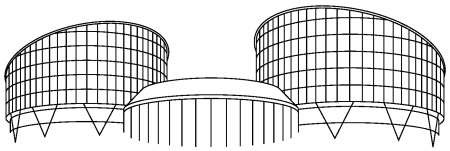

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Overview of the Court's case-law from 1 January to 15 June 2018

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Overview of the Court's case-law from 1 January to 15 June 2018[1]

1. This Overview comprises cases of legal significance selected by the Jurisconsult. It has been drafted by the Directorate of the Jurisconsult and it is not binding on the Court.
This provisional version will be superseded by the final version covering all of 2018.

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Jurisdiction and admissibility

Admissibility (Articles 34 and 35)

Radomilja and Others v. Croatia[1] concerned Articles 32 and 34 of the Convention and in particular the elements that define a complaint and thus the scope of a case referred to the Court.

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

Before the Court they complained under Article 1 of Protocol No. 1 of the domestic courts' refusal to acknowledge their acquisition by adverse possession, arguing mainly that those courts had wrongly assessed the facts and misapplied domestic law. The Chamber concluded, on the basis of *Trgo v. Croatia*[2], that the applicants had acquired the land *ex lege* while the derogation had been in force and found a violation of Article 1 of Protocol No. 1, thus taking into account the period 1941-91 in the qualifying period for adverse possession. On 28 November 2016 a panel referred the case to the Grand Chamber. The Grand Chamber found that, in so far as the complaints before it included the period 1941-91, they were new because the applicants had not relied on that period before the Chamber. Consequently, those complaints were inadmissible as out of time (the remaining complaints were found not to give rise to a violation of the Convention).

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

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

In arriving at this conclusion, the Grand Chamber accepted that different strands of the Court's case-law, while indicating an intrinsic link between the factual and legal submissions, suggested that a

1. *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, 20 March 2018.
2. *Trgo v. Croatia*, no. 35298/04, 11 June 2009.

complaint is delimited by the facts presented by the applicants. It considered the case-law on exhaustion of domestic remedies to be an exception to that principle, since the Court continues to emphasise the Convention arguments relied on at the national level, finding that a failure to raise legal arguments to the same or like effect based on domestic law leads the Court to conclude that the complaint brought before the authorities had not corresponded in substance to that introduced before the Court and that the applicants had not exhausted domestic remedies. The Grand Chamber thereby emphasised its continued attachment to the principles which afford the State a genuine opportunity of preventing or redressing the alleged violation coherently with the subsidiary character of the Convention system.

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

"Core" rights

Right to liberty and security (Article 5)

Speediness of review (Article 5 § 4)

Mehmet Hasan Altan v. Turkey and *Şahin Alpay v. Turkey*[3] concerned the length of the review of the lawfulness of the pre-trial detention of journalists arrested during an attempted *coup d'état*.

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

The Court did not consider that the length (fourteen and sixteen months respectively) of the review of the lawfulness of the applicants' pre-trial detention by the Constitutional Court breached the speediness requirement of Article 5 § 4 of the Convention. The Court recognised that this was on the borderline of what could be considered speedy even taking into account the exceptional burden of work the Constitutional Court had after the failed *coup* attempt in 2016. However, those in pre-trial detention could request their release at any time and appeal any refusal of release: the applicants had made several such requests, each of which was examined speedily. Pre-trial detention was automatically reviewed a minimum of every thirty days. In such a system, the Court could tolerate that the review conducted by the Constitutional Court, which had seen a drastic increase in its caseload since 2016, could take more time. Accordingly, and repeating that the length of the

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

Article 5 § 4 review by the Constitutional Court had been close to the limit of what could be considered speedy, that duration did not, in the particular circumstances of the case, give rise to a violation of Article 5 § 4 of the Convention. The Court reserved the possibility of reviewing this conclusion in any future cases.

Procedural rights

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

Applicability[4]

Mirovni Inštitut v. Slovenia[5] concerns the applicability of Article 6 to a call for tenders procedure.

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

The judgment is noteworthy as regards the Court's treatment of the applicability of Article 6 to the litigation arising out of the applicant's unsuccessful tender. It would appear from the case-law up to that point that the fact that an unsuccessful tenderer had the right to object to an award and to have the objections considered at a public hearing did not amount to a civil right, but merely to a right of a public nature. A right to object to an award did not suffice to make Article 6 applicable to proceedings determining the award of a tender, in view of the discretion vested in the body adjudicating on the competing bids to decide who should be granted the tender (see, for example the approach followed in *I.T.C. LTD v. Malta*[6]; see also *Marti AG and Others v. Switzerland*[7]; *Skyradio AG and Others v. Switzerland*[8]; and *S.C. Black Sea Caviar S.R.L. v. Romania*[9].

In the instant case, the Court decided to revisit that line of authority, noting that the applicant did not have a right to an award of funding and that the domestic authorities exercised their discretion in examining the merits of the competing bids. It took as its starting-point the principles recently developed by the Grand Chamber in *Regner v. the Czech Republic*[10]. In that case the Grand Chamber observed in paragraph 105 of its judgment that

> "[i]n some cases, lastly, national law, while not necessarily recognising that an individual has a subjective right, does confer the right to a lawful procedure for examination of his or her claim, involving matters such as ruling whether a decision was arbitrary or *ultra vires* or whether there were procedural irregularities … This is the case regarding certain decisions where the authorities have a purely discretionary power to grant or refuse an advantage or privilege, with the law conferring on the person concerned the right to apply to the courts, which, where they find that the decision was unlawful, may set it aside. In such a case Article 6 § 1 of the Convention is applicable, on condition that the advantage or privilege, once granted, gives rise to a civil right."

4. See also, under Article 6 § 1 (Access to a court) below, *Naït-Leman v. Switzerland* [GC], no. 51357/07, 15 March 2018.
5. *Mirovni Inštitut v. Slovenia*, no. 32303/13, 13 March 2018.
6. *I.T.C. LTD v. Malta* (dec.), no. 2629/06, 11 December 2007.
7. *Marti AG and Others v. Switzerland* (dec.), no. 36308/97, ECHR 2000-VIII.
8. *Skyradio AG and Others v. Switzerland* (dec.), no. 46841/99, 31 August 2004.
9. *S.C. Black Sea Caviar S.R.L. v. Romania* (dec.), no. 13013/06, 31 May 2016.
10. *Regner v. the Czech Republic* [GC], no. 35289/11, 19 September 2017 (extracts).

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

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

Article 6 was therefore applicable.

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

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

Access to a court

The *Naït-Liman v. Switzerland*[11] judgment concerned whether domestic courts are obliged under international law to accept actions for damages by victims of acts of torture committed extraterritorially by, or under the jurisdiction of, a third State.

The applicant alleged that he had been detained and tortured in Tunisia in 1992, on the order of the then Minister of the Interior. He was granted political asylum in Switzerland in 1995. In 2004 he brought proceedings in Switzerland against Tunisia and the Minister for compensation for non-pecuniary damage arising from alleged acts of torture. The Swiss courts refused to entertain the action, the Federal Supreme Court finding that the Swiss courts lacked jurisdiction under the "forum of necessity"[12] given the lack of connection between the facts of the case and Switzerland (section 3 of the Federal Law on private international law)[13].

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

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

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

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

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

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

(i) Article 6 was considered to be applicable as the applicant had a claim to a right which was, at least on arguable grounds, recognised under Swiss law. In this respect the Grand Chamber relied not only on the general principle of civil liability for unlawful acts under domestic law, but also on elements of international law and, notably, Article 14 of the Convention against Torture[14] which guarantees a right "firmly embedded, as such, in general international law" of victims of acts of torture to obtain redress and to fair and adequate compensation. The Convention against Torture had been ratified by Switzerland; its provisions were part of domestic law and the authorities were required to comply with them. The dispute as to the extraterritoriality of that right was not considered to be decisive for the applicability of Article 6 of the Convention.

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

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

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

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

Accordingly, in the absence of a requirement imposed by international law, the margin of appreciation open to the respondent State had been "wide". Finding that the Swiss courts' interpretation of section 3 of the Federal Law on private international law to reject the applicant's action had not exceeded that margin, that decision was not disproportionate to the legitimate aims pursued so that there had been no violation of Article 6 of the Convention. The recent case of *Arlewin v. Sweden*[15] was distinguished: given the strength of the links between that claim and Sweden, the question of a possible forum of necessity did not arise in that case.

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

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

14. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.
15. *Arlewin v. Sweden*, no. 22302/10, 1 March 2016.

rule out the possibility of developments in the future given the dynamic nature of this area. Although it found no violation in the present case,

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

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Zubac v. Croatia[16] concerned issues of foreseeability and proportionality of limitation on access to a court.

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

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

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

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

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

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

– As regards the second criterion of bearing the adverse consequences of errors made, the Grand Chamber confirmed that, when procedural errors occur both on the side of the applicant and the relevant authorities, there was no clear-cut rule in the case-law as regards who should bear the burden. While the solution would depend on all the circumstances, some guiding criteria were

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

discernable from the Court's case-law: whether the applicant was represented; whether the applicant/legal representative displayed the requisite diligence in pursuing the relevant procedural actions, procedural rights usually going hand in hand with procedural obligations; whether the errors could have been avoided from the outset; and whether the errors are mainly or objectively attributable to the applicant or to the courts.

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

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

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

Fairness of the proceedings

In *Baydar v. the Netherlands*[17], the Court examined the scope of a final court's obligation to give reasons for refusing a request for a preliminary ruling from the Court of Justice of the European Union (CJEU).

The applicant lodged a cassation appeal with the Supreme Court, contesting his conviction for, among other things, people trafficking. In his reply to the Advocate General's observations on his grounds of appeal, he requested that the Supreme Court seek a preliminary ruling from the CJEU on the interpretation of a matter of European Union law. The Supreme Court rejected the applicant's appeal (with the exception of the ground relating to the length of the proceedings). Referring to section 81(1) of the Judiciary (Organisation) Act, the Supreme Court stated that its decision required no further reasoning "as the grievances do not give rise to the need for a determination of legal issues in the interest of legal uniformity or legal development". The applicant complained in the Convention proceedings that the unreasoned refusal of his request for a preliminary ruling breached Article 6 § 1 of the Convention. The Court found that there had been no breach of that Article.

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

The judgment is noteworthy in that this is the first time the Court has addressed at length the interaction between its case-law on, firstly, the scope of the requirement to give reasons for a refusal to refer a question to the CJEU for a preliminary ruling (see, in this connection, *Ullens de Schooten and Rezabek v. Belgium*[18]; *Vergauwen and Others v. Belgium*[19]; and *Dhahbi v. Italy*[20]) and, secondly, the Court's acceptance that a superior court may dismiss an application for appeal on the basis of summary reasoning (see *Wnuk v. Poland*[21]; *Gorou v. Greece (no. 2)*[22]; and *Talmane v. Latvia*[23], with further references). It is of interest that the Court's reasoning in the instant case was situated within the framework of an accelerated procedure for the disposal of appeals in cassation in the interests of efficiency. This procedure enables the Supreme Court to reject an appeal if it does not constitute grounds for overturning the judgment appealed against and does not give rise to the need for a determination of legal issues (section 81(1) of the Judiciary (Organisation) Act), and to declare an appeal inadmissible as having no prospect of success (section 80a of the same Act).

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

> "– Article 6 § 1 requires the domestic courts to give reasons, in the light of the applicable law, for any decision refusing to refer a question for a preliminary ruling;
>
> – when the Court hears a complaint alleging a violation of Article 6 § 1 on this basis, its task consists in ensuring that the impugned refusal has been duly accompanied by such reasoning;
>
> – whilst this verification has to be made thoroughly, it is not for the Court to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law;
>
> – in the specific context of the third paragraph of Article 234 of the Treaty establishing the European Community (current Article 267 of the Treaty on the Functioning of the European Union (TFEU)), this means that national courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of European Union law, are required to give reasons for such refusal in the light of the exceptions provided for by the case-law of the CJEU. They must therefore indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt."

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

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

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

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

Judiciary (Organisation) Act when it comes to requests for a preliminary ruling. It observed (paragraph 48) as follows.

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

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

Defence rights (Article 6 § 3)

Defence through legal assistance (Article 6 § 3 (c))

Correia de Matos v. Portugal[24] concerned the right of an accused with legal training to represent himself in person and the differing positions of the Court and the UN Human Rights Committee (HRC) on the question.

The applicant, a lawyer by training, was convicted in 1998 for insulting a judge. According to Portuguese law, it is obligatory for an accused (in criminal proceedings) to be represented by counsel, regardless of his legal training (the applicant, a lawyer by profession, had already been suspended from the Bar Council roll). Relying on Article 6 §§ 1 and 3 (c), he applied to this Court, complaining of not being able to conduct his own defence and that he had been assigned a lawyer to represent him against his will. The Court found the application inadmissible as manifestly ill-founded. His subsequent communication to the HRC, on the same facts and complaints, led to a finding that there had been a failure to observe Article 14 § 3(d) of the International Covenant on Civil and Political Rights[25], views reiterated in the later HRC General Comment No. 32 (23 August 2007, UN Doc. CCPR/C/GC/32, paragraph 37) and Concluding Observations on the fourth periodic report of Portugal (23 November 2012, UN Doc. CCPR/C/PRT/CO/4, paragraph 14), the latter recommending that the rule of mandatory representation be less rigid. Portuguese law was not amended.

The present application concerns similar facts and the same complaints. The applicant was again convicted for insulting a judge, he was refused leave to conduct his own defence and he was defended by a lawyer assigned to him. He again complained under Article 6 § 3 (c) that, despite his legal training, he could not represent himself. The Grand Chamber concluded that there had been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

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

(i) The judgment contains a comprehensive review of the Court's case-law under Article 6 as regards mandatory legal assistance in criminal proceedings. The Grand Chamber pointed out that the decision in this respect falls within the traditional margin of appreciation of States, who are

24. *Correia de Matos v. Portugal* [GC], no. 56402/12, 4 April 2018.
25. International Covenant on Civil and Political Rights, 16 December 1966 (ICCPR).

considered to be better placed than the Court to choose the appropriate means by which to enable their judicial systems to guarantee the rights of the defence. It emphasised that the rights guaranteed by Article 6 § 3 are not ends in themselves: rather their intrinsic aim is to contribute to ensuring the fairness of the criminal proceedings as a whole (*Ibrahim and Others v. the United Kingdom*[26]). The relevant test by which to examine compliance of mandatory legal assistance in criminal proceedings with Article 6 §§ 1 and 3 (c) was therefore summed up as follows.

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

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

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

It is interesting to note that the State and international practice examined did not lean in favour of mandatory legal assistance. In the first place, the Court's comparative study revealed a tendency amongst States to recognise the right of an accused to defend himself or herself in person without the assistance of a registered lawyer (of the thirty-five States reviewed, thirty-one had established the right to conduct one's own defence as a general rule, with four States prohibiting, as a general rule, self-representation). Secondly, the case-law of the Court to date and of the HRC differed. At the same time, the Grand Chamber reiterated that the Convention had to be interpreted as far as possible in harmony with other rules of international law; it accepted that when interpreting the Convention it had had regard on a number of occasions to the views of the HRC and its interpretation of the ICCPR; it noted that the relevant provisions of the Convention and the ICCPR were almost identical; and the Grand Chamber acknowledged that the facts of the present case and of its prior communication to the HRC were virtually identical. Thirdly, the terms of the Charter of Fundamental Rights of the European Union, its explanatory notes and Directive 2013/48/EU[27] suggested that the relevant rights in the Charter corresponded to those in Article 6 §§ 1, 2 and 3 of

26. *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 251, 13 September 2016.
27. Directive 2013/48/EU of the European Parliament and the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, 22 October 2013.

the Convention. The Directive appeared to leave the choice regarding whether or not to opt for a system of mandatory legal representation to individual member States.

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

Other rights and freedoms

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

Private life

Anchev v. Bulgaria[28] concerned the exposure of individuals on account of their affiliation to the former security services during the communist regime.

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

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

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

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

The Court observed that the key issue was to determine whether, in adopting the exposure scheme under the 2006 Law, the authorities had acted within their margin of appreciation. On that point, it noted that Contracting States which have emerged from undemocratic regimes have a broad margin of appreciation in choosing how to deal with the legacy of those regimes. This part of the Court's analysis is noteworthy for its comprehensive review of its previous case-law in this area which illustrates the diversity of the approaches which the new democracies have taken with a view to addressing their past.

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

The Court gave weight to a number of considerations which confirmed that Bulgaria had not exceeded its margin of appreciation including: exposure did not give rise to sanctions or legal disabilities (compare and contrast *Sidabras and Džiautas v. Lithuania*[29]), and it was not certain that exposed persons had been prejudiced as a result in their professional or private life – the applicant has in fact continued to be active in the business world and public life; the Law was only directed at persons who, since the fall of the communist regime, had taken up important functions in the public or private sectors (compare and contrast *Sõro v. Estonia*[30]); the process of exposure was attended by a number of safeguards to prevent arbitrariness or abuse including the right of an individual concerned to have access to the records relied on by the Commission and to seek judicial review of the Commission's decision to expose him or her.

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

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Hadzhieva v. Bulgaria[31] concerned an applicant minor allegedly left to her own devices following her parents' arrest and detention for thirteen days.

The applicant was 14 years old at the time of the events giving rise to the application. She was alone at home on 4 December 2002 when police officers arrived to arrest her parents with a view to the execution of an extradition request issued in respect of them by Turkmenistan. Her parents were out at the time. They were arrested on their return and taken into custody. The applicant remained alone in the flat. She was reunited with her parents on 17 December 2002 following their release on

29. *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, ECHR 2004-VIII.
30. *Sõro v. Estonia*, no. 22588/08, 3 September 2015.
31. *Hadzhieva v. Bulgaria*, no. 45285/12, 1 February 2018.

bail. The applicant was unsuccessful in her claim for compensation for the stress and suffering she endured on account of the alleged failure of the authorities to organise support and care for her during her parents' detention. The court of appeal found that, even if the applicant had been left alone after their arrest, responsibility for that could not be attributed to the police, the prosecuting authorities or the court, given that her mother had stated at a court hearing on 6 December 2002, two days after her arrest, that there had been someone to take care of her.

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

As regards the two-day period, the Court noted that under domestic law the authorities had the responsibility to either place the applicant's parents in a position to arrange for her care at the time of their being taken into custody, or to enquire into the applicant's situation of their own motion. Once the authorities had established the circumstances relating to her care in her parents' absence, if it appeared necessary, they had an obligation to provide the applicant with assistance, support and services as needed, either in her own home, or in a foster family or at a specialised institution. The authorities had failed to comply with their positive obligation under Article 8 to act in order to ensure that the applicant, who was a minor left without parental care, was protected and provided for in her parents' absence.

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

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

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Libert v. France[32] concerned the opening by a public-sector employer of an applicant employee's files that were stored on the hard disk of his professional computer and marked "personal".

The applicant was employed by the SNCF, the French State railway company. He was suspended from his functions pending the outcome of an internal investigation. During the applicant's absence, his employer analysed the content of the hard disk of his office computer. Files were found

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

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

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

The judgment is of interest in that it represents a further contribution to the growing case-law on surveillance at the place of work (see, in this connection, as regards monitoring of telephone and Internet use: *Bărbulescu v. Romania*[33]; *Halford v. the United Kingdom*[34]; *Copland v. the United Kingdom*[35]; and, as regards video surveillance: *Köpke v. Germany*[36]; *Antović and Mirković v. Montenegro*[37]; and *López Ribalda and Others v. Spain*[38]).

The following points may be highlighted.

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

Secondly, unlike in *Bărbulescu* (cited above), for example, the Court examined the applicant's complaint from the standpoint of an alleged interference by the State with the applicant's Article 8 right. The SNCF was a public-law entity even if it displayed certain features of a private-law nature. In *Bărbulescu* the source of the infringement of the applicant's right was a private employer, which meant that the Court had to examine in that case the applicant's complaint from the perspective of the State's compliance with its positive obligation to protect the applicant's right to respect for his private life.

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

33. *Bărbulescu v. Romania* [GC], no. 61496/08, 5 September 2017 (extracts).
34. *Halford v. the United Kingdom,* 25 June 1997, *Reports of Judgments and Decisions* 1997-III.
35. *Copland v. the United Kingdom*, no. 62617/00, ECHR 2007-I.
36. *Köpke v. Germany* (dec.), no. 420/07, 5 October 2010.
37. *Antović and Mirković v. Montenegro*, no. 70838/13, 28 November 2017.
38. *López Ribalda and Others v. Spain*, nos. 1874/13 and 8567/13, 9 January 2018 (referred to the Grand Chamber).

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

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

Private and family life and home

National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France[39] concerns the impact of anti-doping measures on the rights of sportsmen and women.

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

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

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

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

significance for the Court when examining whether France had exceeded its margin of appreciation when balancing the competing interests in this field.

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

The Court accepted that the impugned measure was in accordance with the law. Regarding the legitimacy of the aim pursued, it was satisfied that the "whereabouts" requirement had been introduced in order to address the protection of the health of sports professionals and, beyond that group, the health of others, especially young people engaged in sport. Moreover, it could accept that the requirement was linked to the promotion of fair play by eliminating the use of substances which conferred an unfair advantage on the user, as well as any dangerous incentive which their use may be seen to have, especially by young amateur sportsmen and women, for increasing performance on the sports field. Importantly, the Court also observed that spectators should be able to expect that the sports events they attended reflected fair-play values. For these reasons, the Court considered that the "whereabouts" restrictions could further be justified in terms of the protection of the rights and freedoms of others. The Court's analysis of the legitimacy issue is interesting in view of its readiness to draw on the aims and objectives underpinning the international texts in this area.

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

As to whether a fair balance had been struck between the applicants' Article 8 rights and the aims relied on by the respondent State – the protection of health and the rights and freedoms of others – the Court attached weight to the following considerations: inclusion in the testing pool was limited in principle to one year; it was for those selected for inclusion to indicate where they could be located, including at their home if that was their choice, as well as the one-hour slot when they would be available for testing; the implementation of the "whereabouts" measure was accompanied by procedural safeguards enabling individuals to contest before the courts both their selection and any sanctions imposed on them for failure to comply with the measure.

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

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Lozovyye v. Russia[40] concerned the authorities' failure to notify parents of their son's death.

In 2005 the applicants' son was murdered. He was buried before they were notified of his death. Some measures had been taken by an investigator from the competent prosecutor's office – without success – to trace family members with a view to enabling them to join the criminal proceedings as victims. Having eventually learnt of their son's death, the applicants were allowed to have his body exhumed. He was subsequently given a family burial in his home town. The applicants unsuccessfully sued for compensation. In the Convention proceedings, the applicants alleged a violation of their right to respect for their private and family life guaranteed by Article 8 of the Convention. The Court found for the applicants.

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

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

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

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

Freedom of expression (Article 10)

Freedom of expression

Sekmadienis Ltd. v. Lithuania[41] concerned commercial speech using religious symbolism.

The applicant company published advertisements on public hoardings intended to promote a range of clothing using models depicting religious figures from the Christian faith. The religious symbolism was reinforced by captions intended for comic effect. Around one hundred complaints were lodged, which led to legal proceedings against the applicant company. The domestic courts ultimately found that the advertisements were contrary to public morals and in breach of the relevant provisions of the Law on advertising in force at the material time. The applicant company was fined. In the view of

40. *Lozovyye v. Russia*, no. 4587/09, 24 April 2018.
41. *Sekmadienis Ltd. v. Lithuania*, no. 69317/14, 30 January 2018.

the domestic courts, and among other considerations, the advertisements had been inappropriate, made use of religious symbols for superficial purposes and "promoted a lifestyle which was incompatible with the principles of a religious person".

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

The judgment is of interest given that the Court ruled that, in the circumstances of the case, the respondent State had exceeded its margin of appreciation in the area of commercial speech or advertising, which, according to the established case-law, is broad (see *Markt intern Verlag GmbH and Klaus Beermann v. Germany*[42], and *Mouvement raëlien suisse v. Switzerland*[43]). Of equal relevance in this case is the fact that States are also afforded a broad margin when regulating speech which is liable to offend against religious beliefs or convictions (see, for example, *Murphy v. Ireland*[44]). According to the Court's case-law those exercising Article 10 rights have a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane (see, for example, *Murphy*, cited above, § 65, and *Giniewski v. France*[45]).

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

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

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

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

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

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

42. *markt intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989, § 33, Series A no. 165.
43. *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 61, ECHR 2012 (extracts).
44. *Murphy v. Ireland*, no. 44179/98, § 67, ECHR 2003-IX (extracts).
45. *Giniewski v. France*, no. 64016/00, § 43, ECHR 2006-I.

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

Possessions

O'Sullivan McCarthy Mussel Development Ltd v. Ireland[46] concerned measures taken by the respondent State to comply with a judgment of the Court of Justice of the European Union (CJEU) finding that it had infringed European Union environmental law.

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

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

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

Firstly, as to the applicability of Article 1 of Protocol No. 1, the Court observed that the applicant company had been authorised to fish for mussel seed in the harbour. That was its business activity, made possible by the grant of the relevant permission, and it was that activity, linked to the official authorisation, which amounted to its "possessions". The temporary prohibition on mussel-seed fishing in the harbour constituted an interference in the form of a control of use of its right to the peaceful enjoyment of its "possessions" (see also *Malik v. the United Kingdom*[47], and *Centro Europa 7 S.r.l. and Di Stefano v. Italy*[48]). Interestingly, the Court went on to observe that in assessing the nature and extent of the interference it would bear in mind, among other matters, that the authorisation had not been withdrawn or revoked and that the impugned interference consisted of a temporary prohibition of part of the applicant company's activities.

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

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

46. *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*, no. 44460/16, 7 June 2018.
47. *Malik v. the United Kingdom*, no. 23780/08, §§ 91-92 and 94, 13 March 2012.
48. *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, §§ 177-78, ECHR 2012.

Thirdly, the Court had to address the Government's argument that the impugned interference stemmed directly from the judgment of the CJEU in the infringement proceedings, which meant that the domestic authorities had no room for manoeuvre. This is the first time that the so-called "*Bosphorus* presumption of equivalent protection" issue has been framed in these terms in Convention proceedings. Previous cases have involved EU Regulations (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*[49], and *Avotiņš v. Latvia*[50]), or Directives (*Michaud v. France*[51]). It is noteworthy that the Court found that the conditions for applying the *Bosphorus* presumption had not been met in the specific circumstances of the case, being of the view that, even if the judgment was binding on the respondent State, it was still left with some margin of manoeuvre in determining how to secure compliance. The Court observed (paragraph 112) as follows.

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

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

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

(i) At least from the date of the CJEU judgment (2007), and arguably from the bringing of the infringement proceedings by the Commission (2004), the applicant company, being a commercial operator, should have been aware of a possible risk of interruption of, or at least some consequences for, its usual commercial activities (see *Pine Valley Developments Ltd and Others v. Ireland*[52]; see also, *mutatis mutandis*, *Forminster Enterprises Limited v. the Czech Republic*[53]). The extent and consequences of any infringement judgment could not be foreseen, but the risk of some interruption could clearly not be excluded;

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

(iii) The applicant company was not required to cease all of its operations in 2008, and in 2009 it was able to resume its usual level of business activity; the harbour in question was in fact given

49. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.
50. *Avotiņš v. Latvia* [GC], no. 17502/07, §§ 101-05, 23 May 2016.
51. *Michaud v. France*, no. 12323/11, ECHR 2012.
52. *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, § 59, Series A no. 222.
53. *Forminster Enterprises Limited v. the Czech Republic*, no. 38238/04, § 65, 9 October 2008.

priority over other specially protected sites when it came to the carrying out of environmental impact assessments;

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

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

Other Convention provisions

Derogation in time of emergency (Article 15)

The judgments in *Mehmet Hasan Altan v. Turkey* and *Şahin Alpay v. Turkey*[54] concerned the validity of a derogation for the purposes of Article 15 of the Convention.

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

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

The cases are important in the context of Turkey, constituting as they do the Court's first judgments on the merits of complaints concerning arrest and pre-trial detention on charges related to the attempted *coup* in 2016 in Turkey. A number of case-law points are worth noting.

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

The first question to be addressed was the fact that the derogation did not refer to the Convention Articles from which the measures adopted by the Government might derogate. The Court did not consider this to undermine the validity of the derogation: noting that neither of the parties had

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

disputed the point, the Court accepted that the derogation fulfilled the formal requirements of Article 15 § 3 of the Convention. Secondly, and referring in particular to the findings of the Constitutional Court, the Court found that the attempted military *coup* amounted to a "public emergency threatening the life of the nation". Thirdly, the Court found that the next question – whether the measures were strictly required by the exigencies of the situation – required an examination on the merits of the applicants' complaints, thereby linking the merits of the complaints with the validity of the derogation. It went on to find, having regard to the assize court's failure to implement the clear and unambiguous judgments of the Constitutional Court, that the applicants' pre-trial detention was "unlawful" and "not in accordance with the law" contrary to Article 5 § 1. The Court found, as did the Constitutional Court, that such a deficiency meant, in turn, that the derogation could not be considered proportionate or therefore valid, so that the Court could conclude that there had been a violation of Article 5 § 1 of the Convention. The same approach was adopted as regards Article 10: again relying on the findings of the Constitutional Court, the Court found the interference with the applicants' freedom of expression to be disproportionate and that this was sufficient, in turn, to find the derogation to be disproportionate and invalid, so that it could conclude that there had been a violation of Article 10 of the Convention.

(ii) It is also interesting to note that, because the finding of a violation of Article 5 § 1 was based on the failure by the assize court to implement the judgments of the Constitutional Court, the Court considered it necessary to explain that those findings under Article 5 § 1 did not modify its constant precedent according to which the right of individual petition before the Constitutional Court constitutes an effective remedy as regards complaints concerning pre-trial detention for those deprived of their liberty under Article 19 of the Constitution (see, for example, *Koçintar v. Turkey*[55]). Nevertheless, it reserved the possibility of re-examining the effectiveness of this remedy in future cases concerning complaints under Article 5 of the Convention, at which stage it would be for the Government to demonstrate its effectiveness in law and in practice (*Uzun v. Turkey*[56]).

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

Ireland v. the United Kingdom[57] concerned the interpretation and application of Rule 80 of the Rules of Court in the context of a request for revision of a judgment of the Court in an inter-State case.

In its judgment of 18 January 1978 in *Ireland v. the United Kingdom*[58] the Court ruled that the respondent Government's use of five specific interrogation techniques against fourteen detainees had amounted to a practice of inhuman and degrading treatment in breach of Article 3 of the Convention. However, and contrary to the findings of the Commission, it concluded that their use had not given rise to a practice of torture (see §§ 165-68 of the original judgment, and, as regards the nature of the interrogation techniques, §§ 96-104 and 106-07). In a request filed with the Court on 4 December 2014 pursuant to Rule 80 of the Rules of Court[59], the applicant Government sought the revision of the judgment, but only in so far as the Court had declined to characterise also as torture the application of the five techniques to the detainees. They relied on a television report of 4 June 2014 which had drawn attention to the factual content of documentary materials which, had it been known to the Court at the relevant time, would, in their view, have had a decisive influence on the manner in which the Court had treated the issue of torture. In essence, the applicant Government contended that the materials which had been uncovered revealed, firstly, that a Dr L.

55. *Koçintar v. Turkey* (dec.), no. 77429/12, § 44, 1 July 2014.
56. *Uzun v. Turkey* (dec.), no. 10755/13, § 71, 30 April 2013.
57. *Ireland v. the United Kingdom*, no. 5310/71, 20 March 2018.
58. *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25.
59. Rule 80 § 1 of the Rules of Court provides as follows: "A party may, in the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party, request the Court, within a period of six months after that party acquired knowledge of the fact, to revise that judgment."

called by the respondent Government to give evidence before the Commission had misled the latter regarding the long-term effects of the above-mentioned five techniques and, secondly, that the then respondent Government had adopted a clear policy of withholding from the Convention institutions information regarding the use of these techniques.

The revision judgment is noteworthy for a number of reasons.

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

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

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

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

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

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

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

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

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

The Court noted that the findings contained in the original judgment were not influenced by the possible long-term effects the application of the five techniques may have had on the health of the detainees. That judgment was silent on this matter. Rather, the Court had placed emphasis on the distinction between, on the one hand, torture and, on the other hand, inhuman and degrading treatment in terms of the intensity of the suffering inflicted. The Court found in the original judgment that, although the object of the five techniques was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood. The distinction between "torture" and "inhuman and degrading treatment" was a question of degree, to be assessed in the light of various elements. For the Court in the revision judgment (see paragraph 135)

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