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COUR EUROPÉENNE DES DROITS DE L'HOMME

**DIVISION DE LA RECHERCHE  
RESEARCH DIVISION**

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*National security  
and  
European case-law*

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## SUMMARY

States are recognised to have a certain – even a large – measure of discretion when evaluating threats to national security and when deciding how to combat these. Nevertheless, the Court now tends to require national bodies to verify that any threat has a reasonable basis in fact (Janowiec, Konstantin Markin...).

Where the quality of the law is concerned, the Court has for some time now been developing relatively restrictive standards (*Malone v. the United Kingdom*; *Kruslin v. France*; *Huvig v. France*; *Kopp v. Switzerland*; *Amann v. Switzerland* [GC]).

Furthermore, the Court carefully verifies the need for interference or its proportionality to the legitimate aim, in this instance national security.

The State's margin for appreciation in cases connected with national security is no longer uniformly broad. In certain cases, any room for manoeuvre is explicitly excluded by the very nature of Article 3 (*Chahal v. the United Kingdom* [GC]). In other spheres, the Court has been able to reduce significantly States' freedom, as it has for example in respect of Article 6, where it has considered the possible existence of measures with a less restrictive effect on freedoms (*Van Mechelen v. the Netherlands*), or when it has laid down a strict requirement for independent courts (*Incal v. Turkey*). The Court has also reduced the margin for appreciation in certain areas, such as freedom of expression in the armed forces (*Grigoriades v. Greece*; *VDSÖ and Gübi v. Austria*) and the private life of servicemen (*Lustig-Prean and Beckett v. the United Kingdom*, *Smith and Grady v. the United Kingdom*, *Konstantin Markin*) as compared to its apparent previous position (*Hadjianastassiou v. Greece*).

With more specific reference to cases relating to secret surveillance, the Court is relatively flexible on the subject of recognition of victim status. As for the condition that the interference should be "in accordance with the law", the Court takes the view that the law, both accessible and foreseeable, must be relatively detailed. The Court places particular emphasis on the safeguards which must accompany surveillance and the keeping of records. As to the condition of necessity in a democratic society, the Court weighs the respondent State's interest in protecting its national security against the seriousness of the infringement of the applicant's right to respect for his or her private life, strict necessity being defined in practice as requiring adequate and effective guarantees against abuse and the exercise of supervision, in the last instance at least, by the judicial authorities, or at the very least by independent supervisory bodies (*Klass and Others v. Germany*).

In the case of a "whistle-blower" who had revealed unlawful secret surveillance (*Bucur and Toma v. Romania*), the Court considered that civil society was directly affected by the information disclosed, for anybody could have his or her telephone tapped. Furthermore, this information being connected to abuses committed by high-ranking officials and affecting the democratic foundations of the State, those were very important issues which were a matter for political debate, and which the public had a legitimate interest in being told about. It was therefore necessary to verify whether the interest in maintaining the confidentiality of the information prevailed over the public interest in knowing that unlawful telephone tapping had occurred.

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## INTRODUCTION

1. The possibility for states to invoke national security considerations to justify reductions in the protection which must be afforded to human rights is inevitably a source of concern, as the risk of abuse cannot be entirely ruled out. National security is often referred to in connection with terrorist threats and, in our post 9/11 society, it is relied on as justification for various restrictions on rights (with the relative approval of the public). There is no doubt that the highly complex forms of espionage and terrorism which currently threaten our democratic societies require states to take effective measures to defend themselves, but states cannot be permitted to take any measure they like in the name of this fight.

2. Our aim therefore is to investigate national security as a ground enabling states to exercise exceptional powers which may limit the protection normally afforded to fundamental rights.

3. National security is mentioned in paragraph 2 of Articles 8, 10 and 11 of the European Convention on Human Rights (ECHR) as the first of the “*legitimate aims*” making it necessary to restrict these rights.

4. The term is not clearly defined, however, and could even be said to be somewhat vague. The European Commission of Human Rights (“the Commission”) considered moreover that it could not be comprehensively defined<sup>1</sup>, thus giving it a degree of elasticity and hence flexibility, which is reflected by the margin of appreciation which states have in this sphere.

5. Although its limits are difficult to define, European case-law has made it possible to assign some substance to the concept of national security, as we shall see in more detail below. It most definitely includes the protection of state security and constitutional democracy from espionage, terrorism, support for terrorism, separatism and incitement to breach military discipline.

6. This description of the case-law of the Court (and the Commission), which makes no claim to be exhaustive, will focus mainly, in view of the scandals that have recently come to light in this sphere, on cases linked to secret surveillance, which are moreover some of the most important cases in which the ground of national security has been invoked (I). The report will then move on to other areas of the Convention in which national security considerations may come into play (II) as well as the derogation clause contained in Article 15 (III). Lastly, it will dwell briefly on some important issues at the Council of Europe outside the Convention system (IV).

## I. SECRET SURVEILLANCE, RECORD-KEEPING AND ARTICLE 8

### A. Mass surveillance and victim status

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<sup>1</sup>. *Esbeester v. the United Kingdom*: “the Commission considers however that the principles referred to above do not necessarily require a comprehensive definition of the notion of “the interests of national security”.

7. One of the first questions which was raised in the well-known case of *Klass and Others v. Germany*, which was the first major case concerning telephone-tapping, was whether the applicants could claim to be victims of a violation of the Convention. The applicants, who were German lawyers, complained about the legislation which provided for restrictions on the secrecy of mail, post and telecommunications to the effect that it allowed surveillance measures without obliging the authorities in every case to notify the persons concerned after the event and excluded any remedy before the courts against the ordering and execution of such measures (persons who believed they were under surveillance could apply to the Constitutional Court but this remedy was only available in rare cases).

8. Individuals did not have a kind of *actio popularis* for the interpretation of the Convention and could not complain *in abstracto* against a law whose mere existence they regarded as infringing the rights they enjoyed under the Convention; the law had to have been applied to their detriment<sup>2</sup>.

9. The Court noted, however, that where a state instituted secret surveillance the existence of which remained unknown to the persons being controlled, it was possible for persons to be treated in a manner contrary to Article 8 without their being aware of it and therefore without being able to obtain a remedy at the national level or before the Convention institutions. The Court found it unacceptable that the assurance of the enjoyment of a right guaranteed by the Convention could be thus removed by the simple fact that the person concerned was kept unaware of its violation<sup>3</sup>. **The Court therefore accepted that an individual could, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures had been in fact applied to him or her.** The relevant conditions were to be determined in each case according to the Convention right or rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures<sup>4</sup>.

10. As to the facts in this case, the Court noted that the contested legislation had instituted a system of surveillance under which all persons in the Federal Republic of Germany could potentially have their mail, post and telecommunications monitored, without their ever knowing this. To that extent, the disputed legislation directly affected all users or potential users of the postal and telecommunication services in the Federal Republic of Germany. Having regard to the specific circumstances of the present case, the Court concluded that each of the applicants was entitled to "*claim to be the victim of a violation*" of the Convention, even though he was not able to allege in support of his application that he had been subject to a concrete measure of surveillance. The question whether the applicants had actually been the victims of any violation of the Convention involved determining whether the contested legislation was in itself compatible with the Convention's provisions<sup>5</sup>.

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<sup>2</sup>. *Klass and Others v. Germany*, 6 September 1978, § 33, Series A no. 28.

<sup>3</sup>. *Ibid.*, § 36.

<sup>4</sup>. *Ibid.*, § 34 *in fine*.

<sup>5</sup>. *Ibid.*, §§ 37-38.

11. In the case of *Weber and Saravia v. Germany*<sup>6</sup> (dec.), the Court reiterated its case-law and noted that legislation which by its mere existence entailed a threat of surveillance for all those to whom it might be applied necessarily struck at freedom of communication between users of the telecommunications services and thereby amounted in itself to an interference with the exercise of the applicants' rights under Article 8, irrespective of any measures actually taken against them. This principle was applied in the *Kennedy v. the United Kingdom* judgment<sup>7</sup>, in which it was stipulated that in order to assess whether an individual could claim an interference as a result of the mere existence of legislation permitting secret surveillance measures, the Court had to have regard to the availability of any remedies at the national level and the risk of secret surveillance measures being applied to the person concerned. Where there was no possibility of challenging the alleged application of secret surveillance measures at domestic level, widespread suspicion and concern among the general public that secret surveillance powers were being abused could not be said to be unjustified. In such cases, even where the actual risk of surveillance was low, there was a greater need for scrutiny by the Court.

12. The Court reiterated its case-law under Article 34 in a particular case where one of the applicants was a legal person, namely in the *Case of the Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*. The applicants, who were a non-profit association and a lawyer representing the applicant association before the Court, submitted that under a Special Surveillance Means Act of 1997, they could have been subjected to surveillance measures at any point in time without any notification. The Court found that they could claim to be directly affected by this Act and acknowledged their victim status under Article 34<sup>8</sup>. In cases in which applicants were linked to organisations working in the field of civil liberties or representing applicants before the Court, the Court followed the same line of reasoning and found that there had been an interference with the rights of these organisations or their members under Article 8 (*Liberty and Others v. the United Kingdom*<sup>9</sup>; *Iordachi and Others v. Moldova*<sup>10</sup>).

## **B. The requirements of paragraph 2 of Article 8**

13. Any interference in private life must be in accordance with the law, justified by one of the legitimate aims listed and necessary in a democratic society.

### **1) The existence of interference**

14. Following a surveillance measure, it is not generally disputed that there has been an interference in private life. Some interesting clarifications have been made nonetheless in this respect in cases in which records have been kept on individuals.

<sup>6</sup> *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 78, ECHR 2006-XI.

<sup>7</sup> *Kennedy v. the United Kingdom*, no. 26839/05, 18 May 2010.

<sup>8</sup> *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00, §§ 58-60, 28 June 2007.

<sup>9</sup> *Liberty and Others v. the United Kingdom*, no. 58243/00, §§ 56 and 57, 1 July 2008.

<sup>10</sup> *Iordachi and Others v. Moldova*, no. 25198/02, §§ 30-35, 10 February 2009.

15. The case of *Amman v. Switzerland* [GC] related to a telephone call to the applicant from the Soviet Embassy to order a depilatory appliance which he had been marketing in Switzerland. The call had been intercepted by the public prosecutor's office and a card had been drawn up on the applicant, in which it was stated that the applicant was "a contact with the Russian embassy" and "does business of various kinds with the [A.] company". This card had been kept in the Confederation's files. The Court considered that it was sufficient for it to find that data relating to the private life of an individual had been stored by a public authority to conclude that, in the instant case, the creation and storing of the impugned card had amounted to an interference, within the meaning of Article 8, with the applicant's right to respect for his private life, regardless of the subsequent use of the stored information or whether or not the information gathered had been sensitive or the applicant inconvenienced in any way<sup>11</sup>.

16. In the case of *Rotaru v. Romania* [GC], the Court pointed out that public information could fall within the scope of private life where it was systematically collected and stored in files held by the authorities<sup>12</sup>.

17. Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life. In the case of *McGinley and Egan v. the United Kingdom*, the applicants had been left in doubt as to whether or not they had been exposed to dangerous levels of radiation during their participation in nuclear tests and had asked for information in that respect. Given the applicants' interest in obtaining access to the material in question and the apparent absence of any countervailing public interest in retaining it, the Court considered that a positive obligation under Article 8 had arisen. Where a Government engaged in hazardous activities, such as those in issue in the present case, which could have had hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 required that an effective and accessible procedure be established which enabled such persons to seek all relevant and appropriate information<sup>13</sup>.

## **2) Interference in accordance with the law**

18. According to the Court's established case-law, the requirement that any interference must be "in accordance with the law" will only be met when **three conditions** are satisfied: **the impugned measure must have some basis in domestic law and, with regard to the quality of the law at issue, it must be accessible to the person concerned and have foreseeable consequences**<sup>14</sup>.

<sup>11</sup>. *Amman v. Switzerland* [GC], no. 27798/95, § 69 and 70, ECHR 2000-II. See also *Leander v. Sweden* and *Kopp v. Switzerland*.

<sup>12</sup>. *Rotaru v. Romania* [GC], no. 28341/95, §§ 43 and 44, ECHR 2000-V. This applied all the more where such information concerned a person's distant past. It was truer still if some of the information had been declared false and was likely to injure the applicant's reputation.

<sup>13</sup>. *McGinley and Egan v. the United Kingdom*, 9 June 1998, § 101, *Reports of Judgments and Decisions* 1998-III.

<sup>14</sup>. *Kennedy v. the United Kingdom*, *op. cit.*, § 151; *Rotaru v. Romania*, *op. cit.*, §52; *Amann v. Switzerland*, *op. cit.*, § 50; *Iordachi and Others v. Moldova*, *op. cit.*; *Kruslin v. France*, § 27; *Huvig v. France*, § 26;

19. The *Malone v. the United Kingdom* judgment was the first to find a violation in this area. British legislation simply acknowledged the power of ministers to authorise telephone tapping without truly granting it, and the administrative arrangements for such practices were somewhat vaguely defined. The Court did accept that the requirements of the Convention, notably in regard to **foreseeability, could not be exactly the same in the special context of interception of communications for the purposes of police investigations**. In particular, the requirement of foreseeability could not mean that an individual should be enabled to foresee if and when the authorities were likely to intercept his communications so that he could adapt his conduct accordingly. Nevertheless, the law should be **sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities were empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence**. Since the implementation in practice of measures of secret surveillance of communications was not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law should **indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity**, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference<sup>15</sup>.

20. The Court adopted a similar line of argument in the particular context of secret controls of staff in sectors affecting national security in the case of *Leander v. Sweden*. In this area, the requirement of foreseeability could not be the same as in many other fields. It could not mean that individuals should be enabled to foresee precisely what checks the special police would make in their regard. However, the law had to be sufficiently clear in its terms to give them an adequate indication as to the circumstances in which and the conditions on which the public authorities were empowered to resort to this kind of secret and potentially dangerous interference with private life<sup>16</sup>. In the case of *Amman v. Switzerland* [GC], the Court insisted on the need for rules on the conditions under which files could be opened to be foreseeable: the rules had to specify the conditions in which cards could be created, the procedures to be followed, the information which could be stored and the comments which could be forbidden<sup>17</sup>. In this case, the Court also concluded that since the authorities had not destroyed the stored information when it had emerged that no offence had been being prepared, the storing of the card on the applicant had not been “*in accordance with the law*”<sup>18</sup>.

21. In the cases of *Kruslin v. France* and *Huvig v. France*, the Court considered that tapping and other forms of interception of telephone conversations represented a serious interference with private life and correspondence and had accordingly to be based on a “*law*” that was particularly precise. It was essential to have clear, detailed rules on the subject,

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*Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, *op. cit.*, § 71 ; *Liberty and Others v. the United Kingdom*, *op. cit.*, § 59, etc.

<sup>15</sup>. *Malone v. the United Kingdom*, 2 August 1984, §§ 67 and 68, Series A no. 82. See also *Kennedy v. the United Kingdom*, *op. cit.*, § 152.

<sup>16</sup>. *Leander v. Sweden*, 26 March 1987, § 51, Series A no. 116.

<sup>17</sup>. *Amann v. Switzerland*, *op. cit.*, § 76.

<sup>18</sup>. *Ibid.*, §§ 78-79.



especially as the technology available for use was continually becoming more sophisticated. After this, the Court outlined the substance of what might be regarded as adequate legislation in this sphere, noting that the French system did not afford adequate **safeguards** against various possible abuses and thus finding that there had been a violation of Article 8. For example, the categories of people liable to have their telephones tapped by judicial order and the nature of the offences which could give rise to such an order were nowhere defined; nothing obliged a judge to set a limit on the duration of telephone tapping; nowhere was it specified what the procedure was for drawing up the summary reports containing intercepted conversations or the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge (who could hardly verify the number and length of the original tapes on the spot) and by the defence; and nowhere did it state under what circumstances recordings could or should be erased or the tapes be destroyed, in particular where an accused had been discharged by an investigating judge or acquitted by a court<sup>19</sup>. It should be noted that this judgment had a significant impact on the domestic system as legislation was adopted as a result of it. The same issues were addressed in the case of *Weber and Saravia v. Germany*<sup>20</sup>.

22. It is worth noting that in the case of *Uzun v. Germany*, the Court considered that **GPS surveillance of movements in public should be distinguished** from other methods of visual or acoustic surveillance because they disclosed less information about the conduct, opinions and feelings of the person concerned and therefore interfered less with their private lives. The Court therefore did not consider it necessary to apply the same strict safeguards as it had developed in its case-law with regard to the surveillance of telecommunications, such as the limit on the duration of monitoring or the procedure to be followed for examining, using and storing the data obtained<sup>21</sup>.

23. In the case of *Rotaru v. Romania [GC]*, the Court examined the Romanian legislation on secret surveillance measures linked to national security and concluded that the legislation on gathering and archiving information did not provide the necessary safeguards. The Court reiterated that finding in its judgments on the cases of *Dumitru Popescu v. Romania (no. 2)*<sup>22</sup> and *Association "21 Décembre 1989" and Others v. Romania*<sup>23</sup>. The case of *Shimovolos v. Russia*<sup>24</sup> related to the **registration in a "surveillance database"** of the name of a human rights activist and the monitoring of his movements (along with his arrest in this connection). The Court also found a violation of Article 8 because the database containing the applicant's name had not been established by a ministerial order or published or made accessible to the public in any other way. Citizens were not able to know why a person was registered on this base, how long information was kept on the subject, what type of information was recorded, how the information was stored and used, or who was in charge of it.

24. The case of *Kopp v. Switzerland* related to telephone tapping of the applicant's lawyers. For the purpose of avoiding an unacceptable breach of professional privilege, the

<sup>19</sup>. *Kruslin v. France*, 24 April 1990, §§ 33 and 35, Series A no. 176-A; and *Huvig v. France*, 24 April 1990, §§ 32 and 34, Series A no. 176-B. See also *Kennedy v. the United Kingdom*, *op. cit.*, § 152.

<sup>20</sup>. *Weber and Saravia v. Germany*, *op. cit.*, § 95.

<sup>21</sup>. *Uzun v. Germany*, no. 35623/05, § 66, ECHR 2010 (extracts).

<sup>22</sup>. *Dumitru Popescu v. Romania (no. 2)*, n° 71525/01, 26 April 2007.

<sup>23</sup>. *Association "21 Décembre 1989" and Others v. Romania*, nos. 33810/07 and 18817/08, 24 May 2011.

<sup>24</sup>. *Shimovolos v. Russia*, no. 30194/09, 21 June 2011.

distinction between matters specifically connected with a lawyer's work and those relating to an activity other than that of counsel had been made by an official of the Post Office's legal department, who was a member of the executive. The Court was astonished by this situation and the fact that there had been no **supervision** by an independent judge, especially in this sensitive area of the confidential relations between a lawyer and his or her clients, which directly concerned the rights of the defence. The Court's conclusion was that Swiss law, whether written or unwritten, did not indicate with sufficient clarity the scope and manner of exercise of the authorities' discretion in the matter and that, as a lawyer, the applicant had been the victim of a violation of the rights guaranteed by Article 8<sup>25</sup>.

25. It is worth noting from the *Kopp* judgment that, when national security is at stake, the Court accepts that there are **no conversations for which surveillance should be prohibited**. States are not expected to refrain entirely from monitoring privileged communications such as those between lawyers and their clients, but monitoring of this kind must be adequately supervised.

26. Lastly, it should be noted that adequate safeguards need not necessarily be afforded by a *law per se* but may also be established, for example, by **case-law** – see *Valenzuela Contreras v. Spain*<sup>26</sup>. Furthermore, opinions of academic writers or decisions of national courts which depart from the letter of the law do not necessarily constitute violations of the Convention as it is these bodies' main task to interpret and apply domestic law (see *Kopp v. Switzerland*<sup>27</sup>).

### **3) Necessity in a democratic society in relation to the legitimate aim sought**

27. Generally speaking, the Court easily accepts the legitimacy of the aim sought – it is rare that it questions the state's appraisal and therefore states have a wide margin of appreciation with regard to the existence of a situation affecting national security – and so the main focus of its assessment is the matter of necessity in a democratic society. However, while the Court points out that it is not well equipped to challenge the judgment by the national authorities in any particular case that national security considerations are involved, a competent independent body must review the reasons for the decision and the relevant evidence by means of some form of adversarial proceedings. This body must ascertain whether the conclusion that declassification would constitute a danger to national security has a reasonable basis in fact (*Janowiec and Others v. Russia* [GC]<sup>28</sup>).

28. In the leading judgment on this question, *Klass and Others v. Germany*, the Court started from the premise that democratic societies were under threat from highly sophisticated forms of espionage and terrorism with the result that the State had to be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court therefore accepted that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications was, under exceptional conditions, necessary in a democratic society in the interests of

<sup>25</sup>. *Kopp v. Switzerland*, 25 March 1998, §§ 73-75, *Reports of Judgments and Decisions* 1998-II.

<sup>26</sup>. *Valenzuela Contreras v. Spain*, 30 July 1998, § 34, *Reports of Judgments and Decisions* 1998-V.

<sup>27</sup>. *Kopp v. Switzerland*, *op. cit.*, §§ 59 and 60.

<sup>28</sup>. *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, §§ 213 and 214, 21 October 2013.

national security and/or for the prevention of disorder or crime<sup>29</sup>. Similarly, in the case of *Leander v. Sweden*, the Court recognised that there could be no doubt as to the necessity, for the purpose of protecting national security, for the Contracting States to have laws granting the competent domestic authorities power, firstly, to collect and store in registers not accessible to the public information on persons and, secondly, to use this information when assessing the suitability of candidates for employment in posts of importance for national security<sup>30</sup>.

29. As concerns the **fixing of the conditions under which the system of surveillance is to be operated**, the Court has noted that the domestic legislature enjoys a certain **discretion** (as it is certainly not for the Court itself to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field)<sup>31</sup>. In the case of *Leander v. Sweden*, the Court also accepted that the **margin** of appreciation available to the respondent State in choosing the means of protecting national security, was a wide one<sup>32</sup> – it was for the State to assess whether the “*pressing social need*” implied by the notion of necessity was truly present.

30. However, because of the danger that such a law poses to democracy, the Court has emphasised that states do not have unlimited discretion to subject persons within their jurisdiction to secret surveillance measures in the name of the struggle against espionage and terrorism<sup>33</sup>. As powers of secret surveillance of citizens characterise a police state, they are tolerable only in so far as the means provided for by the legislation to achieve such aims remain within the bounds of what is **necessary** in a democratic society<sup>34</sup>. **The interest of the respondent State in protecting its national security must be balanced against the seriousness of the interference with the applicant’s right to respect for his private life**<sup>35</sup>.

31. Although the Court has stated that the adjective “*necessary*”, found in Articles 8 § 2, 10 § 2, 11 § 2 and 1 § 2 of the first Protocol to the Convention etc. is not synonymous with “*indispensable*”<sup>36</sup> or with “*strict necessity*” if there is no other less drastic remedy<sup>37</sup>, in the case of *Kennedy v. the United Kingdom*, the Court held that powers to instruct secret surveillance of citizens were only tolerated under Article 8 to the extent that they were **strictly necessary** for safeguarding democratic institutions<sup>38</sup>.

32. In the same case of *Kennedy v. the United Kingdom*, the Court considered that in practice, strict necessity meant that there had to be adequate and effective **guarantees** against abuse<sup>39</sup>. The assessment of this matter depended on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering

<sup>29</sup>. *Klass and Others v. Germany, op. cit.*, § 48.

<sup>30</sup>. *Leander v. Sweden, op. cit.*, § 59.

<sup>31</sup>. *Klass and Others v. Germany, op. cit.*, § 49.

<sup>32</sup>. *Leander v. Sweden, op. cit.*, § 59.

<sup>33</sup>. *Klass and Others v. Germany, op. cit.*, § 49.

<sup>34</sup>. *Ibid.*, §§ 46 and 49.

<sup>35</sup>. *Leander v. Sweden, op. cit.*, § 59.

<sup>36</sup>. *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24.

<sup>37</sup>. *James and Others v. the United Kingdom*, 21 February 1986, § 51, Series A no. 98.

<sup>38</sup>. *Kennedy v. the United Kingdom, op. cit.*, § 153.

<sup>39</sup>. *Ibid.*

them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law (*Klass and Others v. Germany*, § 50; *Weber and Saravia v. Germany*, § 106; *Kennedy v. the United Kingdom*, § 153).

33. **Review** of surveillance may intervene at three stages: when the surveillance is first ordered, while it is being carried out, or after it has been terminated. As regards the first two stages, the very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be effected without the individual's knowledge. Since the individual will necessarily be prevented from seeking an effective remedy or from taking a direct part in any review proceedings, the Court found, in the case of *Klass and Others v. Germany*, that it was essential that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the **judiciary**, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure. This was especially important in a field where abuse was potentially so easy and could have such harmful consequences for democratic society as a whole<sup>40</sup>. However, the absence of judicial control did not necessarily constitute a violation of Article 8, as this shortcoming could be offset by the nature of the supervisory and other safeguards provided for by the legislation. In the *Klass* case, these other measures consisted of a board comprising five members of parliament (with a balanced membership including representatives of the opposition) and a commission, both of which were independent from the authorities carrying out surveillance and vested with sufficient powers and competence to exercise an effective and continuous control. The two supervisory bodies could be regarded as enjoying sufficient **independence** to give an objective ruling. Furthermore, individuals believing themselves to be under surveillance had the opportunity of complaining to the commission and referring their case to the Constitutional Court, even if these remedies came into play only in exceptional circumstances<sup>41</sup>.

34. In the case of *Uzun v. Germany*, the surveillance had been carried out by GPS on a vehicle in order to investigate accusations of attempted murder of politicians and civil servants for which a terrorist movement had claimed responsibility and to prevent further bomb attacks. It had therefore served the interests of national security and public safety, the prevention of crime and the protection of the rights of the victims. When the Court assessed the proportionality of the measure, it examined the guarantees provided for, such as those it had referred to in particular in the *Kennedy* case, in which it had cited for example the nature, scope and duration of the possible measures – in the *Uzun* case, the GPS surveillance had been carried out for a relatively short period of time (three months) and had affected the applicant only when he had been travelling in his accomplice's car and therefore, in no respect had the applicant been subjected to total and comprehensive surveillance – and the grounds required for ordering them – in this case, an investigation concerning very serious crimes. It should be noted that in this case, the Court also took account of the fact that the GPS surveillance had been ordered only after other less intrusive methods had proved less successful<sup>42</sup>. On the other hand, where the authorities competent to **supervise** surveillance measures and the **kind of remedy** provided for by the national law were concerned, these

<sup>40</sup>. *Klass and Others v. Germany*, *op. cit.*, §§ 55-56; *Kennedy v. the United Kingdom*, *op. cit.*, § 167.

<sup>41</sup>. *Ibid.*, § 56.

<sup>42</sup>. *Uzun v. Germany*, *op. cit.*, § 80.

questions were examined by the Court from the viewpoint of the "*in accordance with the law*" requirement, as it was on examining this point that it noted that the surveillance was subject to judicial control offering sufficient protection against arbitrariness, making it possible to exclude evidence obtained by unlawful means<sup>43</sup>.

35. With regard to the practical feasibility of requiring that **everyone affected by a surveillance measure be notified subsequently**, the Court has noted that the danger against which the surveillance is directed may continue for years, even decades, after the suspension of the measure. Subsequent notification might well jeopardise the long-term purpose that originally prompted the surveillance. In so far as the "interference" resulting from the contested legislation pursues a legitimate aim, the fact of not informing the individual once surveillance has ceased cannot itself be incompatible with Article 8, since it is this very fact which ensures the efficacy of the "interference"<sup>44</sup>.

36. With regard to the **gap that there may be between legislation and practice**, the applicants in the *Klass* case invoked the danger of abuse as a ground for their contention that the legislation they challenged did not fulfil the requirements of Article 8 § 2. The Court considered that, while the possibility of improper action by a dishonest, negligent or over-zealous official could never be completely ruled out, what mattered were the likelihood of such action and the safeguards provided to protect against it. Therefore in the absence of any evidence or indication that the actual practice followed was different to what the law prescribed, the Court had to assume that the relevant authorities were properly applying the legislation<sup>45</sup>.

37. The Court has also examined the criteria of proportionality in cases linked to the **long-term storage of information in security files**. In the case of *Segerstedt-Wiberg and Others v. Sweden*<sup>46</sup>, the respondent State relied in particular on the ground of national security to justify the storage of files by the Security Police. The Court *restricted its examination of proportionality to the nature and the age of the information*. With regard to a first applicant, the Court found no reason to doubt that the reasons for keeping on record the information relating to bomb threats in 1990 against her and certain other personalities had been relevant and sufficient, and therefore there had been no disproportionate interference with her right to respect for private life. However, as to the information concerning the participation of another applicant in a political meeting in Warsaw in 1967 or according to which a further applicant had allegedly advocated violent resistance to police control during demonstrations in 1969, the Court, **bearing in mind the nature and age of the information, found that its continued storage had not been supported by reasons which were relevant and sufficient with regard to the protection of national security and had therefore entailed a disproportionate interference** with the applicants' right to respect for their private lives.

38. The decision in *Dalea v. France* (dec.) related to the inability of the applicant to gain access and have corrections made to personal data recorded for a long period in the files of the Schengen Information System after he had been reported to the System by the French Security Intelligence Agency ("the DST") for the purposes of being refused entry. The Court

<sup>43</sup>. *Ibid.*, §§ 71-72.

<sup>44</sup>. *Klass and Others v. Germany*, § 58.

<sup>45</sup>. *Ibid.*, § 59.

<sup>46</sup>. *Segerstedt-Wiberg and Others v. Sweden*, no. 62332/00, ECHR 2006-VII.

reiterated that everyone affected by a measure based on national security grounds had to be *guaranteed* protection against arbitrariness. The applicant's inclusion in the database had barred him access to all countries that applied the Schengen Agreement. However, in the area of entry regulation, States had a broad margin of appreciation in taking measures to secure protection against arbitrariness. The applicant had been able to apply for **review of the measure** at issue, first by the French National Data-Protection Commission ("the CNIL"), then by the *Conseil d'Etat*. Whilst the applicant had never been given the opportunity to challenge the precise grounds for his inclusion in the Schengen database, he had been granted access to all the other data concerning him and had been informed that considerations relating to State security, defence and public safety had given rise to the report on the initiative of the DST. The Court concluded that the applicant's inability to gain personal access to all the information he had requested could not in itself prove that the interference was not justified by national security interests. Clearly therefore, **the Court would seem to require that the danger to national security has a reasonable basis in fact** (see also the judgment on the case of *Janowiec and Others v. Russia* [GC]<sup>47</sup>, cited above).

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<sup>47</sup>. *Janowiec and Others v. Russia* [GC], *op. cit.*, §§ 213-214. The applicants were relatives of Polish officers and officials killed by the Soviet secret police without trial in 1940. An investigation into the mass murders was started in 1990 but discontinued in 2004. The text of the decision to discontinue the investigation remained classified and the applicants had access neither to that document nor to any other information concerning the investigation. Repeated requests to gain access to the decision and to declassify its top-secret label were systematically rejected by the Russian courts. The Russian authorities also refused to produce a copy of the decision to the European Court on the grounds that the document was not crucial to the applicants' case and that they were prevented by domestic law from disclosing classified information.

## II. OTHER PROBLEMS RELATED TO ISSUES OF NATIONAL SECURITY

### A. Rights expressly comprising, in paragraph 2, restrictions connected with national security

#### **1) Article 8 – apart from cases of secret surveillance**

39. The cases of *Lustig-Prean and Beckett v. United Kingdom* and *Smith and Grady v. United Kingdom* concerned discharge from the army on grounds of homosexuality. The Government argued that accepting homosexuals in the army would seriously affect the servicemen's morale and consequently undermine the fighting power and operational effectiveness of the armed forces. In the Court's view, this might suggest that from the angle of the policy of excluding homosexuals from the army, the resultant interferences pursued the legitimate aims of "national security" and "prevention of disorder". The Court weighed up the states' margin of discretion where the national security aim pursued is basically the operational effectiveness of the army, against the fact that a most intimate part of private life was at issue, and held that there must exist particularly serious reasons before such interference can be justified. The Court considered the intrusion to have been serious and grave particularly indiscreet, indeed offensive, investigatory procedure, far-reaching effects on the soldiers' careers and future and found a violation of Article 8. In this field, therefore, the Court would appear to adopt a circumspect approach to such allusions to national security.

40. In the case of *Konstantin Markin v. Russia [GC]*, the applicant adduced discrimination on the grounds of sex because he was not entitled to the same parental leave as servicewomen (Article 8 in conjunction with Article 14). The Court was not convinced in this case by the Government's argument that the extension of the parental leave entitlement to servicemen would have a negative effect on the fighting power and operational effectiveness of the armed forces. No expert study or statistical research had ever been made by the Russian authorities to evaluate the number of servicemen who would be in a position to take three years' parental leave at any given time and would be willing to do so, and to assess the potential consequences of servicemen taking such leave. The Court accepts that, given the importance of the army for the protection of national security, certain restrictions on the entitlement to parental leave may be justifiable, provided they are not discriminatory. It might, for instance, be justifiable to exclude from the entitlement to parental leave any personnel, male or female, who may not easily be replaced in their duties owing to such factors as their hierarchical position, rare technical qualifications or involvement in active military actions. In the Court's view, such a general and automatic restriction applied to a group of people on the basis of their sex must be seen as falling outside any acceptable margin of appreciation for the state .

41. National security is often used to justify deportations and therefore infringements of the right to private and family life of the persons subject to them. The Court has expanded on its understanding, in this context of the phrase "in accordance with the law", in order to demand a number of procedural guarantees.

42. In the case of *Al-Nashif v. Bulgaria* the applicant had been deported under an order which stated, without giving reasons, that the person in question posed a threat to national security. In subsequent observations the Minister of the Interior declared that he had been involved in illegal religious activities which threatened national interests. The Court pointed out that the criterion vis-à-vis the quality of the law presupposes safeguards against unfettered power, which safeguards depend on the nature and extent of the interference in question. The necessary foreseeability of the law does not go so far as to require states to include in the law all the behaviours which might give rise to a deportation order based on national security considerations, since the threats to such security can, by their very nature, be difficult to define in advance. However, even where national security is at stake, any measure affecting human rights must be subject to a form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where the authorities interpret national security erroneously. In the case in point, noting that the applicant's deportation had been ordered under a legal system which lacked safeguards against unfettered power, the interference was not effected in accordance with the law and therefore caused a violation of Article 8.

43. A number of Bulgarian cases followed the *Al-Nashif* judgment. In these cases the Bulgarian authorities had begun to authorise appeals against deportation orders, although without providing the requisite safeguards. In the case of *Raza v. Bulgaria*, the Court accepted that the use of confidential information might be unavoidable where national security is at stake and that it was sometimes necessary to classify some types of information used during proceedings, and even some parts of the decisions rendered. However, other states facing terrorist violence have adopted techniques to reconcile national security considerations with fundamental procedural guarantees such as the publicity of judicial decisions. In *Kaushal and others v. Bulgaria*, the Court accepted that some of the applicant's activities could be considered as a risk to national security but noted that the authorities had not demonstrated the existence of precise facts to justify their allegations. In the case of *Amie and others v. Bulgaria*, domestic proceedings had been classified in their entirety, and the authorities had produced no evidence in support of their claim of a threat to national security apart from affirmations which were so general that the applicant found it impossible to challenge them effectively. The Court concluded that even though the possibility had existed for appealing against the deportation order, the appellant had not enjoyed the minimum level of protection against unfettered power as wielded by the authorities, and Article 8 had therefore been violated.

44. In line with these cases, the judgment *C.G and others v. Bulgaria* is interesting in that the Court restricted the meaning of the expression "national security" in Article 8 § 2 by excluding drug-related offences as justification for interference in the right to respect for the private and family life of an alien subject to a deportation order or as justification for depriving him of procedural safeguards. The case concerned the deportation of and ten-year prohibition of residence for a Turkish national with a Bulgarian wife and daughter, on the ground that he represented a serious threat to national security because of his participation in



drug-trafficking and even though he was not subject to criminal prosecution. The Court noted that drug-trafficking was the only basis for the assessment that the person in question posed a risk to national security, and considered that the acts attributed to the applicant – however serious they might be – could not reasonably be considered as capable of constituting a threat to Bulgarian national security. The Bulgarian courts had therefore failed to conduct a serious examination of the allegations against the person in question. Therefore, despite the existence of a formal procedure for requesting judicial review of his deportation order, the applicant had not enjoyed the minimum level of protection against unfettered power, and the interference in his family life had therefore not been “in accordance with the law”.

## **2) Article 10**

45. The tension between freedom of expression and protection of national security has given rise to a substantial number of cases in the European Court. As in other fields, any interference in freedom of expression must pursue a legitimate aim, comply with the law and be necessary in a democratic society.

46. The Court seldom challenges the legitimate national security aim adduced by the state. We might, however, mention the example of *Castells v. Spain*, where a Senator had accused the Government of involvement in the murders of Basque nationalists. The domestic courts had not permitted him to produce evidence in support of his allegations, as their veracity was irrelevant to the offence of insulting the Government. According to the Spanish courts, the Government’s reputation, at a time when the country was still grappling with its post-Franco democratic transition, was a national security problem. The Court, on the other hand, considered that it was more a question of preventing disorder.

47. It is generally when examining the proportionality criterion that the Court finds a violation of Article 10. In so doing, the Court takes account of a range of facts.

### **a) The nature of the interests at issue**

#### **i. Information on a question of public interest**

48. In the case of *Sürek and Özdemir v. Turkey* [GC], the Court considered that the mere fact of the person interviewed being the spokesperson of a terrorist organisation (PKK) is not sufficient to prohibit the publication of an interview, provided that it does not comprise incitement to violence or hatred, in view of the right of the general public to be informed of a different interpretation of the situation in the south-eastern Turkey .

49. The cases of *Observer and Guardian v. United Kingdom* and *Sunday Times v. United Kingdom* (N°2) concerned injunctions geared to prohibiting the press publication of excerpts from the book ‘*Spycatcher*’, which was written by a former member of the British intelligence service (MI 5) and which contained allegations concerning illegal acts committed by this service. After the publication of the book in the United States and its importation to the United Kingdom, the confidentiality of the information which it contained had lapsed, while the public interest requiring the disclosure of illegal acts and the right of the public to information remained . The Court once again concluded that there was no need to prevent the disclosure of certain items of information since they had already been made public or had lost their confidential status in the case of *Vereniging Weekblad Bluf! v. the Netherlands*. The

case concerned the seizure and withdrawal from circulation of an issue of a magazine publishing an old internal report from the Netherlands security services (BVD) – even though it was still classified “confidential”. The Court considered that when the issue was withdrawn from circulation, the information in question had already been widely disseminated in the streets of Amsterdam. Although the publicity surrounding the magazine had been less intense than in the case of *Observer and Guardian v. United Kingdom*, the information in question had been made accessible to a large number of persons, who could, in turn, have communicated it to others. Moreover, the events had been commented by the media. This meant that protecting the information as a state secret was no longer justified and the withdrawal from circulation of issue no. 267 of *Bluf!* was no longer necessary in order to achieve the legitimate aim pursued.

50. The case of *Sürek v. Turkey (No. 2)* [GC] concerned the applicant’s conviction for having published a news report containing accusations of violence against the population on the part of two officials involved in the combat of terrorism. It had been argued that because this report disclosed the officials’ identities, it had endangered their lives by exposing them to terrorist attack. The Court considered that in view of the gravity of the accusations, it was legitimate and in the public interest to know not only the nature of the officials’ conduct but also their identities, even though Turkish law did not allow for the defences of truth and public interest. Furthermore, the information in the news report had already been published in articles by other newspapers (which had not been prosecuted) and was therefore a matter of common knowledge. Lastly, the conviction in question was liable to deter the press from contributing to an open debate on questions of public interest.

ii. Interests relating to national defence, the army and military discipline

51. In the case of *Hadjianastassiou v. Greece*, the applicant was a Greek air force officer who had been convicted of publishing an article containing technical information on a missile, after having written a report, which had been classified secret, on a different missile. The Court considered that the disclosure of the state’s interest in a given weapon and of the corresponding technical information, which could provide data on the state of progress in its production, are liable to considerably damage national security. The Court also points to the specific ‘duties’ and ‘responsibilities’ of members of the armed forces, and the applicant’s obligation of discretion in relation to anything concerning the performance of his duties . The Court dismissed as irrelevant the fact that the information was accessible from other public sources. We should note that the officer had written the article for a private company.

52. In the judgment *Engel and others v. Netherlands*, the Court observed that freedom of expression as secured under Article 10 applies to servicemen as well as all other persons under the jurisdiction of Contracting States. Nevertheless, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline. Examining a refusal to circulate a critical and satirical military magazine owing to the risks of undermining military discipline and efficiency, the Court, in the case of *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*, noted that none of the issues of the magazine recommended disobedience or violence, or even questioned the usefulness of the army. Most of the issues set out complaints, put forward proposals for reforms or encouraged the readers to institute legal complaints or appeals proceedings.

However, despite their often polemical tenor, it does not appear that they overstepped the bounds of what is permissible in the context of a mere discussion of ideas, which must be tolerated in the army of a democratic State just as it must be in the society that such an army serves. In the case of *Grigoriades v. Greece* , a letter from an officer to his superior vehemently criticising the army earned him a three-month prison sentence, which the Court found disproportionate given that the letter had not been published and therefore had had no impact on military discipline.

**b) Incitement to violence**

53. In the case of *Vogt v. Germany* concerning the exclusion of a teacher for her links with the German Communist Party and for consequent lack of loyalty to the German constitutional order, the Court held that the applicant's post did not involve any security risks, that education was virtually a state monopoly and therefore the teacher would have great difficulty in exercising her profession, that she had never exerted any dubious influence over her students, that she had never made any anti-constitutional statements, even outside her workplace, and lastly that the party was not prohibited. It therefore found a violation of Article 10.

54. The Court has had to deal with a number of Turkish cases concerning the Law on the prevention of terrorism, particularly the prohibition of propaganda destined to undermine the territorial integrity of the state. In the case of *Incal v. Turkey*, the applicant had been convicted of having circulated a pamphlet virulently criticising the authorities' harassment of Kurdish traders, and calling on the citizens to oppose this harassment by means of neighbourhood committees. The Court simply noted that there was no indication that the applicant had been responsible for acts of terrorism . In the case of *Ceylan v. Turkey* [GC] concerning the denunciation in an article by a trade union president of state terrorism against the Kurdish people, the Court also found that there was no evidence that the applicant had encouraged the use of violence, and so concluded that the applicant's conviction had been disproportionate . In the case of *Sürek and Özdemir v. Turkey* [GC], the applicants had been convicted of publishing an interview with a PKK leader and a joint declaration by four prohibited left-wing organisations calling for a halt in state terrorism against the Kurdish people. The Court considered that the mere fact of the illegality of the organisations concerned was insufficient to justify the interference and that even though the interview expressed intransigence and rejected all compromise, the texts could not overall be seen as inciting to hatred or violence.

55. Conversely, in the case of *Sürek v. Turkey* (No.3) [GC], which concerned a conviction for the publication of commentary describing the actions of the PKK as a struggle for national liberation, the Court considered that the commentary in question targeted the PKK and called for the use of armed force . The Court therefore found that there had been no violation of Article 10.

**c) Severity of sentencing**

56. Lenient sentencing was one of the elements considered by the Court in the case of *Zana v. Turkey*, concerning the conviction of a former mayor for his statements in support of the PKK, which statements might be seen, in the Court's view, as support for terrorism.

57. In the case of *Sürek v. Turkey* (No. 1) GC] concerning a conviction for publication of letters from readers accusing the Government of complicity in massacres of Kurdish populations, the Court, in its evaluation of proportionality, took account of the nature a fine and the severity – or rather the leniency of the penalty .

**d) The medium used**

58. In the case of *Karatas v. Turkey* [GC], the applicant had been convicted of publishing a book of poetry using highly aggressive language and inciting the Kurds to resist Turkish repression. The Court considers the conviction disproportionate in view of the form of expression used, namely poetry, which involves metaphorical language and has a limited audience.

59. Conversely, in the aforementioned *Zana* case, the fact of the challenged declarations having appeared in one of the foremost national daily newspapers was a factor which was taken into account by the Court.

**3) Article 11**

60. In the case of the *United Communist Party of Turkey and others v. Turkey*, the Party in question (“TBKP”) had been dissolved by the Constitutional Court on the grounds that since its statutes and programme spoke of two different nations, Kurdish and Turkish, it was, in the Constitutional Court’s opinion, geared to creating minorities and promoting separatism, and was therefore liable to infringe the territorial integrity of the state and the unity of the nation. The Court considers that the dissolution of the TBKP pursued at least one of the “legitimate aims” listed in Article 11, namely the protection of “national security”. The Court considers that in respect of political parties, the exceptions set out in Article 11 call for a strict interpretation, as only convincing, overriding reasons can justify restricting the appellants’ freedom of association, and that in order to assess, in such cases, the existence of necessity within the meaning of Article 11 § 2, the Contracting States only have a narrow margin of discretion. It also states that political formations should not be investigated simply for having attempted to hold a public debate on the fate of a section of a given state’s population and become involved in the latter’s politics in order to seek, in accordance with the rules of democracy, solutions satisfying all the players concerned, which was the TBKP’s objective to judge by its programme. In fact, this official programme was never proved false by any practical actions pointing to a secret agenda because, as the party had been dissolved as soon as it was founded, it had not even had time to conduct any action. The Court concluded that such a radical measure as the immediate and definitive dissolution of the TBKP, as ordered even before its initial activities and accompanied by a ban on its leaders’ exercising any other political responsibility, seems disproportionate to the intended aim and therefore unnecessary in a democratic society, thus infringing Article 11 .

61. In the case of *Refah Partisi (Welfare Party) and others v. Turkey* [GC], the dissolution of the party and the temporary suspension of some of its leaders’ political rights and the confiscation of its assets (transferred to the Treasury) had been ordered by the Constitutional Court on the ground that it had become a centre for illegal activities incompatible with the principle of secularism, whereby several acts committed by its leaders had demonstrated that the party’s objectives included the establishment of sharia law and a theocratic regime. In view of the importance of the principle of secularism to the democratic system in Turkey, the

Court considered that the dissolution of Refah pursued several of the legitimate aims listed in Article 11: maintenance of national security and public safety, the prevention of disorder or crime, and the protection of the rights and freedoms of others. The Court considers that a political party can promote changes to legislation and the state's legal and constitutional structures on two conditions:

1. the means used must be legal and democratic;
2. the changes proposed must themselves be compatible with the fundamental democratic principles.

The logical consequence is that a political party whose leaders incite people to violence or propose a political project which is in breach of intended to destroy it democracy, as well as flouting the rights and freedoms recognised by the democratic system, cannot rely on the protection of the Convention against sanctions imposed for these reasons. Provided that it meets the above-mentioned conditions, a political party which is animated by the moral values imposed by a religion cannot be regarded as intrinsically inimical to the fundamental principles of democracy. The Court notes that the acts and words of the members and leaders of Refah, attributable to the whole party, pointed to Refah's long-term political project geared to establishing a regime based on the sharia under a plurality of legal systems. The Court acknowledges that the sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable in nature. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. A regime based on the sharia appears incompatible with the values of the Convention, notably with regard to its rules on criminal law and criminal procedure, the place it assigns to women in the legal system and its intervention in all fields of private and public life, in accordance with religious rules. Moreover, Refah did not preclude the possibility of using force to accede to and remain in power. Considering that these projects contradict the conception of "democratic society" and that the real chances of the Refah implementing them on acceding to power rendered the danger to democracy more plus tangible and immediate, the sanction imposed on the applicants by the Constitutional Court, even in the framework of the narrow margin of discretion available to the states, can reasonably be considered as being based on convincing, compelling reasons corresponding to an "overriding social need" (implied by the adjective "necessary", within the meaning of Article 11 § 2) and was "proportional to the aims pursued", and thus did not constitute violation of Article 11 .

62. The case of Herri Batasuna and Batasuna v. Spain concerned the dissolution of two political parties on the grounds that they supported a terrorist organisation (ETA), notably by justifying its actions and methods. The Court considered that the dissolution pursued several of the legitimate aims listed in Article 11, particularly the maintenance of public safety, the prevention of disorder and the protection of the rights and freedoms of others. The Court approved the grounds adopted by the Constitutional Court in finding that the refusal to condemn violence in a context of terrorism which had existed for over thirty years and had been condemned by all the other political parties could be interpreted as tacit support for terrorism. Accordingly, the political projects of the applicant parties contradicted the concept of "democratic society" and represented a grave danger to Spanish democracy, the sanction imposed on the applicants can reasonably be considered, even in the framework of the narrow margin of discretion available to states, as corresponding to an "overriding social need" and

as being proportional to the legitimate aim pursued within the meaning of Article 11 § 2. The Court therefore found non-violation of Article 11 of the Convention.

63. In the case of *Sidiropoulos and others v. Greece*, the applicants had been refused registration of their association geared to promoting the Macedonian culture, which would have posed a threat to territorial integrity by challenging the Greek identity of this region. In view of the situation prevailing in the Balkans at the time and the political friction between Greece and the FYROM (Former Yugoslav Republic of Macedonia), the Court accepted that the interference in issue was intended to protect national security and prevent disorder. The Court repeated that the exceptions set out in Article 11 must be interpreted strictly, as only convincing and compelling reasons can justify restrictions on freedom of association. The Court was sceptical about the association's alleged separatist intentions. If, once it had started its activities, it had proved to be subsequently pursuing an aim different from that set out in its statutes or if its functioning had proved to be contrary to law, morality or public order, the authorities could have ordered the dissolution of the association. The Court concluded that the refusal to register the applicants' association was disproportionate to the aims pursued, and therefore constituted a violation of Article 11.

64. The Court appeared to show greater flexibility in agreeing to exceptions to Article 11 in matters of the rights for organise of the civilian personnel of an institution exercising functions of vital importance to national security than it had shown vis-à-vis political parties. The case of the *Council of Civil Service Unions and others v. United Kingdom* concerned changes to the employment contracts of officials at the Government Communications Headquarters (GCHQ, a service responsible for ensuring the security of British military and official communications and providing the Government with intelligence gathered via its listening devices) designed to remove the right to join a trade union. The domestic courts had considered that the Government had taken the measures relating to trade union membership in GCHQ for reasons of national security. To the Commission, the role of GCHQ was very similar to that of the armed forces and the police in that its staff, which are responsible for the security of state military and official communications, directly or indirectly exercise vital functions for national security. The Commission considered that in the general context of social movements and the vital functions exercised by GCHQ, the challenged measures, although radical, were in no way arbitrary. They could therefore be deemed legitimate.

## **B. Rights which per se cannot be the subject of a derogation on grounds of national security**

### **1) Article 9**

65. Article 9 unconditionally protects freedom of thought, conscience and religion and enshrines a conditional right to manifest one's belief, subject to the restrictions in Article 9 § 2. However, Article 9 § 2 contrasts with Articles 8 § 2, 10 § 2 and 11 § 2 in that it makes no explicit provision for a restriction in the interests of national security, an omission for which the *travaux préparatoires* do not really offer any explanation.

66. In the judgment in the case of *Nolan and K. v. Russia*, the Court reiterated that the exceptions to freedom of religion listed in Article 9 § 2 should be narrowly interpreted, for their enumeration was strictly exhaustive and their definition was necessarily restrictive.

Unlike the second paragraphs of Articles 8, 10 and 11, Article 9 § 2 did not allow restrictions on the ground of national security. Far from this being an accidental omission, its absence reflected the prime importance of religious pluralism as one of the foundations of a democratic society, as well as the fact that a State may not dictate to anyone his or her beliefs or take coercive action to make him or her change those beliefs. The interests of national security could not therefore be used to justify measures taken in this respect by the authorities against an applicant (this case concerned denial of entry to Russian territory for an alien who was an active member of the Unification Church).

67. In various contexts, however, freedom of religion has been regarded as a potential threat against the State. Bulgaria and Greece, for example, have considered Jehovah's Witnesses to be a threat to national security (*Khristiansko Sdruzhenie "Svideteli na Iehova"*[Christian Association Jehovah's Witnesses] v. Bulgaria (dec) ) and have subjected them to secret surveillance (*Tsavachidis v. Greece* [GC] ). Some military circles in Turkey have taken the view that certain Muslim sects which rejected the separation of the religious from the secular constituted a threat to the Turkish State.

68. In the *Nolan and K. v. Russia* case, the Government constantly asserted that it was the first applicant's "activities", and not his "religious beliefs", which constituted a threat to national security, but without specifying the nature of those activities, and refusing to produce the report by the Russian Federal Security Service which might have substantiated that claim. Furthermore, the Court considered that unreservedly describing foreign missionaries' activities as detrimental to national security showed that the authorities' decision to prevent the applicant's return could have been based in substance on his religious opinions and his status as a foreign missionary for a foreign religion. In short, as it had not been demonstrated that the applicant was engaged in non-religious activities, and since there existed in Russia a general tendency to consider that foreign missionaries constituted a threat to national security, it had been established that the purpose of his expulsion had been to suppress the exercise of his right to freedom of religion, so that expulsion did constitute interference with his rights as guaranteed by Article 9.

69. In the *Perry v. Latvia* case, the applicant was residing in Latvia, where he had set up a community affiliated to a federation of evangelical communities known as Morning Star International, under a temporary residence permit issued "for the purposes of religious activities". The Office of Citizenship and Migration Affairs had rejected his application for renewal of that permit in a decision classified as secret, of which he received only the operative part mentioning one article of the law on aliens whereby a residence permit could not be issued to a person who was "active in a totalitarian or terrorist organisation or one that use[d] violent methods; [who] represent[ed] a danger for national security or public order; or [who was] a member of any secret anti-State or criminal organisation". He was, however, not deported and subsequently received a temporary permit as a spouse (his wife herself having been granted a temporary permit), but at the time at which the permit was issued, staff of the Office told the applicant that his new residence permit did not allow him to engage in religious activities; he was consequently obliged officially to stand down as pastor of his parish. No provision of Latvian law allowed the Office to tell a foreigner holding a residence permit what he was and was not entitled to do (such as engaging in religious activities) on Latvian territory. The Court therefore concluded that the interference with the applicant's

right to freedom of religion had not been “prescribed by law” and that there had therefore been a violation of Article 9.

70. In the case of *Kalaç v. Turkey* the applicant, a judge advocate in the air force, had been compulsorily retired for breaches of discipline and scandalous conduct, and more specifically for adopting unlawful fundamentalist opinions. According to the Government, his compulsory retirement was not an interference with his freedom of conscience, religion or belief but was intended to remove from the military legal service a person who had manifested, through his membership of the Islamist Süleyman community (which was known to have unlawful fundamentalist tendencies), a lack of loyalty to the secularism which was the foundation of the Turkish nation, and which it was the task of the armed forces to guarantee. Various documents annexed to the memorial to the Court showed that the applicant had given it legal assistance, had taken part in training sessions and had intervened on a number of occasions in the appointment of servicemen who were members of the sect. The Court took the view that, in choosing to pursue a military career the applicant was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians, States being allowed to adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service. Furthermore, the applicant was able to fulfil the obligations which constitute the normal forms through which a Muslim practises his religion. His compulsory retirement was not based on his opinions and religious beliefs, but on his conduct and attitude, which breached military discipline and infringed the principle of secularism. The Court concluded that his compulsory retirement did not amount to an interference with the right guaranteed by Article 9, since it was not prompted by the way the applicant manifested his religion.

71. The *Larissis and Others v. Greece* case concerned the conviction of air force officers for proselytism. The Government and the Commission took the view that this action had been taken against the applicants with the aim of protecting the rights and freedoms of others, and also, where the measures taken following the proselytising of the airmen were concerned, with the aim of preventing disorder in the armed forces and thus protecting public safety and order. Having regard to the circumstances of the case and, particularly, the terms of the national courts’ decisions, the Court considered that the impugned measures essentially pursued the legitimate aim of protecting the rights and freedoms of others. Where the proselytising of the airmen was concerned, the Court did not consider the measures taken to be disproportionate and did not therefore find a violation of Article 9, taking the view that it would be difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. What would in the civilian world be seen as an innocuous exchange of ideas which the recipient was free to accept or reject might, within the confines of military life, be viewed as an application of undue pressure (the Court on the other hand found that there had been a violation where the conviction for proselytising civilians was concerned).

## **2) Article 2**

72. Article 2 does not mention national security, although the United Kingdom initially proposed that it should. National security considerations may nevertheless be relevant to the exceptions allowed to the right to life. Lethal force might, for example, be used in the event



of absolute necessity, in legitimate defence or to defend a person against violence linked to national security – most frequently terrorist attacks, the arrests of suspects or prevention of their escape, or the quelling of a riot or insurrection against a state institution – cf. Article 2 § 2 (a)-(c).

73. It is in the context of matters clearly linked to national security that various fundamental points have been made clear in relation to Article 2. Thus, in the case of *McCann and Others v. the United Kingdom*, the Court stated that the exceptions set out in Article 2 § 2 did not primarily cover instances where it was permitted intentionally to kill an individual, but described the situations where it was permitted to use force which could result, as an unintended outcome, in the deprivation of life . The use of force, however, should be no more than “absolutely necessary” for the achievement of one of the purposes set out in subparagraphs (a), (b) or (c), which implied a stricter and more compelling test of necessity than that normally used to determine whether State action was “necessary in a democratic society” under paragraph 2 of Articles 8 to 11. In particular, the force used should be strictly proportionate to the achievement of the aims set out in Article 2 § 2 (a), (b) and (c).

74. The case concerned the deaths of IRA terrorists killed by British soldiers. British intelligence had received information about a car bomb planned for Gibraltar. When an attempt was made to arrest the suspects, threatening movements led to the soldiers firing. It was found that the IRA members were merely on a reconnaissance mission, were unarmed and had no remote control to trigger a bomb from a distance. The Court considered the operation to have been poorly organised and executed and, concluding that there had been a violation of Article 2, laid down the principle that any operation which might involve the use of lethal force needed to be carefully planned.

75. The Court also took the view that Article 2 required by implication that there should be some form of effective official investigation when individuals had been killed as a result of the use of force by, inter alios, agents of the State. The Court specified in the case of *Ergi v. Turkey* (in the context of an ambush set for terrorists by security forces) that this obligation was not confined to cases where it had been established that the killing was caused by an agent of the State; in the case under consideration, the mere knowledge of the killing on the part of the authorities gave rise ipso facto to an obligation under Article 2.

76. Certain persons regarded as threats to national security are known to be subjects of forced disappearances. In the case of *Çakıcı v. Turkey* [GC], relating to the disappearance of the applicant’s brother, suspected of belonging to the PKK, the Court considered that there was sufficient circumstantial evidence, based on concrete elements, on which it could be concluded beyond reasonable doubt that Ahmet Çakıcı had died following his apprehension and detention by the security forces. It observed that no explanation had been forthcoming from the authorities as to what had occurred following his apprehension, nor any ground of justification given by the Government in respect of any use of lethal force by their agents. Liability for Mr Çakıcı’s death was thus attributable to the respondent State, and there had therefore been a violation of Article 2 on that account.

**3) Article 3**

77. The unconditional nature of the prohibition of torture and inhuman or degrading treatment or punishment implies that considerations of national security can never be relied on to justify a violation of Article 3. Nevertheless, national security may be taken into account in the determination of whether an act is contrary to Article 3. Indeed, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3, and the assessment of that minimum depends on the circumstances of the case, particularly its context . For example, the threat of a terrorist attack could never justify treatment contrary to Article 3 on the pretext of obtaining information which would enable the attack to be prevented. On the other hand, that risk might justify conditions of detention which were particularly rigorous for persons convicted of or awaiting trial for such acts, conditions which in other circumstances would constitute a violation of Article 3.

78. Thus in the case of *Treholt v. Norway* (dec), which related to a highly sensitive case of espionage, the Commission took the view that the applicant's placement in solitary confinement for one year and four months and the other restrictions (visits and mail) imposed on him during his detention on remand were justified by the nature of the charges against him.

79. In the case of *Chahal v. the United Kingdom* [GC], the UK authorities wished to deport the applicant, an Indian citizen suspected of involvement in terrorist activities related to Sikh separatism, for reasons of national security and on other grounds, namely the international fight against terrorism. The applicant relied on Article 3 because of the risks of torture to which he would be exposed again if he were returned to India. The Government argued that Article 3 contained an implicit restriction which allowed a Contracting State to deport an individual to another country, even in the event of a real risk of ill-treatment, when that deportation was necessary in the interests of national security . The Court rejected this view of things. In its opinion, the prohibition of ill-treatment set out in Article 3 was equally absolute in deportation cases. Thus, whenever substantial grounds had been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment was engaged in the event of deportation. The activities of the individual in question, however undesirable or dangerous, could not be a material consideration , and this has been reaffirmed subsequently on many occasions by the Court (see, for example, *Auad v. Bulgaria* ; in respect of the principles for assessing the risk of exposure to ill-treatment, see *Saadi v. Italy* [GC] ).

80. This reasoning was reiterated by the Court in respect of Article 13 in conjunction with Article 3 in the case of *El Masri v. "the former Yugoslav Republic of Macedonia"* [GC] (consequences of an "extraordinary rendition" operation whereby the applicant was handed over to CIA agents in "the former Yugoslav Republic of Macedonia" and transferred to a detention and interrogation centre in Afghanistan). For the Court, taking account of the irreversible nature of the damage which might be caused if a risk of ill-treatment became a reality, and in view of the importance that it attached to Article 3, the concept of an effective remedy within the meaning of Article 13 required an independent and rigorous examination of any complaint giving serious reasons to believe that a real risk existed of treatment which

was contrary to Article 3. That examination must take into account neither what the person concerned may have done to justify deportation nor any threat to national security which may be perceived by the State deporting him or her.

**4) Article 5**

81. National security considerations may affect the safeguards provided by Article 5, but the Court is far from willing to give carte blanche to the authorities every time they invoke national security.

82. This absence of carte blanche for the authorities recurs even in some cases connected with security problems outside national territory, as in the case of *Al-Jedda v. the United Kingdom* [GC], which concerned the preventive detention of an Iraqi national by the British forces in Iraq on the basis of a UN Security Council resolution. The Court concluded that the resolution authorised the United Kingdom to take steps to contribute to the maintenance of security and stability in Iraq, without, however, requiring the United Kingdom to imprison, without any time limit or charge, an individual considered to be a security risk. In these conditions, in the absence of a binding obligation to make use of internment, the Court considered that there was no conflict between the obligations imposed on the United Kingdom by the United Nations Charter and those deriving from Article 5 § 1 of the Convention, which should therefore be complied with. The Court concluded that the applicant's detention constituted a violation of Article 5 § 1.

**a) Article 5 § 1 (c)**

83. Article 5 § 1 (c) allows arrest and detention on reasonable suspicion that a person has committed an offence. In the *Fox, Campbell and Hartley v. the United Kingdom* case (which concerned terrorist-related offences in Northern Ireland), the Court stated that a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" depended upon all the circumstances. In this respect, terrorist crime fell into a special category. Because of the attendant risk of loss of life and human suffering, the police were obliged to act with utmost urgency in following up all information, including information from secret sources. Further, the police might on frequent occasions have to arrest a suspected terrorist on the basis of information which was reliable but which could not, without putting in jeopardy the source of the information, be revealed to the suspect or produced in court to support a charge. Nevertheless, the exigencies of dealing with terrorist crime could not justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5 § 1 (c) was impaired. It was for the respondent Government to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence.

**b) Article 5 § 1 (f)**

84. Article 5 § 1 (f) allows the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition.

85. In the case of *Chahal v. the United Kingdom* [GC], which has already been mentioned, the applicant was detained for over six years, of which three years and seven months were

taken into consideration by the Court. Part of this time was due to the exercise of legal remedies. The detention was lawful, furthermore, and the Court considered that sufficient safeguards existed against arbitrary detention. One of these safeguards was the advisory panel, notwithstanding its link with the executive and the fact that it did not constitute an effective remedy within the meaning of Article 13 or a court within the meaning of Article 5 § 4 (see below). In view of the exceptional circumstances of the case – involving national security considerations – and given the fact that the national authorities had acted with due diligence throughout the deportation proceedings, a prolonged period of detention was considered acceptable in the context of deportation in pursuance of Article 5 § 1 (f) .

**c) Article 5 § 2**

86. In pursuance of Article 5 § 2, everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

87. In the case of *Fox, Campbell and Hartley v. the United Kingdom*, which has already been mentioned, the standards in respect of the information to be supplied on arrest did not seem to be very high. In fact, at the time of their arrest, the police merely told the applicants that they were being arrested under the Northern Ireland (Emergency Provisions) Act 1978, because the police suspected them of being terrorists. This simple mentioning of the statutory basis for their arrest, on its own, did not meet the requirements of Article 5 § 2. Subsequently, on the other hand, the police questioned each of the applicants about their presumed role in specific criminal acts and their suspected membership of proscribed organisations, which the Court considered to have given them an adequate indication of why they were suspected of terrorism and the grounds for their deprivation of liberty.

**d) Article 5 § 3**

88. In pursuance of Article 5 § 3, everyone arrested or detained in accordance with the provisions of Article 5 § 1 (c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

89. In the case of *Brogan and Others v. the United Kingdom*, the Court accepted that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland had the effect of prolonging the period during which the authorities might, without violating Article 5 § 3, keep a person suspected of serious terrorist offences in custody before bringing him or her before a judge or “other judicial officer”. However, the scope for flexibility in interpreting and applying the notion of “promptness” was very limited. In the eyes of the Court, the applicant’s four days and six hours in custody went beyond the strict constraints as to time permitted by Article 5 § 3 . To attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or “other judicial officer” would be an unacceptably wide interpretation of the plain meaning of the word “promptly”.

90. The Court’s ruling went along the same lines in the case of *Demir and Others v. Turkey*, in which it took the view that, in respect of such lengthy periods of detention in police custody (in this case 16 and 23 days), it was not sufficient to refer in a general way to the difficulties caused by terrorism and the number of people involved in the investigation. It

should be indicated, for example, for what precise reasons relating to the actual facts of the case judicial scrutiny of the applicants' detention would have prejudiced the progress of the investigation.

91. In that case, it should be noted that the Court did not accept that the context of the problem of terrorism in south-eastern Turkey could justify measures derogating from Article 5 § 3 – in that instance two examinations by a forensic medicine centre tasked merely with ascertaining whether, at the beginning and end of their detention in police custody, the applicants' bodies “showed the marks of blows or violence”.

92. In *Debboub alias Hussein Ali v. France*, the applicant, who was suspected of involvement in an extensive network providing logistical support to an Islamist terrorist group, had been held in pre-trial detention for over four years, and all his applications for release on bail had been dismissed, on the grounds that continued pre-trial detention was necessary to ensure that the applicant remained at the disposal of the French courts, in the light of the requirements of the investigation, in order to protect public order from the adverse effects of the offence and the risk of further offending, and to avoid any collusion with other defendants or accomplices who were being sought. The Court took the view that some of the grounds for dismissal of the applicant's applications were both relevant and sufficient, but decreasingly so as time went on. Thus, while fear of collusion between all the defendants and of destruction of evidence was conceivable at the beginning of the investigation, it could, however, no longer play a decisive role once the witnesses had been interviewed on numerous occasions. The domestic courts had not given precise grounds, particularly in their last decisions, for believing that the applicant's release would have contributed to the realisation of the fear expressed.

**e) Article 5 § 4**

93. Article 5 § 4 states that everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

94. In the case of *Chahal v. the United Kingdom [GC]*, already mentioned, the Court pointed out that, because national security was involved, the domestic courts had not been in a position to review whether the decisions to detain the applicant and to keep him in detention were justified on national security grounds. Furthermore, although the procedure before the advisory panel undoubtedly provided some degree of control, bearing in mind that the applicant was not entitled to legal representation before the panel, that he was given only an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed, the panel could not be considered to be a “court” within the meaning of Article 5 § 4. The Court recognised that the use of confidential material might be unavoidable where national security was at stake. This did not mean, however, that the national authorities could be free from effective control by the domestic courts whenever they chose to assert that national security and terrorism were involved.

95. The case of *A. and Others v. the United Kingdom [GC]* related to the situation of several persons detained in the context of anti-terrorism measures following the 11 September 2001

attacks. The applicants argued that their detention was illegal under domestic law because there were no reasonable grounds for believing that their presence in the United Kingdom threatened national security.

215. The Court recalls that although the judges sitting as SIAC [Special Immigration Appeals Commission] were able to consider both the “open” and “closed” material, neither the applicants nor their legal advisers could see the closed material. Instead, the closed material was disclosed to one or more special advocates, (...) act[ing] on behalf of each applicant. During the closed sessions before SIAC, the special advocate could make submissions on behalf of the applicant, both as regards procedural matters, such as the need for further disclosure, and as to the substance of the case. However, from the point at which the special advocate first had sight of the closed material, he was not permitted to have any further contact with the applicant and his representatives, save with the permission of SIAC. In respect of each appeal against certification, SIAC issued both an open and a closed judgment.

216. (...) during the period of the applicants' detention the activities and aims of the al'Qaeda network had given rise to a “public emergency threatening the life of the nation”. (...) at the relevant time there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack and, although the United Kingdom did not derogate from Article 5 § 4, a strong public interest in obtaining information about al'Qaeda and its associates and in maintaining the secrecy of the sources of such information (...).

217. Balanced against these important public interests, however, was the applicants' right under Article 5 § 4 to procedural fairness. Although the Court has found that (...) the applicants' detention did not fall within any of the categories listed in subparagraphs (a) to (f) of Article 5 § 1, it considers that the case-law relating to judicial control over detention on remand is relevant, since in such cases also the reasonableness of the suspicion against the detained person is a *sine qua non* (...).

218. (...), it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5 § 4 required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him.

219. The Court considers that SIAC, which was a fully independent court (...) and which could examine all the relevant evidence, both closed and open, was best placed to ensure that no material was unnecessarily withheld from the detainee. In this connection, the special advocate could provide an important, additional safeguard through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure. On the material before it, the Court has no basis to find that excessive and unjustified secrecy was employed in respect of any of the applicants' appeals or that there were not compelling reasons for the lack of disclosure in each case.

220. The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations. An example would be the allegation made against several of the applicants that

they had attended a terrorist training camp at a stated location between stated dates; given the precise nature of the allegation, it would have been possible for the applicant to provide the special advocate with exonerating evidence, for example of an alibi or of an alternative explanation for his presence there, sufficient to permit the advocate effectively to challenge the allegation. Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied.

## **5) Article 6**

### **a) Access to a court**

96. In *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, the applicants in the Tinnelly case had been unable to win a public contract with Northern Ireland Electricity Services (NIE), although they had submitted the lowest tender, or, subsequently, to obtain a contract as a subcontractor. The applicant subsequently learned that for security reasons, NIE had deemed its employees unacceptable. Taking the view that it had been denied the contracts because of perceived religious beliefs and/or political opinions (its management and workforce being Catholics), and that it had consequently been the victim of unlawful discrimination, the applicant company had complained in pursuance of the Fair Employment (Northern Ireland) Act 1976. The disclosure of documents which could, in the applicant's view, have proved the existence of discrimination was prevented by a certificate issued by the Minister of State for Northern Ireland which was conclusive proof, and in pursuance of which the decision not to award the contract to Tinnelly was "an act done for the safeguarding of national security or the protection of public safety or public order". The Court accepted that the protection of national security was a legitimate aim which might entail limitations on the right of access to a court, including for the purposes of ensuring the confidentiality of security-vetting data, and assessed whether there existed a reasonable relationship of proportionality between the concerns for the protection of national security invoked by the authorities and the impact which the means they employed to this end had on the applicants' right of access to a court or tribunal. The mechanisms that existed for securing the control and accountability of the intelligence agencies involved in the making of negative-vetting decisions such as those taken against Tinnelly and the McElduffs would not have resulted in any independent judicial scrutiny of the facts grounding those decisions. Such mechanisms could not be considered therefore to compensate for the severity of the limitations which those certificates imposed on the applicants' right of access to a court. The right guaranteed to an applicant under Article 6 § 1 of the Convention to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the ipse dixit of the executive.

### **b) Independence of the courts**

97. Courts martial are not as such inconsistent with the requirements of Article 6, but certain safeguards are needed, such as independence of the chain of command or a subsequent review process (*Findlay v. the United Kingdom*).

98. In *Incal v. Turkey*, the Court examined the consistency with the Convention of National Security Courts, which comprised three judges, two of them civilians and one a regular officer who was a member of the Military Legal Service. The status of the military judges did provide certain guarantees of independence and impartiality. For example, they underwent

the same professional training as their civilian counterparts; military judges enjoyed constitutional safeguards identical to those of civilian judges; in addition, with certain exceptions, they could not be removed from office without their consent; they sat as individuals; and according to the Constitution they had to be independent, and no public authority could give them instructions concerning their judicial activities or influence them in the performance of their duties. On the other hand, they remained servicemen subject to military discipline, and assessment reports were compiled on them by the army in that context. The only justification for the presence of military judges in the National Security Courts was their undoubted competence and experience in the battle against organised crime, including that committed by illegal armed groups. It was not for the Court – which was aware of the problems caused by terrorism – to determine in abstracto whether it was necessary to set up such courts. However, because of the presence of a military judge, it was legitimate for the applicant to fear that the court would lack independence. The Court of Cassation was not able to dispel those concerns, as it did not have full jurisdiction (its jurisdiction being limited to questions concerning the lawfulness and procedural regularity of the first-instance judgment).

**c) Public hearing**

99. Article 6 § 1 provides that “(...) the press and public may be excluded from all or part of the trial in the interests of (...) national security in a democratic society. (...)”.

100. The Court frequently applies a proportionality test to ascertain whether that restriction corresponds to a pressing social need.

101. The Court applies a strict interpretation of the possible exceptions to the requirement for a public hearing, considering the list in Article 6 § 1 to be exhaustive. In *Engel and Others v. the Netherlands*, the adversarial proceedings had taken place in camera (in accordance with the established practice of the Supreme Military Court in disciplinary proceedings). The Court pointed out that, although the applicants did not seem to have suffered on that account, in the field it governed Article 6 § 1 required in a very general fashion that judicial proceedings be conducted in public. Article 6 § 1 of course made provision for exceptions which it listed, but the Government had not pleaded, and it did not emerge from the file, that the circumstances of the case amounted to one of the occasions when it was permissible for the press and the public to be excluded. On this particular point, therefore, there had been a violation of Article 6 § 1.

**d) Equality of arms and secret evidence**

102. There is no absolute right to receive the relevant evidence. There may, in any criminal proceedings, be competing interests, such as national security, the protection of witnesses, and the need to keep secret certain investigation methods used by the police, and those interests have to be balanced with the rights of the accused (*Leas v. Estonia* – the applicant was subjected to surveillance, and the material gathered led to criminal proceedings for corruption).

103. Any measure restricting the rights of the defence has to be absolutely necessary (*Van Mechelen and Others v. the Netherlands* ; *Leas v. Estonia* ). When evidence has been withheld from the defence on public interest grounds, it is not for the Court to say whether



such an attitude was absolutely necessary, for it is in principle a matter for the domestic courts to assess the evidence produced before them. Thus the Court has to scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused (*Fitt v. the United Kingdom [GC]* ; *Jasper v. the United Kingdom [GC]* ; *Leas v. Estonia* ). The question of the time and facilities from which the accused must benefit has to be evaluated in the light of the circumstances of each particular case (*Galstyan v. Armenia* ; *Leas v. Estonia* ).

104. Thus, in the case of *Doorson v. the Netherlands*, the Court stated that the evidence of anonymous witnesses could be justified by the circumstances – as it was in that case (safety of witnesses in a case relating to drug trafficking), and as conviction had not been based to a decisive extent on anonymous statements and as the handicaps under which the defence laboured had been sufficiently counterbalanced by the procedures followed by the judicial authorities (for example questioning carried out in the presence of the defence lawyer, who was also able to question the witness), the Court found that there had been no violation of Article 6 .

105. In *Van Mechelen and Others v. the Netherlands*, neither did the Court exclude the possibility of anonymous evidence being given by members of the police force of the State, although, because of their links with the authorities, that measure restricting the rights of the defence had to be strictly necessary and accompanied by counterbalancing measures to safeguard the rights of the defence. Whenever a less restrictive measure would be sufficient, that was the one which should be applied . In that particular case, the Court took the view that the nature of the proceedings as a whole had not been fair. The Court also concluded that there had been a violation of Articles 6 §1 and 6 § 3 (d) in *Lüdi v. Switzerland*, in which anonymous evidence had been given by an undercover police officer involved in a drug trafficking case .

106. In the case of *Kennedy v. the United Kingdom*, the applicant argued that he had been subjected to secret surveillance but had not had access, through the national authorities, to certain confidential information. The Court noted that, since the proceedings related to secret surveillance measures, there was a need to keep secret sensitive and confidential information. The relevant documents and details of witnesses were likely to be highly sensitive, and it was not possible to disclose redacted documents or to appoint special advocates, as these measures would not have achieved the aim of preserving the secrecy of whether any interception had taken place. The Court emphasised the scope of the access to the Investigatory Powers Tribunal (IPT) available to persons claiming to be victims of telephone tapping, as well as the fact that a complainant did not have to overcome any evidential burden to apply to the IPT. In order to ensure the efficacy of the secret surveillance regime, and bearing in mind the importance of such measures to the fight against terrorism and serious crime, the Court considered that the restrictions on the applicant's rights in the context of the proceedings before the IPT were both necessary and proportionate and did not impair the very essence of the applicant's Article 6 rights.

107. In the light of recent surveillance scandals, it is interesting to note the recent case of *Bucur and Toma v. Romania*. One of the applicants, a former member of the Romanian

intelligence service, had been convicted of divulging secret information about allegedly unlawful telephone tapping. During his trial, he had *inter alia* alleged the unauthorised nature of, and the non-existence of any circumstances which would have threatened national security and justified, the telephone tapping in question. The national authorities had refused to provide some evidence which was classified top secret so that the authenticity of the telephone tapping authorisations could be verified. According to the Court, the information disclosed was particularly important in a society which had, during the communist regime, experienced a policy of rigorous surveillance by the secret services. Furthermore, civil society was directly affected by the information disclosed, as anyone's telephone might be tapped. In addition, the information was related to abuses committed by high-ranking officials, and to the democratic foundations of the State. These were highly important issues which were a matter for political debate in a democratic society, where the public had a legitimate interest in being informed. The Court took the view that, by refusing to verify whether the "top secret" classification was justified and to answer the question of whether the interest in maintenance of the confidentiality of the information prevailed over the public interest in learning about the alleged unlawful telephone tapping, the domestic courts had not sought to examine the case from every angle, thereby depriving the applicant of the right to a fair trial.

108. Certain problems regarding Article 6 and State security issues have also been raised in cases relating to the legislation on lustration (disqualification of communists from administrative office) in post-communist systems. According to the laws concerned, certain information held by the security services of the communist era continued to be considered State secrets, and was therefore inaccessible or not easily accessible to the persons concerned. The Court's view was that it could not be assumed that there remained a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes (*Bobek v. Poland*).

**e) Unlawful evidence**

109. The Court cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence may be admissible, particularly in a case in which the evidence concerned, a recording of the telephone conversation made by a private individual solely on his own initiative, had not been the only evidence on which the conviction had been based (*Schenk v. Switzerland*).

110. In *Teixeira de Castro v. Portugal*, the applicant, who had been convicted of drug trafficking after making a purchase incited by agents provocateurs, had had no criminal record, no preliminary investigation had been opened against him and he had done only what the police had asked him to do. There was nothing to suggest that, without their intervention, the offence would have been committed. The Court concluded that Article 6 had been violated, the police officers' actions having gone beyond those of undercover agents because they had instigated the offence. That intervention and its use in the impugned criminal proceedings meant that, right from the outset, the applicant was definitively deprived of a fair trial. This reasoning can easily be transposed to cases relating to national security, for example if a State official were incited by an agent provocateur to copy secret documents.

111. In *Ramanauskas v. Lithuania* [GC], the court confirmed that the use of special investigative methods – in particular, undercover techniques – could not in itself infringe the right to a fair trial. However, on account of the risk of police incitement entailed by such techniques, their use must be kept within clear limits. The subsequent use of such sources to found a conviction is acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question.

**f) Presumption of innocence and the right not to incriminate oneself**

112. The right not to incriminate oneself applies to criminal proceedings in respect of all types of criminal offences, from the simplest to the most complex (*Saunders v. the United Kingdom* [GC]).

113. Early access to a lawyer is part of the procedural safeguards to which the Court has particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. In order for the right to a fair trial to remain sufficiently “practical and effective”, Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right (*Salduz v. Turkey* [GC]).

114. A conviction may not be based solely or mainly on the accused’s silence or refusal to answer questions or to give evidence. On the other hand, the right to remain silent should not prevent the accused’s silence, in situations which clearly call for an explanation from him or her, from being taken into account in assessing the persuasiveness of the evidence. It cannot be said therefore that an accused’s decision to remain silent throughout criminal proceedings should necessarily have no implications. Whether the drawing of adverse inferences from an accused’s silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation (*John Murray v. United Kingdom* [GC] ). The weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and be weighed against the individual interest that the evidence against him or her be gathered lawfully. However, public interest concerns cannot justify measures which extinguish the very essence of defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention (*Jalloh v. Germany*, [GC] ). The public interest cannot justify the use of answers obtained through compulsion in a non-judicial investigation to incriminate the accused during criminal proceedings (*Heaney and McGuinness v. Ireland*).

115. The Contracting States may in principle, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence (*Salabiaku v. France*, in which the Court dealt with a presumption of criminal liability for smuggling, based on possession of drugs). Article 6 § 2 nevertheless requires States to confine presumptions within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (*Salabiaku v. France* );

in other words, the means used must be reasonably proportionate to the legitimate aim pursued.

### III. ARTICLE 15

116. Article 15 of the Convention allows derogation (derogation which may not, according to Article 15 § 2, relate to the rights protected by Articles 2, 3, 4 § 1 and 7 of the Convention, by Article 3 of Protocol No. 6 and by Article 4 § 3 of Protocol No. 7) in time of war or other public emergency threatening the life of the nation, subject to certain conditions, including notification (Article 15 § 3) and the proviso that “such measures are not inconsistent with its other obligations under international law” (Article 15 § 1).

117. It was in pursuance of the Article 15 derogation that the Court ruled, in the case of *Brannigan and McBride v. the United Kingdom*, that the possibility of extension of remand in custody to seven days without judicial review (a possibility for which the Prevention of Terrorism (Temporary Provisions) Act 1984 provided, in the context of terrorist activities in Northern Ireland) was in accordance with the Convention, whereas it had reached the opposite conclusion, in the absence of derogation in pursuance of Article 15, in the case of *Brogan and Others v. the United Kingdom*.

118. Article 18, which limits the use of restrictions of rights, requires such limitations to be applied for no other purpose than those for which they have been prescribed. On the subject of derogations, the Court reiterated that principle when it specified in the case of *Lawless v. Ireland (No.3)* that the State was entitled to take measures derogating from its obligations under the Convention, applying the provisions of Article 15 § 1 for the purposes for which those provisions were made.

119. The words “in time of war or other public emergency threatening the life of the nation” refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.

120. While the Court affirms its right to verify the reality of the public emergency threatening the life of the nation entitling a State to make use of the derogation system, in practice the State’s appraisal is only called into question in exceptional cases. The Commission nevertheless took the view in the Greek Case that the public emergency threatening the life of the nation invoked by the Greek State (the junta which had taken power) did not in reality exist.

121. Measures in derogation are not to be taken, in pursuance of Article 15 § 1, other than to the extent strictly required by the exigencies of the situation. States of course enjoy broad discretion in this respect. In practice, it falls in the first place to each Contracting State, with its responsibility for “the life of [its] nation”, to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international

judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it . The Court subsequently reaffirmed that it was not its role to substitute its view as to what measures were most appropriate in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other. Nevertheless, States do not enjoy an unlimited power in this respect. The Court is empowered to rule on whether States have gone beyond the “extent strictly required” by the exigencies of the crisis.

122. In a number of cases, the Court has thus taken the view that, although a State had validly relied on a derogation based on Article 15, the measures adopted, too severe (in their scope, in their arrangements), were not ultimately “necessary” to deal with the emergency threatening the nation. Thus, in the case of *Aksoy v. Turkey*, the Government had not adduced any detailed reasons before the Court as to why the fight against terrorism in south-eastern Turkey rendered judicial intervention impracticable. The Court, although it took the view that the investigation of terrorist offences undoubtedly presented the authorities with special problems, concluded that it could not accept that it was necessary to hold a suspect for fourteen days without judicial intervention. an exceptionally long period which had left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture . The Court applied similar reasoning in the cases of *Demir and Others v. Turkey* and *Bilen v. Turkey* , for example. In *A. and Others v. the United Kingdom [GC]*, the Court took the view that, in choosing, in order to avert a real and imminent threat of terrorist attack (post-11 September), to use an immigration measure to address what was essentially a security issue, the Government and Parliament had failed adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. In practice, the terrorist threat was posed by both nationals and non-nationals, and there was no significant difference in the potential adverse impact of detention without charge on a national or on a non-national.

## IV. THE COUNCIL OF EUROPE

### A. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, or Convention 108

#### 1) Overview

123. Council of Europe Convention 108 is the only legal instrument with binding force in the field of personal data protection. It protects individuals from the abuses which may go hand in hand with the collection and processing of personal data, and is also intended to regulate cross-border data flows.

124. Where the collection and processing of personal data are concerned, the principles set out in the Convention relate more specifically to fair and lawful collection and to the automatic processing of data stored for specified and legitimate purposes and not used in a way incompatible with those purposes or stored for longer than necessary. The principles also relate to the quality of the data concerned (adequate, relevant and not excessive – proportionality), data accuracy, the informing of the data subjects and those subjects’ right of access and rectification.

125. As well as providing safeguards relating to the collection and processing of personal data, it prohibits the processing of “sensitive” data about race, political opinions, health, religion, sex life, criminal record, etc, unless appropriate safeguards are in place.

126. Restrictions on the rights enshrined in the Convention are possible only if higher interests are at stake, such as State security and defence.

127. Various (non-binding) recommendations of the Committee of Ministers have been adopted to flesh out the principles laid down by Convention 108, and a public consultation exercise was carried out in 2011 with a view to modernising it, and particularly to strengthening the protection of private life in the digital age and the mechanisms which monitor the Convention.

128. 45 of the 47 Council of Europe member States are Parties to the Convention, which is also open to States which are not members of the Council of Europe (so far Uruguay, soon to be joined by Morocco), and was also amended in 1999 to make accession possible for the European Union.

## **2) Case-law of the Court**

129. The Court has on several occasions referred to Convention 108 in its interpretation of the concept of private life. In practice, the Court considers that the term “private life” should not be restrictively interpreted. In particular, respect for private life encompasses the individual’s right to establish and develop relationships with other human beings; furthermore, there is no reason of principle allowing professional or business contexts to be excluded, and the Court highlights the concordance between this extensive interpretation and that of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, of 28 January 1981, which came into force on 1 October 1985, and the aim of which is “to secure [...] for every individual [...] respect for [...] in particular his right to privacy, with regard to automatic processing of personal data relating to him” (Article 1), such data being defined by Article 2 as “any information relating to an identified or identifiable individual”. (*Amann v. Switzerland* [GC] ; *Rotaru v. Romania* [GC] ; *Haralambie v. Romania* ).

130. The Court also emphasises the concordance of its interpretation of the concept of private life and that of Convention 108 when it points out that “public information” can fall within the scope of “private life” where it is systematically collected and stored in files held by the authorities (*Haralambie v. Romania* ; *Cemalettin Canli v. Turkey* ).

131. Where the confidentiality of personal health-related data is concerned, the Court, noting that the protection of personal data is of fundamental importance to a person’s enjoyment of his or her right to respect for private life and that domestic legislation should therefore afford appropriate safeguards to prevent any disclosure of personal health data which may be inconsistent with the guarantees in Article 8 of the Convention, refers, *mutatis mutandis*, to Articles 3 § 2 (c), 5, 6 and 9 of Convention 108. It adds that these considerations “are especially valid” as regards protection of the confidentiality of information about a person’s HIV infection, and states that the interests in protecting the confidentiality of such information will therefore weigh heavily in the balance in determining whether the

interference was proportionate to the legitimate aim pursued, since such interference cannot be compatible with Article 8 of the Convention unless it is justified by an overriding requirement in the public interest (*Z. v. Finland*; *Peck v. the United Kingdom*).

132. The Court, when it states that an individual's ethnic identity must be regarded as an important element of his or her private life, also refers to Convention 108, and more particularly to Article 6 thereof, which places personal data revealing racial origin, together with other sensitive information about the individual, in the special categories of data which cannot be processed unless appropriate safeguards are provided (*S. and Marper v. the United Kingdom* [GC]).

133. The Court also mentions Convention 108 in the "relevant international law" section of some of its judgments, referring, for example, to Article 5 on "quality of data" (*Bernh Larsen Holding AS and Others v. Norway* ; *Khelili v. Switzerland* ; *B.B. v. France* ; *M.M. v. the United Kingdom* ), to Article 6 on "special categories of data" (*B.B. v. France*; *M.M. v. the United Kingdom*), to Article 7 on "data security" (*B.B. v. France*), and to Article 9 on "exceptions and restrictions" (*M.M. v. the United Kingdom*).

134. The case-law of the Court also complements Convention 108. Article 5 of Convention 108, for example, sets out the principle of the lawfulness of automatic processing of data, but without defining what constitutes unlawful processing. Reference therefore needs to be made to the interference permitted by the ECHR.

135. Convention 108 and the case-law of the Court, furthermore, frequently reach identical conclusions. Thus the right of access to one's personal data is explicitly recognised by Convention 108 as well as by the case-law of the Court , although the latter concluded, in the case of *Leander v. Sweden*, that access to personal data stored by the authorities could be limited in certain circumstances .

## **B. Recommendations of the Committee of Ministers**

136. The Committee of Ministers of the Council of Europe has adopted a number of relevant recommendations, including:

- Recommendation CM/Rec(2010)13 of the Committee of Ministers to member states on the protection of individuals with regard to automatic processing of personal data in the context of profiling ;
- Recommendation CM/Rec(2012)3 of the Committee of Ministers to member States on the protection of human rights with regard to search engines ;
- Recommendation CM/Rec(2012)4 of the Committee of Ministers to member States on the protection of human rights with regard to social networking services .

137. We should also mention the Draft Committee of Ministers declaration on risks to fundamental rights stemming from digital tracking and other surveillance technologies.

138. It is sometimes the case that recommendations of the Committee of Ministers are mentioned in the case-law of the Court, as, for example, when a reference was made in the

judgment in the case of [Ahmet Yildirim v. Turkey](#) to Recommendation CM/Rec(2012)3 on the protection of human rights with regard to search engines.

## CONCLUSION

139. States are recognised to have a certain – even a large – measure of discretion when evaluating threats to national security and when deciding how to combat these. Nevertheless, the Court now tends to require national bodies to verify that any threat has a reasonable basis in fact (Janowiec, Konstantin Markin...).

140. Where the quality of the law is concerned, the Court has for some time now been developing relatively restrictive standards (Malone, Kruslin, Huvig, Kopp, Amann).

141. Furthermore, the Court carefully verifies the need for interference or its proportionality to the legitimate aim, in this instance national security.

142. The State’s margin for appreciation in cases connected with national security is no longer uniformly broad. In certain cases, any room for manoeuvre is explicitly excluded by the very nature of Article 3 (Chahal). In other spheres, the Court has been able to reduce significantly States’ freedom, as it has for example in respect of Article 6, where it has considered the possible existence of measures with a less restrictive effect on freedoms (Van Mechelen), or when it has laid down a strict requirement for independent courts (Incal). The Court has also reduced the margin for appreciation in certain areas, such as freedom of expression in the armed forces (Grigoriades, VDSÖ and Gübi) and the private life of servicemen (Lustig-Prean and Beckett, Smith and Grady, Konstantin Markin) as compared to its apparent previous position (Hadjianastassiou).

143. With more specific reference to cases relating to secret surveillance, the Court is relatively flexible on the subject of recognition of victim status. As for the condition that the interference should be “in accordance with the law”, the Court takes the view that the law, both accessible and foreseeable, must be relatively detailed. The Court places particular emphasis on the safeguards which must accompany surveillance and the keeping of records. As to the condition of necessity in a democratic society, the Court weighs the respondent State’s interest in protecting its national security against the seriousness of the infringement of the applicant’s right to respect for his or her private life, strict necessity being defined in practice as requiring adequate and effective guarantees against abuse and the exercise of supervision, in the last instance at least, by the judicial authorities, or at the very least by independent supervisory bodies (Klass).

144. In the case of a “whistle-blower” who had revealed unlawful secret surveillance (Bucur and Toma), the Court considered that civil society was directly affected by the information disclosed, for anybody might have his or her telephone tapped. Furthermore, this information being connected to abuses committed by high-ranking officials and affecting the democratic foundations of the State, those were very important issues which were a matter for political debate, and which the public had a legitimate interest in being told about. It was therefore necessary to verify whether the interest in maintaining the confidentiality of the information prevailed over the public interest in knowing that unlawful telephone tapping had occurred.



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