), zato meni, da je celo žaljiv jezik, ki ne sodi v okvir varovanja svobode izražanja, kadar so žalitve njegov edini namen, lahko deležen varovanja po 10. členu, če se uporablja zgolj v slogovne namene (glej *Tuşalp proti Turčiji*, št. 32131/08 in 41617/08, 48. odstavek, 21. februar 2012).

46. Po mnenju Sodišča domača sodišča niso v zadostni meri upoštevala konteksta, v katerem je bila dana sporna izjava, in sloga, ki je bil uporabljen v članku. V luči teh dveh dejavnikov Sodišče meni, da omenjena izjava ne pomeni neupravičenega osebnega napada na S.P. Poleg tega Sodišče v zvezi s tem poudarja, da se politična žalitev pogosto razširi na osebno področje; takšna so tveganja politike in svobodnega razpravljanja o idejah, ki so zagotovilo demokratične družbe (glej *Lopes Gomes da Silva*, navedena zgoraj, 34. odstavek).

47. Ob upoštevanju navedenega Sodišče ocenjuje, da domača sodišča niso prepričljivo dokazala nujne družbene potrebe po umestitvi varovanja ugleda S.P. nad pravico pritožnice do svobode izražanja in nad splošni interes spodbujanja svobode izražanja na področju, ki zadeva vprašanja splošnega javnega interesa. Sodišče ugotavlja, da razlogi, ki so jih navedla domača sodišča, niso bili zadostno utemeljeni za poseg v pritožnično pravico do svobode izražanja. Zato domača sodišča niso vzpostavila pravičnega ravnovesja med nasprotujočima si interesoma. Na ta zaključek ne more vplivati niti dejstvo, da je bil zadevni postopek pravdne in ne kazenske narave.

48. Poseg, nad katerim se pritožuje pritožnica, v skladu z zgoraj navedenim ni bil "nujen v demokratični družbi" v smislu drugega odstavka 10. člena konvencije.

49. Torej je bil 10. člen konvencije kršen.

## II. Uporaba 41. člena konvencije

50. 41. člen konvencije določa:

"Če Sodišče ugotovi, da je prišlo do kršitve konvencije ali njenih protokolov, in če notranje pravo visoke pogodbenice dovoljuje le delno zadoščenje, Sodišče oškodovani stranki, če je potrebno, nakloni pravično zadoščenje."

## A. Škoda

51. Pritožnica je zahtevala 2.921,05 evrov (EUR) za premoženjsko škodo, kar je znesek, ki ji je bil naložen v plačilo S.P. v domačem postopku. Poleg tega je zahtevala 10.000 EUR za nepremoženjsko škodo zaradi škodovanja njenemu ugledu kot posledica izida postopka pred domačimi sodišči.

52. Vlada ni nasprotovala plačilu zneska, zahtevanega za premoženjsko škodo v primeru, če se ugotovi kršitev konvencije. Je pa nasprotovala znesku za nepremoženjsko škodo s trditvijo, da je previsok glede na sodno prakso Sodišča v podobnih zadevah.

53. Sodišče se je prepričalo, da obstaja vzročna zveza med pritožničnim zahtevkom za premoženjsko škodo in ugotovljeno kršitvijo. Zato meni, da je primerno pritožnici dodeliti celotni zahtevani znesek za premoženjsko škodo skupaj z zakonitimi obrestmi po domačem pravu, ki začnejo teči z dnevom, ko je pritožnica znesek plačala (glej *Tușalp proti Turčiji*, navedena zgoraj, 57. odstavek). Vendar pa Sodišče meni, da v okoliščinah obravnavane zadeve ugotovitev kršitve predstavlja zadostno pravično zadoščenje za vso nepremoženjsko škodo pritožnice.

## B. Stroški in izdatki

54. Pritožnica je zahtevala tudi 4.026,29 EUR za stroške in izdatke, ki so nastali pred domačimi sodišči, in 1.824 EUR za stroške in izdatke, ki so nastali pred Sodiščem.

55. Vlada je nasprotovala znesku za stroške in izdatke, ki so nastali v postopkih pred domačimi sodišči. Poleg tega je menila, da stroški za pravno zastopanje niso bili utemeljeni z zadostnimi dokumenti.

56. V skladu s sodno prakso Sodišča je pritožnik upravičen do povrnitve stroškov, če dokaže, da so dejansko nastali in bili neizogibni ter da je njihov znesek razumen. Sodišče v tej zadevi ob upoštevanju razpoložljivih dokumentov in zgoraj navedenih meril prisoja celotni znesek, ki ga je pritožnica zahtevala za stroške, ki so nastali v domačih postopkih in v postopku pred Sodiščem.

### C. Zamudne obresti

57. Po mnenju Sodišča je primerno, da zamudne obresti temeljijo na mejni posojilni obrestni meri Evropske centralne banke, ki se ji dodajo tri odstotne točke.

#### Iz teh razlogov sodišče soglasno

1. *razglaš*a, da je pritožba sprejemljiva;
2. *razs*oja, da je bil kršen 10. člen konvencije;
3. *razs*oja, da ugotovitev kršitve predstavlja zadostno pravično zadoščenje za nepremoženjsko škodo pritožnice;
4. *razs*oja,
  - a) da mora tožena država pritožnici v treh mesecih od dne, ko postane sodba v skladu z drugim odstavkom 44. člena konvencije dokončna, plačati naslednja zneska:
    - (i) 2.921,05 (dva tisoč devetsto enaindvajset evrov in pet centov), skupaj z zakonitimi obrestmi po domačem pravu, ki začnejo teči z dnevom plačila tega zneska, za premoženjsko škodo ter morebitni davek;
    - ii) 5.850,29 EUR (pet tisoč osemsto petdeset evrov in devetindvajset centov) za stroške in izdatke ter morebitni davek, obračunan pritožnici;
  - b) da se za navedena zneska od dneva poteka treh mesecev do plačila obračunajo linearne obresti po stopnji, ki je enaka stopnji mejne posojilne obrestne mere Evropske centralne banke, za vse zamujeno obdobje z dodanimi tremi odstotnimi točkami;
5. *zavra*ča preostali del zahtevka pritožnice za pravično zadoščenje.



**Smiselno dopolnite s pojmi na koncu besedila:**

V zadevi *Mladina d.d. proti Sloveniji* je ESČP presoјalo, ali je bila pritožnici kršena pravica do svobode \_\_\_\_\_ iz 10. člena EKČP zaradi tega, ker so ji domača sodišča naložila plačilo \_\_\_\_\_ za zapis, objavljen v tedniku Mladina. Sporni članek je bil objavljen v okviru razprave o \_\_\_\_\_ istospolnih partnerskih skupnosti, torej o vprašanju, ki je bilo nedvomno v \_\_\_\_\_ interesu.

Članek se je nanašal na nastop poslanca S.P. med parlamentarno razpravo. Avtor članka ni zgolj poročal o njegovih izjavah, ampak jih je tudi zelo ostro \_\_\_\_\_. Posebej odmeven je bil zapis, v katerem je bil poslanec označen z izrazom »cerebralni \_\_\_\_\_«. Slovenska sodišča so presodila, da je tak izraz pomenil žaljivo vrednostno sodbo o \_\_\_\_\_ lastnostih poslanca in da je zato presegal meje dopustne kritike.

ESČP je najprej poudarilo, da ima tisk v demokratični družbi posebno pomembno \_\_\_\_\_. Njegova naloga ni le posredovanje informacij, ampak tudi sodelovanje v javni razpravi o vprašanjih, ki zadevajo \_\_\_\_\_ družbe. Kadar gre za politični govor ali razpravo o temi splošnega pomena, je prostor za omejevanje svobode izražanja po 10. členu Konvencije praviloma zelo \_\_\_\_\_.

Poleg tega je bil S.P. \_\_\_\_\_, torej javna osebnost, ki mora v primerjavi z zasebnikom prenesti višjo stopnjo javne kritike. ESČP je ponovno poudarilo, da meje dopustne kritike v razmerju do politikov segajo \_\_\_\_\_ kot pri »običajnih« posameznikih, zlasti kadar politik sam javno nastopa in zavzame stališča, ki lahko izzovejo ostre odzive.

Pomembno je bilo tudi, da je bila sporna izjava uporabljena v posebnem \_\_\_\_\_. Ni šlo za osebni spor, ampak za odziv na govor v parlamentu, v katerem je poslanec uporabljal izraze in geste, ki jih je ESČP razumelo kot \_\_\_\_\_ istospolno usmerjenih oseb in kot krepitev negativnih stereotipov. Zato je bilo treba sporni članek presoјati ob upoštevanju celotnega \_\_\_\_\_, ne pa zgolj na podlagi ene same besede ali besedne zveze.

ESČP je pritrdilo, da je bil uporabljeni izraz nedvomno \_\_\_\_\_ in da ga je mogoče razumeti kot žaljivega. Vendar to še ni pomenilo, da je bil poseg države avtomatično dopusten. ESČP je poudarilo razliko med trditvami o \_\_\_\_\_ in vrednostnimi sodbami. Sporni izraz ni bil predstavljen kot preverljivo dejstvo o

poslancu, temveč kot izrazito ostra \_\_\_\_\_ sodba, podana kot odziv na njegovo javno ravnanje in nastopanje.

Pri tem je ESČP ocenilo, da ta vrednostna sodba ni bila brez vsakršne \_\_\_\_\_ podlage. Članek je namreč precej podrobno opisal, kaj je S.P. govoril in kako se je vedel med parlamentarno razpravo. Prav zaradi tega je ESČP menilo, da avtorjeva ocena ni bila povsem \_\_\_\_\_ iz dejanskega dogajanja, temveč je imela dovolj opore v ravnanju, ki ga je članek pred tem že opisal.

Posebej pomembno je bilo tudi vprašanje \_\_\_\_\_ izražanja. ESČP je poudarilo, da 10. člen ne varuje le vsebine izraženih misli, temveč tudi njihovo \_\_\_\_\_. Novinarska svoboda zato vključuje določeno mero pretiravanja, provokacije in celo \_\_\_\_\_. Tudi žaljiv ali šokanten jezik je lahko v posameznih okoliščinah varovan, kadar ni uporabljen zgolj zaradi gole osebne žalitve, ampak kot del širšega sloga politične ali novinarske kritike.

Po presoji ESČP domača sodišča niso v zadostni meri upoštevala prav tega širšega \_\_\_\_\_. Preveč so se osredotočila na sam izraz, premalo pa na dejstvo, da je bil članek objavljen v okviru ostre politične razprave, da je bil usmerjen proti \_\_\_\_\_, da je bil odziv na žaljiv in stereotipen nastop ter da je bil napisan v izrazito polemičnem in deloma \_\_\_\_\_ tonu.

Zato je ESČP sklenilo, da sporna izjava ni pomenila \_\_\_\_\_ osebnega napada na S.P., ampak predvsem izraz močnega nestrinjanja in prezira do njegovih stališč ter načina njihove predstavitve. Domača sodišča po mnenju ESČP niso prepričljivo izkazala, da je obstajala \_\_\_\_\_ družbena potreba, da se v konkretnem primeru varstvo ugleda poslanca postavi nad pravico revije do svobode izražanja.

Končni sklep ESČP je bil, da domača sodišča niso vzpostavila pravičnega \_\_\_\_\_ med pravico pritožnice do svobode izražanja in pravico S.P. do varstva njegovega ugleda. Poseg zato ni bil \_\_\_\_\_ v demokratični družbi v smislu drugega odstavka 10. člena EKČP.

Pri pravičnem zadoščenju je ESČP pritožnici prisodilo povračilo \_\_\_\_\_ škode v višini zneska, ki ga je morala plačati na podlagi domače sodbe, medtem ko je glede \_\_\_\_\_ škode ocenilo, da že sama ugotovitev kršitve predstavlja zadostno

pravično zadoščenje. Poleg tega ji je prisodilo tudi povračilo \_\_\_\_\_ in izdatkov.

**Možne rešitve:** konteksta, bankrotiranec, nujna, satiričnem, osebnostnih, politik, dejanske, čezmernosti, javnem, vrednostna, odškodnine, skrajn, vlogo, stroškov, izražanja, premoženjske, zakonski ureditvi, smešenje, ravnovesja, kontekstu, neupravičenega, obliko, kritiziral, nepremoženjske, ozek, dejstvih, dlje, interese, konteksta, politiku, oblike, nujen, iztrgana

### Vprašanja

- Kako je ESČP v tej zadevi razmejilo med varstvom ugleda posameznika in svobodo izražanja medijev? Kateri kriteriji so bili pri tem odločilni?
- Zakaj je bilo za presojo posebej pomembno, da je sporni članek posegel v politično razpravo o vprašanju javnega interesa? Kako to vpliva na mejo dopustne kritike?
- Kakšen pomen je imelo dejstvo, da je bil S.P. poslanec oziroma politik?
- Kako je ESČP razlikovalo med navedbami o dejstvih in vrednostnimi sodbami? Zakaj je bila ta razlika v obravnavani zadevi bistvena za ugotovitev kršitve 10. člena EKČP?
- Ali je lahko tudi zelo žaljiv, grob ali pretiran izraz še vedno varovan v okviru svobode izražanja?
- Kakšno vlogo sta pri presoji igrala kontekst in slog spornega članka? Zakaj po mnenju ESČP domača sodišča teh okoliščin niso dovolj upoštevala?
- Kako je ESČP ovrednotilo ravnanje in nastop poslanca S.P. med parlamentarno razpravo?
- Zakaj je ESČP menilo, da sporna označba ni pomenila zgolj osebne žalitve, temveč predvsem izraz močnega vrednostnega nasprotovanja poslančevim stališčem? Ali se s tem briše meja med osebno diskreditacijo in politično kritiko?
- Kako bi primerjali pristop slovenskih sodišč in pristop ESČP glede pomena družbeno odgovorne javne razprave? Kje so domača sodišča po presoji ESČP naredila ključno napako?
- Kakšen širši ustavnopravni pomen ima ta sodba za slovenski pravni red? Kaj nam pove o razlagi 39. člena Ustave v povezavi z 34. in 35. členom Ustave, kadar pride do kolizije med svobodo izražanja in varstvom osebnostnih pravic?

# Vaskrsiќ proti Sloveniji z dne 15. aprila 2017, št. 31371/12

V zadevi Vaskrsiќ proti Sloveniji Evropsko sodišče za človekove pravice (četrty oddelek) kot senat v sestavi:

András Sajó, *predsednik*,  
Vincent A. De Gaetano,  
Nona Tsotsoria,  
Paulo Pinto de Albuquerque,  
Krzysztof Wojtyczek,  
Egidijus Kūris, *sodniki*,  
Boštjan Zalar, *ad hoc sodnik*,  
in Marialena Tsirli, *sodna tajnica oddelka*,

po razpravi, zaprti za javnost, ki je bila 4. aprila 2017,

izreka to sodbo, sprejeto navedenega dne:

## Postopek

1. Zadeva se je začela s pritožbo (št. 31371/12) proti Republiki Sloveniji, ki jo je po 34. členu Konvencije o varstvu človekovih pravic in temeljnih svoboščin (v nadaljnjem besedilu: konvencija) pri Sodišču 22. maja 2012 vložil slovenski državlján Zoran Vaskrsiќ (v nadaljnjem besedilu: pritožnik).

2. Pred Sodiščem ga je zastopala Odvetniška družba Čeferin in partnerji, odvetniška pisarna s sedežem v Grosupljem. Slovensko vlado (v nadaljnjem besedilu: vlada) je zastopala B. Jovin Hrastnik, državna pravobranilka.

3. Pritožnik je zlasti trdil, da je prodaja njegove hiše na javni dražbi pomenila kršitev 1. člena protokola št. 1 konvencije in da v zvezi s tem ni imel na voljo nobenega učinkovitega pravnega sredstva, kakor ga zahteva 13. člen konvencije.

4. Očitki na podlagi 1. člena protokola št. 1 konvencije in 13. člena konvencije so bili 2. decembra 2014 posredovani vladi, preostali del pritožbe pa je bil v skladu s tretjim odstavkom 54. člena Poslovnika Sodišča razglašen za nesprejemljiv .

5. Marko Bošnjak, izvoljeni sodnik iz Slovenije, ni mogel sodelovati pri obravnavanju zadeve (28. člen Poslovnika Sodišča). Zato se je predsednik četrtega oddelka odločil, da za sodelovanje pri obravnavanju zadeve imenuje Boštjana Zalarja kot *ad hoc* sodnika (četrti odstavek 26. člena konvencije in prvi odstavek 29. člena Poslovnika).

## Dejstva

### I. Okoliščine zadeve

6. Pritožnik je bil rojen leta 1980 in živi v Kresnicah.

7. Pritožnik in njegova družina so živeli v hiši v Litiji, ki je bila prodana v izpodbijanem izvršilnem postopku, opisanem v nadaljevanju.

A. Oris izvršilnih ukrepov, izvedenih proti pritožniku v izvršilnih postopkih

8. Med postopkom, opisanem v nadaljevanju, so proti pritožniku vložili predloge za izvršbo trije različni upniki, in sicer javno podjetje za vodooskrbo JP Vodovod-Kanalizacija (v nadaljnjem besedilu: podjetje J.), zasebno podjetje Porsche Kredit in Leasing SLO (v nadaljnjem besedilu: podjetje P.) in zasebnik A. A. Vsak upnik je uveljavljal svojo terjatev do pritožnika. Čeprav je podjetje P. sprva zahtevalo, da se izvršba opravi z zasegom pritožnikove hiše, pa je bila pozneje njegova terjatev poravnana s pritožnikovega bančnega računa. Ker je bilo podjetje J. neuspešno pri poplačilu svoje terjatve s prodajo premičnin, je nato zahtevalo, da se opravi izvršba

na pritožnikovo hišo. Na koncu je bila hiša prodana na javni dražbi za namen izvršbe terjatve podjetja J. Upnik A. A. se je s svojo terjatvijo pridružil postopku potem, ko je bila hiša na prej omenjeni javni dražbi domaknjena uspešnemu ponudniku. Ker je pritožnik po dražbi povrnil dolg podjetju J., je bil iz iztržka od prodaje hiše odplačan njegov dolg upniku A. A. Iz tega iztržka so bili plačani tudi davki in še neodplačana hipoteka na hišo.

## B. Izvršilni postopek

9. Podjetje J. ima sedež v Ljubljani in je največje javno podjetje za vodooskrbo v Sloveniji. Pritožniku je 18. decembra 2007 poslalo račun za vodo v višini 124 EUR z rokom plačila 5. januarja 2008.

10. Ker pritožnik ni poravnal omenjenega računa za vodo z dne 18. decembra 2007, je podjetje J. 28. maja 2009 proti njemu začelo izvršilni postopek. Zahtevalo je izvršbo glavnice v višini 124 EUR z zamudnimi obrestmi.

11. Okrožno sodišče v Ljubljani je 2. junija 2009 izdalo sklep o izvršbi proti pritožniku in odredilo rubež njegovih premočnin, kot je zahtevalo podjetje J. Sklep je vseboval obvestilo, da lahko dolžnik vloži ugovor v osmih dneh. Sklep je bil pritožniku vročen 24. junija 2009. Ker mu pritožnik ni ugovarjal, je postal 3. julija 2009 pravnomočen. Zadeva je bila nato odstopljena Okrajnemu sodišču v Litiji v nadaljnjo obravnavo.

12. Izvršitelj se je 7. januarja 2010 odpravil do pritožnikove hiše, da bi zarubil premočnine. V poročilu, ki ga je pripravil, je navedel, da ni bilo nikogar doma. Izvršitelj je pustil obvestilo, ki je vsebovalo podatke o poskusu izvršbe glavnice dolga, obresti in stroškov v višini 376 EUR. Pritožniku je tudi napisal sporočilo, v katerem ga je pozval, naj prostovoljno poplača dolg.

13. Podjetje P. je 2. marca 2010 začelo izvršilni postopek, v katerem je zahtevalo plačilo 1.576 EUR, skupaj s pripadajočimi obrestmi od 10. julija 2009 do poplačila. Predlagalo je več izvršilnih sredstev, vključno s prodajo pritožnikove hiše. Okrajno sodišče v Ljubljani je ugodilo predlogu in 9. marca 2010 je bil sklep vročen pritožniku. Ker pritožnik ni vložil ugovora, je sklep 18. marca 2010 postal pravnomočen in je bil odstopljen Okrajnemu sodišču v Litiji v nadaljnjo obravnavo.

14. Okrajno sodišče v Litiji je 21. aprila 2010 v postopku, ki ga je začelo podjetje P, odredilo cenitev pritožnikove hiše. Odredba je bila pritožniku vročena prek njegovega očeta. Cenilec nepremičnin je nato 2. junija 2010 predložil poročilo o cenitvi, v katerem je tržno vrednost hiše ocenil na 140.000 EUR. Povedal je tudi, da mu je pritožnik po telefonu zagotovil, da je bil dolg že poplačan, vendar pa ni predložil potrdila o takem poplačilu. Poročilo je bilo poslano pritožniku, da bi podal pripombe. Ker niti pritožnik niti kateri koli drugi odrasli član gospodinjstva ni bil prisoten na hišnem naslovu, je bilo 8. junija 2010 puščeno obvestilo pritožniku, naj dvigne poročilo o cenitvi na poštnem uradu. Ker pa tega ni storil, je bilo 24. junija 2010 poročilo o cenitvi oddano v njegov poštni predalčnik (glej 52. in 53. odstavek). Pritožnik se na poročilo o cenitvi ni odzval.

15. Medtem je izvršitelj 29. aprila 2010 pregledal notranjost pritožnikove hiše v prisotnosti njegove žene in ugotovil, da ne vsebuje nobenih predmetov, ki bi jih bilo mogoče zarubiti in prodati za poplačilo dolga v izvršilnem postopku, ki ga je sprožilo podjetje J. Izvršitelj je znova pustil sporočilo, v katerem je pozval pritožnika, naj prostovoljno poplača dolg, ki je tedaj znašal že 516 EUR. V svojem poročilu je predlagal, da upnik izbere drugo izvršilno sredstvo, ker izvršba na premičnine ne bi zadostovala niti za plačilo stroškov postopka izvršbe, kaj šele dolga. Ugotovljeno je bilo tudi, da je bil pritožnikov avtomobil zakupljen, zato ga ni bilo mogoče zarubiti za namen izvršbe.

16. Podjetje J. je 15. junija 2010 pri Okrajnem sodišču v Litiji predlagalo izdajo sklepa o dovolitvi izvršbe na pritožnikovo nepremično premoženje, in sicer njegovo hišo.

17. Okrajno sodišče v Litiji je 17. junija 2010 ugodilo predlogu podjetja J. in izdalo sklep, s katerim je dovolilo izvedbo izvršbe s prodajo pritožnikove hiše. Sklep je bil 21. junija 2010 vročen pritožniku prek njegove žene. Pritožnik ni vložil ugovora. Sodišče je nato predlog podjetja J. združilo s postopkom, ki ga je začelo podjetje P.

18. Okrajno sodišče v Litiji je 1. julija 2010 določilo znesek, ki ga je treba plačati cenilcu nepremičnine. Ta znesek je bil nato plačan iz pologa podjetja P. Istega dne je sodišče tudi izdalo sklep o tržni ceni pritožnikove hiše v višini 140.000 EUR. Po neuspešnem poskusu, da bi pritožniku vročili oba sklepa, sta bila oddana v pritožnikov poštni predalčnik (glej 52. in 53. odstavek). Pritožnik se na sklepa ni pritožil.

19. Okrajno sodišče v Litiji je 31. avgusta 2010 ustavilo izvršilni postopek, ki ga je začelo podjetje P., ker je bil dolg poplačan z rubežem sredstev s pritožnikovega bančnega računa.

20. Okrajno sodišče v Litiji je 1. septembra 2010 odredilo, da se 7. oktobra 2010 opravi javna dražba pritožnikove hiše. Po neuspešnem poskusu 3. septembra 2010, da bi pritožniku vročili sklep in sodno vabilo, sta bila 20. septembra 2010 oddana v njegov poštni predalčnik (glej 52. in 53. odstavek).

21. Okrajno sodišče v Litiji je 2. septembra 2010 ustavilo izvršbo v zvezi s pritožnikovimi premičninami, ker podjetje J. ni vložilo novega predloga v roku treh mesecev po neuspešnem poskusu (glej 15. odstavek). Sklep je bil pritožniku vročen 6. septembra 2010.

22. Prva javna dražba pritožnikove hiše je bila 7. oktobra 2010, vendar ni bilo kupcev, ki bi se zanimali zanjo. Pritožnika ni bilo.

23. Okrajno sodišče v Litiji je 8. oktobra 2010 odredilo, da se 18. novembra 2010 opravi druga javna dražba. Po neuspešnem poskusu vročitve sklepa in sodnega vabila pritožniku 14. oktobra 2010 je bilo pritožniku puščeno obvestilo, naj dvigne obe pošiljki na lokalnem poštnem uradu. Ker tega ni storil, sta bili pošiljki 2. novembra 2010 oddani v njegov poštni predalčnik (glej 52. in 53. odstavek).

24. Medtem je podjetje J. 18. in 25. oktobra 2010 Okrajnemu sodišču v Litiji predlagalo razširitev sklepa o izvršbi na druga izvršilna sredstva, in sicer na izvršbo na pritožnikov bančni račun in njegovo plačo.

25. Na drugi javni dražbi, ki je bila 18. novembra 2010, je bila hiša prodana M. L. za 70.000 EUR, kar je 50 % ocenjene tržne vrednosti. Pritožnika ni bilo.

26. Okrajno sodišče v Litiji je 19. novembra 2010 izdalo pisni sklep o domiku nepremičnine ponudniku M. L. (*sklep o domiku*). Sklep o domiku je bil skupaj s kopijo zapisnika o drugi dražbi vročen pritožniku prek njegove žene 23. novembra 2010.

27. Okrajno sodišče v Litiji je 22. novembra 2010 ugodilo predlogoma podjetja J. in izdalo sklep o izvršbi na pritožnikovo plačo in bančni račun. Sklep je bil pritožniku vročen 24. novembra 2010. V sklepu je bilo omenjeno, da je bila predhodno odrejena



izvršba na premičnine, sodna prodaja hiše pa ni pa bila omenjena. Ugotovljeno je bilo, da je mogoče zarubiti do največ dve tretjini plače, ki jo je pritožnik prejemal od svojega delodajalca K., pod pogojem, da pritožniku ostane z zakonom zajamčeni minimalni osebni dohodek. Sklep je vseboval tudi obvestilo banki, v katerem je bilo med drugim navedeno, naj banka, če ni na voljo nobenih sredstev, ta zarubi, ko bodo na voljo, če pa v roku enega leta po vročitvi sklepa banki ni na voljo nobenih sredstev, mora banka o tem obvestiti sodišče.

28. Drug upnik, A. A., je 22. novembra 2010 predlagal sodišču izvršitev sodbe, s katero mu je bila prisojena odškodnina s stroški in obrestmi v skupni višini 5.112 EUR, z nadaljnjimi obrestmi. Zahteval je, da se opravi izvršba na pritožnikovo hišo.

29. Pritožnik je 24. novembra 2010 vložil pritožbo proti sklepu o domiku, v kateri je obvestil sodišče, da je poplačal dolg (glej 26. odstavek). Med drugim je trdil, da se ni mogel udeležiti dražbe in da je šele iz izpodbijanega sklepa izvedel, da je bila dražba opravljena. Zagotovil je tudi, da je v tem času odplačal svoj dolg. Celo leto je bil v finančnih težavah, ker mu je umrl oče, mati pa je izgubila službo. V zvezi s tem je navedel, da jo je moral vzdrževati poleg svoje žene, ki je bila tudi brezposelna, in dveh otrok. Poudaril je, da bi člani njegove družine, če sklep o domiku ne bi bil razveljavljen, lahko postali brezdomci. Poleg tega je njegov delodajalec, podjetje K., istega dne prejel sklep o izvršbi na njegovo plačo.

30. Po pritožnikovem poplačilu dolga 24. novembra 2010 je podjetje J. istega dne sodišču predlagalo ustavitev izvršilnega postopka.

31. Okrajno sodišče v Litiji je 25. novembra 2010 ustavilo izvršilni postopek, ki ga je sprožilo podjetje J.

32. Okrajno sodišče v Ljubljani je 2. decembra 2010 ugodilo predlogu za izvršbo na pritožnikovo hišo v izvršilnem postopku, ki ga je začel A. A. (glej 28. odstavek).

33. Pritožnik je vložil ugovor proti zgoraj navedenemu sklepu (glej 32. odstavek), v katerem je trdil, da je bil izvršilni postopek, ki ga je sprožilo podjetje J., že ustavljen in da želi izvršbo terjatve A. A. z zasgom denarnih sredstev in odplačilom v dvanajstih mesečnih obrokih. Okrajno sodišče v Litiji je 19. januarja 2011 zavrnilo pritožnikov ugovor in zavrnilo odlog izvršilnega postopka v zvezi z izvršbo na pritožnikovo hišo. Prav tako je zavrnilo dovolitev izvršbe z rubežem pritožnikovih denarnih sredstev, kot je predlagal pritožnik, ker ni bilo dokazano, da bi ta sredstva

omogočila poravnavo dolga v enem letu (glej 49. odstavek). Sklep je bil pritožniku vročen 21. januarja 2011. Pritožnik se na sklep ni pritožil.

34. Višje sodišče v Ljubljani je 29. decembra 2010 zavrnilo pritožbo, ki jo je pritožnik vložil proti sklepu o domiku, izdanem v korist M. L. (glej 26. in 29. odstavek), ki je s tem postal pravnomočen. Sodišče je ugotovilo, da je bil pritožnik pravilno vabljen na javno dražbo, čemur v pritožbi ni oporekal, in da ni navedel razloga, zakaj se ni mogel udeležiti dražbe. Sodišče je zavrnilo njegove trditve, da ni bil sposoben odplačati dolga. Pojasnilo je, da je sklep o izvršbi v zvezi z dolgom v višini 124 EUR postal pravnomočen julija 2009, pritožnik pa se je skliceval na okoliščine, nastale leta 2010. Poleg tega je bil dolg manjše vrednosti. Sodišče je nadalje poudarilo, da so bila pritožniku pravilno vročena vsa sodna pisanja v postopku, vendar se nanje ni odzval, kar je povsem njegova odločitev. Prav tako je ugotovilo, da ni nobenega razloga, ki bi kazal na to, da bi pritožnikova družina lahko končala na ulici, čeprav bi se njihov življenjski standard zaradi prodaje hiše lahko poslabšal. Nazadnje se je sodišče sklicevalo na ustavni odločbi št. Up-35/98 in Up-77/04 (glej 55. odstavek) ter poudarilo, da poznejše poplačilo dolga ne more povzročiti preklica sklepa o domiku, ki je bil že razglašen, ne glede na vsoto denarja, ki ga je treba plačati.

35. Okrajno sodišče v Litiji je 12. januarja 2011 po tem, ko je plačal celotno kupnino, M. L. izročilo nepremičnino, prodano na javni dražbi, in odredilo, da se vpiše njegovo ime kot ime lastnika v zemljiško knjigo. Pritožniku je tudi naložilo, da izprazni hišo v tridesetih dneh od prejema sklepa.

36. Pritožnik, ki ga je zdaj zastopala odvetniška pisarna, je 21. januarja 2011 vložil pritožbo proti sklepu o izročitvi nepremičnine in predlog za razveljavitev potrdila o pravnomočnosti sklepa o domiku. Med drugim je trdil, da bi morale sodišče po ustavitvi izvršilnega postopka 25. novembra 2010 v skladu s 76. členom Zakona o izvršbi in zavarovanju (v nadaljnjem besedilu: zakon o izvršbi; glej 48. odstavek) odpraviti vse izvršilne ukrepe, ki so bili že izvedeni, zato bi morale razveljaviti tudi sklep o domiku. Poudaril je, da tedaj kupec še ni pridobil lastništva nepremičnine in zato razveljavitev sklepa o domiku ne bi vplivala na pravice, ki jih je kupec že pridobil. Pritožnik je trdil, da mu sodno vabilo na dražbo ni bilo vročeno.

37. Višje sodišče v Ljubljani je 25. maja 2011 zavrnilo pritožnikovo pritožbo. Ugotovilo je, da je bilo treba v skladu s 192. členom zakona o izvršbi (glej 50. odstavek) izpolniti samo dva pogoja, da se omogoči izročitev nepremičnine kupcu – pravnomočni sklep o domiku in plačilo kupnine. Zakon je bil torej pravilno uporabljen. Sodišče je zavrnilo tudi navedbo, da sodno vabilo pritožniku ni bilo vročeno, in se je pri tem sklicevalo na ugotovitve v sklepu z dne 29. decembra 2010 (glej 34. odstavek). Zavrnilo je tudi pritožnikovo trditev, da bi morala biti posledica ustavitve izvršilnega postopka razveljavitev sklepa o izvedbi izvršbe, vključno z razveljavitvijo sklepa o domiku. Sodišče je nadalje navedlo, da je ustavno sodišče v odločbah št. Up-35/98 in Up-77/04 že izrazilo mnenje, da bi razveljavitev sklepa o domiku posegla v pravice drugih (glej 55. odstavek).

38. Okrajno sodišče v Litiji je 17. junija 2011 opravilo obravnavo o razdelitvi iztržka od prodaje hiše in odločilo, da se razdeli na naslednji način: zneska 146 EUR in 5.895 EUR se izplačata pritožnikovemu upniku A. A., ki je pridružil svoje terjatve izvršilnemu postopku potem, ko je bila hiša že prodana; 1.372 EUR se izplača davčnemu uradu za davke na prodajo hiše in 58.888 EUR banki za še neplačano hipoteko na hišo. Preostanek iztržka od prodaje v višini 3.699 EUR je bil nakazan pritožniku. Sklep je bil pritožniku vročen 18. avgusta 2011.

39. Na predlog M. L. je Okrajno sodišče v Litiji 11. julija 2011 izdalo sklep o izvršbi proti pritožniku in odredilo izselitev pritožnikove družine iz hiše. Pritožnik je vložil ugovor in nadaljnjo pritožbo, ki pa sta bila oba zavrnjena. Skliceval se je na svojo ustavno pritožbo (glej naslednji odstavek) in v bistvu trdil, da bi bilo treba prodajo razveljaviti glede na dejstvo, da je poplačal dolg, preden je sklep o domiku postal pravnomočen. Po njegovem mnenju izročitve nepremičnine M. L. zato ni mogoče šteti za veljavno podlago za njegovo izselitev.

40. Medtem je pritožnik 28. julija 2011 vložil ustavno pritožbo proti sklepoma z dne 12. januarja in 25. maja 2011 (glej 35 in 37. odstavek). Zatrjeval je, da sta sklepa nezakonita in arbitrarna in da prodaja njegove hiše, ki je posledica dolga v višini 124 EUR, pomeni nesorazmeren poseg v njegove lastninske pravice. Zlasti je zatrjeval, da sodišče ni bilo dolžno izdati sklepa o izvršbi na nepremičnino. Trdil je tudi, da sklep o domiku ne bi mogel postati pravnomočen, če bi bil izvršilni postopek ustavljen, kar je izrecno očitel v svoji pritožbi (glej 36. odstavek).

41. Ustavno sodišče je 5. marca 2012 zavrnilo pritožnikovo ustavno pritožbo s sklicevanjem na drugi odstavek 55.b člena Zakona o ustavnem sodišču (glej 54. odstavek).

42. Pritožnik in njegova družina so bili 16. marca 2012 s pomočjo policije izseljeni iz svoje hiše. Najprej so se priselili k svojim sorodnikom, pozneje pa so pridobili nov dom.

## **II. Upoštevani domača zakonodaja in praksa**

...

### **Pravo**

## **II. Zatrjevana kršitev 1. člena protokola št. 1 h konvenciji**

43. Pritožnik se je pritožil, da je prodaja njegove hiše na javni dražbi za izvršbo terjatve v višini 124 EUR pomenila kršitev 1. člena protokola št. 1 konvencije, ki se glasi:

"Vsaka fizična ali pravna oseba ima pravico do mirnega uživanja svojega premoženja. Nikomur ne sme biti lastnina odvzeta, razen če je to v javnem interesu v skladu s pogoji, ki jih določa zakon, in ob spoštovanju splošnih načel mednarodnega prava.

Ta določba pa nikakor ne omejuje pravice držav, da uveljavijo zakone, za katere menijo, da so potrebni za nadzor nad uporabo premoženja v skladu s splošnim interesom ali za zagotovitev plačila davkov, drugih prispevkov ali denarnih kazni."

### **A. Sprejemljivost**

44. Vlada je trdila, da pritožnik ni omenil več pomembnih dejstev, takšnih kot so drugi izvršilni postopki proti njemu in možnosti, ki so mu bile na voljo, da vpliva na postopek. Predlagala je, da se pritožba zavrne na podlagi točke a tretjega odstavka 35. člena konvencije zaradi zlorabe pravice do pritožbe.

45. Pritožnik je izpodbijal trditev vlade, da je v svoji pritožbi izpustil pomembna dejstva. V svoji vlogi je predstavil dejstva, pomembna za njegovo pritožbo, namreč dejstva glede postopka, ki ga je sprožilo podjetje J. Nasprotno pa se vlada sklicuje na dejstva, kot je postopek, ki sta ga sprožila podjetje P. in upnik A. A., ki ni bil

pomemben za očitek pritožnika. Predvsem pa je bil postopek, ki ga je sprožilo podjetje P., končan avgusta 2010, kar je več kot dva meseca pred drugo javno dražbo. A. A. je predlagal izvršbo svoje terjatve potem, ko je bila hiša že prodana. Pritožnikov dolg do podjetja J. je bil torej edini razlog za prodajo hiše.

46. Sodišče ugotavlja, da se pritožba razen v izjemnih primerih zavrne kot zloraba pravice do pritožbe, če zavestno temelji na neresničnih dejstvih (glej *Gross proti Švici* [VS], št. 67810/10, 28. odstavek, ESČP 2014). Sodišče meni, da pritožnikove navedbe v njegovi prvotni pritožbi glede poteka izvršilnega postopka proti njemu, čeprav bi lahko bile bolj izčrpne, ne povzročajo okoliščin, ki bi upravičile odločitev o razglasitvi pritožbe za nesprejemljivo zaradi zlorabe pravice posameznika do pritožbe.

47. Sodišče nadalje ugotavlja, da ta pritožba ni očitno neutemeljena v smislu točke a tretjega odstavka 35. člena konvencije. Prav tako ugotavlja, da ni nesprejemljiva niti iz katerih koli drugih razlogov. Torej jo je treba razglasiti za sprejemljivo.

## B. Utemeljenost

### 1. Trditve pred Sodiščem

#### (a) Pritožnik

48. Pritožnik je trdil, da so bila sredstva iz več razlogov nesorazmerna z zasledovanim ciljem. Prvič, hiše se ne bi smelo prodati zaradi tako majhne glavnice dolga, kot je 124 EUR. Obstajati bi morala zakonska meja, pod katero izvršba s prodajo nepremičnine ne bi bila mogoča. Čeprav ni bil brez nastanitve, pa je pritožnik zaradi izgube svoje hiše utrpel hudo finančno in psihološko škodo.

49. Drugič, sodišča niso ravnala z zadostno skrbnostjo. Predvsem pa sodišča v skladu s 34. členom zakona o izvršbi (glej 45. odstavek) niso dolžna sprejeti nobenih sredstev izvršbe. V njegovi zadevi bi lahko izvršbo uspešno opravili, na primer, s prodajo premoženja, katerih vrednost bi zagotovo zadostovala, ali z izvršbo na njegovo plačo ali bančni račun, saj je bil zaposlen. Glede slednjega je pritožnik zatrjeval, da je sodišče prejelo predloga podjetja J. za izvršbo na njegovo plačo in bančni račun petindvajset dni pred drugo dražbo, vendar ni ustrezno ukrepalo. Sodišče bi moralo dražbo preložiti, vprašati upnika, ali še vedno vztraja pri svojem

predlogu za izvršbo na nepremičnino, in brez nepotrebnega odlašanja odločiti o predlogih. Ker sodišče tega ni storilo, je to povzročilo prodajo hiše, kar je bil najstrožji, vendar nepotreben ukrep.

50. Pritožnik je tudi zatrjeval, da zavrnitev njegove pritožbe, ki je izpodbijala pravnomočnost sklepa o domiku, ni imela pravne podlage. Sklep o domiku ne bi smel postati pravnomočen, ker je bil izvršilni postopek ustavljen šestindvajset dni prej, torej po poplačilu dolga. Pritožnik se je skliceval na 189. člen zakona o izvršbi (glej 50. odstavek) in trdil, da je na sklep o domiku dovoljena pritožba in bi zato lahko imel pravni učinek šele po tem, ko bi postal pravnomočen. Razveljavitev sklepa o domiku bi zavarovala njegovo lastninsko pravico in ne bi posegala v pridobljene pravice kupca, kot so napačno ugotavljala sodišča. V zvezi s tem je pritožnik zatrjeval, da so se odločbe Ustavnega sodišča napačno razlagale. Še zlasti se je odločba št. Up-77/04 nanašala na pravnomočni sklep o domiku in ne na sklep o domiku, ki je bil zgolj razglašen.

51. Po pritožnikovem mnenju je njegova zadeva podobna zadevi *Rouske proti Švedski* (št. 27183/04, 25. julij 2013), saj pritožnik v tisti zadevi tudi ni uporabil vseh možnosti za ustavitev izvršbe, vendar je Sodišče ugotovilo, da prodaja njegove hiše pomeni čezmerno breme za posameznika.

52. Nazadnje je pritožnik zatrjeval, da postopek, ki sta ga sprožila podjetje P. in A. A., ni vplival na prodajo hiše (glej 59. odstavek). Glede obresti in stroškov izvršbe pa je menil, da jim pri ocenjevanju sorazmernosti ni treba pripisati posebne teže. Vendar pa je ukrep, tudi če se upošteva, še vedno nesorazmeren.

#### *b) Vlada*

53. Vlada je trdila, da je izvršilni postopek sestavni del upnikove pravice dostopa do sodišča. Dolg v višini 124 EUR je zapadel v izplačilo 5. januarja 2008, od tedaj do prodaje hiše na javni dražbi pa so minila skoraj tri leta. Pritožnik bi lahko odplačal svoj dolg kadarkoli v času trajanja postopka, vendar je to storil šele potem, ko je bila hiša prodana. Po drugi strani pa njegov dolg A. A. ni bil nikoli prostovoljno odplačan. Pred dražbo je bil opravljen poskus izvršbe z rubežem pritožnikovih premičnin, vendar ni bil uspešen.

54. Pritožniku so bila vsa pomembna pisanja in sodne odločbe pravilno vročeni in imel je številne priložnosti, da vpliva na potek izvršilnega postopka ter se izogne prodaji svoje hiše. Predvsem bi lahko zahteval odlog izvršilnega postopka, kot je določeno v 71. in 74. členu zakona o izvršbi; lahko bi tudi zahteval, da se izvršba opravi le z nekaterimi sredstvi in z drugimi sredstvi od tistih, ki jih je predlagal upnik, v skladu s 34. členom zakona o izvršbi (glej 45. odstavek). Lahko bi tudi izkoristil 169. člen zakona o izvršbi, ki določa posebne pravice dolžnikov za izognitev izvršbi na nepremičnine (glej 49. odstavek). Pritožnik ni uporabil nobenega od teh sredstev, razen vložitve ugovora na sklep o izvršbi, ki je bil izdan na predlog A. A. Po vložitvi ugovora pa se nato pritožnik proti njegovi zavrnitvi ni pritožil.

55. Vlada je navedla, da bi moral pritožnik glede na vsa razpoložljiva sredstva vsaj predlagati izvršbo na svojo plačo ali bančni račun. Če bi to storil v osmih dneh od vročitve sklepa z dne 21. junija 2010, bi lahko preprečil izvršbo na svojo nepremičnino. Če bi tega ne mogel storiti sam, bi lahko najel odvetnika ali zaprosil za pravno pomoč, ki je na voljo v okviru nacionalnega sistema pravne pomoči. Pritožnik ne le da tega ni storil, ampak tudi ni pojasnil, zakaj tega ni storil.

56. V zvezi s predlogoma podjetja J. za izvršbo na pritožnikovo plačo in bančni račun pa je vlada trdila, da upnik ni umaknil predloga za izvršbo na pritožnikovo nepremičnino. To pomeni, da bi bilo, tudi če bi sodišče odločilo o obeh predlogih pred drugo dražbo, le malo verjetno, da bi bil dolg odplačan do dražbe, sodišče pa ne bi moglo odpovedati dražbe zgolj na podlagi neke abstraktne možnosti poravnave dolga z novimi sredstvi. Vlada je še zlasti trdila, da sodišče ni imelo podlage v zakonodaji, da bi odpovedalo sodno prodajo hiše po tem, ko je podjetje J. vložilo predloga za izvršbo na bančni račun in plačo pritožnika. Vlada je tudi poudarila, da je bil dolg do podjetja J. višji, kot ga je navedel pritožnik, in sicer je 29. aprila 2010 znašal 516 EUR, pozneje pa se je še povečal. Poleg tega se je iz iztržka od prodaje hiše odplačal tudi dolg, ki ga je pritožnik imel do A. A. Zgolj dejstvo, da je sodišče odločilo o predlogih za izvršbo na bančni račun in plačo pritožnika po opravljeni dražbi, torej ne omogoča ugotovitve kršitve 1. člena protokola št. 1 konvencije.

57. Glede izpodbijanega stališča sodišč, da sklepa o domiku ni mogoče razveljaviti zaradi poznejšega poplčila dolga, je vlada navedla, da je bil namen tega zagotoviti, da se dražbe izvedejo pravilno. Namen je bil tudi zaščititi kupce in upnike ter dolžnike, saj bi na prodajno ceno vplivalo tveganje razveljavitve zaradi poznejšega

poplačila dolga. Pritožnik je bil seznanjen z vsemi koraki v izvršilnem postopku in je bil vabljen na dražbo, česar v svoji pritožbi proti sklepu o domiku ni izpodbijal.

58. Na koncu je vlada trdila, da pritožnik ni ostal brez nastanitve in je dejansko kupil novo hišo. Glede njegovega položaja in ravnanja v času postopka pa ga ni mogoče primerjati s pritožniki v zadevah *Rouske proti Švedski* (navedeno zgoraj) in *Zehentner proti Avstriji* (št. 20082/02, 16. julij 2009), ki sta vključevali številne okoliščine, tudi stopnjo ranljivosti pritožnikov, ki jih v obravnavani zadevi ni bilo.

## 2. Presoja Sodišča

*(a) Ali se je poseglo v pritožnikovo pravico do mirnega uživanja njegovega premoženja*

59. Sodišče ugotavlja, da se je lastništvo pritožnikove hiše preneslo na drugo osebo v okviru izvršilnih sodnih postopkov, začeti zaradi pridobitve denarnih vsot, ki jih je pritožnik dolgoval svojim upnikom. Sodišče je na podlagi 1. člena protokola št. 1 že preučilo različne položaje v zvezi s prisilno prodajo domov pritožnikov in je ugotovilo, da taka prodaja pomeni poseganje v pravico pritožnikov do mirnega uživanja svojega premoženja (glej, na primer, *Zehentner*, 71. odstavek, in *Rouske*, 109. odstavek, navedena zgoraj). Sodišče ne vidi razloga, da bi v obravnavanem primeru odstopilo od svoje sodne prakse. Poleg tega meni, da je treba sodno prodajo pritožnikove nepremičnine obravnavati po tako imenovanem tretjem pravilu, ki ga vsebuje drugi odstavek 1. člena protokola št. 1 in je povezano s pravico države, "da uveljavi zakone, za katere meni, da so potrebni za nadzor nad uporabo premoženja v skladu s splošnim interesom" (glej, med najbolj nedavnimi primeri, *Vrzić proti Hrvaški*, št. 43777/13, 93. do 96. odstavek, 12. julij 2016).

*(b) Ali je bilo poseganje določeno z zakonom in je imelo zakonit cilj*

60. Sodišče znova poudarja, da je prva in najpomembnejša zahteva 1. člena protokola št. 1, da mora biti vsak poseg oblasti v mirno uživanje premoženja posameznika zakonit (glej *Iatridis proti Grčiji* [VS], št. 31107/96, 58. odstavek, ESČP 1999-II).

61. Poleg tega je vsak poseg v lastninsko pravico, ne glede na pravilo, ki ga ureja, upravičen le, če služi zakonitemu javnemu (ali splošnemu) interesu. Sodišče znova poudarja, da so domači organi oblasti zaradi svojega neposrednega poznavanja



družbe in njenih potreb načeloma bolj kot mednarodni sodniki poklicani za ocenjevanje tega, kaj je "v javnem interesu" (glej, med najbolj nedavnimi primeri, *Matczyński proti Poljski*, št. 32794/07, 99. odstavek, 15. december 2015).

62. Glede obravnavane zadeve Sodišče ugotavlja, da je poseganje v pritožnikovo pravico do mirnega uživanja svojega premoženja temeljilo na ustreznih določbah zakona o izvršbi (glej 43. do 51. odstavek) in je služilo legitimnemu cilju varstva upnikov in kupca hiše.

(c) *Ali je bil poseg sorazmeren z legitimnim ciljem*

(i) Splošna načela

63. Treba je še ugotoviti, ali je bil sporni ukrep sorazmeren z zasledovanim ciljem. Kot Sodišče dosledno presoja, je treba pri poseganju v mirno uživanje premoženja doseči "pravično ravnotežje" med zahtevami splošnega interesa skupnosti in zahtevami po varstvu temeljnih pravic posameznika (glej, med drugim, *Sporrong in Lönnroth proti Švedski*, 23. september 1982, 69. odstavek, Serija A št. 52, in *Jahn in drugi proti Nemčiji* [VS], št. 46720/99, 72203/01 in 72552/01, 93. odstavek, ESČP 2005-VI). Pri posegih, ki sodijo v okvir drugega odstavka 1. člena protokola št. 1, mora obstajati tudi primeren sorazmeren odnos med uporabljenimi sredstvi in zasledovanim ciljem (glej *J.A. Pye (Oxford) Ltd in J.A. Pye (Oxford) Land Ltd proti Združenemu kraljestvu* [VS], št. 44302/02, 55. odstavek, ESČP 2007-III). V vsakem primeru, ki vključuje domnevno kršitev 1. člena protokola št. 1, mora Sodišče ugotoviti, ali je morala zaradi posega države oseba nositi nesorazmerno in pretirano breme. Pri ugotavljanju, ali je bil ta pogoj izpolnjen, Sodišče upošteva, da ima država široko polje proste presoje tako glede izbire izvršilnih sredstev kot ugotavljanja, ali so posledice izvršbe upravičene zaradi splošnega interesa za doseg cilja določenega zakona (glej *Vrzić*, navedeno zgoraj, 100. odstavek).

64. Poleg tega Sodišče znova poudarja, da morajo ti postopki, čeprav 1. člen protokola št. 1 ne vsebuje izrecnih postopkovnih zahtev, posamezniku omogočiti primerno priložnost, da svojo zadevo predloži ustreznim organom, da bi učinkovito izpodbijal ukrepe, ki posegajo v pravice, zagotovljene s to določbo. Pri preverjanju izpolnjevanja tega pogoja je pregled Sodišča celovit (glej *Zehentner*, navedeno zgoraj, 73. odstavek).

## (ii) Uporaba načel pri obravnavani zadevi

65. Sodišče na začetku ugotavlja, da je bil edini namen sodne prodaje pritožnikove hiše poplačilo dolga javnemu podjetju za vodooskrbo J. Zaradi tega mora Sodišče, ne glede na to, kako je bil iztržek od prodaje na koncu razdeljen (glej 8. in 38. odstavek), preučiti, ali je izpodbijana sodna prodaja v skladu z zahtevami 1. člena protokola št. 1.

66. Sodišče po eni strani ugotavlja, da pritožnik ni poravnal dolga podjetju J., ki je zapadel 5. januarja 2008 (glej 10. odstavek). Poleg tega se ni na noben način odzval na sklep o izvršbi, ki mu je bil vročen 24. junija 2009 (glej 11. odstavek), ali na obvestila, ki jih je vročevalec dostavil na njegov dom 7. januarja 2010 in znova 29. aprila 2010 (glej 12. in 15. odstavek). Sodišče nadalje ugotavlja, da je pritožnik ostal pasiven tudi potem, ko je izvršilno sodišče ugodilo predlogu podjetja J. za sodno prodajo njegove hiše, in ni izkoristil različnih postopkovnih možnosti, ki so mu bile na voljo, da bi se izognil prodaji svoje hiše, kljub vročitvi vseh ustreznih sklepov in sodnih vabil na obe dražbi (glej zlasti 17., 22., 25., 44., 48. in 49. odstavek). Šele potem, ko je bila njegova hiša prodana, je pritožnik izkoristil možnost pritožbe, kjer je zatrjeval, da je bil v finančnih težavah in da njegovi družini grozi, da postanejo brezdomci, če prodaja ne bo razveljavljena (glej 29. odstavek). V zvezi s tem Sodišče ugotavlja, da domače sodišče teh navedb očitno ni podrobno preučilo (glej 34. odstavek). Vendar tudi ugotavlja, da pritožnik v postopku pred domačim sodiščem ni dokazal svoje trditve, da je v resnici imel takšne finančne težave, zaradi katerih ne bi mogel plačati tega dolga.

67. Po drugi strani Sodišče ugotavlja, da je dolg, ki ga je podjetje J. uveljavljalo prek prodaje pritožnikove hiše, znašal 124, skupaj z obrestmi in stroški izvršbe pa okoli 500 EUR, pri čemer ni seznanjeno s točnim končnim zneskom (glej 15. in 17. odstavek). Podjetje J. je sprva poskušalo izterjati dolg s prodajo pritožnikovih premočnin, in ko se je to izkazalo za neuspešno, je takoj zahtevalo, da se njegova hiša proda na javni dražbi (glej 16. odstavek<sup>16</sup>). Ko je 15. junija 2010 podjetje J. vložilo predlog za izterjavo dolga s prodajo hiše, je izvršilno sodišče predlogu ugodilo v dveh dneh in je po tem, ko je bilo sodno vabilo na dražbo 20. septembra 2010 dostavljeno v pritožnikov poštni predalčnik, izvedlo prvo dražbo 7. oktobra 2010. Hišo je prodalo za polovico tržne vrednosti na naslednji dražbi, ki je bila 18. novembra 2010 (glej 16. do 25. odstavek). V tem času sodišče ni pretehtalo nobenih drugih ukrepov, ki bi nadomestili sodno prodajo hiše, kljub dejstvu, da je bil

pritožnik očitno zaposlen ter je prejemal mesečni dohodek in je podjetje P. medtem uspešno izterjalo precej višji dolg z rubežem sredstev na njegovem bančnem računu (glej 19., 27. in 63. odstavek).

68. Sodišče ugotavlja, da ustrezna domača zakonodaja, Zakon o izvršbi (glej 43. do 51. odstavek), izrecno ne nalaga izvršilnemu sodišču dolžnosti, da se odloči za manj skrajne izvršilne ukrepe po uradni dolžnosti, ali zahteva, da zavrne predlog upnika, če nastane nesorazmernost. Zakonodaja tudi ne določa minimalnega praga glede višine dolga, tako da se lahko načeloma celo manjši dolg izterja s sodno prodajo nepremičnine, kot je hiša. To potrjujejo tudi podatki, ki jih je predložila vlada, in kažejo, da je bil v obdobju med 1. januarjem 2008 in 1. marcem 2012 sklep o izročitvi nepremičnine po sodni prodaji nepremičnine izdan v dvaintridesetih zadevah v zvezi z dolgovi, ki so znašali manj kot 1.000 EUR (glej 56. odstavek). Poleg tega Sodišče ugotavlja, da je bila v skladu z Zakonom o izvršbi nepremičnina, prodana na dražbi, domaknjena kupcu in da so domača sodišča v obravnavani zadevi razlagala zakonodajo na način, kot da zaradi varstva legitimnih interesov kupca prodaje na tej točki ni več mogoče razveljaviti iz takšnih razlogov, kot je naknadno poplačilo dolga (glej 34. in 37. odstavek).

69. Čeprav Sodišče priznava, da imajo države pogodbenice široko polje proste presoje na tem področju (glej 77. odstavek) in da se lahko cilji, ki jih ustrezna zakonodaja želi uresničiti, nanašajo tudi na vprašanja, ki presegajo samo plačilo posameznega dolga, kot je izboljšanje discipline odplačevanja v državi, pa kljub temu meni, da so bili organi oblasti zaradi izjemnega pomena izvršilnega ukrepa, sprejetega zoper pritožnikovo nepremičnino, ki je bila tudi njegov dom, ter očitne nesorazmernosti med tem ukrepom in zneskom dolga, ki naj bi se izterjal, dolžni skrbno in izrecno upoštevati druge primerne, vendar manj skrajne možnosti (glej, *mutatis mutandis*, OAO Neftyanaya Kompaniya Jukos proti Rusiji, št. 14902/04, 651. do 654. odstavek, 20. september 2011).

70. V zvezi s tem Sodišče ugotavlja, da Zakon o izvršbi predvideva več izvršilnih sredstev, vključno z rubežem sredstev na dolžnikovem bančnem računu ali dela dolžnikove plače (glej 45. in 47. odstavek). Poleg tega se sklicuje na svojo zgoraj omenjeno ugotovitev o očitnem obstoju možnega ukrepa v obliki rubeža sredstev s pritožnikovega bančnega računa kot možnem ustreznem in učinkovitem ukrepu za izterjavo pritožnikovega dolga (glej 81. odstavek), še posebej, če bi se ga uporabilo z določeno mero prožnosti, kot je vračilo v primernem časovnem obdobju. Še več,

skoraj mesec dni pred drugo dražbo je podjetje J. predlagalo, da se izvršba opravi z rubežem pritožnikove plače in bančnega računa. Kljub temu, da sta bila predloga vložena 18. oziroma 25. oktobra 2010, pa jima sodišče ni ugodilo do 22. novembra 2010, torej po tem, ko je bila hiša prodana na drugi dražbi (glej 24. in 27. odstavek). Po mnenju Sodišča je presenetljivo, da je izvršilno sodišče, ki je pred tem odločitve sprejemalo precej hitro (glej 81. odstavek), za odločitve o predlogih podjetja J. potrebovalo mesec dni.

71. Dejansko bi morale sodišče glede na nepopravljive posledice sodne prodaje za pritožnika pravočasno sprejeti odločitev o predlogih podjetja J. in sprejeti ukrepe za odlog ali odpoved dražbe. Sodišče priznava, da je lahko zadnje omenjeno, tako kot tudi pomanjkanje začetnega upoštevanja sorazmernosti ob sprejetju predloga za izpodbijano sodno prodajo, vsaj deloma posledica tega, kako sodišče razlaga ustrezne zahteve notranjega prava. Kljub temu pa Sodišče ugotavlja, da je imelo to glede na okoliščine zadeve negativen splošen vpliv na vodenje izvršilnega postopka proti pritožniku (glej, *mutatis mutandis*, *OA O Neftyanaya Kompaniya Yukos*, navedeno zgoraj, 656. odstavek).

72. Nazadnje Sodišče pripisuje velik pomen zagotavljanju učinkovitega izvršilnega postopka za upnike (glej, *mutatis mutandis*, *Mindek proti Hrvaški*, št. 6169/13, 82. odstavek, 30. avgust 2016), vendar pa v obravnavani zadevi ni bilo izkazano, da je bila sodna prodaja pritožnikove hiše nujen ukrep za zagotovitev takšne izterjave.

73. Ob upoštevanju zgoraj navedenih ugotovitev, zlasti nizke vrednosti dolga, izterjanega s sodno prodajo pritožnikove hiše, ter ob tem, da državni organi niso upoštevali drugih primernih in manj skrajnih ukrepov, Sodišče ugotavlja, da država ni vzpostavila pravičnega ravnotežja med zasledovanim ciljem in ukrepom, uporabljenim v izvršilnem postopku proti pritožniku. Torej je bil kršen 1. člen protokola št. 1 konvencije.

74. Glede na to ugotovitev Sodišče ne šteje za potrebno, da bi posebej obravnavalo pritožnikovo pritožbo v zvezi z njegovim neuspešnim poskusom, da bi dosegel razveljavitev sklepa, s katerim je bila hiša domaknjena kupcu.

## II. ZATRJEVANA KRŠITEV 13. ČLENA KONVENCIJE

75. Pritožnik se je pritožil, da ni imel na voljo učinkovitega pravnega sredstva v zvezi s pritožbo na podlagi 1. člena protokola št. 1 konvencije. Zlasti se je pritožil, da ni mogel doseči razveljavitve prodaje hiše na podlagi tega, da je bil dolg podjetju J. poplačan. Skliceval se je na 13. člen konvencije, ki se glasi:

"Vsakdo, čigar pravice in svoboščine, zajamčene s to Konvencijo, so kršene, ima pravico do učinkovitih pravnih sredstev pred domačimi oblastmi, in to tudi če je kršitev storila uradna oseba pri opravljanju uradne dolžnosti."

76. Vlada je to navedbo izpodbijala.

77. Sodišče ugotavlja, da je ta očitek povezan s prej obravnavanim očitkom in ga je treba zato prav tako razglasiti za sprejemljivega (glej 61. odstavek).

78. Sodišče ob upoštevanju svoje ugotovitve glede 1. člena protokola št. 1 konvencije (glej 87. odstavek) meni, da ni treba posebej obravnavati pritožbe na podlagi 13. člena (glej, na primer, *Zehentner*, navedeno zgoraj, 82. odstavek).

## III. UPORABA 41. ČLENA KONVENCIJE

79. 41. člen konvencije določa:

"Če Sodišče ugotovi, da je prišlo do kršitve Konvencije ali njenih protokolov, in če notranje pravo visoke pogodbenice dovoljuje le delno zadoščenje, Sodišče oškodovani stranki, če je potrebno, nakloni pravično zadoščenje."

### A. Odškodnina

80. Pritožnik je zahteval 70.000 EUR za premoženjsko škodo, ki ustreza razliki med ocenjeno tržno vrednostjo hiše in ceno, za katero je bila prodana (polovica te vrednosti). Pritožnik je ob sklicevanju na domače zakonsko določene obresti zahteval tudi zamudne obresti od datuma druge javne dražbe naprej, kar po njegovih navedbah do 12. maja 2015 znaša 27.244, po tem pa približno 7.000 EUR na leto.

81. Pritožnik je zahteval tudi 15.000 EUR za nepremoženjsko škodo. Trdil je, da mu je izguba doma in medijska pozornost, ki je je bila deležna zadeva, povzročila veliko duševno trpljenje.

82. Vlada je oporekala zahtevku za premoženjsko škodo kot neutemeljenemu in trdila, da pritožnik ni utemeljil svojega zahtevka v višini 7.000 EUR, ki ga je uveljavljal kot letne zamudne obresti. Oporekala je tudi zahtevku za nepremoženjsko škodo z utemeljitvijo, da je trditev pritožnika, da je utrpel duševno stisko zaradi medijske pozornosti, nesprejemljiva, saj je pritožnik sam iskal medijsko pozornost in informacije posredoval medijem.

83. Sodišče poudarja, da je ugotovilo kršitev 1. člena protokola št. 1 konvencije v zvezi s prodajo pritožnikove nepremičnine na javni dražbi. Pritožnik je zato upravičen do odškodnine za premoženjsko škodo, če obstaja vzročna povezava med ugotovljeno kršitvijo in povzročeno škodo. Pritožnik mora tudi utemeljiti vrednost povzročene škode in nastale stroške. Tožena država ima pravno obveznost zagotoviti prenehanje kršitve in odpraviti posledice tako, da se čim bolj vzpostavi stanje, kakršno je bilo pred kršitvijo (glej *Rousk*, navedeno zgoraj, 150. odstavek, in *Iatridis proti Grčiji* (pravično zadoščenje) [VS], št. 31107/96, 32. odstavek, ESČP 2000-XI).

84. V zadevah, kjer je sporni poseg izpolnjeval pogoj, da ga določa zakon in ni arbitraren, je Sodišče menilo, da je odškodnina na ravni tržne vrednosti nepremičnine v času posega primerna (glej *Rousk*, navedeno zgoraj, 151. odstavek). Sodišče ne vidi razloga, da bi v tem primeru ocenilo drugače. Ugotavlja, da je pritožnikovo nepremičnino pregledal cenilec nepremičnin pred prodajo, ko je bila njena tržna vrednost ocenjena na 140.000 EUR (glej 14. odstavek). Vlada ni predložila dokazov o tem, da bi bila pravilnost te ocene vprašljiva. Iz tega sledi, da je treba pritožniku plačati odškodnino v višini razlike med tržno vrednostjo 140.000 EUR in ceno 70.000 EUR, za katero je bila nepremičnina prodana, kar znaša 70.000 EUR. Sodišče prav tako meni, da je treba navedeni odškodnini prišteti obresti kot nadomestilo za izgubo vrednosti odškodnine v daljšem časovnem obdobju. Obresti morajo odražati nacionalne gospodarske razmere, kot so stopnje inflacije in obrestnih mer (glej *Ghigo proti Malti* (pravično zadoščenje), št. 31122/05, 20. odstavek, 17. julij 2008). V zvezi s tem Sodišče poudarja, da je pritožnik zahteval obresti na podlagi domačih zakonskih zamudnih obrestnih mer. Vendar pa Sodišče glede na okoliščine primera in ob upoštevanju inflacije v ustreznem obdobju (glej *Scordino proti Italiji* (št. 1) [VS], št. 36813/97, 258. odstavek, ESČP 2006-V) meni, da je treba vsoti 70.000 EUR dodati še enkratno izplačilo 10 % obresti.

85. Glede na navedeno Sodišče meni, da je upravičeno pritožniku prisoditi skupaj 77.000 EUR za premoženjsko škodo, zvišano za morebitni davek, ki se obračuna na ta znesek.

86. V zvezi s pritožnikovim zahtevkom za nepremoženjsko škodo pa Sodišče meni, da je pritožnik utrpel nepremoženjsko škodo, zlasti občutke tesnobe in stiske, kot posledico prodaje njegovega doma, in to kljub temu, da se lahko šteje, da je sam delno prispeval k temu položaju. Sodišče zato pritožniku prisoja 3.000 EUR za nepremoženjsko škodo, zvišano za morebitni davek na ta znesek.

#### B. Stroški in izdatki

87. Pritožnik je zahteval tudi 3.680 EUR za stroške in izdatke, nastale v domačem postopku. Ta znesek je sestavljen iz stroškov zastopanja, zaračunanih pritožniku za pritožbo proti izročitvi nepremičnine in zahtevo za razveljavitev pravnomočnega sklepa o domiku (glej 36. odstavek), za pravna sredstva proti izselitvi in ustavno pritožbo (glej 39. in 40. odstavek). Pritožnik je zahteval tudi 1.500 EUR za stroške in izdatke, nastale v postopku pred Sodiščem. Svoj zahtevek je oblikoval po uradni odvetniški tarifi in zahteval, da se zahtevanim zneskom doda DDV.

88. Vlada o tem zahtevku ni izrazila mnenja.

89. V skladu s sodno prakso Sodišča je pritožnik upravičen do povrnitve stroškov in izdatkov, če dokaže, da so ti dejansko nastali in bili neizogibni, ter je njihov znesek razumen. Sodišče v tej zadevi ob upoštevanju razpoložljivih dokumentov in zgoraj navedenih meril meni, da je upravičeno prisoditi 5.000 EUR za kritje stroškov iz vseh ustreznih naslovov.

#### C. Zamudne obresti

90. Po mnenju Sodišča je primerno, da zamudne obresti temeljijo na mejni posojilni obrestni meri Evropske centralne banke, ki se ji dodajo tri odstotne točke.

**Iz teh razlogov sodišče soglasno**

1. *razglaš*a, da je pritožba sprejemljiva;
2. *razsoja*, da je bil kršen 1. člen protokola št. 1 konvencije;
3. *razsoja*, da ni treba posebej preučiti pritožbe po 13. členu konvencije;
4. *razsoja*:
  - a) da mora tožena država pritožniku v treh mesecih od dne, ko sodba postane dokončna po drugem odstavku 44. člena konvencije, plačati te zneske:
    - (i) 77.000 EUR (sedeminsedemdeset tisoč evrov) in morebitni davek, ki se lahko obračuna, za premoženjsko škodo;
    - (ii) 3.000 EUR (tri tisoč evrov) in morebitni davek, ki se lahko obračuna, za nepremoženjsko škodo;
    - (iii) 5.000 EUR (pet tisoč evrov) za stroške in izdatke ter morebitni davek, obračunan pritožniku;
  - b) da se za navedene zneske od dneva poteka treh mesecev do plačila obračunajo linearne obresti po stopnji, enaki stopnji mejne posojilne obrestne mere Evropske centralne banke, za vse zamujeno obdobje z dodanimi tremi odstotnimi točkami;
5. *zavrača* preostali del zahtevka pritožnika za pravično zadoščenje.

**Smiselno dopolnite s pojmi na koncu besedila:**

ESČP je v zadevi *Vaskrsi* proti Sloveniji presoјalo, ali je prodaja pritožnikove hiše v izvršilnem postopku pomenila kršitev pravice do \_\_\_\_\_ uživanja \_\_\_\_\_ iz 1. člena Protokola št. 1 k EKČP. Pritožnik je zatrjeval, da je bila njegova hiša prodana zaradi zelo majhnega dolga, ki je izviral iz neplačanega računa za \_\_\_\_\_. Glavnica dolga je znašala le \_\_\_\_\_, čeprav so se znesku pozneje prištele še \_\_\_\_\_ in stroški izvršilnega postopka. Za ESČP zato ni bilo odločilno samo vprašanje, ali je bil izvršilni postopek formalno izveden v skladu z zakonom, temveč predvsem, ali je bila prodaja hiše kot izvršilno sredstvo \_\_\_\_\_ glede na zasledovani cilj.



Pritožnik in njegova družina so živeli v hiši v Litiji, ki je bila v izvršilnem postopku prodana na javni \_\_\_\_\_. Hiša je bila ocenjena na \_\_\_\_\_ EUR, na drugi dražbi pa je bila prodana za \_\_\_\_\_ EUR, torej za \_\_\_\_\_ ocenjene tržne vrednosti. Čeprav je izvršba načeloma legitimno sredstvo za varstvo pravic \_\_\_\_\_, je bila v tej zadevi posebej problematična očitna razlika med višino dolga in vrednostjo prodane \_\_\_\_\_. Izvršba ni posegla le v premoženjski interes pritožnika, temveč tudi v njegov življenjski prostor, saj je šlo za njegov \_\_\_\_\_.

ESČP je najprej ugotovilo, da je prodaja hiše pomenila \_\_\_\_\_ v pritožnikovo pravico do mirnega uživanja premoženja. Tak poseg sam po sebi še ni prepovedan. Država sme namreč z zakonom urediti izvršilne postopke in zagotoviti, da lahko upniki dosežejo \_\_\_\_\_ svojih terjatev. Izvršba je povezana tudi s pravico upnika do učinkovitega \_\_\_\_\_ varstva. Vendar mora biti vsak poseg v lastninsko pravico ne samo določen z \_\_\_\_\_ in usmerjen k legitimnemu cilju, ampak mora prestati tudi preizkus \_\_\_\_\_.

V obravnavani zadevi ESČP ni ugotovilo, da bi bila prodaja hiše brez pravne podlage. Poseg je temeljil na določbah slovenskega \_\_\_\_\_ o izvršbi in zavarovanju. Prav tako je ESČP sprejelo, da je poseg zasledoval \_\_\_\_\_ cilj, in sicer varstvo upnikov ter varstvo kupca nepremičnine na javni dražbi. Ključno vprašanje pa je bilo, ali je država vzpostavila \_\_\_\_\_ ravnotežje med tem ciljem in težo posledic za pritožnika. Po ustaljeni presoji ESČP namreč posameznik pri posegu v lastninsko pravico ne sme nositi \_\_\_\_\_ in pretiranega bremena.

Pri presoji je ESČP upoštevalo tudi ravnanje pritožnika. Pritožnik se na začetku izvršilnega postopka ni odzival na sklepe sodišča, čeprav so mu bila sodna pisanja pravilno \_\_\_\_\_. Ni vložil ugovora zoper sklep o izvršbi, ni se odzval na poročilo o cenitvi in se ni udeležil javnih \_\_\_\_\_. Prav tako ni pravočasno predlagal, naj se izvršba opravi z drugim izvršilnim \_\_\_\_\_. Ta pasivnost je bila za ESČP pomembna, saj je pokazala, da pritožnik ni izkoristil vseh možnosti, ki jih je imel v domačem postopku. Vendar pa po presoji ESČP dolžnikova pasivnost sama po sebi še ne pomeni, da lahko država uporabi vsak, tudi skrajno \_\_\_\_\_ izvršilni ukrep.

Posebna teža zadeve je bila v tem, da je bila prodana nepremičnina, ki je bila pritožnikov \_\_\_\_\_. Izguba doma ima za posameznika praviloma hujše posledice kakor izguba drugega premoženja. Zato mora biti izvršilno sodišče v takšnem primeru posebej pozorno na \_\_\_\_\_ med sredstvom izvršbe in višino dolga. Tudi če dolžnik ni ravnal skrbno, morajo državni organi preprečiti, da bi izvršilni postopek povzročil očitno \_\_\_\_\_ posledico. ESČP je zato poudarilo, da bi morali domači organi zaradi izjemne teže ukrepa posebej skrbno preveriti, ali obstajajo \_\_\_\_\_ skrajna izvršilna sredstva.

Takšna sredstva so v zadevi očitno obstajala. Pritožnik je bil \_\_\_\_\_, zato bi bila mogoča izvršba na njegovo \_\_\_\_\_. Prav tako bi bila mogoča izvršba na denarna sredstva na njegovem \_\_\_\_\_ računu. Pomembno je bilo tudi, da je drug upnik, podjetje P., pred tem uspešno poplačal precej višji dolg z rubežem sredstev na pritožnikovem bančnem računu. To je kazalo, da izvršba na denarna sredstva ni bila zgolj teoretična možnost, ampak potencialno \_\_\_\_\_ in manj invaziven ukrep.

Še posebej pomembno je bilo, da je podjetje J. skoraj mesec dni pred drugo javno dražbo samo predlagalo razširitev izvršbe na pritožnikovo \_\_\_\_\_ in bančni račun. Sodišče pa o teh predlogih ni odločilo pred dražbo, temveč šele \_\_\_\_\_ tem, ko je bila hiša že prodana. ESČP je ugotovilo, da je bilo to nenavadno, saj je isto izvršilno sodišče v drugih fazah postopka odločalo razmeroma \_\_\_\_\_. Glede na to, da je prodaja hiše povzročila za pritožnika skoraj \_\_\_\_\_ posledice, bi moralo sodišče o alternativnih sredstvih odločiti pravočasno in po potrebi razmisliti o \_\_\_\_\_ ali odpovedi dražbe.

Slovenska zakonodaja v relevantnem času izvršilnemu sodišču ni izrecno nalagala, da mora po \_\_\_\_\_ dolžnosti izbrati milejše izvršilno sredstvo. Prav tako ni določala \_\_\_\_\_ praga dolga, pod katerim izvršba na nepremičnino ne bi bila dopustna. To je pomenilo, da je bila prodaja nepremičnine načeloma mogoča tudi za zelo \_\_\_\_\_ dolgove. ESČP pa je opozorilo, da odsotnost takšnega zakonskega praga ne odvezuje sodišč dolžnosti, da v konkretnem primeru upoštevajo zahtevo po \_\_\_\_\_. Formalna skladnost z zakonom namreč še ne pomeni nujno, da je poseg tudi konvencijsko \_\_\_\_\_.

ESČP je priznalo, da imajo države pri urejanju izvršilnih postopkov \_\_\_\_\_ polje proste presoje. Učinkovita izvršba je pomembna za pravno varnost, za zaupanje v sodni sistem in za varstvo \_\_\_\_\_. Če dolžniki ne bi mogli biti prisiljeni k plačilu dolgov, bi lahko bile sodne odločbe in drugi izvršilni naslovi brez dejanskega učinka. Vendar pa učinkovitost izvršbe ne more pomeniti, da se sme za izterjavo majhnega dolga brez resne presoje uporabiti najstrožje možno \_\_\_\_\_.

ESČŠ je zato v tej zadevi tehtalo več interesov. Na eni strani je bil interes upnika, da doseže \_\_\_\_\_ dolga. Na isti strani je bil tudi interes kupca, ki je nepremičnino kupil na javni dražbi in je lahko pričakoval določeno stopnjo \_\_\_\_\_ varnosti. Na drugi strani pa je bil interes pritožnika, da zaradi majhnega dolga ne izgubi svojega doma. ESČP ni zanikalo pomena prvih dveh interesov, vendar je ugotovilo, da domača sodišča niso zadostno pokazala, da so jih uravnotežila s težo posega v pritožnikovo \_\_\_\_\_ pravico.

Pomembno je tudi, da ESČP ni zaključilo, da prodaja nepremičnine zaradi denarnega dolga nikoli ni dopustna. Sporočilo sodbe je bolj \_\_\_\_\_.: kadar gre za očitno nesorazmerje med nizkim dolgom in prodajo doma, morajo sodišča opraviti posebej \_\_\_\_\_ presojo. Preveriti morajo, ali obstajajo milejši ukrepi, ali bi ti lahko učinkovito dosegli isti cilj in ali bi prodaja nepremičnine dolžniku naložila \_\_\_\_\_ breme.

ESČP je na koncu ugotovilo, da v tej zadevi ni bilo vzpostavljeno \_\_\_\_\_ ravnotežje med legitimnim ciljem izvršbe in sredstvom, ki ga je država uporabila zoper pritožnika. Odločilni razlogi so bili nizka vrednost dolga, izjemna teža ukrepa, dejstvo, da je šlo za pritožnikov dom, obstoj manj skrajnih možnosti izvršbe in pomanjkanje pravočasne presoje teh možnosti. Zato je ugotovilo kršitev \_\_\_\_\_ k EKČP.

Glede očitka po \_\_\_\_\_ EKČP, torej glede pravice do učinkovitega pravnega sredstva, ESČP ni opravilo posebne vsebinske presoje. Ker je že ugotovilo kršitev pravice do mirnega uživanja premoženja, je menilo, da tega očitka ni treba obravnavati ločeno. Pritožniku je prisodilo \_\_\_\_\_ EUR za premoženjsko škodo, ker je bila hiša prodana za polovico ocenjene vrednosti, ter \_\_\_\_\_ EUR za nepremoženjsko škodo zaradi tesnobe in stiske, povezane z izgubo doma.

Sodba je pomembna tudi za razumevanje ustavnopravnega varstva \_\_\_\_\_ v izvršilnih postopkih. Kaže, da sodišča ne smejo delovati zgolj kot formalni izvrševalec upnikovega predloga, ampak morajo v očitnih primerih nesorazmerja opraviti vsebinsko presojo \_\_\_\_\_. Izvršilni postopek je sicer namenjen učinkovitemu poplačilu upnika, vendar mora ostati znotraj meja \_\_\_\_\_ države. Če sodišče spregleda očitno nesorazmernost med dolgom in posledicami izvršbe, lahko zakonit postopek postane konvencijsko \_\_\_\_\_ poseg v temeljne pravice posameznika.

**Možni pojmi:** mirnega, premoženja, vodo, 124 EUR, obresti, sorazmerna, dražbi, 140.000, 70.000, polovico, upnikov, nepremičnine, dom, poseg, poplačilo, sodnega, zakonom, Zakona, legitimni, pravično, nesorazmernega, vročena, dražb, sredstvom, invaziven, dom, sorazmernost, nesorazmerno, manj, zaposlen, plačo, bančnem, učinkovit, plačo, po, hitro, nepopravljive, odlogu, uradni, minimalnega, majhne, sorazmernosti, dopusten, široko, upnikov, sredstvo, poplačilo, lastninsko, uravnoteženo, skrbno, pretirano, pravično, 1. člena Protokola št. 1, 13. členu, 77.000, 3.000, , sorazmernosti, pravne

## Vprašanja

- Zakaj je ESČP ugotovilo, da je prodaja pritožnikove hiše pomenila kršitev pravice do mirnega uživanja premoženja? Pojasnite, katere okoliščine so bile za ESČP odločilne pri ugotovitvi, da izvršba ni bila sorazmerna.
- Kako bi ocenili ravnanje pritožnika v izvršilnem postopku? Pojasnite, ali je s svojo pasivnostjo in neodzivanjem na sodna pisanja sam pomembno prispeval k nastalemu položaju, ter zakaj ESČP kljub temu ni štelo, da to razbremeni državo odgovornosti za nesorazmeren poseg.
- Kaj pomeni zahteva po pravičnem ravnotežju med interesom upnika in pravicami dolžnika? Pojasnite, zakaj mora sodišče pri izvršbi upoštevati ne samo pravico upnika do poplačila, ampak tudi posledice izvršbe za dolžnika.
- Zakaj je bila višina dolga v tej zadevi tako pomembna? Pojasnite, zakaj je bilo problematično, da je bila zaradi dolga v višini 124 EUR oziroma približno 500 EUR z obrestmi in stroški prodana hiša, ocenjena na 140.000 EUR.
- Zakaj je bilo pomembno, da prodana nepremičnina ni bila navadno premoženje, ampak pritožnikov dom? Pojasnite, zakaj ima izguba doma za posameznika hujše posledice kot izguba drugega premoženja.

- Ali mora izvršilno sodišče paziti na sorazmernost izvršbe tudi takrat, ko dolžnik sam ne predlaga milejšega sredstva izvršbe? Pojasnite, kaj ta sodba pove o dolžnosti sodišča, da prepreči očitno nesorazmeren poseg.
- Zakaj je bilo pomembno, da je upnik pred drugo dražbo sam predlagal izvršbo na plačo in bančni račun?
- Zakaj je bilo problematično, da zakon ni določal najnižjega zneska dolga, pri katerem je še dopustna prodaja nepremičnine v izvršbi?
- Pojasnite razliko med formalno zakonitim vodenjem izvršbe in vsebinsko presojo, ali izvršba povzroča očitno nesorazmeren poseg v lastninsko pravico.

# Khadija Ismayilova proti Azerbajdžanu z dne 27. januarja 2026, št. 71556/16 in 74112/17

In the case of Khadija Ismayilova v. Azerbaijan (no. 4), the European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Ioannis Ktistakis, *President*,  
Lətif Hüseynov,  
Darian Pavli,  
Úna Ní Raifeartaigh,  
Mateja Đurović,  
Canòlic Mingorance Cairat,  
Vasilka Sancin, *judges*,  
and Milan Blaško, *Section Registrar*,

Having regard to:

the applications (nos. 71556/16 and 74112/17) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Azerbaijani

national, Ms Khadija Rovshan gizi Ismaylova (*Xədicə Rövşən qızı İsmaylova* – “the applicant”), on the dates indicated in the appended table;

the decision to give notice to the Azerbaijani Government (“the Government”) of the complaints under Article 6 §§ 1 and 3 (b), (c) and (d) and Articles 7, 10 and 18 of the Convention and to declare the remainder of application no. 71556/16 inadmissible;

the parties’ observations;

Having deliberated in private on 30 September and 9 December 2025,

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

## Introduction

1. The applications concern the alleged unfairness of the criminal proceedings against the applicant and the alleged breach of her right not to be convicted on account of acts which did not constitute the criminal offence of illegal entrepreneurship under domestic law. The applicant also complained that her prosecution and conviction had amounted to a restriction of her right to freedom of expression, which had been applied for a purpose other than those prescribed by the Convention. The applicant relied on Articles 6, 7, 10 and 18 of the Convention.

## The facts

2. The applicant was born in 1976 and lives in Baku. She was represented by Mr P. Hughes and Mr F. Namazli, lawyers based in London and Azerbaijan respectively.

...

4. The facts of the case may be summarised as follows.

## **I. Background and criminal charges against the applicant**

5. The applicant is a well-known investigative journalist and civil society activist. She is known for her strong criticism of the Azerbaijani government and was involved earlier in her career in numerous journalistic investigations relating, in particular, to cases of alleged corruption and the business activities of public officials.

6. In November 2007 the applicant started to work as a freelance journalist for the Baku bureau of the Azerbaijani service (“Azadliq Radio”) of Radio Free Europe/Radio Liberty (“RFE/RL”). RFE/RL is a non-profit international broadcasting corporation with its headquarters in Prague and funded by the United States Congress.

7. On 1 July 2008 the applicant was recruited to the Baku bureau as acting head of the bureau, based on a fixed-term employment contract. On 1 July 2009 the applicant was appointed as head of the bureau and her employment contract was further extended. On 1 October 2010 the applicant’s employment contract with RFE/RL was terminated and from then until December 2014 she worked for the bureau on a freelance basis.

8. On 20 October 2014 T.M., a former colleague of the applicant at Azadliq Radio, attempted to commit suicide. On 24 October 2014 the Prosecutor General’s Office instituted criminal proceedings under Article 125 (incitement to suicide) of the Criminal Code.

9. On 25 November 2014 T.M. lodged a complaint with the Prosecutor General’s Office accusing the applicant of inciting him to commit suicide. On 5 December 2014 the applicant was charged with the criminal offence under Article 125 of the Criminal Code in the framework of the above-mentioned criminal proceedings and was detained on remand (for more detail, see *Khadija Ismayilova (no. 2)*, cited above, §§ 16-27).

10. On 13 February 2015 the applicant was charged with additional criminal offences under Articles 179.3.2 (high-level embezzlement), 192.2.2 (illegal entrepreneurship committed for the purpose of generating a large amount of income), 213.1 (tax evasion) and 308.2 (aggravated abuse of power) of the Criminal Code (*ibid.*, § 36). In particular, she was accused of the following:



(i) The applicant had allegedly misappropriated State property and abused her power by illegally employing several individuals to work at the Baku bureau of Azadliq Radio on the basis of service contracts under the Civil Code (which were subject to a simplified low tax rate of 4%). In breach of the requirements of the Labour Code, the applicant had not signed employment contracts with those people (which would have been subject to personal income tax at a rate of 14%) and had therefore inflicted material damage on the State in the amount of 17,992.60 Azerbaijani manats (AZN), which represented a difference of 10% between the above rates;

(ii) In the applicant's capacity as head of the Baku bureau of Azadliq Radio, which was a non-commercial organisation, she had allegedly engaged in illegal entrepreneurship by continuing the radio broadcasting activities of the Baku bureau despite the fact that the broadcasting licence given to the bureau by the National Television and Radio Council had expired on 1 January 2008 and had not been renewed thereafter, which amounted to conducting entrepreneurial activity without a licence within the meaning of Article 192 of the Criminal Code. Furthermore, since 1 October 2010 she had been working for Azadliq Radio without being accredited with the Ministry of Foreign Affairs as a representative of the foreign media, as required by the Law on Media, which amounted to "entrepreneurial activity without State registration" within the meaning of Article 192 of the Criminal Code. Consequently, in the period between 1 July 2008 and 1 December 2014 the applicant had acquired profit through illegal entrepreneurship by receiving and paying money to herself and other employees of the Baku bureau "disguised as salaries and service fees" in the total amount of AZN 335,880.54 (including AZN 79,480 during the period after 1 October 2010);

(iii) While head of the Baku bureau of Azadliq Radio in the period between 1 July 2008 and 1 October 2010, the applicant had allegedly avoided paying profit tax in the amount of AZN 45,145.63.

## **II. The applicant's conviction and appeals**

11. On 1 September 2015 the Baku Court of Serious Crimes acquitted the applicant of the charge under Article 125 (incitement to suicide) of the Criminal Code for lack of evidence and convicted her under Articles 179.3.2, 192.2.2, 213.1 and 308.2 of the Criminal Code. It sentenced her to seven and a half years' imprisonment and a ban on holding managerial and financial positions in public and local self-

government bodies for a period of three years. In particular, as regards the charge of illegal entrepreneurship under Article 192.2.2, the court found her guilty on account of broadcasting without a licence and working without accreditation (as described in detail in paragraph 10 above). As regards the charge of tax evasion under Article 231.1 of the Criminal Code, it appears that the court mainly relied on an interim audit report by the Ministry of Taxes of 19 January 2015, issued at the request of the prosecuting authorities, and on a forensic accounting report of 13 February 2015, as well as testimony by the authors of those reports and a number of bank documents. The reports stated, *inter alia*, that, while during its operations Azadliq Radio made various payments in connection with the collection of information as well as other related expenses, it was not possible to identify the purpose and destination of some of those payments. Some money was paid to individuals who did not work for it and its bank statements did not indicate the purpose and destination of certain payments. Some of the documents confirming the purpose and destination of payments were missing from the documents obtained for audit. As a result of those payments being made for unknown purposes and to unknown destinations, it was determined that Azadliq Radio had engaged in activities not aligning with its main activity as defined in its charter. It appears that, therefore, the authors of the reports regarded the total amount received by Azadliq Radio from its head office for its activities as “profit” and calculated a 20% profit tax (*mənfiəət vergisi*) from that amount. While the applicant was the head of the Baku bureau from 1 July 2008 to 1 October 2010, the unpaid profit tax calculated for that period corresponded to AZN 45,145.63. The court further held that, in accordance with Article 53.1 of the Tax Code, the applicant, as the head of the representative office, was responsible for the under-reporting and non-payment of those taxes.

12. The applicant appealed against that judgment, arguing that she had been wrongfully convicted of criminal offences that she had not committed. Citing a number of examples of her investigative journalistic work, she submitted that because of this, she had faced extensive harassment in various forms. She further argued that the criminal proceedings against her formed part of the broader harassment she had already faced because of her investigative work and were intended to silence and punish her for her publications exposing high-level corruption. Moreover, in respect of the offence of illegal entrepreneurship in the part concerning her work without accreditation, she submitted that during the period between 1 October 2010 and 1 December 2014 she had not been an employee of

Azadliq Radio (and thus, not a representative of foreign media), but had worked as a freelance journalist collaborating with various local and foreign media outlets on the basis of civil-law contracts. Moreover, under the relevant provisions of the Law on Media, accreditation of foreign journalists with the Ministry of Foreign Affairs was not a precondition for journalistic activity, but merely a right that granted access to more opportunities to receive information. The domestic law did not provide for any criminal or other form of liability for not obtaining accreditation and it was erroneous to characterise journalistic activity without applying for accreditation as illegal entrepreneurship. For that reason, it was also “legal nonsense” to conclude that her income from her journalistic work during the relevant period, namely AZN 79,480, had amounted to illegally obtained profit.

13. With regard to the offence of tax evasion, the applicant argued that the finding that Azadliq Radio had “engaged in activities not complying with its main activity as defined in its charter” had been vague and unclear as to what exactly it had meant. Previous tax audits of Azadliq Radio had not revealed any breaches of tax law. Azadliq Radio was a non-commercial organisation and its purposes did not include business activities. As such, it could not be subject to profit tax. Moreover, Azadliq Radio only received money from its parent entity in Prague and classifying the entire amount transferred to it during the period between 1 July 2008 to 1 October 2010 (amounting to AZN 1,354,368 in total for that period) as “profit” had been a “clear manifestation of prejudice” against the applicant. That amount had not been profit, rather it had merely represented the necessary and minimal expenses needed for Azadliq Radio to continue functioning (such as rent, employees’ salaries, fees to be paid to contract-based workers and repairs). Moreover, as head of the Baku bureau of Azadliq Radio, the applicant had not had financial tasks and had not been responsible for paying taxes or social contributions and, according to her employment contract, she had only had a coordinating role between the Baku bureau and the main office in Prague (see, for more detail, *Khadija Ismayilova* (no. 2), cited above, §§ 8-9). The applicant also argued, in respect of the interim audit report of 19 January 2015, that the Tax Code did not provide for an “interim report” (*aralıq akti*) and that the report and its contents had not been in compliance with the requirements of the Tax Code (the specific provisions relied on by the applicant are summarised in paragraphs 25-28 below). The report had not determined the issues of liability, nor had it specifically explained for what exactly the applicant had been responsible, and no decision had been made to hold her accountable for violating tax legislation. Neither that report, nor the forensic accounting report of 13 February

2015, which had been subsequently issued on its basis, could be considered lawful and accepted as evidence.

14. On 25 November 2015 the Baku Court of Appeal upheld the first-instance court's judgment of 1 September 2015, repeating its reasoning. In particular, in respect of the offence of illegal entrepreneurship, it held that, as the head of the Baku bureau of Azadliq Radio, the applicant had continued broadcasting after its radio broadcasting licence had expired on 1 January 2008 and that, moreover, she had worked as a representative of the foreign media without obtaining the required accreditation from the Ministry of Foreign Affairs, thus engaging in "entrepreneurial activity without State registration" which constituted the criminal offence of illegal entrepreneurship. In respect of the offence of tax evasion, it found that, based on the available evidence, the applicant, as the head of the Baku bureau of Azadliq Radio during the period between 1 July 2008 and 1 October 2010, was responsible for the under-reporting and non-payment of profit tax in the amount of AZN 45,145.63. The court remained silent concerning the specific arguments raised by the applicant in her appeal.

15. The applicant lodged a cassation appeal with the Supreme Court, repeating her arguments.

16. On 25 May 2016 the Supreme Court quashed the part of the appellate court's judgment of 25 November 2015 relating to the applicant's conviction under Articles 179.3.2 and 308.2 of the Criminal Code for lack of the constituent elements of the offence, as well as her conviction under Article 192.2.2 of the Criminal Code for the part concerning broadcasting without a licence, and upheld her conviction under Articles 192.2.2 (concerning her journalistic activity without being accredited) and 213.1 (tax evasion) of the Criminal Code. As to the latter two criminal offences, it repeated the lower courts' reasoning and did not address any of her specific arguments in detail, dismissing them in general terms by stating that they could not be a basis for concluding that she had not committed those criminal offences. The Supreme Court reduced the applicant's sentence to three and a half years' imprisonment suspended on probation for a period of five years. She was released from detention. Her release was subject to her not changing her permanent place of residence without notifying the law-enforcement authorities in advance, which effectively amounted to a ban on international travel for the period of her probation.

### III. Follow-up proceedings

17. In the meantime, on 6 May 2016 Article 192.1 of the Criminal Code was amended and the words “tax registration” (*vergi uçotuna*) in parentheses were added to the Article after the words “State registration” (*dövlət qeydiyyatına* – see paragraph 22 below).

18. Subsequently, the applicant lodged an application with the Baku Court of Serious Crimes, asking for her criminal conviction under Article 192.2.2 of the Criminal Code to be quashed, submitting that the acts of which she had been convicted did not constitute a criminal offence under that provision following the above-mentioned amendment. She argued that the amendment clarified the meaning of the phrase “State registration” in the definition of the criminal offence of illegal entrepreneurship, by limiting it to tax registration only and, since she had been duly registered as a taxpayer, she could not have been held liable for conducting entrepreneurial activities without State registration.

19. By a decision of 8 August 2016, the Baku Court of Serious Crimes partly dismissed and partly granted the applicant’s request. It rejected her interpretation of the amended version of Article 192 of the Criminal Code, stating briefly that the addition of the words “tax registration” did not limit the original wider meaning of the words “State registration” as previously applied to the applicant’s case. The applicant could therefore not be acquitted. However, the court noted that the relevant law of 6 May 2016 on the amendments to the Criminal Code specified that the words “large amount” (*külli miqdar*) in Article 192.2.2 meant an amount larger than AZN 100,000. It further noted that, following the quashing by the Supreme Court of the applicant’s conviction for illegal entrepreneurship in the part concerning broadcasting without a licence (see paragraph 16 above), the relevant amount of the applicant’s income generated in relation to the remaining part of the criminal conviction was only AZN 79,480 (which constituted a “significant amount” (*xeyli miqdar*)). The court therefore re-classified the offence under Article 192.1 of the Criminal Code and reduced the sentence imposed under that charge to four months’ imprisonment, as well as further reducing her total merged sentence from three and a half years’ imprisonment suspended on probation to two years and three months’ imprisonment suspended on probation.

20. Following a series of appeals, by a final decision of 16 February 2017 the Supreme Court upheld that decision. It held that the amendment to Article 192 of the Criminal Code could not be interpreted as limiting the definition of “State registration” to tax registration only, in particular in the context of activities of foreign media outlets or their representatives. It further noted in that regard that, under the Law on Media, the provisions of which remained in force and unchanged, foreign mass media outlets and their representatives were required to be accredited through the Ministry of Foreign Affairs before they could operate within the country, and that therefore tax registration alone was insufficient for their activity. The court further noted that, contrary to the applicant’s argument, engaging in journalistic or business activity without such accreditation did not, by itself, entail criminal liability; such activity constituted illegal entrepreneurship if, in addition, it caused significant or large damage to citizens, organisations or the State, or generated a significant or large amount of income. In the applicant’s specific case, the court found that she had failed to obtain the required accreditation while she had been the head of the Baku bureau of Azadliq Radio and that, subsequently, from 2010 to 2014, she had conducted entrepreneurial activities generating income amounting to AZN 79,480. Since the income had exceeded the threshold set by Article 192.1 of the Criminal Code, and given the absence of legal accreditation, the court ruled that her conviction under Article 192.1 had been valid and that there were no grounds to annul her sentence.

## **Relevant legal framework**

...

## **The law**

### **I. Joinder of the applications**

30. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

## II. Alleged violation of article 7 of the convention

31. The applicant complained under Article 7 that the acts of which she had been convicted had been lawful and had not constituted the offence of illegal entrepreneurship as set out in the applicable domestic law. Article 7 of the Convention reads as follows:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

### A. Admissibility

32. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

### B. Merits

#### *1. The parties' submissions*

##### (a) The applicant

33. The applicant argued that the charge of illegal entrepreneurship was initially based on two factors: Azadliq Radio's broadcasting without a licence and her lack of journalist accreditation, neither of which, she contended, had constituted a criminal offence on her individual part under domestic law at the time. Nonetheless, she accepted the Government's submission that, following the partial acquittal and narrowing the charge to the period of her freelance work, her conviction had been based solely on working without accreditation.

34. The applicant maintained that, nevertheless, the narrowed scope of the conviction had lacked a legal basis and had violated Article 7 of the Convention. The applicant emphasised that the Government had failed to counter her claim that accreditation had not been a legal requirement for journalists, including those working with foreign media, under domestic law at the time. She argued that accreditation could not be equated with “State registration” or “licensing” under Article 192 of the Criminal Code owing to its fundamentally different function and nature.

35. The applicant also challenged the characterisation of her freelance journalistic work as “entrepreneurship” under Azerbaijani law. Even if the courts deemed it to be so, she argued that entrepreneurship was not illegal in itself. Rather, Article 192 criminalised engaging in entrepreneurship without proper State registration or tax registration, or, for activities subject to licensing, without a licence. The applicant’s tax registration had never been questioned, and journalism was not an activity requiring a licence under Azerbaijani legislation. The courts, however, had treated accreditation as equivalent to either State registration or licensing under Article 192 and that interpretation had lacked a legal basis.

36. She further pointed out that that understanding had contradicted the Law on Media. According to Article 50 of that Law, accreditation was a system by which State bodies granted journalists privileged access to information, rather than a mandatory prerequisite for engaging in journalism. Article 53 referenced accreditation for foreign correspondents but did not establish a distinct form of accreditation for them beyond what was outlined in Article 50. Furthermore, while Article 53 stated that only accredited foreign correspondents could benefit from journalist status under the Law on Media, it explicitly allowed for non-accredited journalists to operate, reinforcing that accreditation was not a requirement for lawful journalistic activity.

37. Even if accreditation for foreign correspondents was considered mandatory, the applicant argued that it could not fall under the scope of Article 192 of the Criminal Code, as doing so would effectively classify all foreign correspondents as entrepreneurs. She asserted that the principle of *nullum crimen, nulla poena sine lege* required that the applicability of Article 192 to such cases be explicitly stated in law. Moreover, she contended that she was not a foreign correspondent and that no reasonable interpretation of the term could apply to her situation. As an Azerbaijani



national working as a freelance journalist with both domestic and international media outlets, she argued that her case had not fallen within the scope of Article 53 of the Law on Media. She criticised the courts and the Government for failing to address those concerns, instead focusing on the scope of “State registration” under Article 192 of the Criminal Code.

38. As regards in particular the proceedings she initiated after the 6 May 2016 amendments to the Criminal Code (see paragraphs 17-20 above), the applicant argued that the domestic courts had misinterpreted the amendment to Article 192. She maintained that their interpretation had amounted to a continued overly broad and unforeseeable reading of the law. Contrary to the courts’ findings, she asserted that the bracketed phrase “tax registration” had been intended to clarify the meaning of “State registration”, not expand it. She contended that the domestic courts had overlooked both the grammatical construction of the amended Article and, more importantly, the legislature’s intention. During parliamentary discussions, lawmakers had emphasised that the proposed amendments had been designed to decriminalise certain economic offences and to reduce penalties for non-violent crimes. The amendment had aimed to ease the burden on previously convicted individuals by narrowing the scope of criminal liability. However, the courts had failed to consider those policy goals and had treated the revision as if it had preserved or even widened the existing legal responsibility.

39. Ultimately, the applicant maintained that the legal basis for her conviction for illegal entrepreneurship had been absent, rendering it unforeseeable and unlawful.

(b) The Government

40. The Government argued that the applicant had engaged in illegal entrepreneurship from 2010 to 2014 by working without being accredited with the Ministry of Foreign Affairs as a representative of a foreign media outlet. They contended that her failure to be accredited, combined with the profits she had acquired, had amounted to a criminal offence under domestic law. Furthermore, they rejected the applicant’s argument that an amendment to Article 192 of the Criminal Code had limited the scope of the offence to only tax registration, asserting that her interpretation was unsupported by any legal authority.

41. The Government noted that the amendment did not restrict the criminal offence but merely clarified that tax registration was also covered by the provision. They pointed to similar structural formulations in other legal provisions to illustrate how the applicant's interpretation was, in their view, flawed. For instance, they noted that in Article 159 and subsequent Articles of the Criminal Code, the word "referendum" appeared in parentheses following the word "elections", which did not imply that the provisions concerned only referendums and excluded elections. Similarly, in Article 174, the word "supervision" was included in parentheses after "guardianship", meaning the provision applied to both concepts rather than just supervision. The Government further cited Article 200, where the word "services" appeared in parentheses after "goods", reinforcing that the provision applied to both. They argued that the same logic applied to Article 192 – the addition of "tax registration" in parentheses did not replace or narrow the meaning of the provision but clarified that both State registration and tax registration fell within its scope. They argued that the law required State registration and tax registration when applicable, meaning that conducting business without either form of registration, when required, constituted illegal entrepreneurship.

42. Addressing the applicant's argument that the legislature's intention had been to alleviate penalties, the Government asserted that no express reference to Article 192 of the Criminal Code appeared in the parliamentary records – specifically, the official transcript of parliamentary hearings dated 6 May 2016. While some amendments adopted on that date had aimed to reduce criminal responsibility, others, including an amendment to Article 192, had increased penalties. For example, one amendment provided that a person who committed illegal entrepreneurship for the first time could be exempt from criminal liability if they compensated for the damage or transferred illegal income to the State budget. However, another amendment had increased the penalty from double the amount of the unlawful gain to between two and four times the amount, demonstrating that not all changes had been designed to ease punishments.

## *2. The Court's assessment*

### *(a) General principles*

43. Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) (see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 78, ECHR 2013, and *Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], request no. P16-2021-001, Armenian Court of Cassation, § 67, 26 April 2022; see also *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, § 238, 26 September 2023).

44. The principle that offences and sanctions must be provided for by law entails that criminal law must clearly define the offences and the sanctions by which they are punished, such as to be accessible and foreseeable in its effects (see *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 242, 28 June 2018). This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account (see *Cantoni v. France*, 15 November 1996, § 29, *Reports of Judgments and Decisions* 1996-V; *Del Río Prada*, cited above, § 79; and *G.I.E.M. S.r.l. and Others*, cited above, § 242). Even when a point is ruled on for the first time in an applicant's case, a violation of Article 7 of the Convention will not arise if the meaning given is both foreseeable and consistent with the essence of the offence (see *Khodorkovskiy and Lebedev v. Russia* (no. 2), nos. 42757/07 and 51111/0, § 570, 14 January 2020, and *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* [GC], request no. P16-2019-001, Armenian Constitutional Court, § 62, 29 May 2020, and the references therein).

45. The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment

imposed did not exceed the limits fixed by that provision (see *Del Río Prada*, cited above, § 80, and the references therein).

46. The Court reaffirms that in principle, it should not substitute itself for the domestic jurisdictions. Its duty, in accordance with Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. Given the subsidiary nature of the Convention system, it is not the Court's function to deal with alleged errors of fact committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention and unless that domestic assessment is manifestly arbitrary (see *Kononov v. Latvia* [GC], no. 36376/04, § 189, ECHR 2010, and *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 160, ECHR 2015). More generally, the Court points out that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 51, ECHR 2015, and *Jidic v. Romania*, no. 45776/16, § 83, 18 February 2020). The Court also observes that it is not its task to substitute itself for the domestic courts as regards the assessment of the facts and their legal classification (see *Rohlena*, cited above, § 51), or to rule on the applicant's individual criminal responsibility (see *Kononov*, cited above, § 187).

47. However, the Court points out that its powers of review must be greater when the Convention right itself, Article 7 in the present case, requires that there was a legal basis for a conviction and sentence. Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicant's conviction and, in particular, it must satisfy itself that the result reached by the relevant domestic courts was compatible with Article 7 of the Convention, even if there were differences between the legal approach and reasoning of this Court and the relevant domestic decisions. To accord a lesser power of review to this Court would render Article 7 devoid of purpose (see *Kononov*, cited above, § 198; *Rohlena*, cited above, § 52; and *Vasiliauskas*, cited above, § 161).

48. In short, the Court's function is to consider, from the standpoint of Article 7 § 1 of the Convention, whether the applicant's act, at the time when it was committed, constituted an offence defined with sufficient accessibility and foreseeability by domestic or international law (see *Korbely v. Hungary* [GC], no. 9174/02, § 73, ECHR 2008; *Kononov*, cited above, § 187; and *Vasiliauskas*, cited above, § 162).

(b) Application of the principles to the present case

49. In the present case, in addition to the offence of tax evasion, the applicant was ultimately convicted of the offence of illegal entrepreneurship committed for the purpose of generating a large amount of income under Article 192.2.2 of the Criminal Code, later re-classified as the offence of illegal entrepreneurship under Article 192.1 of the Criminal Code (see paragraphs 19-20 above). The Court must verify whether the acts attributed to her fell within a definition of that criminal offence which was sufficiently foreseeable.

50. The Court notes at the outset that part of the applicant's submissions and essentially the entirety of the Government's submissions in respect of this complaint focused on whether or not the 2016 amendment to Article 192 of the Criminal Code limited the scope of the offence of illegal entrepreneurship by limiting the meaning of words "State registration" to tax registration only. The Court considers that resolving this disagreement is not crucial for the purposes of the present complaint because, even accepting the domestic courts' and the Government's position that the relevant amendment did not limit the scope of the offence, it considers, for the reasons it will set out below, that finding the applicant guilty under Article 192 of the Criminal Code was problematic from the standpoint of Article 7 of the Convention. The Government did not comment on the applicant's other, broader arguments that accreditation as a journalist could not in any event be equated with "State registration" within the meaning of Article 192 of the Criminal Code and that the domestic law did not clearly provide that the acts attributed to her, namely working as a representative of a foreign media outlet without accreditation, were criminalised (see paragraphs 34-37 above).

51. The Court also notes that the Government have not produced any decisions of domestic courts, whether of the higher courts or courts of first instance, demonstrating that, prior to the judgments delivered in the present case, it had been explicitly held that working as a foreign journalist or representative of a foreign media outlet without accreditation with the Ministry of Foreign Affairs constituted a criminal offence of illegal entrepreneurship, that is "conducting entrepreneurial activity without State registration" (compare, *mutatis mutandis*, *Pessino v. France*, no. 40403/02, § 34, 10 October 2006, and *Dragotoniū and Militaru-Pidborni v. Romania*, nos. 77193/01 and 77196/01, § 42, 24 May 2007; and contrast *Georgouleas and Nestoras v. Greece*, nos. 44612/13 and 45831/13, § 63, 28 May 2020). Furthermore,

even though, as noted above, the Government argued extensively that the amendment to Article 192 of the Criminal Code did not limit the scope of the criminal offence, no clear definition of the wider scope of the term “State registration” within the meaning of Article 192 was provided in the present case either by the courts or by the Government with reference to any other provisions of the domestic law or judicial decisions.

52. As to the lack of such “State registration” in the present case, the domestic courts held that the applicant had engaged in journalistic activity without being accredited by the Ministry of Foreign Affairs as a representative of foreign media, as required by Articles 50 and 53 of the Law on Media. However, the Court notes in this regard, firstly, that the applicant consistently brought to the domestic courts’ attention the fact that, during the period in question, namely between 1 October 2010 and 1 December 2014, she had no longer been an employee of Azadliq Radio but had been a freelance journalist working with various media outlets, both domestic and foreign, on the basis of civil-law contracts. Accordingly, she had been an Azerbaijani journalist working in Azerbaijan on a freelance basis and had not represented any particular media outlet, either domestic or foreign. However, the courts did not at all address the applicant’s arguments in that regard and it is not clear on what basis they concluded that she should be considered as a “representative of a foreign media outlet” within the meaning of Article 53 of the Law on Media. That approach essentially meant that any domestic journalist who collaborated with a foreign media outlet in any non-exclusive way could be considered a foreign journalist or a representative of a foreign media outlet, which would amount to the arbitrarily extensive application of the law. The Court therefore considers that it could not have been sufficiently foreseeable for the applicant that, in her particular situation, her status would be equated in such an arbitrary manner to a “representative of a foreign media outlet”.

53. Secondly, the Court notes that the domestic courts held that the Law on Media “required” accreditation for foreign journalists and representatives of foreign media outlets. In other words, in the present case, the courts regarded accreditation as some form of precondition, akin to a work permit, for lawful journalistic activity for foreign correspondents. However, having had regard to the text of Article 53 of that Law, which regulated activities of representatives of foreign media, the Court notes that, in respect of accreditation, it merely referred back to Article 50 of that same Law, noting that accreditation of foreign correspondents was carried out under the

same procedure as provided in that Article. It imposed no additional conditions on foreign correspondents other than specifying that accreditation of foreign correspondents was carried out by the “relevant executive authority” (which was the Ministry of Foreign Affairs for this particular procedure). Turning to Article 50 of the Law on Media, the Court notes that, at the material time, it stated that “mass media outlets may accredit their journalists ...” with various bodies and explained that such accreditation entailed access to advance information about meetings, consultations and other events, as well as access to various relevant documents. In other words, the accreditation procedure was formulated in that provision as a possibility, and not a requirement, and specified that accredited journalists had thereby acquired a right of additional or privileged access to certain types of information. This is further confirmed by the provisions of the fifth paragraph of Article 53 of the Law on Media, which further regulated rights and obligations of “foreign correspondents who [were] not accredited in accordance with established procedures”, as well as by the lack in both the Law on Media, as well as any other domestic law, of any provisions expressly providing for any form of liability for not obtaining accreditation.

54. In such circumstances, the Court cannot but conclude that there was no clear legal basis for the domestic courts’ finding that accreditation with the Ministry of Foreign Affairs was a requirement for foreign journalists. However, the domestic courts of all three levels of jurisdiction merely briefly held that the applicant had worked as a representative of a foreign media outlet without obtaining the required accreditation from the Ministry of Foreign Affairs, thus engaging in “entrepreneurial activity without State registration” which constituted a criminal offence of illegal entrepreneurship. They provided no further reasoning and did not attempt to give any plausible interpretation of the Law on Media to support their finding that accreditation was a “requirement”, and remained completely silent as to the applicant’s relevant objections and arguments in that regard.

55. The Court notes that only the Supreme Court, in its decision of 16 February 2017 in the follow-up proceedings (see paragraph 20 above), attempted to provide some form of extended legal reasoning. However, like the other courts, it provided no clear legal basis for its brief finding that foreign media outlets and their representatives were “required” to be accredited with the Ministry of Foreign Affairs in order to operate in the country, a finding which, as discussed above, was unsupported by the straightforward textual interpretation of the Law on Media. It

then merely proceeded to state at more length that engaging in journalistic activity without such accreditation did not, by itself, entail criminal liability and that such activity constituted illegal entrepreneurship if, in addition, it caused significant or large public damage or generated a significant or large amount of income. The applicant's income during the relevant period exceeded the "significant amount" threshold. The entirety of the applicant's income as a journalist during the relevant period was taken into account as income generated through illegal entrepreneurship for the sole reason that she had no accreditation during that period, whereas there was no clear legal basis to hold that such accreditation was at all required in her situation. The Court notes that such circular reasoning by the Supreme Court is incompatible with Article 7 of the Convention.

56. Having regard to the above, the Court considers that, in the determination of the criminal charge against the applicant of the offence of illegal entrepreneurship, the provisions of Article 192 of the Criminal Code and the relevant provisions of the Law on Media, as in force at the relevant time, were extensively and unforeseeably construed to her detriment, in a manner which could not be said to have constituted a development consistent with the essence of the offence (compare, *mutatis mutandis*, *Navalnyy v. Russia*, no. 101/15, § 68, 17 October 2017). Even as a professional journalist who could seek appropriate legal advice, it would have been difficult – if not impossible – for the applicant to have foreseen that the domestic law would be applied to her situation in such an arbitrary manner and to have known that her work as a freelance journalist with both domestic and foreign media without accreditation with the Ministry of Foreign Affairs could result in a criminal sanction.

57. Accordingly, there has been a violation of Article 7 of the Convention as regards the applicant's conviction for the offence of illegal entrepreneurship.

### **III. Alleged violation of article 6 § 1 of the convention**

58. The applicant complained that the domestic courts had delivered unreasoned judgments, in breach of the requirements of Article 6 § 1 of the Convention, which reads as follows:

"In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."



## A. Admissibility

59. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

## B. Merits

### 1. *The parties' submissions*

60. The applicant submitted that the trial against her had been a sham. The charges against her had been baseless and politically motivated and “not a single piece of evidence [had] disclosed [her] involvement in any crimes”. The domestic courts’ judgments had lacked proper reasoning. It was evident from the judgments that the courts had failed to address any of the applicant’s arguments relating to the charges of illegal entrepreneurship and tax evasion, that is the two charges of which she had ultimately been convicted.

61. The Government submitted that the complaint was unsubstantiated. They contended that the applicant had failed to produce any specific argument or evidence about the alleged unfairness of the criminal proceedings, but had merely stated that they had been unfair while asserting that she had not committed any criminal offences. All evidence, arguments and motions submitted by the applicant had been thoroughly examined by the domestic courts.

### 2. *The Court's assessment*

62. The relevant case-law principles concerning the adequate reasoning in domestic judgments are summarised in *Ilgar Mammadov v. Azerbaijan* (no. 2) (no. 919/15, §§ 205-10, 16 November 2017); *Farzaliyev v. Azerbaijan* (no. 29620/07, §§ 34-36, 28 May 2020); and *Fatullayev v. Azerbaijan* (no. 2), (no. 32734/11, §§ 76-83, 7 April 2022).

63. At the outset, the Court reiterates that in the *Khadija Ismayilova* (no. 2) judgment (cited above) it found, among other things, violations of Article 5 §§ 1 (c) and 4 of the Convention and a violation of Article 18 of the Convention in conjunction with Article 5, in respect of the applicant’s pre-trial detention in the framework of the same criminal proceedings.

64. One of the main factors leading the Court to its conclusions was the finding of a *prima facie* lack of plausibility of the accusations against the applicant (see, in particular, *Khadija Ismayilova* (no. 2), cited above, §§ 80-82). The Court concluded in that judgment that, contrary to Article 5 § 1 (c) of the Convention, the material put before it did not meet the minimum standard for the reasonableness of a suspicion required for an individual's arrest and continued detention (ibid., §§ 83-84). In breach of the requirements of Article 5 § 4 of the Convention, the domestic courts in that case failed to verify the existence of a reasonable suspicion underpinning the applicant's arrest and detention despite her repeated complaints to that end and, by using vague and standard wording, automatically endorsed the prosecution's applications without any genuine and independent review of the "lawfulness" of her detention (ibid., § 91). Having also had regard to the combination of case-specific facts, the Court found that, contrary to the requirements of Article 18 of the Convention, the authorities' actions had been driven by improper reasons: the actual purpose of the impugned measures was to silence and to punish the applicant for her journalistic activities (ibid., §§ 114-20).

65. The scope of the *Khadija Ismayilova* (no. 2) judgment (cited above) was limited, *inter alia*, to the issues of compatibility with Articles 5 §§ 1 (c) and 4 and Article 18 of the Convention of the applicant's detention during the pre-trial stage of the proceedings. In the present case, however, the Court is called upon to examine a different set of legal issues – namely, whether the criminal proceedings against the applicant as a whole were fair, as required by Article 6 of the Convention.

66. While the issues to be examined and the legal standards applicable under Article 6 of the Convention are different, both the previous case and the present case concern the same criminal proceedings against the applicant involving the same charges stemming from the same events. Although the applicant was eventually acquitted of the offences of incitement to suicide, embezzlement and abuse of power under Articles 125, 179.3.2 and 308.2 of the Criminal Code, she was ultimately convicted of the offences of illegal entrepreneurship under Article 192.2.2 (later re-classified under Article 192.1) and tax evasion under Article 213.1 of the Criminal Code. As the Court held in the *Khadija Ismayilova* (no. 2) judgment (cited above), during the pre-trial stage of the proceedings, those accusations against the applicant had also suffered from a *prima facie* lack of plausibility calling for a high level of scrutiny of the facts. The circumstances on which this previous finding of the Court was based remain unchanged in the present case as regards the charges of illegal

entrepreneurship and tax evasion. The Court will therefore proceed with analysing under Article 6 whether this deficiency has been compensated by the evidence presented at the trial and the reasons provided by the domestic courts (compare *Ilgar Mammadov* (no. 2), cited above, § 203).

67. Turning to the present case, the Court firstly refers to its analysis and findings in paragraphs 49-57 above in respect of the applicant's conviction for the offence of illegal entrepreneurship and considers that they are equally relevant for the present complaint. In particular, the applicant raised before the domestic courts strong, pertinent and well-founded objections that the acts attributed to her had not fallen within the scope of the criminal offence of illegal entrepreneurship. An adequate examination of those objections would be decisive for the outcome of the case and, therefore, those arguments required a specific and express reply from the domestic courts. However, as the Court found above, the domestic courts did not provide any adequate response to them in their judgments, instead relying on very brief and manifestly arbitrary reasoning.

68. As regards the charge of tax evasion, the situation was very similar. The conviction under that charge was mainly based on two reports, which the applicant argued had been vague, unclear as to what had been meant by their conclusions and compiled in a manner which had not been compliant with the relevant domestic law. She further argued that Azadliq Radio was a non-commercial organisation which did not engage in business activities and was not liable to pay profit tax. She also argued that the manner in which the amount of "profit" had been determined and the profit tax calculated had been erroneous in view of the fact that Azadliq Radio had only received funds from its parent entity for the purpose of covering the necessary operational expenses. She also maintained that her particular role as the head of the Baku bureau of Azadliq Radio during the relevant period had not involved any responsibility for financial matters or payment of taxes and social contributions. In the Court's view, the applicant's arguments objecting to the charge of tax evasion were pertinent, strong and capable of influencing the outcome of the case if properly assessed. However, again the domestic courts either remained completely silent in respect of those arguments or dismissed them in a very general, stereotypically worded manner. Consequently, the decisions reached by them in respect of the charge of tax evasion were arbitrary and manifestly unreasonable.

69. The Court finds that the judicial examination of the applicant's case and the reasoning in the domestic courts' decisions were flawed with arbitrariness which was distinct from an incorrect legal classification or a similar error in the application of domestic criminal law. That undermined the fairness of the criminal proceedings in such a fundamental way that it rendered other criminal procedure guarantees irrelevant (compare, *mutatis mutandis*, *Navalnyy*, cited above, §§ 83-84).

70. It follows that there has been a violation of Article 6 § 1 of the Convention.

#### IV. Alleged violation of Article 10 of the Convention

71. The applicant complained under Article 10 of the Convention that the charges on the basis of which she had been ultimately convicted were baseless and fabricated in order to prevent her from carrying out her investigative journalistic work, and to punish her for it. Article 10 provides as follows:

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

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

##### A. Admissibility

72. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

##### B. Merits

*1. The parties' submissions**(a) The applicant*

73. The applicant submitted that her criminal conviction had constituted an unjustified interference with her right to freedom of expression, and in particular her right to impart information and the public's right to receive it. In addition to the criminal offence of tax evasion, she had been convicted under Article 192 of the Criminal Code for "illegal entrepreneurship," specifically for carrying out journalistic activities without accreditation from the Ministry of Foreign Affairs. She argued that the conviction had not only been unfounded but had been clearly aimed at punishing her for her investigative reporting, particularly her work exposing corruption involving the ruling elite.

74. She maintained that her trial and conviction had been a sham, and had formed part of a broader campaign of harassment and intimidation that began following her first publication on government corruption in 2010. Her case had unfolded against the backdrop of increasingly repressive measures targeting civil society and independent media in Azerbaijan. The charges brought against her had been fabricated and politically motivated, with the sole aim of silencing her critical voice.

75. The applicant further submitted that this interference had not met the requirements of Article 10, as it had not been prescribed by law, had not pursued a legitimate aim, and had not been necessary in a democratic society. She emphasized that the proceedings against her had been marred by serious procedural violations, including a lack of equality of arms, prosecutorial bias, and the courts' refusal to consider exculpatory evidence or engage meaningfully with the defence's submissions. She contended that the criminal proceedings had not been genuinely aimed at enforcing laws on entrepreneurship or taxation, but had instead been a retaliatory measure designed to punish her for her journalistic work.

76. Finally, the applicant highlighted the broader impact of her prosecution, noting the chilling effect it had on the press and public discourse in Azerbaijan. She argued that her case discouraged other journalists and citizens from engaging in public debate or expressing critical views, for fear of similar reprisals. In this regard, she submitted that the respondent State had failed to fulfil its positive obligation to

create an enabling environment for journalists to express their opinions freely and without fear.

(b) The Government

77. The Government submitted that the applicant's complaint was of a speculative nature and unsubstantiated. They maintained that there had been no interference with the applicant's rights under Article 10 of the Convention and that she had been convicted by the domestic courts in accordance with the Criminal Code for the criminal offences committed by her.

2. *The Court's assessment*

78. The Court must first ascertain whether the measures complained of amounted to an interference with the applicant's exercise of freedom of expression. In order to answer that question, the scope of the measure must be determined by putting it in the context of the facts of the case and of the relevant legislation (see *Wille v. Liechtenstein* [GC], no. 28396/95, § 43, ECHR 1999-VII; *Miroslava Todorova v. Bulgaria*, no. 40072/13, § 153, 19 October 2021; and *Selishcheva and Others v. Russia*, nos. 39056/22 and 9 others, § 41, 27 May 2025). Having regard to the facts of the present case and the nature of the allegations made, the Court considers that this issue should be examined in the light of the general principles emerging from its case-law on the assessment of evidence. It reiterates in this connection that in assessing evidence, it has adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems which use that standard. The Court's role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. The Court adopts those conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts in their entirety and from the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII). It has been the Court's practice to allow flexibility in this respect, taking

into consideration the nature of the substantive right at stake and any evidentiary difficulties involved. In certain instances, only the Government have access to information capable of corroborating or refuting the applicant's allegations; consequently, a rigorous application of the principle *affirmanti, non neganti, incumbit probatio* is impossible. Although these principles have mainly been applied in the context of Articles 2 and 3 of the Convention, the Court observes that there are examples in which they have been applied in respect of other Convention rights, including Article 10 of the Convention (see *Baka v. Hungary* [GC], no. 20261/12, § 143, 23 June 2016, with further references).

79. These principles are particularly relevant in the present case, where no domestic court ever examined the applicant's allegations that she had been targeted because of the content of her publications. It is against this background that the Court considers that the facts of the case and the sequence of events have to be assessed and considered "in their entirety" (compare *Ivanova v. Bulgaria*, no. 52435/99, §§ 83-84, 12 April 2007, and *Baka*, cited above, §§ 145-48).

80. The Court notes at the outset that at least one of the charges on which the applicant was ultimately convicted directly concerned the modalities of her exercise of the journalistic profession. Thus, her conviction for "illegal entrepreneurship" was based on the charge that she had carried out journalistic activities as a "representative of foreign media" without obtaining the relevant accreditation. However, the applicant is an Azerbaijani journalist with a long record of reporting within the country. Such accreditation requirements, where they seek to regulate access to the profession or the terms under which journalistic work may be lawfully carried out, constitute "formalities" or "conditions" within the meaning of the second paragraph of Article 10 of the Convention. Therefore, restrictions or penalties imposed for non-compliance with such conditions, even if formally presented as economic or administrative in nature, amount in principle to an interference with a journalist's ability to receive and impart information and ideas (see, *mutatis mutandis*, *Mándli and Others v. Hungary*, no. 63164/16, § 45, 26 May 2020; *Gafinc v. Romania*, no. 59174/13, § 55, 13 October 2020). As such, the applicant's conviction for "illegal entrepreneurship" did not have a merely incidental impact on her journalistic activity. It was related to her very ability to freely exercise her profession and amounted therefore to an interference with her rights under Article 10 of the Convention, irrespective of whether the criminal proceedings were pursued with an ulterior purpose.

81. The Court furthermore deems it necessary to note the sequence of events in the present case. In particular, it notes that between 2010 and 2013 the applicant wrote a number of investigative articles concerning the high-level corruption in Azerbaijan (see *Khadija Ismayilova v. Azerbaijan*, nos. 65286/13 and 57270/14, §§ 6-8, 10 January 2019, and *Khadija Ismayilova* (no. 2), cited above, § 11). According to the applicant, as a result of her journalistic investigations and published articles, she was constantly threatened and harassed.

82. In particular, in 2012 intimate videos unlawfully recorded by a camera hidden in her bedroom were disseminated on the internet after she had received a threatening letter demanding that she refrain from continuing her journalistic activities (for further details concerning these events, see *Khadija Ismayilova*, cited above, §§ 10-20 and 119). The Court examined the applicant's complaints relating to those events from the standpoint of the respondent State's positive obligations under Articles 8 and 10 of the Convention (*ibid.*, §§ 83-132 and 151-66). It nevertheless emphasised that, while the identity of those who breached the applicant's privacy was unknown, it "[had] concerns as regards the answer" to the "open" question whether those responsible were linked to State agents abusing their official power, in view of the applicant's credible allegations in this regard, the contextual information provided by the third-party interveners in that case and the careful planning and execution of the covert surveillance operation (*ibid.*, § 113). In addition, the Court also found that the respondent State had breached its negative obligation under Article 8 of the Convention through the public disclosure, by the investigating authorities, of an excessive amount of the applicant's personal information obtained during the investigation, thereby further compounding the existing breach of the applicant's privacy (*ibid.*, §§ 133-50).

83. Moreover, during this time period, numerous articles about the applicant and other civil society activists and human rights defenders were published in the State media and in the media allegedly close to the government. In those articles, the applicant and the other persons were described as "spies for foreign interests" and "traitors" (see *Khadija Ismayilova* (no. 2), cited above, § 14; see also, for examples of some of these comments, *Rasul Jafarov v. Azerbaijan*, no. 69981/14, §§ 36-40, 17 March 2016). In some of those articles, the applicant's professionalism and personal character were attacked (see *Khadija Ismayilova v. Azerbaijan* (no. 3), no. 35283/14, §§ 7-8 and 14-17, 7 May 2020). Two days before the applicant's arrest, on 3 December 2014, State-owned news agencies published a sixty-page manifesto



written by R.M., the then head of the President's Office, in which, among other statements, he targeted the applicant personally by accusing her of spreading false information and engaging in activities "tantamount to working for foreign secret services" and treason (for the full quote, see *Khadija Ismayilova* (no. 2), cited above, § 15).

84. In the context of the criminal case against the applicant, which was the subject of the *Khadija Ismayilova* (no. 2) judgment and the present case, the applicant was initially arrested on 5 December 2014 on the charge of incitement to suicide. Additional charges – embezzlement, illegal entrepreneurship, tax evasion, and abuse of power – were brought against her at a later stage (ibid., §§ 21-22 and 36). As noted above, in addition to the other findings, the Court found in the *Khadija Ismayilova* (no. 2) judgment that, contrary to Article 5 § 1 of the Convention, the applicant had been deprived of her liberty in the absence of a "reasonable suspicion" that she had committed a criminal offence (ibid., §§ 67-84). Moreover, it found that, contrary to the requirements of Article 18 of the Convention, the restriction of the applicant's liberty had been imposed for a purpose other than prescribed by Article 5 § 1 (c) of the Convention, namely to silence and to punish her for her journalistic activities (ibid., §§ 114-20).

85. As previously stated, the present case concerns the entirety of the same criminal proceedings, including the trial stage. Although the applicant was ultimately acquitted of the charges of incitement to suicide, embezzlement and abuse of power, she was convicted of the offences of illegal entrepreneurship and tax evasion. As the Court has found above, the domestic courts' judgments convicting the applicant were fundamentally flawed and marked by arbitrariness (see paragraphs 67-70 above). The Court reiterates that the domestic courts failed to address a number of strong, pertinent and well-founded arguments raised by the applicant, including her submissions that the charges against her had been fabricated with the aim of interfering with the exercise of her right to freedom of expression.

86. The Court also points out that in a series of cases concerning Azerbaijan it has noted a pattern of arbitrary arrest, detention or other measures taken in respect of government critics, civil society activists and human rights defenders, all occurring approximately during the same time period as the criminal proceedings against the applicant (see, *inter alia*, *Rasul Jafarov*, cited above, §§ 159-61; *Mammadli v. Azerbaijan*, no. 47145/14, §§ 99-101, 19 April 2018; *Aliyev v. Azerbaijan*,

nos. 68762/14 and 71200/14, § 223, 20 September 2018; *Rashad Hasanov and Others v. Azerbaijan*, nos. 48653/13 and 3 others, §§ 122-25, 7 June 2018; *Natig Jafarov v. Azerbaijan*, no. 64581/16, § 64, 7 November 2019; *Ibrahimov and Mammadov v. Azerbaijan*, nos. 63571/16 and 5 others, §§ 153-57, 13 February 2020; and *Ayyubzade v. Azerbaijan*, no. 6180/15, §§ 48-49, 2 March 2023). The Court considers that the proceedings against the applicant clearly fell within this broader pattern.

87. As noted above, one of the charges against the applicant was directly connected to her practice of journalism. The Court, taking moreover into account the sequence of the related events in their entirety, rather than as separate and distinct incidents, considers that there is prima facie evidence of a causal link between the applicant's exercise of her freedom of expression and the criminal proceedings against her resulting in her conviction for illegal entrepreneurship and tax evasion. Once there is prima facie evidence in favour of the applicant's version of the events and the existence of a causal link, the burden of proof should shift to the Government. However, having had regard to the entirety of the case material and the Government's submissions, the Court is of the view that the Government failed to show convincingly that the impugned measures bore no relation to the applicant's journalistic activities.

88. Having regard to the foregoing, the Court considers that the applicant's criminal prosecution and conviction for a number of offences, including illegal entrepreneurship and tax evasion, constituted an interference with her exercise of her right to freedom of expression.

89. The interference will not be justified under the terms of Article 10 of the Convention unless it is "prescribed by law", pursues one or more of the legitimate aims set out in paragraph 2 of that Article and is "necessary in a democratic society" for the achievement of that aim or aims.

90. The Court recalls at the outset that each member of Council of Europe has undertaken to accept the principle of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms. In the present case the Court observes that the applicants' criminal prosecution was not formally related to the content of the articles she had written as a journalist (compare *Ibrahimov and Mammadov*, cited above, § 173). In retaliation for her

journalistic activity, the authorities chose to initiate criminal proceedings against the applicant on a number of criminal charges and ultimately convicted her of the offences of illegal entrepreneurship and tax evasion. The Court considers that such interference with the applicant's freedom of expression was not only unlawful but also grossly arbitrary and incompatible with the principle of the rule of law, which is expressly mentioned in the Preamble to the Convention and is inherent in all its Articles (see, *mutatis mutandis*, *Baka*, cited above, § 117; compare also *Ibrahimov and Mammadov*, cited above, § 173). Moreover, it goes without saying that such interference could not have served any of the legitimate aims set out in Article 10 § 2 of the Convention.

91. There has been accordingly a violation of Article 10 of the Convention.

**V. Alleged violation of article 18 of the convention taken in conjunction with article 10 of the convention**

92. The applicant complained under Article 18 of the Convention in conjunction with Article 10 of the Convention that her right to freedom of expression had been restricted for purposes other than those for which they were prescribed and that the sole purpose of her detention during the trial and her ultimate conviction had been to hinder and punish her for her investigative work as a journalist. Article 18 provides:

“The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

**A. Admissibility**

93. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

**B. Merits**

*1. The parties' submissions*

(a) The applicant

94. The applicant argued that the criminal proceedings brought against her had not been pursued for the legitimate purposes prescribed by law, but rather for ulterior motives aimed at silencing her critical journalism. She maintained that the sole purpose of her detention during the trial and her ultimate conviction had been to punish her for exposing corruption involving the ruling party and to prevent her from continuing her investigative work.

95. She submitted that her case had lacked any “healthy core” and had instead been part of a broader pattern of politically motivated repression. Her publications revealing government corruption were followed by escalating harassment and intimidation, culminating in her arrest and conviction on fabricated charges. She emphasized that two of these charges had formed the basis of her final conviction, despite the absence of credible evidence.

96. The applicant contended that her prosecution should be viewed in the context of a wider crackdown on dissent in Azerbaijan, during which numerous journalists, activists, and government critics had been similarly prosecuted on spurious charges. She argued that this pattern had drawn international condemnation and highlighted the authorities’ systematic efforts to suppress independent voices.

97. She further argued that the national courts had demonstrated clear prosecutorial bias and had failed to uphold basic standards of fairness. They had refused to consider exculpatory evidence, ignored the absence of proof supporting the prosecution’s case, and interpreted criminal provisions in an arbitrary and unforeseeable manner. This was a strong indication that the authorities’ true aim had not been to enforce the law, but to punish her for her reporting and deter others from engaging in similar journalistic activity.

98. In sum, the applicant asserted that the measures taken against her had been politically motivated and intended to prevent her from exposing corruption at the highest levels of government. She argued that her case exemplified the misuse of legal proceedings to achieve illegitimate objectives, in violation of Article 18 of the Convention.

(b) The Government

99. The Government reiterated that no restrictions had been imposed on the applicant's rights under Article 10 of the Convention and argued that, therefore, in the absence of any restrictions, no issue could arise under Article 18 of the Convention.

100. The Government further argued that, even assuming that the applicant's Article 10 rights had been restricted (which they expressly refused to admit), the mere fact that a restriction of a Convention right or freedom did not meet all the requirements of the clause that permits it did not necessarily raise an issue under Article 18. According to the Court's case-law, separate examination of a complaint under that Article was only warranted if the claim that a restriction had been applied for a purpose not prescribed by the Convention appeared to be a fundamental aspect of the case. With reference to *Razvozhayev v. Russia and Ukraine and Udaltsov v. Russia* (nos. 75734/12 and 2 others, § 305, 19 November 2019), and *Khodorkovskiy and Lebedev v. Russia (no. 2)* (nos. 51111/07 and 42757/07, § 622, 14 January 2020), the Government pointed out that, where an applicant's submissions under Article 18 were essentially the same as their arguments regarding the alleged interference with the applicant's rights under the relevant substantive provisions of the Convention, the Court found no grounds to conclude that the complaint under Article 18 represented a fundamental aspect of the case. Thus, before embarking on the analysis of a complaint under Article 18, the Court should first ascertain whether the crux of it had already been examined under the relevant substantive provision.

101. In connection with the above, the Government argued that, in the present case, the complaint under Article 18 of the Convention did not constitute a fundamental aspect of the case. The applicant's submissions under Article 18 were essentially the same as her submissions regarding the alleged interference with her rights under Article 10 of the Convention.

102. Moreover, no measures were applied for any purpose other than that for which they were prescribed. The applicant was convicted by the domestic courts in accordance with the Criminal Code for the criminal offences committed by her. The applicant failed to demonstrate beyond reasonable doubt the existence of any ulterior purpose and to substantiate her complaint under Article 18.

## 2. *The Court's assessment*

103. The Court refers to the general principles concerning the interpretation and application of Article 18 of the Convention, in particular as set out in its judgments in *Merabishvili v. Georgia* ([GC], no. 72508/13, §§ 287-317, 28 November 2017), and *Navalnyy v. Russia* ([GC], nos. 29580/12 and 4 others, §§ 164-65, 15 November 2018) (see also *Selabattin Demirtaş v. Turkey* (no. 2) [GC], no. 14305/17, §§ 421-22, 22 December 2020).

104. At the outset, the Court reiterates that, in the *Khadija Ismayilova* (no 2) judgment, it has already found that, in violation of the requirements of Article 18 of the Convention taken in conjunction with Article 5, the applicant's arrest and pre-trial detention were carried out for the ulterior purpose of silencing and punishing her for her journalistic activities (see *Khadija Ismayilova* (no. 2), cited above, §§ 114-20).

105. In the present case, the applicant's complaint under Article 18 of the Convention is raised in conjunction with Article 10. The Court has found above that the criminal proceedings against the applicant, resulting in her ultimate conviction for the criminal offences of illegal entrepreneurship and tax evasion, amounted to an unjustified interference with her right to freedom of expression, in violation of Article 10 of the Convention (see paragraphs 88-91 above). Accordingly, the scope of the present complaint under Article 18 differs from that examined in *Khadija Ismayilova* (no. 2) in that, in addition to having been raised in conjunction with a different Convention provision, it relates not only to the applicant's pre-trial detention in the framework of those proceedings, but to the entirety of the criminal proceedings against her, which is to be seen as a continuation of the events that were the subject of the Court's examination in *Khadija Ismayilova* (no. 2).

106. As the Court has found above, the criminal proceedings against the applicant resulting in her conviction constituted an interference with her right to freedom of expression, which was unlawful and did not pursue any legitimate aims set out in Article 10. Therefore, no issue arises in the present case with respect to the plurality of purposes where a restriction is applied both for an ulterior purpose and a purpose prescribed by the Convention (compare *Merabishvili*, cited above, §§ 318-54).

107. However, the mere fact that a restriction of a Convention right or freedom does not meet all the requirements of the clause that permits it does not necessarily raise an issue under Article 18. Separate examination of a complaint under that Article is only warranted if the claim that a restriction has been applied for a purpose not prescribed by the Convention appears to be a fundamental aspect of the case (*ibid.*, § 291). In this connection, the Court notes that the applicant's submissions concerning the complaints under Articles 10 and 18 of the Convention were indeed substantially similar in essence (see paragraphs 73-76 and 94-98 above). However, in view of the particular circumstances of the present case, as discussed in paragraphs 81-86 above, it nevertheless considers that the applicant's complaint under Article 18 of the Convention represents a distinct and fundamental aspect of the case (contrast *Razvozhayev v. Russia and Ukraine and Udaltsov v. Russia*, cited above, §§ 304-05). Therefore, it remains to be seen whether there is proof that the authorities' actions were actually driven by an ulterior purpose.

108. In *Khadija Ismayilova (no. 2)*, the Court's finding of the existence of the ulterior purpose was based on a number of contextual factors, including the applicant's status as a prominent investigative journalist critical of the government, the use of coerced and false accusations leading to her arrest, the escalation of charges once prosecutorial misconduct risked exposure, the stigmatising public statements by high-ranking officials equating her work with "treason", and the broader context of similar retaliatory prosecutions against civil society activists and human rights defenders, all of which pointed to an ulterior purpose behind the interference (see *Khadija Ismayilova (no. 2)*, cited above, §§ 113-18). The Court considers that all of these factors are equally relevant to the present complaint. Moreover, the manner in which the criminal proceedings against the applicant unfolded – being marred by a significant degree of arbitrariness and by the domestic courts' failure to adequately examine the applicant's strong, pertinent and well-founded arguments (see paragraphs 67-69 above) – indicates that the ulterior purpose evident at the initial stages of the proceedings remained unchanged throughout their entirety.

109. In this latter respect, the Court recalls that in a system governed by the rule of law, judicial review represents the ultimate safeguard for the fundamental rights of individuals and their protection from abuse of power. This includes protection from malicious or otherwise ill-founded prosecution, or similar encroachments of the executive branch. And given the role of a free press in a democratic society, prosecution of journalists or other government critics on spurious charges must

attract the closest scrutiny of the courts. It is therefore of grave concern that the national courts failed to apply such scrutiny in the circumstances of the present case.

110. Thus, the totality of the above circumstances indicates that the authorities' actions were driven by improper reasons and that the actual purpose of the criminal proceedings against the applicant, which constituted the interference with her right to freedom of expression, was to silence and to punish her for her journalistic activities. In the light of these considerations, the Court finds that the interference with the applicant's right to freedom of expression pursued a purpose other than that prescribed by Article 10 of the Convention.

111. There has accordingly been a violation of Article 18 of the Convention taken in conjunction with Article 10.

## **VI. Other alleged violations of the convention**

112. The applicant also complained under Article 6 §§ 1 and 3 (b), (c) and (d) of the Convention of the alleged breaches of her rights to adversarial proceedings and equality of arms, her right to have adequate time and facilities for the preparation of her defence, her right to effective legal assistance and her rights to be able to examine witnesses against her and to obtain the attendance of witnesses on her behalf.

113. Having regard to the facts of the case, the submissions of the parties, its findings above in respect of the complaint under Article 7 of the Convention and the applicant's main complaint under Article 6 § 1 of the Convention (see paragraphs 56-57 and 69-70 above), the Court considers that there is no need to give a separate ruling on the admissibility and merits of these complaints (compare *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

## **VII. Application of article 41 of the convention**

...

### **For these reasons, the court**

1. *Decides*, unanimously, to join the applications;



2. *Declares* admissible, unanimously, the complaints under Articles 6 § 1 and 7 of the Convention and, by a majority, the complaints under Articles 10 and 18 of the Convention;
3. *Holds*, unanimously, that there has been a violation of Article 7 of the Convention;
4. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention;
5. *Holds*, by four votes to three, that there has been a violation of Article 10 of the Convention;
6. *Holds*, by four votes to three, that there has been a violation of Article 18 of the Convention taken in conjunction with Article 10 of the Convention;
7. *Holds*, unanimously, that there is no need to examine the admissibility and merits of the remaining complaints under Article 6 §§ 1 and 3 (b), (c) and (d) of the Convention;
8. *Holds*, by four votes to three,

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the Respondent State at the rate applicable at the date of settlement:

(i) EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 4,000 (four thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

**Smiselno dopolnite s pojmi na koncu besedila:**

ESČP je v zadevi *Khadija Ismayilova proti Azerbajdžanu* presoјalo, ali je bila novinarka kazensko obsoјena na podlagi dovolj jasne in \_\_\_\_\_ pravne podlage. Eno izmed ključnih vprašanj je bilo, ali je lahko posameznik že iz besedila zakona razumno sklepal, da je njegovo ravnanje \_\_\_\_\_. Če tega ne more ugotoviti niti ob skrbni razlagi prava, je lahko kršeno načelo \_\_\_\_\_.

Pritožnica je bila obsoјena, ker naj bi brez ustrezne \_\_\_\_\_ opravljala dejavnost za tuji medij. Domača sodišča so njeno delo razumela kot obliko nezakonitega opravljanja dejavnosti, vendar po presoјi ESČP niso dovolj natančno pojasnila, zakaj naj bi bila taka akreditacija nujen \_\_\_\_\_ za zakonito novinarsko delo. Iz zakonodaje je namreč izhajalo, da akreditacija novinarju omogoča lažji dostop do \_\_\_\_\_ in dogodkov, ne pa da je obvezni pogoj za samo opravljanje poklica.

Posebej pomembno je bilo, da pritožnica v relevantnem obdobju ni bila zaposlena kot klasična predstavnica enega tujega medija, temveč je delovala kot \_\_\_\_\_ novinarka. Sodelovala je z več različnimi mediji, zato je bila razlaga domačih sodišč, da jo je treba avtomatično šteti za predstavnico tujega medija, po presoјi ESČP preveč \_\_\_\_\_ in za obdolženko neugodna. Takšna razlaga ni bila skladna z zahtevo, da se kazensko pravo uporablja \_\_\_\_\_ in ne na način, ki širi pomen določbe preko njenega razumnega besedila.

Pritožnica je med postopkom opozarjala, da njeno ravnanje ni bilo jasno prepovedano, da ni bila odgovorna za očitana finančna ravnanja in da je bil postopek povezan z njenim kritičnim \_\_\_\_\_ o korupciji. Domača sodišča na te ugovore niso dala jasnega in konkretnega \_\_\_\_\_. Namesto tega so večinoma ponovila stališča tožilstva. Zato je ESČP ugotovilo, da sodne odločbe niso bile dovolj \_\_\_\_\_, kar je vplivalo na poštenost postopka kot celote.

ESČP je poudarilo, da kazenski postopek proti novinarki ni vplival samo na njen osebni položaj, ampak tudi na njeno pravico do \_\_\_\_\_ izražanja. Kadar država uporabi kazenski pregon proti osebi, ki raziskuje in razkriva ravnanja oblasti, lahko to povzroči tudi širši \_\_\_\_\_ učinek: ne le na konkretno novinarko, ampak tudi na druge novinarje, urednike in osebe, ki bi želele opozoriti na nepravilnosti.

Pri svoji presoji je ESČP upoštevalo tudi širši \_\_\_\_\_ primera. Pritožnica je bila znana kot preiskovalna novinarka, ki je objavljala prispevke o korupciji najvišjih državnih funkcionarjev. Pred kazenskim postopkom je bila deležna pritiskov, javnih napadov in diskreditacij. Takšno zaporedje dogodkov je bilo pomembno za presojno, ali je bil kazenski postopek res namenjen varovanju \_\_\_\_\_ ali pa je šlo v resnici za sredstvo pritiska.

ESČP je ugotovilo, da v tej zadevi ni šlo le za običajen kazenski postopek, ampak za poseg, katerega resnični namen je bil novinarko \_\_\_\_\_ in jo kaznovati zaradi njenega dela. Takšna uporaba kazenskega prava ni združljiva z idejo \_\_\_\_\_ države, v kateri morajo sodišča posameznika varovati pred samovoljo oblasti. Če sodišča tega ne storijo, ampak nekritično sledijo tožilstvu in spregledajo bistvene argumente obrambe, postane sodni postopek sredstvo \_\_\_\_\_ namesto sredstvo pravnega varstva.

**Možni pojmi:** predvidljive, kaznivo, zakonitosti, akreditacije, pogoj, informacij, svobodna, arbitrarna, restriktivno, poročanjem, odgovora, obrazložene, svobode, odvrtačni, kontekst, zakonitosti, utišati, pravne, represije

## Vprašanja

- Zakaj je ESČP v tej zadevi ugotovilo kršitev 7. člena EKČP? Pojasnite, kako je ESČP uporabilo načelo *nullum crimen, nulla poena sine lege* in zakaj je menilo, da je bila razlaga kaznivega dejanja nezakonitega podjetništva za pritožnico nepredvidljiva.
- Kakšen pomen ima v tej zadevi razlika med akreditacijo kot privilegiranim dostopom do informacij in akreditacijo kot pogojem za zakonito opravljanje novinarskega dela?
- Kako je ESČP utemeljilo, da je bila uporaba kazenskega prava v tem primeru ekstenzivna in v škodo obdolženke? Primerjajte to z dopustnim sodnim razvojem prava in pojasnite, kdaj tak razvoj po stališču ESČP prestopi mejo dopustnega.
- Zakaj je ESČP ugotovilo kršitev 6. člena EKČP zaradi neobrazloženosti sodb domačih sodišč? Katere konkretne argumente pritožnice bi morala domača sodišča obravnavati izrecno in zakaj je bil njihov molk z vidika poštenega sojenja odločilen?

- Pojasnite razliko med »navadno« zmotno uporabo prava in takšno arbitrarnostjo, ki po presoji ESČP poseže v samo bistvo pravice do poštenega sojenja.
- Zakaj je ESČP štelo, da je bila obsodba pritožnice poseg v svobodo izražanja po 10. členu EKČP?
- Kako je ESČP ugotavljalo vzročno zvezo med novinarskim delom pritožnice in kazenskim pregonom zoper njo? Ocenite pomen zaporedja dogodkov, predhodnega nadlegovanja, javnih napadov državnih funkcionarjev in širšega konteksta represije nad kritiki oblasti.
- Ali lahko navidezno nevtralna kazenskoppravna očitka, kot sta davčna utaja ali nezakonito opravljanje dejavnosti, v avtoritarnih ali hibridnih režimih služita obračunu z neodvisnimi novinarji?
- Kakšne širše posledice ima ta sodba za varstvo novinarjev in za razumevanje vladavine prava v državah članicah Sveta Evrope? Razmislite, kaj sodba sporoča o vlogi sodišč kot zadnjega varuha pred zlorabo izvršilne oblasti in o nevarnosti, ki nastane, kadar sodišča takšne vloge ne opravijo.





# Praktične naloge

## 1 Protest pred občino

V mestu Jazbečev dol je mestni svet obravnaval predlog prostorskega akta, ki bi omogočil gradnjo večje industrijske cone na območju blizu reke. Civilna iniciativa »Čista dolina« je nasprotovala projektu, ker naj bi po njihovem mnenju ogrožal pitno vodo in zdravje prebivalcev.

Tri dni pred sejo občinskega sveta je iniciativa na družbenih omrežjih napovedala protest pred občinsko stavbo. Protesta ni formalno prijavila policiji, ker so organizatorji menili, da gre za »spontan odziv javnosti na odločanje občine«. Objava je pozivala ljudi, naj se zberejo pred občino eno uro pred začetkom seje in »mirno pokažejo, da občina ne more odločati mimo ljudi«.

Na dan seje se je pred občino zbralo približno 120 ljudi. Protestniki so nosili transparente z napisi »Voda pred profitom«, »Občina nas prodaja« in »Župan, sram te bodi«. Nekateri so vzklikali tudi bolj ostre parole, na primer: »Koruptivna občina!« in »Župan je mafija!« Ni bilo fizičnega nasilja, prav tako ni prišlo do poškodovanja premoženja.

Ker je bil pločnik pred občino ozek, se je del protestnikov premaknil na cesto pred stavbo. Promet je bil zaradi tega ustavljen približno 50 minut. Policija je protestnike večkrat pozvala, naj se umaknejo s ceste na pločnik ali na bližnji trg, ki je bil približno 150 metrov stran. Organizatorji so odgovorili, da bi premik na trg protestu odvzel pomen, saj tam občinski svetniki protestnikov ne bi videli.



Po približno eni uri je policija protest razpustila. Večina protestnikov se je mirno razšla. Eden od organizatorjev, Alfonz, je bil kasneje kaznovan z globo 800 EUR zaradi organizacije neprijavljenega javnega zbiranja in oviranja prometa. V odločbi je bilo navedeno, da je imel protestnik možnost izraziti svoje mnenje na drugem kraju in da popolna zapora ceste ni bila dopustna.

Alfonz je vložil pravno sredstvo. Trdil je, da protest ni bil nasilen, da je šlo za zadevo velikega javnega pomena in da bi morale oblasti pokazati večjo mero strpnosti do začasne motnje prometa. Poudaril je tudi, da je bila seja občinskega sveta že vnaprej napovedana, odločanje pa naj bi bilo po njegovem mnenju hitro in netransparentno. Pred domačimi sodišči pritožnik ni bil uspešen. Vsa po vrstni so namreč presodila, da svoboda izražanja in zbiranja v zadevnem primeru ne varujeta neprijavljenih protestov, ki ovirajo promet, ter da je bila globa zakonito izrečena in sorazmerna. Alfonz je vložil pritožbo na ESČP.

## 2 Odlaganje in sežiganje odpadkov

Pokrajina Južna ravnica je gosto poseljeno območje, na katerem živi približno milijon ljudi. Gre za ravninsko regijo z več srednje velikimi mesti, številnimi vasi, kmetijskimi površinami, manjšimi industrijskimi conami in gosto mrežo lokalnih cest. Prebivalci se tradicionalno ukvarjajo s kmetijstvom, pridelavo hrane, trgovino in ročno obrtjo.

Že več desetletij se na območju pojavljajo nezakonita odlagališča odpadkov. Najprej je šlo predvsem za gradbeni material, staro opremo in komunalne odpadke, kasneje pa so prebivalci začeli opazovati tudi sode z neznano vsebino, industrijske odpadke, ostanke barv, topil, plastike, gum in kemičnih snovi. Odpadki so se pogosto odlagali ponoči, na opuščениh zemljiščih, v zapuščenih gramoznicah, ob rečnih strugah, na robovih kmetijskih površin in v bližini stanovanjskih naselij.

Po navedbah lokalnih prebivalcev za odlaganjem stoji organizirana kriminalna skupina, ki za plačilo prevzema nevarne odpadke od podjetij iz različnih delov države in jih nezakonito odlaga ali sežiga. Prebivalci večkrat tedensko opažajo gost črn dim, močan vonj po plastiki, kemikalijah in zažgani gumi.

Oblasti so bile z razmerami seznanjene že dolgo časa. Lokalni prebivalci, zdravniki, novinarji in okoljska društva so več kot dvajset let pošiljali prijave policiji, občinam, Ministrstvu za okolje in zdravstvenim organom. V nekaterih primerih so prebivalci predložili fotografije tovornjakov, registrske številke, posnetke požarov in lokacije domnevnih odlagališč. Kljub temu so se postopki pogosto končali brez jasnega rezultata. Uradna pojasnila so se ponavljala: storilcev ni bilo mogoče identificirati, izvor odpadkov ni bil znan, dokazov ni bilo dovolj, pristojnosti med različnimi organi pa naj bi bile nejasne.

V več internih poročilih državnih organov je bilo že pred leti zapisano, da nezakonito odlaganje in sežiganje odpadkov predstavlja resno tveganje za zdravje prebivalcev. V enem od poročil okoljske inšpekcije je bilo navedeno, da nekatera odlagališča vsebujejo nevarne industrijske snovi, med drugim težke kovine, ostanke topil in snovi, ki lahko pri gorenju sproščajo rakotvorne spojine. Drugo poročilo je opozarjalo, da lahko onesnaženje prehaja v zemljo in podtalnico. Ta poročila niso bila javno objavljena, prebivalci pa so zanje izvedeli šele kasneje prek novinarskih razkritij.

V zadnjih petnajstih letih so zdravniki iz več bolnišnic in zdravstvenih domov opozorili na nenavadno visoko število rakavih obolenj, bolezni dihal, bolezni ščitnice in prirojenih zdravstvenih težav pri otrocih. Nekateri zdravniki so javno izjavili, da opažajo vzorce, ki jih ni mogoče pojasniti zgolj z življenjskim slogom prebivalcev. Država je sicer naročila nekaj epidemioloških analiz, vendar so bile te delne, metodološko omejene ali pa niso zajele celotnega območja. V zaključkih je bilo praviloma zapisano, da neposredna vzročna zveza med onesnaženjem in posameznimi boleznimi ni zanesljivo dokazana, hkrati pa da obstaja povečano okoljsko in zdravstveno tveganje.

Kljub tem ugotovitvam država ni sprejela celovitega in učinkovitega programa sanacije. Nekatera odlagališča so bila ograjena, postavljene so bile opozorilne table, občasno so bili odstranjeni manjši kupi odpadkov, vendar se je nezakonito odlaganje nadaljevalo. Požari so se ponavljali. Sistematičnega nadzora nad območjem ni bilo. Merjenje kakovosti zraka je bilo občasno in prostorsko omejeno. Testiranje tal in podtalnice ni bilo izvedeno na vseh kritičnih lokacijah. Prebivalci pogosto niso vedeli, ali je voda iz vodnjakov varna, ali lahko uživajo lokalno pridelano zelenjavo in ali naj otrokom dovolijo igro na prostem.



V javnosti so se pojavili tudi indici o povezanosti med kriminalnimi skupinami, lokalnimi podjetniki in predstavniki oblasti. Nekateri novinarji so poročali, da so bili določeni inšpekcijski pregledi vnaprej napovedani, da so dokumenti izginjali iz upravnih spisov in da so bili inšpekcijski postopki proti določenim podjetjem nenavadno hitro zaključeni. Nekdanji uslužbenec občinske uprave je anonimno izjavil, da so bili nekateri lokalni uradniki plačani za to, da niso ukrepali ali da so postopke zavlačevali. Državno tožilstvo je začelo več preiskav zaradi suma korupcije, vendar do pravnomočnih obsodb ni prišlo.

Prebivalka Giorgia živi v eni izmed najbolj prizadetih občin, približno 500 metrov od območja, kjer so bili večkrat najdeni zažgani industrijski odpadki. Njen mož je umrl zaradi raka, sama ima kronične težave z dihalni, njena hči pa je bila v otroštvu večkrat hospitalizirana zaradi hudih astmatičnih napadov. Giorgia trdi, da je družina več let živela v neposredni bližini gorečih odlagališč in da jih oblasti nikoli niso jasno opozorile na tveganje. Večkrat je zahtevala podatke o onesnaženosti zraka, tal in vode, vendar je prejela le splošne odgovore, da »nevarnost ni dokazana«.

Prebivalec Alberto živi v drugi občini iste pokrajine. Sam ni zbolel za težjo boleznijo, vendar navaja, da že leta živi v stalnem strahu. Njegova hiša stoji blizu kmetijskih zemljišč, kjer so bili najdeni zakopani sodi z neznano fluorescentno zeleno vsebino. Alberto ne uporablja več lastnega vodnjaka, ne prideluje več zelenjave in otrok ne pusti igrati zunaj, kadar je v zraku vonj po zažgani plastiki. Trdi, da mu država ni dala nobenih zanesljivih informacij o tem, ali je območje, kjer živi, varno.

Skupina prebivalcev je vložila več tožb pred domačimi sodišči. Trdili so, da država že desetletja ve za sistematično nezakonito ravnanje z nevarnimi odpadki, vendar ni sprejela učinkovitih ukrepov za zaščito življenja in zdravja ljudi. Domača sodišča so njihove zahteve večinoma zavrnili. Poudarila so, da država ne more odgovarjati za vsako kaznivo ravnanje zasebnikov, zlasti kadar storilci niso identificirani. Dodala so, da pritožniki niso dokazali neposredne vzročne zveze med konkretnim odlagališčem, konkretnim požarom in konkretno boleznijo posameznega prebivalca.

Kasacijsko sodišče je v sodbi zapisalo, da so razmere na območju nedvomno zaskrbljujoče, vendar da vprašanje sanacije tako velikega območja spada predvsem v polje proste presoje zakonodajne in izvršilne veje oblasti. Po mnenju sodišča ni naloga sodstva, da določa, kdaj, kako hitro in s kakšnimi sredstvi mora država očistiti onesnaženo območje. Sodišče je tudi navedlo, da je država v zadnjih letih vendarle

sprejela nekatere ukrepe, med drugim ustanovitev posebne delovne skupine, pripravo osnutka sanacijskega načrta in občasne policijske akcije proti nezakonitemu prevozu odpadkov.

Prebivalci menijo, da so bili ti ukrepi prepozni, razdrobljeni in neučinkoviti. Opozarjajo, da se odpadki še vedno sežigajo, da številna odlagališča niso očiščena, da zdravstveni monitoring ni sistematičen in da država nikoli ni jasno priznala obsega problema. Po njihovem mnenju problem ni v tem, da država ni mogla preprečiti vsakega posameznega požara, ampak v tem, da je desetletja dopuščala obstoj celotnega sistema nezakonitega ravnanja z nevarnimi odpadki na območju, kjer živi približno milijon ljudi.

Po izčrpanju domačih pravnih sredstev se skupina prebivalcev, med katerimi sta tudi Giorgia in Alberto, pritoži na ESČP.

### 3 Policijsko pridržanje

Pritožnik Igor je star 47 let in živi v manjšem mestu. Je brez stalne zaposlitve, občasno opravlja priložnostna dela in ima več let diagnosticirano sladkorno bolezen tipa 1. Zaradi bolezni mora redno prejemati inzulin in jesti ob določenih urah. V preteklosti je bil dvakrat obravnavan zaradi manjših prekrškov, obsojen pa ni bil.

Nekega petkovega večera je policija prejela prijavo, da je v trgovini z elektroniko prišlo do kraje več mobilnih telefonov. Varnostna kamera je posnela moškega podobne postave kot Igor. Policisti so Igorja našli približno kilometer od trgovine. Pri sebi ni imel ukradenih predmetov, vendar je bil po oceni policistov nervozen in je na vprašanja odgovarjal nejasno. Ker pri sebi ni imel osebnega dokumenta, so ga odpeljali na policijsko postajo.

Igor trdi, da je policistom že ob prijettu povedal, da je diabetik in da mora imeti pri sebi inzulin. Policisti to zanikajo in navajajo, da je o bolezni prvič govoril šele naslednje jutro. V zapisniku o pridržanju je navedeno, da je bil Igor ob prihodu na policijsko postajo »vidno razburjen, vendar brez znakov bolezni ali poškodb«.

Igor je bil pridržan od petka zvečer do ponedeljka dopoldne, skupaj približno 58 ur. Prvih šest ur je preživel v manjši sobi za pridržanje brez ležišča, kjer je sedel na plastičnem stolu. Po navedbah policije je bilo to zato, ker so bile celice takrat

zasedene. Kasneje je bil premeščen v celico velikosti približno 8 kvadratnih metrov, v kateri sta že bila dva moška. V celici je bila ena pogradna postelja in ena tanka vzmetnica na tleh. Igor je prvo noč spal na tleh brez odeje, drugo noč pa na zgornjem ležišču.

Celica je imela stranišče, ki je bilo od preostalega prostora ločeno le z nizko pregrado. Igor navaja, da je moral stranišče uporabljati pred drugima pridržanima osebama in da je bilo v celici neprijetno zaradi vonja. Policija trdi, da so bile razmere v celici skladne z minimalnimi standardi in da je bila celica redno čiščena.

V soboto zjutraj je Igor prosil za zdravnika, ker se je počutil slabo. Dežurni policist mu je prinesel slaček čaj in kos kruha, zdravnika pa ni poklical, ker je ocenil, da stanje ni nujno. Igor trdi, da mu takšna hrana ni ustrezala in da brez inzulina ni mogel normalno uravnavati sladkorja. Policisti navajajo, da se Igor ni zdel resno bolan, da je normalno hodil in govoril ter da ni izgubil zavesti.

V soboto popoldne je Igor med zaslišanjem postal bled, tresel se je in se pritoževal nad vrtoglavico. Takrat je bil poklican zdravnik, ki ga je pregledal v policijski postaji. Zdravnik je v poročilu zapisal, da je Igor »utrujen, dehidriran in potrebuje redno prehrano ter dostop do zdravil«. Ni pa odredil prevoza v bolnišnico. Policistom je naročil, naj mu omogočijo obroke in naj preverijo, ali ima doma zdravila. Igorjeva sestra je kasneje prinesla inzulin, vendar ga je Igor prejel šele nekaj ur po tem, ko je bil dostavljen na policijsko postajo, ker po navedbah policije ni bilo takoj jasno, ali ga sme uporabiti brez dodatnega zdravniškega navodila.

Igor zatrjuje tudi, da so bili policisti do njega ponižujoči. Eden naj bi mu rekel, naj »ne igra bolnika«, drugi pa naj bi se pred drugimi pridržanimi norčeval, da »bo že zdržal brez večerje«. Policisti te navedbe zanikajo. Varnostne kamere v hodniku policijske postaje nimajo zvoka, celica pa ni bila zvočno ali slikovno snemana.

V nedeljo zjutraj je Igor zahteval, da se umije. Policisti so mu dovolili uporabo umivalnika na hodniku, ne pa tuša, ker naj bi bila prha namenjena samo osebam, ki so v pridržanju dlje časa. Igor trdi, da se je zaradi potenja in slabega počutja počutil ponižanega, še posebej ker je moral v istih oblačilih preživeti celotno obdobje pridržanja. Policija odgovarja, da pridržanje ni trajalo tako dolgo, da bi bila prha nujna.

Med pridržanjem je Igorja dvakrat zaslišal kriminalist. Prvič je zaslišanje trajalo približno dve uri, drugič približno uro in pol. Igor trdi, da je bil zaslišan tudi takrat, ko se je počutil zelo slabo in ni mogel jasno razmišljati. Kriminalist navaja, da je Igor odgovarjal razumljivo, da ni kazal znakov zmedenosti in da je bil poučen o svojih pravicah. Igor je podpisal zapisnik zaslišanja, vendar je kasneje trdil, da ga ni natančno prebral, ker se je želel čim prej vrniti nazaj v celico počivati.

V ponedeljek dopoldne je bil Igor izpuščen, ker policija ni našla dokazov, da bi sodeloval pri kraji. Istega dne je odšel k osebni zdravnici. Ta je zapisala, da je Igor izčrpan, dehidriran in psihično vznemirjen, brez hujših telesnih poškodb. Na roki je imel modrico, za katero je trdil, da je nastala pri prijetju, policisti pa so navajali, da se je sam sunkovito iztrgal in zadel ob vrata službenega vozila. Modrica ni bila resna in ni zahtevala zdravljenja.

Igor je vložil odškodninsko tožbo proti državi. Trdil je, da je bil med pridržanjem izpostavljen nečloveškemu in ponižujočemu ravnanju. Poudaril je kombinacijo več okoliščin: dolgo pridržanje brez obtožbe, neustrezne pogoje v celici, pomanjkanje zasebnosti pri uporabi stranišča, zamudo pri dostopu do zdravil, neustrezno prehrano glede na sladkorno bolezen, ponižujoče komentarje policistov in zaslišanje v času slabega zdravstvenega stanja.

Domača sodišča so Igorjevo tožbo zavrnila. Presodila so, da so bile razmere v pridržanju nedvomno neprijetne, vendar ne tako hude, da bi pomenile nečloveško ali ponižujoče ravnanje. Sodišče je posebej poudarilo, da ni bilo dokazano namerno trpinčenje in da Igor ni utrpel trajnih zdravstvenih posledic. Glede zdravil je ugotovilo, da je prišlo do določene zamude, vendar ne do take opustitve, ki bi pomenila resno ogrožanje življenja ali zdravja.

Igor se po izčrpanju domačih pravnih sredstev obrne na ESČP.

## 4 Program Sokol

Po več terorističnih napadih v sosednjih državah je država sprejela Zakon o preprečevanju terorizma in nasilnega ekstremizma. Zakon je obveščevalni službi in policiji omogočil vzpostavitev posebnega informacijskega sistema z imenom Sokol. Namen sistema je bil zgodnje odkrivanje oseb, ki bi lahko predstavljale varnostno tveganje zaradi povezav s terorističnimi organizacijami.

Sistem Sokol ni bil namenjen samo spremljanju oseb, ki so bile že osumljene kaznivega dejanja. Zakon je omogočal tudi obdelavo podatkov oseb, ki bi se lahko znašle v širši mreži varnostno relevantnih povezav. V sistem so se stekali podatki iz več virov: evidenc prehodov državne meje, podatkov letalskih prevoznikov, podatkov o telefonskih komunikacijah, podatkov o lokaciji mobilnih naprav, javno dostopnih objav na družbenih omrežjih, nekaterih bančnih transakcij in podatkov iz evidenc tujcev. Dostop do teh podatkov je bil mogoč na podlagi odobritve posebnega oddelka znotraj obveščevalne službe. Sodna odredba ni bila potrebna v začetni fazi analize, temveč šele takrat, ko je obveščevalna služba želela začeti prisluškovanje vsebini komunikacij.

Sokol je uporabljal algoritemski sistem za ocenjevanje tveganja. Oseba je lahko prejela višjo oceno tveganja zaradi različnih kombinacij podatkov: pogostih potovanj v določene države, stikov z osebami, ki so bile že v varnostnih evidencah, udeležbe na določenih javnih dogodkih, uporabe šifriranih komunikacijskih aplikacij, nakazil v tujino ali objav na družbenih omrežjih, ki so vsebovale določene ključne besede. Natančna merila algoritma niso bila javno znana, ker so bila označena kot tajni podatek.

V prvih treh letih delovanja je sistem obdelal podatke več milijonov oseb. Večina oseb nikoli ni bila neposredno predmet policijske preiskave, njihovi podatki pa so bili kljub temu vključeni v analitične modele, ker so komunicirale z osebami iz širšega varnostnega omrežja ali so se gibale na območjih, ki jih je sistem označil kot tvegana. Podatki oseb, pri katerih ni bilo ugotovljeno konkretno varnostno tveganje, so se praviloma hranili še pet let, nato pa naj bi bili anonimizirani.

Parlamentarni odbor za nadzor obveščevalnih služb je bil o sistemu obveščen samo v splošnih letnih poročilih. Poročila so vsebovala število analiziranih primerov in število varnostnih opozoril, niso pa vsebovala podatkov o tem, koliko oseb je bilo zajetih v sistem, koliko podatkov je bilo izbranih in koliko oseb je bilo napačno označenih za tvegane.

Informacijski pooblaščenec je po več novinarskih vprašanjih začel nadzorni postopek. Obveščevalna služba mu je omogočila vpogled v splošna pravila delovanja sistema, ne pa tudi v celotno tehnično dokumentacijo algoritma. Pooblaščenec je v poročilu ugotovil, da sistem zasleduje legitimen varnostni cilj, vendar je opozoril na

pomanjkljivo določnost zakona, širok krog zajetih oseb, dolgo obdobje hrambe podatkov in odsotnost učinkovitega obveščanja posameznikov po koncu obdelave podatkov. Poročilo ni bilo v celoti javno objavljeno, ker so bili ključni deli označeni kot zaupni.

Primer je postal javno odmeven, ko je novinar Guido objavil serijo člankov o sistemu Sokol. Guido je raziskoval stike med domačimi skrajnimi skupinami in tujimi organizacijami. Zaradi svojega dela je večkrat komuniciral z osebami, ki so bile predmet varnostnega spremljanja. Kasneje je izvedel, da je bil tudi sam vključen v sistem kot oseba z »visoko komunikacijsko relevantnostjo«. Njegovi telefonski in lokacijski podatki so bili analizirani več kot leto dni.

Guido o tem ni bil uradno obveščen. Za vključitev v sistem je izvedel šele, ko je del dokumentacije prišel v javnost zaradi razkritja nekdanjega uslužbenca obveščevalne službe. V dokumentih je bilo zapisano, da Guido ni osumljen sodelovanja pri kaznivih dejanjih, vendar da je »analitično pomemben« zaradi stikov z osebami iz varnostnih evidenc. Med zabeleženimi podatki so bili tudi njegovi stiki z odvetnikom, dvema opozicijskima poslancema in virom informacij v tujini.

Drugi posameznik, Ferenz, je študent z dvojnim državljanstvom. Večkrat je potoval v državo, iz katere izvira njegova družina. Ker je uporabljal šifrirane aplikacije (Signal), nakazoval manjše zneske sorodnikom v tujino in obiskoval verski center, ki ga je sistem povezal z eno od oseb iz varnostne evidence, je bil označen kot oseba s povečanim tveganjem. Zaradi tega je bil na letališču večkrat dodatno zaslišan, enkrat pa mu je bil začasno zavržen vstop na letalo, dokler policija ni opravila dodatnega preverjanja. Proti njemu nikoli ni bil uveden kazenski postopek.

Tretja posameznica, Klaudia, je učiteljica v srednji šoli. V sistem je bila zajeta zato, ker je bila v telefonskem stiku z Ferenzevo materjo, ki je bila njena prijateljica. Klaudia ni imela nobene povezave z varnostno občutljivimi dejavnostmi. Njeni podatki so bili v sistemu označeni kot nizko relevantni, vendar niso bili takoj izbrisani, ker je sistem hranil podatke vseh oseb iz komunikacijske mreže analiziranih posameznikov.

Po javnem razkritju sistema je vlada sporočila, da je Sokol pomembno prispeval k preprečitvi več varnostnih incidentov. V enem primeru naj bi sistem omogočil pravočasno odkritje osebe, ki je načrtovala potovanje na območje oboroženega

spopada. V drugem primeru naj bi pomagal prepoznati mrežo oseb, ki so prek navidezno humanitarnih nakazil zbirale denar za tujo ekstremistično skupino. Podrobnosti niso bile razkrite zaradi varovanja tajnih podatkov.

Več posameznikov je zahtevalo vpogled v podatke, ki jih je država obdelovala o njih. Večina je prejela odgovor, da se zahteva zavrne zaradi zaščite nacionalne varnosti. Nekateri so prejeli le splošno pojasnilo, da njihovi podatki niso bili obdelani na način, ki bi zahteval popravek ali izbris. Posamezniki niso mogli preveriti, kateri konkretni podatki so bili zbrani, kdo je do njih dostopal, kako dolgo so bili hranjeni in ali so bili posredovani drugim organom.

Skupina prizadetih oseb je sprožila postopke pred domačimi sodišči. Sodišča so odločila, da je boj proti terorizmu posebej pomemben javni interes in da država pri organizaciji obveščevalnih sistemov uživa široko polje proste presoje. Hkrati so ugotovila, da je bil sistem določen z zakonom, da je bil podvržen notranjemu nadzoru, parlamentarnemu nadzoru in omejenemu nadzoru informacijskega pooblaščenca. Vrhovno sodišče je dodalo, da posamezniki nimajo pravice do popolnega vpogleda v varnostne evidence, kadar bi to lahko ogrozilo delovanje obveščevalne službe.

Prizadeti posamezniki vložijo pritožbo na ESČP.

# O avtorju

Rok Dacar je docent na Pravni fakulteti Univerze v Mariboru. Diplomiral je na Pravni fakulteti v Ljubljani, kjer je tudi magistriral. Zaključil je še magistrski študij na College of Europe. Leta 2022 je opravil pravniški državni izpit, leta 2024 pa je na Pravni fakulteti v Mariboru uspešno zagovarjal doktorsko disertacijo. Raziskovalno deluje zlasti na področju ustavnega prava ter pravnih vidikov digitalnih trgov in digitalnega gospodarstva. Sam ali v soavtorstvu je v priznanih domačih in tujih revijah objavil več znanstvenih in strokovnih člankov ter poglavij v monografijah.

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# PRAKTIKUM ZA USTAVNO PRAVO: PRAKSA EVROPSKEGA SODIŠČA ZA ČLOVEKOVE PRAVICE

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Publikacija predstavlja zbirko praktičnih vaj s področja ustavnega prava, ki temelji na izbranih sodbah Evropskega sodišča za človekove pravice. Obravnava temeljne človekove pravice in svoboščine, med drugim prepoved nečloveškega ravnanja, pravico do osebne svobode in poštenega sojenja, svobodo izražanja in veroizpovedi ter varstvo lastnine. Bralca sistematično vodi skozi dejansko in pravno ozadje posameznih primerov ter ključna stališča Evropskega sodišča za človekove pravice. Z vprašanji in praktičnimi nalogami spodbuja kritično presojo sodne prakse, razvoj pravne argumentacije in uporabo pridobljenega znanja pri reševanju konkretnih pravnih problemov. Namenjena je predvsem študentom prava, uporabna pa je tudi za vse, ki želijo poglobiti razumevanje evropskega sistema varstva človekovih pravic.

DOI  
[https://doi.org/  
10.18690/um.pf.3.2026](https://doi.org/10.18690/um.pf.3.2026)

ISBN  
978-961-299-194-4

**Ključne besede:**  
literarna nagrada  
večernica,  
Oko besede,  
nagrajena ali nominirana  
literarna dela,  
otroška književnost,  
mladinska književnost



DOI  
[https://doi.org/  
10.18690/um.pf.3.2026](https://doi.org/10.18690/um.pf.3.2026)

ISBN  
978-961-299-194-4

**Keywords:**

Večernica award,  
Oko besede,  
award-winning or  
nominated literary works,  
children's literature,  
YA literature

# CONSTITUTIONAL LAW WORKBOOK: CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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The publication is a collection of practical exercises in constitutional law based on selected judgments of the European Court of Human Rights. It addresses fundamental human rights and freedoms, including the prohibition of inhuman treatment, the rights to personal liberty and a fair trial, freedom of expression and religion, and the protection of property. It systematically guides readers through the factual and legal background of individual cases and the Court's key findings. Through questions and practical exercises, it encourages critical engagement with case law, develops legal reasoning skills, and promotes the application of acquired knowledge to specific legal problems. The publication is intended primarily for law students but will also benefit anyone seeking a deeper understanding of the European system for the protection of human rights.



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