Funded
by the European Union
and the Council of Europe

EUROPEAN UNION

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Implemented
by the Council of Europe

PRECOP-RF

Joint EU/CoE project on Protection of the Rights of Entrepreneurs in the Russian Federation from Corrupt Practices

Review of European Court of Human Rights case law on protection of entrepreneurs' rights

ECCU-PRECOP-TP8/2014

The PRECOP RF is funded through the Partnership for Modernization, a jointly launched initiative by the EU and Russian authorities. One of the priority areas of this initiative is the effective functioning of the judiciary and strengthening of the fight against corruption.

For further information please contact:

Economic Crime Cooperation Unit (ECCU)
Action against Crime Department
Directorate General of Human Rights and Rule of Law-DG I, Council of Europe

Tel: +33-3-9021-4550
Fax: +33-3-9021-5650
e-mail: mustafa.ferati@coe.int
www.coe.int/corruption
www.coe.int/precop

Table of Content

1 EXECUTIVE SUMMARY

This review of the European Court of Human Rights' case law relevant to the protection of entrepreneurs' rights is done within the framework of the joint EU/COE project on "Protection of Entrepreneurs Rights in the Russian Federation from Corrupt Practices" (PRECOP RF).

The goal of this review is to present a select number of judgements relating to prevalent issues concerning the protection of the rights of entrepreneurs and corporations. The first part of the review deals with cases relating to the failure of authorities to respect the rights of suspects during the criminal investigation, including the rights pertaining to searches and seizure of documents and/or other property. The second part of the review will focus on the case law relating to the criminal asset recovery and the protection of property as provided by Article 1 of Protocol No. 1. The third part of this review presents cases dealing with the protection of whistle-blowers.

Effective measures for the protection of whistle-blowers may provide an incentive for an increase in the reporting of wrongdoings or instances of abuse of power resulting from the corrupt behaviour. The last chapter focuses on the approach that the European Court of Human Rights has taken in relation to such cases.

This review presents relevant cases submitted to the Court by applicants from various countries, including cases from the Russian Federation. It provides detailed account of the approach that the European Court of Human Rights has taken in the review of applications relating to violations committed in the course of criminal proceedings, including here:

- Cases when search warrants were drawn up in terms which were too broad and the search impinged on the professional secrecy of some of the materials that had been inspected;
- Cases when a disproportionate quantity of documents was seized;
- Cases when authorities failed to provide any details of the reasons for searches; etc.

The Convention provides ample opportunities for the protection of companies against searches and seizures on the basis of the Articles 3, 8, and 13 of the Convention, and Protocol No. 1. In particular, the Court has found a violation of Article 3 (prohibition of inhuman treatment) on account of the ill-treatment in the course of inspections as well as the failure of authorities to duly investigate allegations concerning such treatment. A violation of Article 13 (right to effective remedy) has been found when national courts failed to review complaints concerning the retention of documents and other property seized during searches.

The European Court of Human Rights has acknowledged that it may be necessary for Member States to resort to measures such as searches of residential premises and seizures in order to obtain physical evidence. It is recognized that such measures normally interfere with a person's rights under paragraph 1 of Article 8. Therefore, the reasons for such measures must be relevant and sufficient and not disproportionate to the aim pursued. Moreover, the Court must be satisfied that the relevant legislation and practice afford individuals adequate and effective safeguards against abuse. The Court has thus concentrated on the requirements that searches be "lawful" and be conducted with adequate procedural safeguards against arbitrariness and abuse.

From its conception, Article 8 (right to private life) aimed at the protection of physical

persons in their residences. However, later developments allowed such protection to be stretched also to business premises. The Court acknowledges that in certain circumstances guarantees of Article 8 of the Convention could be construed to include the right to respect for a company's head office, branch office, or place of business.

In a recent case against Russia, the Court found a violation of Article 8 because a search was not based on a reasonable suspicion, was not founded on relevant and sufficient reasons, the search warrant was not drafted with sufficient precision, and thus granted officers unreasonably broad powers.

Defects during searches, including cases of seizure/retention of documents for an excessively long period, were found to be in violation of a right to property, as were as that they inhibited professional activities and even hindered the administration of justice (see case of Smirnov v. Russia below). The majority of Convention' violations in respect to searches and seizures are, however, connected to Article 8.

2 THE CASE LAW ON VIOLATIONS DURING CRIMINAL INVESTIGATIONS

2.1 Case of Societe Colas Est and others v. France

Application no. 37971/97
JUDGMENT
STRASBOURG
16 April 2002
FINAL
16/07/2002

PROCEDURE

1. The case originated in an application (no. 37971/97) against the French Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three French companies, Colas Est, Colas Sud-Ouest and Sacer ("the applicant companies"), based in Colmar, Mérignac and Boulogne-Billancourt respectively, on 2 December 1996. The applicant companies were represented before the Court by Mr F. Goguel, of the Paris Bar. The French Government ("the Government") were represented by their Agent, Mr R. Abraham, Director of Legal Affairs at the Ministry of Foreign Affairs.

2. The applicant companies alleged a violation of their right to respect for their home, relying on Article 8 of the Convention.

3. The Commission declared the application partly inadmissible on 21 October 1998 and adjourned the examination of the remainder of the complaints. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 19 June 2001 the Chamber declared the application admissible [Note by the Registry. The Court's decision is obtainable from the Registry].

6. The applicant companies and the Government each filed observations on the merits (Rule 59 § 1).

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1).

This case was assigned to the newly composed Second Section (Rule 52 § 1).

THE FACTS
I. THE CIRCUMSTANCES OF THE CASE

8. Following complaints from the National Union of Finishing Contractors (Syndicat national des entreprises de second œuvre) that large construction firms were engaging in certain illegal practices, France's central government authorities instructed the National

Investigations Office to carry out a large-scale administrative investigation into the conduct of public-works contractors.

9. In a memorandum dated 9 October 1985 the head of the National Investigations Office – a body attached to the Competition and Consumer Affairs Department, which on 5 November 1985 became the Department for Competition, Consumer Affairs and Fraud Prevention ("the DGCCRF") – provided the officials responsible at inter-département level with details of the planned investigation into the conduct of roadworks contractors in local tendering procedures. Appended to the memorandum was a list of companies to be inspected, either at their head office or at local branch offices, in seventeen départements. The list included the three applicant companies.

10. On 19 November 1985 inspectors from the DGCCRF carried out simultaneous raids on fifty-six companies without authorisation from the companies' management and seized several thousand documents. At a later date, on 15 October 1986, they conducted further inquiries with a view to obtaining statements.

11. On each occasion the inspectors entered the applicant companies' premises under the provisions of Ordinance no. 45-1484 of 30 June 1945, which did not require any judicial authorisation. While carrying out the raids, the inspectors seized various documents containing evidence of unlawful agreements relating to certain contracts that did not appear in the list of contracts concerned by the investigation.

12. On 14 November 1986, on the basis of those documents, the Minister for Economic Affairs, Finance and Privatisation asked the Competition Commission (which became the Competition Council after the entry into force of Ordinance no. 86-1243 of 1 December 1986) to investigate certain acts which, in his opinion, amounted to collusion between separate firms, artificial competition between firms belonging to one and the same group in local tendering procedures for roadworks contracts, and agreements restricting competition in the operation of mixing plants.

13. On 30 July 1987 the Competition Council was additionally asked by the head of the DGCCRF to investigate acts of a similar nature. That request concerned fifty-five companies, including the applicant companies.

14. In a decision of 25 October 1989, published in the Official Bulletin on Competition, Consumer Affairs and Fraud Prevention (Bulletin officiel de la concurrence, de la consommation et de la répression des fraudes – "the BOCCRF"), the Competition Council, finding evidence of practices outlawed by the ordinance of 30 June 1945 and the ordinance of 1 December 1986, fined the first applicant company 12,000,000 French francs (FRF), the second FRF 4,000,000 and the third FRF 6,000,000.

15. In a judgment of 4 July 1990 published in the BOCCRF, the Paris Court of Appeal upheld all those penalties. The applicant companies appealed on points of law.

16. In a judgment of 6 October 1992, likewise published in the BOCCRF, the Commercial Division of the Court of Cassation quashed the judgment of the Paris Court of Appeal, on the ground that its calculation of turnover and its assessment of the amount of the fines had had no basis in law. It remitted the case to the Paris Court of Appeal sitting with different judges.

17. At the retrial in the Court of Appeal, the applicant companies contested the lawfulness of the searches and seizures carried out by the inspectors, without any judicial authorisation, under the 1945 ordinance. They relied on Article 8 of the Convention.

18. On 8 April 1994 the head of the Competition and Planning Section of the DGCCRF submitted additional observations on behalf of the Minister for Economic Affairs, stating, inter alia:

> "... I will consider two points concerning the investigation procedure ... :
> (a) The inspections carried out under the 1945 ordinance should have been judicially authorised in advance, in accordance with the European Convention on Human Rights ...
> (b) Secondly, the seizures carried out by the DGCCRF officials went beyond the actual purpose of the inspections, in that documents not expressly referred to in the application for the investigation were taken from several companies' head offices.
> ... section 15 of Ordinance no. 45-1484 of 30 June 1945 is worded in very explicit terms, as it states that in the course of their investigations, inspectors may require the production of, and seize, documents of any kind that are likely to facilitate the accomplishment of their tasks, irrespective of whose hands the documents are in. The distinctive feature of this procedure was that, in contrast to the provisions now in force, which were introduced by section 48 of the ordinance of 1 December 1986, the inspections were not carried out under constant judicial supervision. In the absence of any provisions on the matter, it is hard to see what supervisory procedure should have been followed.
> ... it appears from the provisions of the 1945 ordinances that the inspectors were vested with powers of search and seizure which they exercised when carrying out their general task of obtaining evidence. The aforementioned section 15 must be interpreted in the light of section 16 of the same ordinance, by which inspectors were granted unrestricted access to premises ..."

19. On 4 July 1994 the differently constituted Paris Court of Appeal held, inter alia:
"... the administrative investigation was carried out in accordance with section 15 of the aforementioned ordinance. By virtue of that provision, inspectors are authorised to require the production of, and to seize, documents of any kind that are likely to facilitate the accomplishment of their task, irrespective of whose hands the documents are in. They have a general right to inspect documents, reinforced by a power of seizure. Since no search took place in the course of the administrative investigation, the firms have no grounds for arguing that there has been interference with their private life or home in breach of Article 8 of the Convention ..."

20. The Court of Appeal fined the first applicant company FRF 5,000,000, the second FRF 3,000,000 and the third FRF 6,000,000. The applicant companies again appealed on points of law.

21. In a judgment of 4 June 1996 published in the BOCCRF, the Court of Cassation dismissed their appeal. In particular, it dismissed their complaint under Article 8 of the Convention, holding that "the administrative investigation ... [had] not give[n] rise to any searches or coercive measures".

II. CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES AND OF THE COURT OF FIRST INSTANCE

26. In its judgment of 21 September 1989 in Hoechst v. Commission (Joined Cases 46/87 and 227/88 [1989] European Court Reports (ECR) 2859), the Court of Justice of the European Communities (CJEC) held:

> "17. Since the applicant has also relied on the requirements stemming from the fundamental right to the inviolability of the home, it should be observed that, although the existence of such a right must be recognised in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities.
>
> 18. No other inference is to be drawn from Article 8 ... of the ... Convention ... The protective scope of that article is concerned with the development of man's personal freedom and may not therefore be extended to business premises. Furthermore, it should be noted that there is no case-law of the European Court of Human Rights on that subject.
>
> 19. None the less, in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognised as a general principle of Community law. In that regard, it should be pointed out that the Court has held that it has the power to determine whether measures of investigation taken by the Commission under the ECSC Treaty are excessive (judgment of 14 December 1962 in Joined Cases 5 to 11 and 13 to 15/62, San Michele and Others v. Commission [1962] ECR 449)."
>
> The CJEC reaffirmed that position in two judgments of 17 October 1989, Dow Benelux v. Commission (Case 85/87 [1989] ECR 3137, paragraphs 28-30) and Dow Chemical Ibérica and Others v. Commission (Joined Cases 97-99/87 [1989] ECR 3165, paragraphs 14-16).

27. In its judgment of 20 April 1999 in Limburgse Vinyl Maatschappij NV and Others v. Commission (Joined Cases T-305/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94), the Court of First Instance of the European Communities held:

> "398. ... the applicants argue that in the course of its investigations the Commission infringed the principle of inviolability of the home within the meaning of Article 8 of the European Convention on Human Rights (ECHR) as interpreted in the case-law of the European Court of Human Rights (Niemietz v. Germany, judgment of 16 December 1992, Series A no. 251-B), whose review is more extensive than that performed in the context of Community law ...
>
> 403. The Commission begins by arguing that the ECHR does not apply to Community competition procedures. ...
>
> 404. As to the merits of the plea, the Commission considers that the relevance of the case-law of the Court of Justice (Hoechst and Dow Benelux, cited above) is not

affected by Article 8 of the ECHR as interpreted by the European Court of Human Rights.

FINDINGS OF THE COURT

...

(ii) The merits of the plea

417. For the reasons set out above ..., the plea must be understood as alleging infringement of the general principle of Community law ensuring protection against intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, which are disproportionate or arbitrary (Hoechst, paragraph 19; Dow Benelux, paragraph 30; Joined Cases 97/87, 98/87 and 99/87 Dow Chemical Ibérica v. Commission [1989] ECR 3165, paragraph 16). ...

– The first part of the plea, concerning the validity of the formal acts relating to the investigations

419. ... In so far as the pleas and arguments put forward today by LVM and DSM are identical or similar to those put forward at that time by Hoechst, the Court sees no reason to depart from the case-law of the Court of Justice.

420. That case-law is, moreover, based on the existence of a general principle of Community law, as referred to above, which applies to legal persons. The fact that the case-law of the European Court of Human Rights concerning the applicability of Article 8 of the ECHR to legal persons has evolved since [the judgments cited above] therefore has no direct impact on the merits of the solutions adopted in those cases."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

28. The applicant companies considered that the raids carried out by official inspectors on 19 November 1985 and 15 October 1986, without any supervision or restrictions, had infringed their right to respect for their home. They relied on Article 8 of the Convention, the relevant parts of which provide:

1. Everyone has the right to respect for ... his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of ... crime ... or for the protection of the rights and freedoms of others.

29. The Government submitted that the 1945 ordinance had conferred on inspectors a general right of inspection, supplemented, where necessary, by a power of seizure. Although the exercise of those powers was not subject to prior authorisation by a judge, ex post facto review had been possible in the ordinary or administrative courts. The Government pointed out that, although the investigations in the instant case had been governed by the provisions of the 1945 ordinance, the new procedural arrangements laid down in the ordinance of 1 December 1986 had been applied, so that the applicant companies had been able to avail themselves of the newly established judicial remedies to complain of the manner in which the inspections had been conducted. They argued that the current rules distinguished between ordinary investigative powers and powers requiring prior authorisation by a judge. It followed from sections 47 and 48 of the 1986 ordinance, taken together, that the inspectors'

right of unannounced access could be exercised only in respect of business premises, and for the sole purpose of inspecting documents. The DGCCRF officials' power to enter business premises and seize documents was subject to authorisation in the form of an order by a judge of the ordinary courts, against which an appeal lay to the Court of Cassation. Such operations were supervised by the judge.

30. The Government pointed out that, although the Court had made clear that professional or business addresses were protected by Article 8, all the cases in which it had made that finding had concerned premises where a natural person had carried on an occupation. Relying on Niemietz v. Germany (judgment of 16 December 1992, Series A no. 251-B), they considered that in the instant case, which concerned the business premises of public limited companies, the entitlement to interfere "might well be more far-reaching". They submitted that, while juristic persons could enjoy similar rights under the Convention to those afforded to natural persons, they could not claim a right to the protection of their professional or business premises with as much force as an individual could in relation to his professional or business address.

31. The Government further considered that the operations in issue could not be treated as a general search (perquisition) within the meaning of the Code of Criminal Procedure or as a house search (visite domiciliaire) within the meaning of the Customs Code. Their nature, purpose and effect had been different. Thus, they had not been carried out by senior police officers or sworn officials with a view to establishing criminal or customs offences for which individuals could be imprisoned, as in Funke v. France, Crémieux v. France and Miailhe v. France (no. 1) (judgments of 25 February 1993, Series A nos. 256-A, 256-B and 256-C, respectively). The inspectors in the instant case had gone to the applicant companies' premises and had exercised a general right to inspect documents in accordance with the provisions of section 15 of Ordinance no. 45-1484 of 30 June 1945. The aim had been to obtain documents in connection with an administrative investigation into anti-competitive practices for which only fines and not criminal penalties could be imposed. Determining what action to take in the light of the DGCCRF's investigations and imposing fines had been entrusted to an independent administrative authority, the Competition Council, which was responsible for monitoring compliance with legislation on trade and industry. The procedure was a special one, even though it complied with the adversarial principle and remained subject to review by the judges of the Court of Appeal. In the instant case both the Paris Court of Appeal and the Court of Cassation had taken the view that the administrative investigation had not given rise to any searches or coercive measures.

32. The Government accepted, however, that the exercise of the right to inspect documents had amounted to interference with the applicant companies' right to respect for their home within the meaning of Article 8 of the Convention.

They submitted that the inspections had been carried out in accordance with section 15 of the ordinance of 30 June 1945, which laid down the scope and manner of exercise of the power conferred on the DGCCRF's inspectors, thereby eliminating any risk of arbitrariness. Admittedly, the courts' review took place ex post facto, but it was effective and genuine. The interference had therefore been in accordance with the law. The Government argued that the interference had sought to establish whether any anti-competitive practices were occurring. It had therefore pursued legitimate aims for the purposes of the second paragraph of Article 8, as the inspections had been carried out in the interests of both "economic well-being" and "the prevention of crime" (see, mutatis mutandis, Funke, cited above, p. 24, § 52).

33. The Government considered that the interference with the applicant companies' rights did not appear disproportionate, regard being had to the scale of the operations conducted simultaneously in order to prevent the disappearance or concealment of evidence whose production had been necessary for the prosecution of offences. They also relied on the margin of appreciation left to States in assessing the need for interference. It was accepted that the entitlement to interfere was more far-reaching where business premises or professional activities were concerned. In the instant case, the right of inspection had been exercised on juristic persons' business premises, which were not always at the official address of their registered office, and had not been accompanied by "intrusive" measures such as searches or coercion. In any event, the Government submitted that the applicant companies could not claim to have sustained any obvious damage as a result of the interference, as they had not alleged a violation of their right until many years after the impugned measures had been taken.

34. Accordingly, the Government considered that the inspectors' exercise of their right to have documents made available had not breached Article 8 of the Convention. In conclusion, they argued that the complaint was manifestly ill-founded and asked the Court to dismiss the application.

35. The applicant companies contended that a house search most certainly had been carried out on their premises. Ordinance no. 45-1484 of 30 June 1945 afforded officials the possibility of unrestricted access to all premises other than residential ones. The interference had therefore been in accordance with the law.
They pointed out that the ordinance of 1 December 1986 had been issued more than a year after the events in question. The safeguards laid down in the ordinance in relation to searches and seizures had therefore not existed in the legislation applicable at the time of the events. They submitted that if the Court considered that it did not have to express its opinion on the legislative reforms carried out after the material time, the fact that the ordinance of 1 December 1986 had introduced a judicial authorisation procedure, together with guarantees of judicial supervision in the course of inspections, showed that the legislation applicable at the material time had made no provision for any such authorisation or supervision.

36. The aim pursued by the interference did not call for any observations on the part of the applicant companies.

They disputed the Government's submission that the inspectors had done no more than have documents made available for inspection. Relying on the additional observations submitted by the Minister for Economic Affairs in reply to their pleadings alleging a violation of Article 8 of the Convention, they inferred that the minister made no distinction between the right of inspection and the right of search, since he had referred to the judicial supervision introduced by section 48 of the ordinance of 1 December 1986, which applied solely to "searches of any premises" – that is to say, either house searches or general searches. They concluded that both the minister and his department, to which the inspectors were answerable, regarded the right of inspection (section 15) and the right of search (section 16) as an indivisible whole. Besides, the fact that the precise nature of the operations was in question showed that the inspectors' powers were not subject to any safeguards or limits whatsoever. The inspectors' reports had described the "seizure" of documents without indicating whether the documents had been obtained by exercising the right of inspection or the right of search; no safeguards had been in place in either case. They observed that in the absence of any judicial supervision

of the operations, it had been possible for the inspectors to switch at any time from exercising the right of inspection to exercising the right of search. Lastly, they argued that the reference in the judgments of the Paris Court of Appeal and the Court of Cassation to the absence of coercion was purely theoretical. Since inspectors had the power and the practical opportunity to make searches, even where they merely availed themselves of their right of inspection, they did so with the underlying threat of a possible search.

37. Referring to Funke, Crémieux and Miailhe (no. 1), the applicant companies pointed out that although the state of competition law had at the material time been similar to that of customs law, the absence of any safeguards had been even more blatant in competition law. They considered that the Government could not rely on the argument that the measures in question had "not been carried out by senior police officers".

The applicant companies submitted that the argument that the procedural arrangements laid down in the 1986 ordinance had been applied in the investigations already under way could not be accepted, since the measures in issue had been carried out on 19 November 1985, more than a year before the ordinance of 1 December 1986 had been issued. The new supervisory measures laid down in the ordinance were linked to the requirement of prior judicial authorisation in the form of an order. In the instant case, in the absence of any judicial authorisation, no judge had been able to supervise the search and the seizure. The possibility of ex post facto review stemmed from a court order which could be challenged by means of an appeal on points of law to the Court of Cassation. In practice, however, the applicant companies had not had any specific judicial remedy at the material time in respect of the measures in issue. They had been able to challenge them solely in the proceedings on the merits many years afterwards.

38. Consequently, the applicant companies considered that a balance had not been struck between the aims pursued and the measures available. Even if the Court were to construe the judgment in Niemietz as permitting greater interference with the right to respect for professional or business premises, such interference could not be regarded as lawful where it was not attended by supervision or by any constraints on investigative powers. They further submitted that the argument that the measures could have resulted only in fines and not in criminal penalties properly speaking did not carry as much weight as the Government had maintained. Lastly, the fact that the applicants were companies was particularly irrelevant as the items seized in the instant case had included not only business documents but also employees' personal papers (handwritten notes and extracts from diaries recording personal appointments). The total number of documents seized was unknown because no complete inventory had been drawn up covering all the firms concerned; the volume of the documents submitted to the courts had amounted to several cubic metres.

39. The applicant companies accordingly submitted that there had been a violation of Article 8 of the Convention.

A. Principles established under Article 8 of the Convention and their applicability to the "homes" of juristic persons

40. The Court notes at the outset that the present case differs from those in Funke, Crémieux and Miailhe (no; 1), cited above, in that the applicants are juristic persons alleging a violation of their right to respect for their "home" under Article 8 of the Convention. However, the Court would point out that, as it has previously held, the word "domicile" (in the French

version of Article 8) has a broader connotation than the word “home” and may extend, for example, to a professional person's office (see Niemietz, cited above, p. 34, § 30).
In Chappell v. the United Kingdom (judgment of 30 March 1989, Series A no. 152-A, pp. 12-13, § 26, and p. 26, § 63), the Court considered that a search conducted at a private individual's home which was also the registered office of a company run by him had amounted to interference with his right to respect for his home within the meaning of Article 8 of the Convention.

41. The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see, mutatis mutandis, Cossey v. the United Kingdom, judgment of 27 September 1990, Series A no. 184, p. 14, § 35 in fine). As regards the rights secured to companies by the Convention, it should be pointed out that the Court has already recognised a company's right under Article 41 to compensation for non-pecuniary damage sustained as a result of a violation of Article 6 § 1 of the Convention (see Comingersoll v. Portugal [GC], no. 35382/97, §§ 33-35, ECHR 2000-IV). Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises (see, mutatis mutandis, Niemietz, cited above, p. 34, § 30).

42. In the instant case, the Court observes that during a large-scale administrative investigation, officials from the DGCCRF went to the applicant companies' head offices and branches in order to seize several thousand documents. It notes that the Government did not dispute that there had been interference with the applicant companies' right to respect for their home (see paragraph 32 above), although they argued that the companies could not claim a right to the protection of their business premises “with as much force as an individual could in relation to his professional or business address” (see paragraph 30 above) and that, consequently, the entitlement to interfere “might well be more far-reaching”.
The Court must therefore determine whether the interference with the applicant companies' right to respect for their home satisfied the requirements of paragraph 2 of Article 8.

B. Requirement of a measure “in accordance with the law”

43. The Court reiterates that an interference cannot be regarded as “in accordance with the law” unless, first of all, it has some basis in domestic law (see, mutatis mutandis, Chappell, cited above, p. 22, § 52). In accordance with the case-law of the Convention institutions, in relation to paragraph 2 of Article 8 of the Convention, the term “law” is to be understood in its “substantive” sense, not its “formal” one. In a sphere covered by the written law, the “law” is the enactment in force as the competent courts have interpreted it (see, mutatis mutandis, Kruslin v. France and Huvig v. France, judgments of 24 April 1990, Series A nos. 176-A and 176-B, pp. 21-22, § 29, and p. 53-54, § 28, respectively).

In the instant case, the searches and seizures of documents by DGCCRF inspectors fell within the scope of the powers granted to them by sections 15 and 16(2) of the ordinance of 30 June 1945 governing their investigative powers for the detection of economic offences relating to competition. The Court therefore concludes that the interference was “in accordance with the law”.

C. Legitimate aim

44. The purpose of the interference with the applicant companies' right to respect for their premises was to obtain evidence of unlawful agreements between public-works contractors in the award of roadworks contracts. The interference was manifestly in the interests of both "the economic well-being of the country" and "the prevention of crime".

It remains to be determined whether the interference appears proportionate and may be regarded as necessary for achieving those aims.

D. "Necessary in a democratic society"

45. The Court notes that the Government submitted that, in accordance with the 1945 ordinance, the officials had exercised only a general right of inspection, supplemented by a power of seizure, and that no "house searches" or "general searches" had been carried out. Although the exercise of the inspectors' powers had not been subject to prior authorisation by a judge, it had been reviewed ex post facto by the courts. The Government considered that the interference did not appear disproportionate, and they relied on the State's margin of appreciation, which could be more far-reaching where business premises or professional activities were concerned.

The applicant companies considered that a house search had been carried out on their premises and pointed out that sections 15 and 16(2) of the 1945 ordinance empowered officials to make such searches and seizures without any prior judicial authorisation or any supervision in the course of such operations. The safeguards laid down in the 1986 ordinance in relation to searches and seizures had not existed in the legislation applicable at the material time. The applicant companies accordingly submitted that the interference had not been proportionate to the aims pursued.

46. The Court notes that the inspections ordered by the authorities were carried out simultaneously at the applicant companies' head offices and branches included in a "list of companies to be inspected" (see paragraph 9 above). The inspectors entered the premises of the applicant companies' head or branch offices, without judicial authorisation, in order to obtain and seize numerous documents containing evidence of unlawful agreements. It therefore appears to the Court that the operations in issue, on account of the manner in which they were carried out, constituted intrusions into the applicant companies' "homes" (see paragraph 11 above). The Court considers that although the Ministry of Economic Affairs, to which the authority responsible for ordering investigations was attached at the material time, made no distinction between the power of inspection and the power of search or entry, as the applicant companies pointed out (see paragraph 18 above), it is not necessary to determine this issue, as at all events "the interference complained of is incompatible with Article 8 in other respects" (see, mutatis mutandis, Funke, Crémieux and Miailhe (no. 1), cited above, p. 23, § 51, p. 61, § 34, and p. 88, § 32, respectively).

47. Admittedly, the Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the need for interference, but it goes hand in hand with European supervision. The exceptions provided for in paragraph 2 of Article 8 are to be interpreted narrowly (see Klass and Others v. Germany, judgment of 6 September 1978, Series A no. 28, p. 21, § 42), and the need for them in a given case must be convincingly

established (see Funke, Crémieux and Miailhe (no. 1), cited above, p. 24, § 55, p. 62, § 38, and p. 89, § 36, respectively).

48. The Court considers that although the scale of the operations that were conducted – as the Government pointed out – in order to prevent the disappearance or concealment of evidence of anti-competitive practices justified the impugned interference with the applicant companies' right to respect for their premises, the relevant legislation and practice should nevertheless have afforded adequate and effective safeguards against abuse (ibid., mutatis mutandis, pp. 24-25, § 56, p. 62, § 39, and pp. 89-90, § 37, respectively).

49. The Court observes, however, that that was not so in the instant case. At the material time – and the Court does not have to express an opinion on the legislative reforms of 1986, whereby inspectors' investigative powers became subject to prior authorisation by a judge – the relevant authorities had very wide powers which, pursuant to the 1945 ordinance, gave them exclusive competence to determine the expediency, number, length and scale of inspections. Moreover, the inspections in issue took place without any prior warrant being issued by a judge and without a senior police officer being present (ibid., mutatis mutandis, p. 25, § 57, p. 63, § 40, and p. 90, § 38, respectively). That being so, even supposing that the entitlement to interfere may be more far-reaching where the business premises of a juristic person are concerned (see, mutatis mutandis, Niemietz, cited above, p. 34, § 31), the Court considers, having regard to the manner of proceeding outlined above, that the impugned operations in the competition field cannot be regarded as strictly proportionate to the legitimate aims pursued (see Funke, Crémieux and Miailhe (no. 1), cited above, p. 25, § 57, p. 63, § 40, and p. 90, § 38, respectively).

50. In conclusion, there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. Article 41 of the Convention provides:

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

A. Damage

52. The applicant companies pointed out that the Government had taken nearly three years, following the Constitutional Council's decision of 29 December 1983, to repeal the 1945 ordinance and that the administrative authorities had in the meantime continued to implement regulations which they must have known to be contrary to the Constitution and to the principles enshrined in Article 8 of the Convention. It had been during that very period that the inspections in issue had been carried out. The applicant companies further stated that no advice had been issued to the inspectors to exercise a minimum of caution. Having regard to the proceedings after the case had been remitted to the Paris Court of Appeal, the applicant companies argued that that court had not drawn the necessary inferences from the observations submitted by the minister in reply to their pleadings alleging a violation of Article 8 of the Convention. In their submission, the minister's reasoning should logically have led the court to find, in the light of Funke, Crémieux and Miailhe (no. 1), that there had been a violation of Article 8 and therefore to set aside the investigation proceedings. The

Paris Court of Appeal's finding that only the right of inspection had been exercised in the instant case had therefore been made proprio motu and was a statement of principle which did not follow from any of the material before it. The applicant companies considered that the judicial authorities had "salvaged" the proceedings in disregard of the Court's case-law. In practical terms, the actions complained of had resulted in the following fines for the applicant companies: 5,000,000 French francs (FRF) for Colas Est, FRF 3,000,000 for Colas Sud-Ouest and FRF 6,000,000 for Sacer.

The applicant companies submitted that the award of just satisfaction should compensate for the unfairness of having had to pay fines that would not have been payable if the documents seized in breach of Article 8 had not been made available to the courts dealing with the case and used by them.

They consequently asked the Court to award them reimbursement of the fines they had paid in compensation for the damage sustained.

53. The Government considered that the applicant companies' claim for reimbursement of the fines they had been ordered to pay – amounting to FRF 14,000,000 – was wholly disproportionate. In their submission, the fines had been intended to punish proven anti-competitive practices and there was no evidence to suggest that if the inspections carried out at the applicant companies' offices had taken place within a different legal framework, the outcome of the proceedings would not have been exactly the same and a penalty would not have been imposed. They therefore argued that the applicant companies' claims under this head must be dismissed as no causal link had been established between the alleged violation, the circumstances in which the inspection of the companies' offices had been carried out and the damage complained of. Accordingly, they submitted that the finding of a violation would be sufficient to make good any damage sustained by the applicant companies. They pointed out that in Crémieux, which had been relied on by the applicant companies and had concerned a similar complaint, the Court had held that the finding of a violation constituted in itself sufficient just satisfaction.

54. The Court notes that the applicant companies' claim in respect of the alleged damage corresponds to the amount of the fines they were ordered to pay as a result of the domestic courts' judgments. Admittedly, the Court cannot speculate as to what the outcome of the inspectors' operations would have been if the procedure had complied with Article 8 of the Convention. It would point out, however, that it has found a violation of Article 8 on the ground that the investigation proceedings did not satisfy the requirements of that provision.

55. It therefore concludes that the applicant companies certainly sustained non-pecuniary damage and, accordingly, making its assessment on an equitable basis as required by Article 41, awards each of the applicant companies 5,000 euros (EUR) under that head.

B. Costs and expenses

56. The applicant companies claimed the legal costs incurred during the domestic proceedings as a whole, submitting invoices in support of their claim.

The Court reiterates that if it finds that there has been a violation of the Convention, it may award the applicant the costs and expenses incurred before the national courts for the prevention or redress of the violation (see Zimmermann and Steiner v. Switzerland, judgment

of 13 July 1983, Series A no. 66, p. 14, § 36, and Hertel v. Switzerland, judgment of 25 August 1998, Reports of Judgments and Decisions 1998-VI, p. 2334, § 63).

In the instant case the Court notes that the point at which the applicant companies first relied on their right to respect for their home – the right which it has found to have been violated – was when the case was remitted by the Court of Cassation to the Paris Court of Appeal. It further notes that they supported their claims by submitting invoices for the costs incurred from that time onwards and that the amounts concerned are broken down between the applicant companies as follows: FRF 91,700 for Colas Est, FRF 184,100 for Colas Sud-Ouest, and FRF 31,700 for Sacer. However, the Court also considers that not all of those costs were "necessarily" incurred in order to remedy the violation it has found and that the claim cannot be considered "reasonable" as to quantum. Accordingly, the Court, making its assessment on an equitable basis, awards the applicant companies the following amounts: EUR 3,500 to Colas Est, EUR 7,000 to Colas Sud-Ouest, and EUR 1,200 to Sacer, together with any value-added tax (VAT) that may be chargeable.

As regards the costs incurred before the Convention institutions, the Court awards each of the applicant companies EUR 3,200, together with any VAT that may be chargeable.

C. Default interest

57. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 4.26% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 8 of the Convention;
2. Holds
    (a) that the respondent State is to pay the applicant companies, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
        (i) for non-pecuniary damage, EUR 5,000 (five thousand euros) to each company;
        (ii) for costs and expenses, EUR 6,700 (six thousand seven hundred euros) to the Colas Est company, EUR 10,200 (ten thousand two hundred euros) to the Colas Sud-Ouest company and EUR 4,400 (four thousand four hundred euros) to the Sacer company, together with any value-added tax that may be chargeable;
    (b) that simple interest at an annual rate of 4.26% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

3. Dismisses the remainder of the applicant companies' claims for just satisfaction.

2.2 Case of Camenzind v. Switzerland

Application no. 21353/93
JUDGMENT
STRASBOURG
16 December 1997

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 28 October 1996 and by the Government of the Swiss Confederation ("the Government") on 14 January 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 21353/93) against Switzerland lodged with the Commission under Article 25 by a Swiss national, Mr Bruno Camenzind, on 2 October 1992.

The Commission's request and the Government's application referred to Articles 44 and 48 and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 8 and 13 of the Convention.

2. In accordance with Rule 31 § 1 of Rules of Court B, the applicant designated the lawyer who would represent him.

3. The Chamber to be constituted included ex officio Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 29 October 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr J. De Meyer, Mr A.N. Loizou, Mr A.B. Baka, Mr G. Mifsud Bonnici, Mr J. Makarczyk, Mr E. Levits and Mr P. van Dijk (Article 43 in fine of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 27 March 1997 and the Government's memorial on 1 April.

5. On 16 May 1997 Mr Bernhardt granted the applicant legal aid (Rule 4 of the Addendum to Rules of Court A, mutatis mutandis).

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 June 1997. The Court had held a preparatory meeting beforehand.

THE FACTS
I. CIRCUMSTANCES OF THE CASE

7. On 5 December 1991 the radio communications surveillance unit of the Head Office of the Swiss Post and Telecommunications Authority (PTT) located on a frequency reserved for civil and military aircraft a private telephone conversation being held on a telephone of an unauthorised type. The surveillance unit recorded the conversation held on the line allocated to Mr Camenzind – a lawyer living in Fribourg – and informed the appropriate PTT authorities.

8. The applicant was suspected of contravening section 42 of the Federal Act of 1922 "regulating telegraph and telephone communications". On 11 December 1991 the Berne cantonal telecommunications office (Fernmeldekreisdirektion) of the PTT began an investigation concerning the applicant pursuant to the Federal Administrative Criminal Law Act 1974.

9. On 13 December 1991 the area director of the PTT in Berne issued a warrant to search the applicant's home under sections 48 et seq. of the Federal Administrative Criminal Law Act. It was specified in the warrant that the purpose of the search was to find and seize the unauthorised cordless telephone.

10. At 9.50 a.m. on 21 January 1992 two PTT officials went to the applicant's home. He admitted having tested a cordless telephone in the past but said that it was no longer in his possession. After being shown the search warrant, he allowed the PTT officials into the hall of the flat, in which he in fact occupied only one room, the other five being let. Having been told of the legal aspects of the search, he consulted the file on his case and telephoned a lawyer and a senior official at the PTT office in Berne.

11. The search was carried out by a single PTT official, as requested by Mr Camenzind, and in his presence. The official searched every room of the two-storey building, including the cellar. He did no more than check whether the telephones and television sets were PTT-approved. He did not touch anything, open any drawers or examine any documents. No equipment of the type sought was found. At 11.55 a.m. a record was drawn up and signed by both the applicant and the investigating official. The record indicated among other things that a complaint could be made about the search under sections 26 to 28 of the Federal Administrative Criminal Law Act.

A. Application to the Indictment Division of the Federal Court for a declaration that the search was a nullity

12. On 24 January 1992 Mr Camenzind applied to the Indictment Division of the Federal Court under section 26 of the Federal Administrative Criminal Law Act for a declaration that the search was a nullity. The Head Office of the PTT argued that the application was inadmissible.

13. On 27 March 1992 the Federal Court delivered a judgment dismissing the application in the following terms (translation from German):

> 1. (a) The Indictment Division of the Federal Court has jurisdiction to hear complaints about coercive measures (sections 45 et seq. of the [Federal Administrative Criminal

Law Act]) and related administrative acts (section 26 (1) of [that Act]). Under section 28 (1) of the Act a complaint may be lodged by anyone who is affected by the impugned investigative measure and has an interest worthy of protection in having it quashed or varied.

(b) The applicant did not dispute that he had in his possession a telephone that had not been approved in Switzerland. He even expressly said, during the course of the search, that he had used such a telephone; it had, however, proved to be unusable and had consequently been destroyed ... It was therefore not possible for any seizure to be effected as the telephone could not be found. The complaint is not, therefore, directed against a seizure (none was effected) but against the search and the interception of telephone conversations ...

(c) In so far as the complaint concerns the search as such ('unlawful search [unlawfully entering a person's home]', 'forced search', 'threat of the use of force'), and the interception and recording of telephone conversations, it is unnecessary to consider it, since the applicant has no present interest in invoking the protection of the courts (aktuelles Rechtsschutzbedürfnis) as the measures have ceased and he is no longer affected by them (BGE [Bundesgerichtsentscheidungen – Judgments of the Federal Court] 103 IV 117 E. 1a).

(d) That is also true in principle of the locating and recording of the telephone calls concerned here, which are closely linked to the search. Exceptionally, however, the Federal Court does not in practice require a present interest where the impugned infringement of the law is likely to recur at any time, where an application to the courts could not be heard in time in the particular case and where the issues raised could arise again in similar or comparable circumstances at any time and are, because of the importance of the principle concerned, of sufficient public interest (BGE 116 Ia 150 E. 2a; 116 II 729 E. 6; Ib 59 E. 2b).

These conditions are satisfied in the present case because the carrying out of a search presupposes that in the first place the person using a telephone of an unauthorised type has been located by appropriate means. That investigation will, however, already have ended by the time the search and any seizure are made. For that reason, the complaint must be upheld in so far as it is directed at the interception and recording of conversations held on the applicant's unauthorised telephone.

...
For these reasons the Indictment Division holds:
(1) In so far as it has been declared admissible, the complaint is dismissed;
..."

B. The order of the Federal Communications Office

14. In decisions of 14 August and 26 September 1995 the Federal Communications Office imposed a fine of 150 Swiss francs on the applicant for an offence under section 42 of the Act "regulating telegraph and telephone communications" and ordered him to pay the costs and expenses.

15. On 11 October 1995 Mr Camenzind brought proceedings for review of that decision in the Saane District Court (Bezirksgericht), which on 18 December 1995 were dismissed on the ground that prosecution of the offence in question was time-barred (absolute Verjährung).

II. RELEVANT DOMESTIC LAW

A. The Federal Act of 1922 "regulating telegraph and telephone communications"

16. At the material time, section 42 of the Federal Act of 1922 "regulating telegraph and telephone communications" provided:

> "(1) Anyone setting up, operating or using, without a licence or permit or in a manner contrary to the terms on which a licence or permit was granted, transmitters or receivers or any equipment for which a licence or permit is required and which is used for electric or radio transmission of signals, images or sounds,
> ...
> shall be liable to a term of imprisonment not exceeding three months or a fine not exceeding 10,000 Swiss francs unless, under Article 151 of the Swiss Criminal Code, he is liable to a heavier sentence.
> (2) The fine shall not exceed 5,000 Swiss francs where the offence has been committed through negligence."

B. THE FEDERAL ADMINISTRATIVE CRIMINAL LAW ACT

17. Administrative criminal law procedures are governed by the Federal Administrative Criminal Law Act of 22 March 1974, as amended ("the DPA").

1. The investigation

18. The federal authorities are responsible for prosecuting and trying certain offences against federal law. They are also vested with the power to conduct the investigations into such offences. The necessary interviews (of which records are made), on-the-spot inspections and coercive measures are entrusted to officials specially trained for the purpose (section 20 (1) of the DPA).

19. Officials called upon to conduct an investigation or to take or prepare a decision are required to stand down if they have a personal interest in the case, if they are related to the "suspect" by blood or marriage, by direct or collateral descent up to the third degree, or are linked with him through marriage, engagement or adoption and if there are circumstances such as to make them appear to be partial in the case (section 29).

20. A "suspect" is entitled, whatever the circumstances, to representation (section 32). In principle, both the "suspect" and his representative may be given leave by the investigating official to participate in the taking of evidence (section 35).

21. The investigating official may interview the "suspect" (section 39), other people "for information purposes" (section 40) and – in the presence of the "suspect" and his representative – witnesses (section 41). He may also order an expert opinion – in consultation with the "suspect" (section 43) – and an on-the-spot inspection, which the "suspect" and his representative are entitled to attend (section 44). The investigating official is in addition empowered to effect "with due regard for the person concerned and his property" seizures,

searches and provisional arrests (sections 45 et seq.); these measures, known as "coercive" measures, may not be used in respect of a "breach of administrative regulations" (such a breach is a contravention which is so described in special administrative law or one for which an administrative fine can be imposed; section 3).

22. Searches in particular are governed by the following provisions of the Federal Administrative Criminal Law Act:

Section 48

(1) Dwellings and other premises, including any adjoining enclosed area, may be searched only if it is likely that a suspect is in hiding there or if objects or valuables liable to seizure or evidence of the commission of the offence are to be found there.

(2) A suspect may be searched if necessary. The search must be carried out by a person of the same sex or by a doctor.

(3) Searches shall be carried out under a written warrant issued by the director or head of the authority concerned or, if the investigation is within his competence, by the area director of customs or of the PTT.

(4) If there is immediate danger and a search warrant cannot be obtained in time, the investigating official may himself order a search or carry it out. Reasons for the measure must be given in the file."

Section 49

(1) At the beginning of a search the investigating official shall provide evidence of identity.

(2) The occupier of the premises must be informed of the purpose of the search and be asked to attend, if present. If he is absent, a relative or a member of the household shall be asked to attend. A public officer designated by the competent cantonal authority – or, if the investigating official is acting on his own initiative, a member of the municipal authority or an official of the canton, district or municipality – shall also be required to attend the search in order to ensure that it does not deviate from its purpose. A search may be conducted without public officers, members of the household or relatives being present where it would be dangerous to defer the search or where the occupier has consented.

(3) As a general rule, searches shall not be conducted on Sundays or public holidays or at night except in important cases or where there is imminent danger.

(4) A record of the search shall be drawn up immediately in the presence of the persons who attended; if they so request, they shall be provided with a copy of the search warrant and of the record.

Section 50

"(1) Searches for documents must be carried out with the greatest regard for private and confidential information; in particular, documents shall not be examined unless it is apparent that their content is important for the investigation.

(2) Searches shall be carried out so as to preserve occupational confidentiality and the confidentiality of information given to clergymen, barristers, notaries, doctors, chemists, midwives and their auxiliaries in the exercise of their ministry or profession.

(3) Before a search is carried out, the person in possession of the documents shall, whenever possible, be allowed to indicate their content. If he does not agree to the search, the documents shall be placed under seal and deposited in a safe place; the Indictment Division of the Federal Court shall decide whether the search is lawful ..."

2. Remedies

A. Judicial review of coercive measures

23. Coercive measures, including searches (sections 45 et seq. of the DPA), and related acts and omissions may form the subject of a complaint to the Indictment Division of the Federal Court (section 26).
Complaints are admissible for breaches of federal law – or of the Convention (see the Federal Court's judgment of 17 August 1989 in the case of X v. Caisse de pensions de l'Etat de Neuchâtel et tribunal administratif du Canton de Neuchâtel, Judgments of the Swiss Federal Court, vol. 115, V, p. 253) – for inaccurate or incomplete findings of fact or for inappropriateness. A complaint may be lodged by anyone affected by the impugned investigative measure, the omission complained of or the decision on the complaint and who has an interest worthy of protection in having the measure, omission or decision quashed or varied (section 28). The Indictment Division of the Federal Court has said (X. gegen Generaldirektion PTT, 23 June 1977, Judgments of the Swiss Federal Court, vol. 103, IV, p. 115; translation from German):
"Only persons who are (still) affected, at least in part, by the impugned decision and as a result have an interest in its being varied have *locus standi* to lodge a complaint."

B. Obtaining a court judgment

24. The authorities have jurisdiction to try offences against administrative criminal law. However, where the department to which they are subordinate considers that a custodial sentence or measure must be contemplated, jurisdiction lies with the courts. A person affected by a decision of the authorities in criminal proceedings may, within ten days of being notified of the decision, ask to be tried by a court. If he does not do so, the decision is "treated as a judgment that has become final" (sections 21 and 72).

C. Compensation in the event of a finding of no case to answer

25. A suspect who is found to have no case to answer may seek compensation from the authorities for detention pending trial and other losses sustained. Compensation may be reduced or refused if it was through the suspect's own fault that the investigation was started or if, without reason, the suspect has hindered or delayed the proceedings. The authorities'

decision on that issue may be challenged by lodging a complaint with the Indictment Division of the Federal Court (sections 99 and 100).

PROCEEDINGS BEFORE THE COMMISSION

26. In his application (no. 21353/93) to the Commission of 2 October 1992, Mr Camenzind alleged that the search carried out at his home had infringed Article 8 of the Convention and that he had had neither a fair hearing within the meaning of Article 6 nor an effective remedy before a national authority as required by Article 13.
27. The Commission declared the application admissible on 27 February and 27 November 1995 with respect to Articles 8 and 13 only. In its report of 3 September 1996 (Article 31), it expressed the unanimous opinion that there had been no violation of Article 8, but that there had been a violation of Article 13. The full text of the Commission's opinion is reproduced as an annex to this judgment[4].

FINAL SUBMISSIONS TO THE COURT

28. In their memorial the Government asked the Court to
"conclude, like the Commission, that there has been no violation of Article 8 of the Convention in the instant case and to consider whether, as regards the search at his home, the applicant had an effective remedy before a national authority within the meaning of Article 13 of the Convention".

29. The applicant requested the Court to
"conclude, like the Commission, that there has been a violation of Article 13 of the Convention in the instant case [and to] find a violation of Article 8 § 2 of the Convention".
as to the law

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

30. Mr Camenzind submitted that the search carried out in the instant case had infringed Article 8 of the Convention, which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

31. The Government and the Commission disagreed with that submission.

A. Whether there was an interference

32. The applicant considered that the search had interfered with his right to respect for his home, not only as regards the room he occupied in the building but also as regards the other rooms, which he had let to another person. He maintained that he had *locus standi* to act on behalf of his tenant – whom he had associated with his application to the Commission – in that, as landlord, he was contractually bound to protect his tenant "from any wrongful interference by others".

33. The Government did not deny that there had been an interference with Mr Camenzind's right to respect for his home. They nonetheless argued that Mr Camenzind – the sole applicant in the present case – could only claim to be a victim of a violation of Article 8 with respect to the search of that part of the flat he actually occupied.

34. The Commission did not express an opinion on the latter issue; it concluded that there had been an interference with the right concerned.
35. The Court finds it unnecessary to embark on a discussion of this issue, the outcome of which would be of no relevance in the present case. It suffices for the Court to find that in any event (and this was common ground) the search of the room occupied by the applicant amounted to an interference, within the meaning of Article 8, with his right to respect for his home.
It accordingly has to be determined whether the interference was justified under paragraph 2 of Article 8, in other words whether it was "in accordance with the law", pursued one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve the aim or aims in question.

B. Whether the interference was justified

1. "In accordance with the law"

36. The applicant denied that the search had been "in accordance with the law". He argued that the act of which he had been accused was not an "offence" but a "breach of administrative regulations" within the meaning of section 3 of the Federal Administrative Criminal Law Act of 22 March 1974, as amended ("the DPA"). Section 45 (2) of the DPA therefore operated to preclude the use of any coercive measures against him. Furthermore, that Act provided, contrary to the general principles of administrative law, that coercive measures were to be ordered by public servants and not by a judicial authority. Lastly, section 48 (1) of the DPA provided that searches could only be carried out on premises if it was "likely" that the object sought was to be found there. However, as the applicant had informed the officials present when the search was carried out that the telephone was no longer in his possession, that statutory requirement had not been satisfied.

37. The Court reiterates that the expression "in accordance with the law", within the meaning of Article 8 § 2 of the Convention, requires that the impugned measure should have some basis in domestic law and that the law in question should be accessible to the person concerned – who must moreover be able to foresee its consequences for him – and compatible with the rule of law (see the Kruslin v. France judgment of 24 April 1990, Series A no. 176-A, p. 20, § 27). In the instant case it notes, firstly, that under section 42 of the Federal Act of 1922 "regulating telegraph and telephone communications" it was an offence, inter alia, to "[set up, operate or use], without a licence or permit ... transmitters or receivers or any equipment for which a licence or permit is required and which is used for electric or radio transmission of signals, images or sounds" (see paragraph 16 above). The Court further notes that to enable offences under administrative criminal law to be detected, section 48 of the DPA provides that searches may be carried out in dwellings and other premises "if ... evidence of the commission of the offence [is] to be found there" and that the Act contains safeguards against arbitrary interference by the authorities with the right to respect for the home (see paragraphs 17–25 above and paragraph 46 below). Since the applicant did not supply any evidence in support of his allegations, the Court, like the

Government and the Commission, accepts that the measure complained of was "in accordance with the law".

2. Legitimate aim

38. Mr Camenzind maintained that the aim of the search – to find evidence of the offence – had become unlawful once he had informed the officials responsible that the telephone in question was no longer in his possession.
39. Neither the Government nor the Commission accepted that proposition.

40. The Court notes that the applicant was suspected of having contravened section 42 of the Federal Act of 1922 "regulating telegraph and telephone communications" by using a cordless telephone of an unauthorised type. There is, therefore, no doubt that the search of the building in which the applicant lived, with a view to finding and seizing the telephone, pursued an aim that was consistent with the Convention, namely the "prevention of disorder or crime".

3. "Necessary in a democratic society"

41. Mr Camenzind argued that it had not been "necessary" for the purpose of obtaining physical proof of the offence, and hence of achieving the aim pursued, to search his property. Such proof had already existed as the conversation had been recorded by the radio communications surveillance unit of the Head Office of the Swiss Post and Telecommunications Authority (PTT) and he had admitted using the telephone. Other factors showed the measure to have been disproportionate: he had not used the telephone again during the six-week period the authorities had allowed to elapse between the commission of the offence and the search, the act he was accused of was "trifling" and the authorities could have taken measures that were less coercive. In short, the interference had not met a "pressing social need" within the meaning of the case-law of the Convention institutions.

42. The Government submitted that the Contracting States were permitted by the Court's case-law to have recourse to certain coercive measures in order to obtain evidence of an offence, in so far as their relevant legislation and practice afforded adequate and effective safeguards against abuse and the resulting interference was proportionate to the legitimate aim pursued. The fact that the search had been carried out without a judicial warrant therefore did not necessarily mean that there had been a violation of the Convention. On the contrary, the statutory basis on which it had been ordered, the manner in which it had been executed and its very limited scope showed it to have been "necessary in a democratic society".

43. The Commission reached the same conclusion.

44. Under the Court's settled case-law, the notion of "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued; in determining whether an interference is "necessary in a democratic society", the Court will take into account that a margin of appreciation is left to the Contracting States (see, for example, the Olsson v. Sweden (no. 1) judgment of 24 March 1988, Series A no. 130, pp. 31–32, § 67).

45. The Contracting States may consider it necessary to resort to measures such as searches of residential premises and seizures in order to obtain physical evidence of certain offences.

The Court will assess whether the reasons adduced to justify such measures were relevant and sufficient and whether the aforementioned proportionality principle has been adhered to (see the Funke v. France, Crémieux v. France and Miailhe v. France judgments of 25 February 1993, Series A no. 256-A, pp. 24–25, §§ 55–57, Series A no. 256-B, pp. 62–63, §§ 38–40, and Series A no. 256-C, pp. 89-90, §§ 36–38, respectively; and, mutatis mutandis, the Z v. Finland judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I, p. 347, § 94). As regards the latter point, the Court must firstly ensure that the relevant legislation and practice afford individuals "adequate and effective safeguards against abuse" (ibid.); notwithstanding the margin of appreciation which the Court recognises the Contracting States have in this sphere, it must be particularly vigilant where, as in the present case, the authorities are empowered under national law to order and effect searches without a judicial warrant. If individuals are to be protected from arbitrary interference by the authorities with the rights guaranteed under Article 8, a legal framework and very strict limits on such powers are called for. Secondly, the Court must consider the particular circumstances of each case in order to determine whether, in the concrete case, the interference in question was proportionate to the aim pursued.

46. In the present case the purpose of the search was to seize an unauthorised cordless telephone that Mr Camenzind was suspected of having used contrary to section 42 of the Federal Act of 1922 "regulating telegraph and telephone communications" (see paragraphs 7–9 above). Admittedly, the authorities already had some evidence of the offence as the radio communications surveillance unit of the Head Office of the PTT had recorded the applicant's conversation and Mr Camenzind had admitted using the telephone (see paragraphs 7 and 10 above). Nevertheless, the Court accepts that the competent authorities were justified in thinking that the seizure of the corpus delicti – and, consequently, the search – were necessary to provide evidence of the relevant offence.

With regard to the safeguards provided by Swiss law, the Court notes that under the Federal Administrative Criminal Law Act of 22 March 1974, as amended (see paragraphs 17–25 above), a search may, subject to exceptions, only be effected under a written warrant issued by a limited number of designated senior public servants (section 48) and carried out by officials specially trained for the purpose (section 20); they each have an obligation to stand down if circumstances exist which could affect their impartiality (section 29). Searches can only be carried out in "dwellings and other premises ... if it is likely that a suspect is in hiding there or if objects or valuables liable to seizure or evidence of the commission of an offence are to be found there" (section 48); they cannot be conducted on Sundays, public holidays or at night "except in important cases or where there is imminent danger" (section 49). At the beginning of a search the investigating official must produce evidence of identity and inform the occupier of the premises of the purpose of the search. That person or, if he is absent, a relative or a member of the household must be asked to attend. In principle, there will also be a public officer present to ensure that "[the search] does not deviate from its purpose". A record of the search is drawn up immediately in the presence of the persons who attended; if they so request, they must be provided with a copy of the search warrant and of the record (section 49). Furthermore, searches for documents are subject to special restrictions (section 50). In addition, suspects are entitled, whatever the circumstances, to representation (section 32); anyone affected by an "investigative measure" who has "an interest worthy of protection in having the measure ... quashed or varied" may complain to the Indictment Division of the Federal Court (sections 26 and 28). Lastly, a "suspect" who is found to have no case to answer may seek compensation for the losses he has sustained (sections 99–100).

As regards the manner in which the search was conducted, the Court notes that it was at Mr Camenzind's request that it was carried out by a single official (see paragraph 11 above). It took place in the applicant's presence after he had been allowed to consult the file on his case and telephone a lawyer (see paragraph 10 above). Admittedly, it lasted almost two hours and covered the entire house, but the investigating official did no more than check the telephones and television sets; he did not search in any furniture, examine any documents or seize anything (see paragraph 11 above).

47. Having regard to the safeguards provided by Swiss legislation and especially to the limited scope of the search, the Court accepts that the interference with the applicant's right to respect for his home can be considered to have been proportionate to the aim pursued and thus "necessary in a democratic society" within the meaning of Article 8. Consequently, there has not been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION taken together with Article 8

48. Mr Camenzind also complained that he had been the victim of a violation of Article 13 of the Convention, which provides:
"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The Government's preliminary objection

49. As they had done before the Commission, the Government raised in substance an objection concerning the fact that the present complaint, which Mr Camenzind had not expressly raised in his application, had been examined by the Commission of its own motion.

50. The Court reiterates that the institutions set up under the Convention have jurisdiction to review in the light of the entirety of the Convention's requirements the circumstances complained of by an applicant. In the performance of their task, the Convention institutions are, notably, free to attribute to the facts of the case, as found to have been established on the evidence before them, a characterisation in law different from that given by the applicant or, if need be, to view the facts in a different manner (see, for example, the Foti and Others v. Italy judgment of 10 December 1982, Series A no. 56, pp. 15–16, § 44).
In the present case it is not disputed that Mr Camenzind referred in his application to the judgment of 27 March 1992 of the Indictment Division of the Federal Court and to the reasoning contained in it, and alleged a violation of Article 13. Moreover, the complaint now before the Court is identical to the one the Commission considered to be valid after hearing the parties' submissions on it. Consequently, the Court, being required to give a ruling in the light of the case as it now stands (ibid.), holds that it has jurisdiction to consider that issue.

B. Merits of the complaint

51. Mr Camenzind's submission, which the Commission accepted, was that he had not had an "effective remedy" for his complaint under Article 8 of the Convention (even though that complaint had been "arguable" for the purposes of the case-law of the Convention institutions), because the Federal Court had refused to rule on the "legality and justification on the merits" of the search. Admittedly, once the administrative criminal law proceedings

had ended, he could have used the procedure laid down by section 99 of the DPA, but that procedure was confined to considering whether the conditions for payment of compensation for the loss sustained as a result of the search had been satisfied; an action for damages or a criminal complaint against the PTT officials would have been equally inadequate.

52. The Government maintained that unless there was a finding of a violation of Article 8, the applicant did not have an "arguable" complaint under the Convention and that consequently no issue arose under Article 13. As to the merits, the Government did not deny that the Federal Court had not ruled on the lawfulness of the measure concerned. In so doing, it had followed its settled case-law whereby "only persons who are (still) affected, at least in part, by the impugned decision and as a result have an interest in its being varied have *locus standi* to lodge a complaint". In other words, the Indictment Division had held that it was unnecessary to consider Mr Camenzind's complaint relating to the search because it had already been carried out. However, that practice would only have given rise to a problem under Article 13 if the applicant had had no other means of obtaining a decision from a "national authority" on his complaint of a breach of Article 8. In fact, several possibilities were open to him; had he sought compensation under section 99 of the DPA, brought an action for damages against the officials concerned or lodged a criminal complaint against them for unlawful entry into his home, he would have caused an authority to rule on the merits and lawfulness of the search as an ancillary issue.

53. Article 13 has consistently been interpreted by the Court as requiring "an effective remedy before a national authority" in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, p. 14, § 31).
In the instant case there is no doubt that the complaint under Article 8 was "arguable", because the Court has found that the search amounted to an interference with Mr Camenzind's right to respect for his home (see paragraph 35 above). It must accordingly be determined whether the Swiss legal system afforded him an "effective" remedy, allowing the competent "national authority" both to deal with the complaint and to grant appropriate relief (see, for example, the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 39, § 122).

54. The Federal Administrative Criminal Law Act provides a special remedy in respect of coercive measures – such as searches of people's homes – taken in connection with administrative criminal law proceedings: the measures and any related acts or omissions may form the subject of a complaint to the Indictment Division of the Federal Court. The complaint may be lodged by "anyone affected by the impugned investigative measure, the omission complained of or the decision on the complaint who has an interest worthy of protection in having the measure, omission or decision quashed or varied" (sections 26 and 28 of the DPA, see paragraph 23 above).
However, it is the settled case-law of the Indictment Division of the Federal Court that the aforementioned "interest" must be a present one. In principle, only persons who are still affected, at least in part, by the impugned decision have *locus standi* to lodge a complaint (see paragraph 23 above). The Indictment Division accordingly declared inadmissible that part of Mr Camenzind's complaint concerning the search because "[the measure had] ceased and the applicant [was] no longer affected by [it]" (see paragraph 13 above).
Thus, even though the Indictment Division considered the complaint in so far as it concerned the interception and recording of the telephone conversation in question, the remedy described above cannot be termed "effective" within the meaning of Article 13.

55. That is true also of the proceedings for review by a court which the applicant brought under section 72 of the Federal Administrative Criminal Law Act (see paragraph 24 above) and which the Saane District Court dismissed on the ground that prosecution of the offence was time-barred (see paragraph 15 above).

56. As regards the other procedures relied on, the Government referred to a case concerning a detention measure, but gave no example of a case "similar" to the present one in which such procedures had been used. The Court consequently considers that the procedures have not been shown to be effective (see, for example, the Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria judgment of 19 December 1994, Series A no. 302, p. 20, § 53, and the Valsamis v. Greece judgment of 18 December 1996, Reports 1996-VI, p. 2327, § 48 in fine).

57. In short, regard being had to all the circumstances of the case, the applicant did not have "an effective remedy before a national authority" for airing his complaint under Article 8. It follows that there has been a violation of Article 13 of the Convention, taken together with Article 8.

III. Application of article 50 of the convention

58. Article 50 of the Convention provides:

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

A. Non-pecuniary damage

59. By way of reparation for the non-pecuniary damage he had sustained as a result of the violation of the Convention, the applicant claimed a "symbolic sum" of 100 Swiss francs (CHF).

60. The Delegate of the Commission did not express a view.

61. The Court considers that the present judgment constitutes in itself sufficient just satisfaction for the alleged non-pecuniary damage.

B. Costs and expenses

62. The applicant claimed CHF 13,755 for costs and expenses incurred before the Federal Court and the Strasbourg institutions.

63. The Government indicated that they were ready to pay the applicant CHF 5,000 if the Court were to find violations of Articles 8 and 13 of the Convention, and only half that sum if a violation was found in respect of only one of those provisions.

64. The Delegate of the Commission did not express a view.

65. Making its assessment on an equitable basis, the Court awards Mr Camenzind CHF 8,000, less 9,184 French francs paid in legal aid by the Council of Europe.

C. Default interest

66. According to the information available to the Court, the statutory rate of interest applicable in Switzerland at the date of adoption of the present judgment is 5% per annum.

FOR THESE REASONS, THE COURT:

1. Holds by eight votes to one that there has been no violation of Article 8 of the Convention;

2. Dismisses unanimously the Government's preliminary objection concerning the fact that the Commission examined of its own motion the complaint under Article 13 of the Convention taken together with Article 8;

3. Holds unanimously that there has been a violation of Article 13 of the Convention, taken together with Article 8;

4. Holds unanimously that the finding of a violation constitutes in itself sufficient just satisfaction in respect of the alleged non-pecuniary damage;

5. Holds unanimously:

(a) that the respondent State is to pay the applicant, within three months, 8,000 (eight thousand) Swiss francs for costs and expenses, less 9,184 (nine thousand one hundred and eighty-four) French francs to be converted into Swiss francs at the rate applicable on the date of delivery of the present judgment;

(b) that simple interest at an annual rate of 5% shall be payable from the expiry of the above-mentioned three months until settlement;

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

2.3 Case of Kolesnichenko v. Russia

(Application no. 19856/04)
JUDGMENT
STRASBOURG
9 April 2009
FINAL
09/07/2009

PROCEDURE

1. The case originated in an application (no. 19856/04) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Aleksey Petrovich Kolesnichenko ("the applicant"), on 4 May 2004.

2. The Russian Government ("the Government") were represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, a violation of the right to respect for his home.

4. On 12 September 2006 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. The Government objected to the joint examination of the admissibility and merits of the application. Having examined the Government's objection, the Court dismissed it.

THE FACTS
I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1962 and lives in Perm. At the material time he was a practising advocate and member of the Perm Regional Bar.

7. On 10 June 2003 the prosecutor of the Sverdlovskiy District of Perm opened an investigation into theft of property by a Mr S. The theft had been allegedly committed through the use of forged documents. The applicant acted as counsel for Mr S. in the criminal proceedings against him.

8. The investigator suspected that the documents allegedly forged by Mr S. and a procedural application made by the applicant in the criminal proceedings against Mr S. had been printed on the same device. He commissioned an expert to study those documents. On 21 August 2003 the expert reported that the allegedly forged document and the applicant's application could have been printed "on the same printing device or on different devices having the same or higher resolution..." The expert specified that it was impossible to make any conclusive findings because "the documents did not contain any singularities that could permit identification of the printing device".

9. On 9 February 2004 the investigator asked the Sverdlovskiy District Court of Perm to issue search warrants for the applicant's home in Gorky Street and his late parents' flat in Kuybyshev Street.

10. On 12 February 2004 the Sverdlovskiy District Court of Perm granted the investigator's request and issued two warrants authorising searches at the applicant's and his late parents' flats. The entire reasoning of the first warrant concerning the Gorky Street reads as follows:
"The investigator... has submitted an application for a search warrant at the address... which is the place of residence of Mr Kolesnichenko, an advocate with the Perm Regional Bar Association. The investigator argues that certain documents allegedly prepared by Mr G.S. had not in fact been drafted by him but rather fabricated by an electrophotographic process with the probable use of the same device as that used for preparing an application by the advocate Mr Kolesnichenko. This fact is confirmed by an expert report; accordingly, the investigation believes that certain objects of relevance for the investigative acts and the criminal case may be located at that address.

Having studied the materials produced at the hearing, the court considers that the application should be granted because it is reasoned. Since no criminal proceedings have been instituted against the advocate Mr Kolesnichenko and no charges have been levelled against him, the investigator's application for a search warrant was lodged in accordance with law.
Sufficient information was submitted to the court in support of the application and, in these circumstances, there are grounds for authorising a search in Mr Kolesnichenko's residence located at [the address on Gorky Street]."

The reasoning of the second warrant concerning Kuybyshev Street was identical, save for the mention that the address in Kuybyshev Street was the registered place of residence of the applicant's late parents and also the registered address of the applicant's office.

11. At 9.40 p.m. on the same day the investigator, accompanied by police officers and two attesting witnesses (ponyatye), came to the applicant's home in Gorky Street. He asked the applicant to hand over the copying device, which the applicant did.

12. The investigator and officers then searched the applicant's flat and seized two computers containing the applicant's private and professional data, a printer, his personal notebook, certain documents relating to the criminal case against Mr S. and to other cases, three business card holders, and other items.

13. The search at the applicant's residence ended at 4 a.m. on 13 February 2004. The investigator and the police then proceeded to search the flat in Kuybyshev Street.

14. According to the search and seizure report of 12 February 2004, the purpose of the search was to find and seize "copying devices (printers, copiers) [and] documents relevant to the criminal case".

15. On 16 February 2004 the applicant lodged a complaint with the Sverdlovskiy District Court. He submitted that the investigator had unlawfully seized belongings of his which were not referred to in the search warrants of 12 February 2004. As a consequence he had been unable to carry on his professional activities and his clients' right to defence had also been impaired.

16. On 3 March 2004 the Sverdlovskiy District Court of Perm dismissed the applicant's complaint, finding as follows:

"The judicial decision of 12 February 2004 authorised a search of the flat in Gorky Street. It follows from the [investigator's] application for a search warrant and the judicial decision that the search was necessary because there were sufficient reasons to believe that certain objects relevant to the criminal case could be found at the advocate Mr Kolesnichenko's home. The judicial decision did not contain any concrete list of objects or documents. Thus, the claimant's argument that the investigator seized objects and documents which had not been listed in the judicial decision, is unsubstantiated."

17. It appears that on 26 March, 1, 14 and 27 April 2004 certain seized objects and documents were returned to the applicant.

18. On 27 April 2004 the Perm Regional Court upheld the District Court's decision on appeal. It noted that on 12 February 2004 the District Court authorised search and seizure of unspecified objects and documents and for that reason the investigator had the discretion to determine which objects and documents were relevant to the criminal case. The objects and documents which had been found to be irrelevant had been returned to the applicant.

II. RELEVANT DOMESTIC LAW

19. Article 25 of the Constitution establishes that the home is inviolable. No one may penetrate into the home against the wishes of those who live there unless otherwise provided for in a federal law or a judicial decision.

20. The Code of Criminal Procedure of the Russian Federation establishes that a search may be carried out if there are sufficient grounds to believe that instruments of a crime, objects, documents or valuables having relevance to a criminal case could be found in a specific place or on a specific person (Article 182 § 1). A search of a place of residence requires a judicial warrant issued on the basis of an application by the investigator (Article 165).

21. Investigative actions, such as a search, may not be carried out at night except in emergency situations (Article 164 § 3). Night is defined as the period between 10 p.m. and 6 a.m. local time (Article 5 (21)).

22. Prior to starting the search, the investigator offers the residents the opportunity to surrender voluntarily objects, documents or valuables which are of relevance to the criminal case. If such objects have been handed over voluntarily the investigator may decide not to proceed with the search (Article 182 § 5).

23. Upon permission of the investigator, counsel and/or advocate for the person in whose premises the search is being carried out may be present during the search (Article 182 § 11).

24. Residential and professional premises of an advocate may only be searched on the basis of a judicial decision. The information, objects and documents obtained during the search may be used in evidence only if they are not covered by the attorney-client privilege in a given criminal case (section 8 § 3 of the Advocates Act, Law no. 63-FZ of 31 May 2002).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

25. The applicant complained that the search at his home and office had been carried out in breach of his right to respect for his home guaranteed under Article 8 of the Convention, which reads as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

A. Admissibility

26. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

27. The applicant emphasised that the domestic authorities had been aware of his special status as an advocate because it had been mentioned in the search warrant. That awareness notwithstanding, they had proceeded to search his residence and his office and to seize his files, which had interfered with his professional activities. The applicant pointed out that the search had begun at 9.40 p.m. and obviously could not be completed by 10 p.m., whereas the domestic law prohibited night-time searches, the night time being defined as after 10 p.m.

28. The Government submitted that the search had been conducted in accordance with law since the domestic law did not contain a prohibition on searching the advocate's premises, on condition that there existed a judicial warrant, since the procedure for conducting the search had been complied with, and since the search had begun before the onset of night time. The investigation had had valid grounds to suspect the applicant of having been involved in fraud; that suspicion had been corroborated by an expert report.

2. The Court's assessment

29. The Court observes that the search was carried out at two addresses: firstly in the flat on Gorky Street where the applicant had his registered residence and subsequently in the flat on Kuybyshev Street where the applicant had a registered office. The Court has consistently interpreted the notion of "home" in Article 8 § 1 as covering both private individuals' homes and professional persons' offices (see Buck v. Germany, no. 41604/98, § 31, ECHR 2005-IV, and Niemietz v. Germany, judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, §§ 29-31). It follows that in the present case both searches amounted to an interference with the applicant's right to respect for his home.

30. The Court has next to determine whether the interference was justified under paragraph 2 of Article 8, that is, whether it was "in accordance with the law", pursued one or more of the

legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve that aim or those aims. Given that the searches were authorised by the judicial decisions as required by Article 165 of the Code of Criminal Procedure, and purported to uncover evidence in a fraud case, the Court is prepared to accept that they were lawful in domestic terms and pursued the legitimate aim of the prevention of crime. What remains to be examined is whether they were "necessary in a democratic society".

31. The Court has repeatedly held that persecution and harassment of members of the legal profession strikes at the very heart of the Convention system. Therefore the searching of lawyers' premises should be subject to especially strict scrutiny (see Elci and Others v. Turkey, nos. 23145/93 and 25091/94, § 669, 13 November 2003). To determine whether these measures were "necessary in a democratic society", the Court has to explore the availability of effective safeguards against abuse or arbitrariness under domestic law and to check how those safeguards operated in the specific case under examination. Elements taken into consideration in this regard are the severity of the offence in connection with which the search and seizure have been effected, whether they were carried out pursuant to a warrant issued by a judge or a judicial officer – or subjected to after-the-fact judicial scrutiny –, whether the warrant was based on reasonable suspicion and whether its scope was reasonably limited. The Court must also review the manner in which the search was executed, and – where a lawyer's office is concerned – whether it was carried out in the presence of an independent observer to ensure that material subject to legal professional privilege is not removed. The Court must finally take into account the extent of the possible repercussions on the work and the reputation of the persons affected by the search (see Camenzind v. Switzerland, 16 December 1997, § 45, Reports of Judgments and Decisions 1997-VIII; Buck, cited above, § 45; Smirnov v. Russia, no. 71362/01, § 44, ECHR 2007-...; and Wieser and Bicos Beteiligungen GmbH v. Austria, no. 74336/01, § 57, ECHR 2007-...).

32. Turning to the present case, the Court observes that the search warrants of 12 February 2004 were issued by the District Court on an application by the investigator. It follows from the text of the search warrants that the only piece of evidence submitted by the investigator in support of his application was the report by an expert who had been commissioned to compare the documents prepared by Mr S. and by the applicant with a view to determining whether they could have been prepared on the same printing device. The report indicated that no reliable finding could be drawn because the documents lacked any distinctive marks which could have permitted identification of the printing device (see paragraph 8 above). In his application, the investigator did not explain how the seizure of the printing device from the applicant's home or office could have furthered the investigation in the absence of any distinctive marks on the documents capable of ensuring identification of the specific device. The investigator did not refer to any evidence which could have corroborated his conjecture that the applicant was involved in the printing of the documents allegedly forged by Mr S. The District Court, for its part, merely acknowledged the existence of the report without analysing its contents and findings. Whilst acknowledging that the applicant was an advocate and that he had not been charged or accused of any criminal offence or unlawful activities, the District Court did not examine whether the material gathered by the investigation was capable of founding a reasonable suspicion that he was implicated in the fraud allegedly organised by Mr S. The Court finds therefore that the search warrants were not founded on "relevant and sufficient" reasons.

33. The Court further notes that the search warrants did not specify what objects or documents were expected to be found at the applicant's home or office or how they would be

relevant to the investigation. They allowed the investigative authorities to carry out searches in the applicant's home and office in general and broad terms (compare Niemietz, cited above, § 37; Smirnov, cited above, § 47; and Ernst and Others v. Belgium, no. 33400/96, § 116, 15 July 2003). The subsequent judicial review confirmed that the search warrants had not referred to "any concrete list of objects or documents" and that the investigator therefore had unrestricted discretion in determining which documents were "of interest" for the criminal investigation (see paragraphs 16 and 18 above). Moreover, in issuing the warrant the judge did not touch upon the issue of whether privileged material was to be safeguarded, although he was aware – as was mentioned in the text of the search warrants – that the applicant was a bar member and could have possessed documents given to him by his clients. According to the Court's case-law, search warrants have to be drafted, as far as practicable, in a manner calculated to keep their impact within reasonable bounds (see Iliya Stefanov v. Bulgaria, no. 65755/01, § 41, 22 May 2008, and Van Rossem v. Belgium, no. 41872/98, § 45, 9 December 2004). This requirement was manifestly disregarded in the present case.

34. The Court finally observes that the warrant's excessive breadth was reflected in the way in which it was executed. After the applicant had voluntarily handed over the copying device at the request of the investigator, the latter nevertheless proceeded with a thorough search of the premises at both Gorky and Kuybyshev Streets, and seized the applicant's computers with peripherals, personal and professional records, business cards and other objects. The Court notes that during the search there was no safeguard in place against interference with professional secrecy, such as, for example, a prohibition on removing documents covered by lawyer-client privilege or supervision of the search by an independent observer capable of identifying, independently of the investigation team, which documents were covered by legal professional privilege (see Sallinen and Others v. Finland, no. 50882/99, § 89, 27 September 2005, and Tamosius v. the United Kingdom (dec.), no. 62002/00, ECHR 2002-VIII). The presence of two attesting witnesses obviously could not be considered a sufficient safeguard, given that they were laymen who had no legal qualification and were unable to detect privileged material (see Iliya Stefanov, cited above, § 43). Moreover, as regards the electronic data contained in the applicant's computers which were seized by the investigator, it does not seem that any sort of sifting procedure was followed during the search (see Wieser and Bicos Beteiligungen GmbH, cited above, § 63).

35. Having regard to the materials that were inspected and seized, the Court finds that the search impinged on professional secrecy to an extent that was disproportionate to whatever legitimate aim was pursued. The Court reiterates in this connection that, where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention (see Smirnov, § 48, and Niemietz, § 37, both cited above).

36. In sum, the Court considers that the search carried out, without relevant and sufficient grounds and in the absence of safeguards against interference with professional secrecy, at the flat and office of the applicant, who was not suspected of any criminal offence but was representing the defendant in the same criminal case, was not "necessary in a democratic society". There has therefore been a violation of Article 8 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

37. Lastly, relying on Articles 3, 6, 10 and 13 of the Convention, the applicant complained that carrying out the search during the night was inhuman, that the examination of his

complaint was unfair, that he had been persecuted for expressing an opinion on the lawful actions of the police, and that there was no effective remedy for his grievances.

38. However, having regard to all the material in its possession, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. Article 41 of the Convention provides:

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

A. Damage

40. The applicant claimed 1,000,000 euros (EUR) in respect of non-pecuniary damage.

41. The Government submitted that the claim was ill-founded and evidently excessive.

42. The Court accepts that the applicant has suffered non-pecuniary damage, such as distress and frustration in connection with a breach of his right to respect for his home, which is not sufficiently compensated for by the finding of a violation of the Convention. However, it finds the amount claimed by the applicant excessive. Making its assessment on an equitable basis, the Court awards the applicant EUR 3,000 under this head, plus any tax that may be chargeable on that amount.

B. Costs and expenses

43. The applicant also claimed 332.70 Russian roubles for postal expenses. He produced copies of postal receipts.

44. The Government submitted that the claim was unfounded.

45. On the basis of the material produced before it, the Court is satisfied that the expenses claimed were actually incurred and are reasonable as to quantum. Accordingly, the Court awards the applicant the entire amount claimed, that is EUR 10, plus any tax that may be chargeable to him.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Declares the complaint concerning the search at the applicant's premises admissible and the remainder of the application inadmissible;

2. Holds that there has been a violation of Article 8 of the Convention;

3. Holds

(a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into Russian roubles at the rate applicable at the date of settlement:

(i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 10 (ten euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

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

4. Dismisses the remainder of the applicant's claim for just satisfaction.

2.4 Case of Smirnov v. Russia

Application no. 71362/01)
JUDGMENT
STRASBOURG
7 June 2007
FINAL
12/11/2007
Translation in Russian available

PROCEDURE

1. The case originated in an application (no. 71362/01) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Mikhail Vladimirovich Smirnov ("the applicant"), on 27 November 2000.

2. The Russian Government ("the Government") were represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, a violation of the right to respect for his home and the right to peaceful enjoyment of possessions as regards the search at his place of residence and the retention of his computer. He also claimed that he did not have an effective remedy in respect of the latter complaint.

4. By a decision of 30 June 2005 the Court declared the application partly admissible.

THE FACTS
I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1956 and lives in St Petersburg. The applicant is a lawyer; at the material time he was a member of the St Petersburg United Bar Association (Санкт-Петербургская объединенная коллегия адвокатов).

A. Search at the applicant's home

6. On 20 January 1999 the St Petersburg City Prosecutor opened criminal case no. 7806 against Mr Sh., Mr G. and fifteen other persons who were suspected of forming and participating in an organised criminal enterprise and of other serious offences.
7. On 7 March 2000 Mr D., an investigator with the Serious Crimes Department in the prosecutor's office, issued a search warrant which read in its entirety as follows:

> "Taking into account that at the [applicant's] place of residence at the address [the applicant's home address] there might be objects and documents that are of interest for the investigation of criminal case [no. 7806], I order a search of the premises at the address [the applicant's home address] where [the applicant] permanently resides and the seizure of objects and documents found during the search."

8. On the same day a St Petersburg deputy prosecutor approved the search and countersigned the warrant.

9. The Government claimed that the applicant had not been a party to criminal case no. 7806 and had not represented anyone involved. The applicant maintained that he had been a representative of:

(a) Mr S., who had been first a suspect and later a witness in criminal case no. 7806. On 21 February 2000 the applicant had represented Mr S. before the Oktyabrskiy Court of St Petersburg in proceedings concerning a complaint about a decision by the investigator D. The applicant had also been S.'s representative in unrelated civil proceedings on the basis of an authority form of 25 May 1999;
(b) Mr Yu., who had been a defendant in criminal case no. 7806 and whom the applicant had represented from 10 July to 25 December 1998;
(c) Mr B., who had been the victim in a criminal case concerning the murder of his son. Subsequently that case had been joined to criminal case no. 7806. The applicant had represented Mr B. from 11 February to 23 March 2000;
(d) Mr Sh., who had been a defendant in criminal case no. 7806 and whom the applicant had represented before the Court (application no. 29392/02).

10. On 9 March 2000 the investigator D., in the presence of the applicant, assisted by police officers from the Organised Crime District Directorate (РУБОП) and two attesting witnesses (понятые), searched the applicant's flat. According to the record of the search, the applicant was invited to "voluntarily hand over... documents relating to the public company T. and the federal industrial group R.". The applicant responded that he had no such documents and countersigned under that statement.

11. The investigator found and seized over twenty documents which the applicant declared to be his own and the central unit of the applicant's computer. According to the record of the search, the applicant had no complaints about the way the search was carried out, yet he objected to the seizure of the central unit because it contained two hard disks and was worth 1,000 United States dollars. The seized documents included, in particular, Mr S.'s power of attorney of 25 May 1999 and extracts of a memorandum in Mr B.'s case.

12. On the same date the investigator D. held a formal interview with the applicant in connection with criminal case no. 7806.

13. On 17 March 2000 the investigator L. issued an order for the attachment of the documents seized at the applicant's flat and the central unit of his computer as "physical evidence" in criminal case no. 7806.

B. Judicial review of the search and seizure orders

14. The applicant complained to a court. He sought to have the search and seizure of the documents declared unlawful. He claimed, in particular, that the central unit of the computer, his personal notebook and his clients' files and records were not related to the criminal case and could not be attached as evidence because the seizure had impaired his clients' defence rights.

15. On 19 April 2000 the Oktyabrskiy Court of the Admiralteyskiy District of St Petersburg heard the applicant's complaint. The court found that the search had been approved and carried out in accordance with the applicable provisions of the domestic law and had therefore been lawful. As to the attachment of the computer, the court ruled as follows:

> "...the purpose of the search was to find objects and documents in connection with a criminal case. During the search a number of documents and a computer central unit were seized; they were thoroughly examined by the investigator, as is evident from the record of the examination of the seized items and printouts of the files contained in the central unit.
>
> Accordingly, the above shows that the aim of the search has been achieved; however, the order to attach the seized objects and documents as evidence in the criminal case amounts to the forfeiture of the [applicant's] property which was taken from him and never returned, whereas [the applicant] was neither a suspect nor a defendant in the criminal case and was interviewed as a witness.
>
> Under such circumstances, the constitutional rights of the applicant, who was deprived of his property, were violated. Having achieved the purpose of the search and recorded the results received, the investigator, without any valid and lawful grounds, declared [the applicant's property] to be physical evidence..."

16. The District Court ordered that the applicant's documents, his notebook and the central unit be returned to him.

17. On 25 May 2000 the St Petersburg City Court quashed the judgment of 19 April 2000 and remitted the case for a fresh examination by a differently composed court. The City Court pointed out that the first-instance court had erroneously considered that the order for the attachment of objects as evidence amounted to the forfeiture of the applicant's property.

18. On 6 June 2000 the investigator returned the notebook and certain documents, but not the computer, to the applicant.

19. On 2 August 2000 the applicant brought a civil action against the St Petersburg City Prosecutor's Office and the Ministry of Finance, seeking compensation for the non-pecuniary damage incurred as a result of the seizure of his belongings.

20. On 17 August 2000 the Oktyabrskiy Court of St Petersburg held a new hearing on the applicant's complaint. The court ruled that the search of the applicant's flat had been justified and lawful and that the remainder of the applicant's complaints were not amenable to judicial review.

21. On 12 September 2000 the St Petersburg City Court quashed the judgment of 17 August 2000 and remitted the case for a fresh examination by a differently composed court. The City Court found that the first-instance court had failed to examine, in a sufficiently thorough manner, whether the investigator had had sufficient grounds to search the flat of a person who had not been charged with any criminal offence.

22. On 17 November 2000 the Oktyabrskiy Court of St Petersburg delivered the final judgment on the applicant's complaint. As regards the lawfulness of the search, the court found as follows:

> "The search warrant was issued because there were sufficient reasons [to believe] that [at the applicant's home address] where [the applicant] lived there could be objects and documents that could be used as evidence in connection with one of the counts in criminal case no. 7806. This fact was established by the court and confirmed by the materials in the case file, in particular, a statement by the investigator D[.] of 16 November 2000, the decision to bring charges of 22 February 1999, the decision to lodge an application for an extension of detention on remand of 10 July [? - unclear] 2000, letter no. 200409 of 22 September 1998 and other materials; therefore, the court comes to the conclusion that the search in [the applicant's] flat was justified under Article 168 of the RSFSR Code of Criminal Procedure..."

23. The court further established that the search had been carried out in strict compliance with the laws on criminal procedure. As regards the remainder of the applicant's claims, the court decided that it was not competent to examine them, but that it was open to the applicant to complain about the investigator's decisions to a supervising prosecutor.

24. On 19 December 2000 the St Petersburg City Court dismissed an appeal by the applicant. It upheld the District Court's finding that the search at the applicant's flat had been justified and procedurally correct and that the order to attach objects as evidence was not amenable to judicial review because such an avenue of appeal was not provided for in domestic law.

25. The applicant's civil claim for damages has not been examined to date.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Searches at a person's home

26. Article 25 of the Constitution establishes that the home is inviolable. No one may penetrate into the home against the wishes of those who live there unless otherwise provided for in a federal law or a judicial decision.

27. The RSFSR Code of Criminal Procedure, in force at the material time, provided in Article 168 ("Grounds for carrying out a search") that an investigator could carry out a search to find objects and documents that were of relevance to the case, provided that he had sufficient grounds to believe that such objects and documents could be found in a specific place or on a specific person. The search could be carried out on the basis of a reasoned warrant issued by an investigator and approved by a prosecutor.

28. Searches and seizures were to be carried out in the presence of the person whose premises were being searched or adult members of his family. Two attesting witnesses were to be present as well (Article 169). Any person having no interest in the case could be an attesting witness. Attesting witnesses were required to certify the scope and results of the search, and could make comments which were to be entered into the search record (Article 135).

29. A complaint against the actions of an investigator could be submitted either directly to a prosecutor or through the person against whom the complaint was lodged. In the latter case the person concerned was to forward the complaint to the prosecutor within twenty-four hours, together with his explanations (Article 218). The prosecutor was to examine the complaint within three days and give a reasoned decision to the complainant (Article 219).

30. On 23 March 1999, the Constitutional Court determined that decisions and actions of investigators and prosecutors relating to searches, seizure of property, suspension of proceedings and extension of time-limits for preliminary investigations should be amenable to judicial review on an application by the person whose rights had been violated.

B. Physical evidence

31. Article 83 of the Code of Criminal Procedure defined physical evidence as "any objects that... carried traces of a criminal offence... and any other objects that could be instrumental for detecting a crime, establishing the factual circumstances of a case, identifying perpetrators or rebutting the charges or extenuating punishment".

32. Physical evidence was to be retained until the conviction had entered into force or the time-limit for appeal had expired. However, it could be returned to the owner before that if such return would not harm ongoing criminal proceedings (Article 85). The court was to order the return of physical evidence to its legal owner in the final decision closing the criminal proceedings (Article 86).

C. Council of Europe recommendation

33. Recommendation (2000) 21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer provides, inter alia, as follows:
"Principle I - General principles on the freedom of exercise of the profession of lawyer
... 6. All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law. "

THE LAW
I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

34. The applicant complained that the search carried out at his place of residence infringed Article 8 of the Convention, which reads as follows:

> 1. Everyone has the right to respect for... his home...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

35. The Government contested that view.

A. Whether there was an interference

36. The Court observes that the search and seizure ordered by the investigator concerned the applicant's residential premises in which he kept his computer and certain work-related materials. The Court has consistently interpreted the notion "home" in Article 8 § 1 as covering both private individuals' homes and professional persons' offices (see Buck v.

Germany, no. 41604/98, § 31, ECHR 2005-IV; and Niemietz v. Germany, judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, §§ 29-31). It follows that in the present case there has been an interference with the applicant's right to respect for his home.

B. Whether the interference was justified

37. The Court has next to determine whether the interference was justified under paragraph 2 of Article 8, that is, whether it was "in accordance with the law", pursued one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve that aim or those aims.

1. Whether the interference was "in accordance with the law"

38. The applicant claimed that the interference was not "in accordance with the law" because the search had been authorised by a deputy prosecutor rather than by a court, as the Constitution required. The Court observes that under the Russian Constitution, the right to respect for a person's home may be interfered with on the basis of a federal law or a judicial decision (see paragraph 26 above). The RSFSR Code of Criminal Procedure – which had the status of federal law in the Russian legal system – vested the power to issue search warrants in investigators acting with the consent of a prosecutor (see paragraph 27 above). The Court is satisfied that that procedure was followed in the present case and that the interference was therefore "in accordance with the law".

2. Whether the interference pursued a legitimate aim

39. The Government submitted that the interference had pursued the legitimate aim of the protection of rights and freedoms of others.

40. The Court notes that the purpose of the search, as set out in the investigator's decision, was to uncover physical evidence that might be instrumental for the criminal investigation into serious offences. Accordingly, it pursued the legitimate aims of furthering the interests of public safety, preventing disorder or crime and protecting the rights and freedoms of others.

3. Whether the interference was "necessary in a democratic society"

41. The applicant claimed that his flat had been searched with a view to obtaining evidence against his clients, including Mr S., Mr Yu., Mr B. and many others, and gaining access to the clients' files stored on his computer. The search had violated the lawyer-client privilege and had been followed by a formal interview in which the investigator D. had questioned him about the circumstances of which he had become aware as his clients' representative.
42. The Government submitted that the decision to search the applicant's flat had been based on witness testimony and that the search had been necessary because "objects and documents of importance for the investigation of criminal case no. 7806" could have been found in the applicant's flat. The applicant had not objected to the search.

43. Under the Court's settled case-law, the notion of "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether an interference is "necessary in a democratic society" the Court will take into account that a certain margin of appreciation is left to the Contracting States (see, among other authorities, Camenzind v. Switzerland, judgment of 16

December 1997, Reports of Judgments and Decisions 1997-VIII, p. 2893, § 44). However, the exceptions provided for in paragraph 2 of Article 8 are to be interpreted narrowly, and the need for them in a given case must be convincingly established (see Buck, cited above, § 44).

44. As regards, in particular, searches of premises and seizures, the Court has consistently held that the Contracting States may consider it necessary to resort to such measures in order to obtain physical evidence of certain offences. The Court will assess whether the reasons adduced to justify such measures were "relevant" and "sufficient" and whether the aforementioned proportionality principle has been adhered to. As regards the latter point, the Court must first ensure that the relevant legislation and practice afford individuals adequate and effective safeguards against abuse. Secondly, the Court must consider the particular circumstances of each case in order to determine whether, in the concrete case, the interference in question was proportionate to the aim pursued. The criteria the Court has taken into consideration in determining this latter issue have been, among others, the circumstances in which the search order had been issued, in particular further evidence available at that time, the content and scope of the warrant, the manner in which the search was carried out, including the presence of independent observers during the search, and the extent of possible repercussions on the work and reputation of the person affected by the search (see Buck, cited above, § 45; Chappell v. the United Kingdom, judgment of 30 March 1989, Series A no. 152-A, p. 25, § 60; Camenzind, cited above, pp. 2894-95, § 46; Funke v. France, judgment of 25 February 1993, Series A no. 256-A, p. 25, § 57; and Niemietz, cited above, pp. 35-36, § 37).

45. With regard to the safeguards against abuse existing in the Russian legislation the Court observers that, in the absence of a requirement for prior judicial authorisation, the investigation authorities had unfettered discretion to assess the expediency and scope of the search and seizure. In the cases of Funke, Crémieux and Miailhe v. France the Court found that owing, above all, to the lack of a judicial warrant, "the restrictions and conditions provided for in law... appear[ed] too lax and full of loopholes for the interferences with the applicant's rights to have been strictly proportionate to the legitimate aim pursued" and held that there had been a violation of Article 8 of the Convention (see Funke, cited above, and Crémieux v. France and Miailhe v. France (no. 1), judgments of 25 February 1993, Series A nos. 256-B and 256-C). In the present case, however, the absence of a prior judicial warrant was, to a certain extent, counterbalanced by the availability of an ex post factum judicial review. The applicant could, and did, make a complaint to a court which was called upon to review both the lawfulness of, and justification for, the search warrant. The efficiency of the actual review carried out by the domestic courts will be taken into account in the following analysis of the necessity of the interference.

46. The Court observes that the applicant himself was not charged with, or suspected of, any criminal offence or unlawful activities. On the other hand, the applicant submitted documents showing that he had represented, at different times, four persons in criminal case no. 7806, in connection with which the search had been ordered. In these circumstances, it is of particular concern for the Court that, when the search of the applicant's flat was ordered, no provision for safeguarding the privileged materials protected by professional secrecy was made.

47. The search order was drafted in extremely broad terms, referring indiscriminately to "any objects and documents that [were] of interest for the investigation of criminal case [no. 7806]", without any limitation. The order did not contain any information about the ongoing investigation, the purpose of the search or the reasons why it was believed that the search at

the applicant's flat would enable evidence of any offence to be obtained (compare Niemietz, cited above, pp. 35-35, § 37, and Ernst and Others v. Belgium, no. 33400/96, § 116, 15 July 2003). Only after the police had penetrated into the applicant's flat was he invited to hand over "documents relating to the public company T. and the federal industrial group R.". However, neither the order nor the oral statements by the police indicated why documents concerning business matters of two private companies – in which the applicant did not hold any position – should have been found on the applicant's premises (compare Buck, cited above, § 50). The ex post factum judicial review did nothing to fill the lacunae in the deficient justification of the search order. The Oktyabrskiy Court confined its finding that the order had been justified, to a reference to four named documents and other unidentified materials, without describing the contents of any of them (see paragraph 22 above). The court did not give any indication as to the relevance of the materials it referred to and, moreover, two out of the four documents appeared after the search had been carried out. The Court finds that the domestic authorities failed in their duty to give "relevant and sufficient" reasons for issuing the search warrant.

48. As regards the manner in which the search was conducted, the Court further observes that the excessively broad terms of the search order gave the police unrestricted discretion in determining which documents were "of interest" for the criminal investigation; this resulted in an extensive search and seizure. The seized materials were not limited to those relating to business matters of two private companies. In addition, the police took away the applicant's personal notebook, the central unit of his computer and other materials, including his client's authority form issued in unrelated civil proceedings and a draft memorandum in another case. As noted above, there was no safeguard in place against interference with professional secrecy, such as, for example, a prohibition on removing documents covered by lawyer-client privilege or supervision of the search by an independent observer capable of identifying, independently of the investigation team, which documents were covered by legal professional privilege (see Sallinen and Others v. Finland, no. 50882/99, § 89, 27 September 2005, and Tamosius v. the United Kingdom (dec.), no. 62002/00, ECHR 2002-VIII). Having regard to the materials that were inspected and seized, the Court finds that the search impinged on professional secrecy to an extent that was disproportionate to whatever legitimate aim was pursed. The Court reiterates in this connection that, where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention (see Niemietz, cited above, pp. 35-36, § 37).

49. In sum, the Court considers that the search carried out, without relevant and sufficient grounds and in the absence of safeguards against interference with professional secrecy, at the flat of the applicant, who was not suspected of any criminal offence but was representing defendants in the same criminal case, was not "necessary in a democratic society". There has therefore been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

50. The applicant complained under Article 1 of Protocol No. 1 about a violation of his property rights resulting from the seizure and retention of his documents and computer. Article 1 of Protocol No. 1 provides as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Submissions by the parties

51. The applicant submitted that the seizure of the central unit had constituted a disproportionate interference with his property rights and had imposed an excessive burden on him. The central unit proper could not be used as evidence in the criminal case because it had not been an instrument, object or product of a crime and had not borne any traces of a crime. Furthermore, the data contained therein could not have had any evidentiary value either, because the unit had been in the possession of the prosecution for a long time and the data could have been erased or modified. The applicant agreed with the reasons set out in the judicial decision of 19 April 2000. In his view, the prosecution should have abided by that decision rather than contesting it on appeal. The applicant claimed that the real purpose of the seizure had been to hinder his legal professional activities. The unlawful withholding of his computer had deprived him of access to more than two hundred clients' files and had been detrimental to his legal practice as a whole. Lastly, the applicant indicated that he had eventually received his notebook and some documents back.

52. The Government submitted that the central unit of the applicant's computer had been sealed and attached as physical evidence in criminal case no. 7806 in order to prevent loss of data. The examination of the criminal case had not yet been completed. The applicant's documents and central unit would be stored in the St Petersburg City Court until such time as the judgment had been delivered. Accordingly, the applicant's right to use his property had been restricted in the public interest, with a view to establishing the truth in criminal case no. 7806.

B. The Court's assessment

53. The Court observes that the search of the applicant's home was followed by the seizure of certain documents, his notebook and the central unit of his computer – that is, the part containing hard disks with data. As the applicant eventually regained possession of his notebook and documents, the Court will confine its analysis to the compatibility of the retention of the computer to this day with the applicant's right to peaceful enjoyment of possessions guaranteed by Article 1 of Protocol No. 1.

54. It is undisputed that the applicant was the lawful owner of the computer; in other words, it was his "possession". The investigator ordered that the computer be kept as physical evidence in a criminal case until such time as the trial court had given judgment, determining in particular the use of evidence. The Court considers that this situation falls to be examined from the standpoint of the right of a State to control the use of property in accordance with the general interest.

55. The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be

lawful. In particular, the second paragraph of Article 1, while recognising that States have the right to control the use of property, subjects their right to the condition that it be exercised by enforcing "laws". Moreover, the principle of lawfulness presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application (see, for example, Baklanov v. Russia, no. 68443/01, §§ 39-40, 9 June 2005, with further references).

56. The Court observes that the decision to retain the computer was based on the provisions of the RSFSR Code of Criminal Procedure governing the use of physical evidence in criminal proceedings (see paragraphs 31 and 32 above). The investigator had the discretion to order retention of any object which he considered to be instrumental for the investigation, as was the case with the applicant's computer. The Court has doubts that such a broad discretion not accompanied by efficient judicial supervision would pass the "quality of law" test but it sees no need for a detailed examination of this point for the following reasons.

57. The Court accepts that retention of physical evidence may be necessary in the interests of proper administration of justice, which is a "legitimate aim" in the "general interest" of the community. It observes, however, that there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the State, including measures designed to control the use of the individual's property. That requirement is expressed by the notion of a "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see Edwards v. Malta, no. 17647/04, § 69, 24 October 2006, with further references).

58. The Court agrees with the applicant's contention, not disputed by the Government, that the computer itself was not an object, instrument or product of any criminal offence (compare Frizen v. Russia, no. 58254/00, §§ 29-31, 24 March 2005). What was valuable and instrumental for the investigation was the information stored on its hard disk. It follows from the judgment of 19 April 2000 that the information was examined by the investigator, printed out and included in the case file (see paragraph 15 above). In these circumstances, the Court cannot discern any apparent reason for continued retention of the central unit. No such reason has been advanced in the domestic proceedings or before the Court. Nevertheless, the computer has been retained by the domestic authorities until the present day, that is, for more than six years. The Court notes in this connection that the computer was the applicant's professional instrument which he used for drafting legal documents and storing his clients' files. The retention of the computer not only caused the applicant personal inconvenience but also handicapped his professional activities; this, as noted above, might have had repercussions on the administration of justice.

59. Having regard to the above considerations, the Court finds that the Russian authorities failed to strike a "fair balance" between the demands of the general interest and the requirement of the protection of the applicant's right to peaceful enjoyment of his possessions. There has therefore been a violation of Article 1 of Protocol No. 1.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION, TAKEN TOGETHER WITH ARTICLE 1 OF PROTOCOL No. 1

60. The applicant complained under Article 13 of the Convention that he had not had an effective remedy in respect of the unlawful restriction on his property rights under Article 1 of Protocol No. 1. Article 13 provides as follows:

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

A. Submissions by the parties

61. The applicant pointed out that the scope of review by the domestic courts had been confined to the lawfulness of the search. As to his property complaints, the courts had determined that those issues had not been amenable to judicial review. In his view, the Constitutional Court's ruling of 23 March 1999 should have been interpreted as opening the way for judicial review of all decisions affecting a person's property rights. He stressed that his civil claim for damages had, under various pretexts, not been examined for more than four years.

62. The Government submitted that the applicant had been able to challenge the contested decision before a court which had considered and dismissed his complaints (on 19 December 2000 in the final instance). Furthermore, his civil claim for damages against the St Petersburg City Prosecutor and Ministry of Finance was now pending before the Oktyabrskiy Court of St Petersburg.

B. The Court's assessment

63. The Court has consistently interpreted Article 13 as requiring a remedy in domestic law in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, Boyle and Rice v. the United Kingdom, judgment of 27 April 1988, Series A no. 131, pp. 23-24, § 54). In the present case there has been a finding of a violation of Article 1 of Protocol No. 1 and the complaint under Article 13 must therefore be considered. It must accordingly be determined whether the Russian legal system afforded the applicant an "effective" remedy, allowing the competent "national authority" both to deal with the complaint and to grant appropriate relief (see Camenzind, cited above, pp. 2896-97, § 53).

64. The applicant asked for a judicial review of the lawfulness of the search and seizure conducted at his place of residence and of the decision on retention of his computer as physical evidence. Whereas the domestic courts examined the complaint concerning the search and seizure, they declared inadmissible the complaint about the failure to return the applicant's computer on the ground that the retention decision was not amenable to judicial review (see paragraphs 22 et seq. above). The applicant was told to apply to a higher prosecutor instead. In this connection the Court reiterates its settled case-law to the effect that a hierarchical appeal to a higher prosecutor does not give the person employing it a personal right to the exercise by the State of its supervisory powers and for that reason does not constitute an "effective remedy" (see, for example, Horvat v. Croatia, no. 51585/99, § 47, ECHR 2001-VIII).

65. As regards the pending civil claim for damages to which the Government referred, the Court notes that a civil court is not competent to review the lawfulness of decisions made by investigators in criminal proceedings.

66. It follows that in these circumstances the applicant did not have "an effective remedy before a national authority" for airing his complaint arising out of a violation of Article 1 of Protocol No. 1. There has therefore been a violation of Article 13 of the Convention, taken together with Article 1 of Protocol No. 1.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. Article 41 of the Convention provides:

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

68. The Court points out that under Rule 60 of the Rules of Court any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents or vouchers, "failing which the Chamber may reject the claim in whole or in part".

69. In a letter of 5 July 2005, after the application had been declared admissible, the Court invited the applicant to submit claims for just satisfaction by 7 September 2005. He did not submit any such claim within the specified time-limit.

70. In these circumstances, the Court makes no award under Article 41.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 8 of the Convention;

2. Holds that there has been a violation of Article 1 of Protocol No. 1;

3. Holds that there has been a violation of Article 13 of the Convention, taken together with Article 1 of Protocol No. 1;

4. Decides not to make an award under Article 41 of the Convention.

2.5 Case of Blumberga v. Latvia

Application no. 70930/01
JUDGMENT
STRASBOURG
14 October 2008
FINAL
14/01/2009

PROCEDURE

1. The case originated in an application (no. 70930/01) against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Latvian national, Ms Ināra Blumberga ("the applicant"), on 19 April 2001.
2. Although the applicant was granted legal aid, she submitted her observations on the admissibility and merits of the application by herself.

3. The Latvian Government ("the Government") were represented by their Agent, Mrs I. Reine.

4. The applicant alleged that she had lost some property as a result of the failure of the police to carry out their duty and that she could not obtain redress for the damage sustained because of the lengthy and ineffective pre-trial investigation of the criminal cases and the refusal of the civil courts to adjudicate her claim. She relied on Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention.

5. On 14 December 2005 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS
I. THE CIRCUMSTANCES OF THE CASE

6. On 19 April 1995 the applicant, who was born in 1939 and lives in Ventspils, was arrested by the Jelgava police and remanded in custody until 13 June 1995. During this period of time some of the applicant's property stored in her house in Jelgava, where a café belonging to her was also located, and in her second house in Dobele, was stolen. Criminal proceedings were initiated in this connection.

1. Proceedings in respect of the burglary in Jelgava

7. On 23 May 1995 criminal proceedings in case no. 22546495 were initiated regarding the burglary in Jelgava.

8. On 25 May 1995 the Jelgava police decided to acknowledge the applicant as a civil claimant in criminal case no. 22546495, with a claim for 763 Latvian lati (LVL) (approximately EUR 1,090).

9. On 11 July 1995 another set of criminal proceedings, allocated case number no. 22564195, was initiated regarding the burglary in Jelgava. On the same date the Jelgava police decided to acknowledge the applicant as a civil claimant in criminal case no. 22564195, with a claim for LVL 6725.60 (approximately EUR 9,607). According to a copy of that decision, submitted by the applicant, the police investigator crossed out the above amount, putting LVL 12,103 (approximately EUR 17,290) instead. The applicant requested to be acknowledged as a civil claimant with a claim for that amount when she was questioned on 11 September 1995.

10. On 28 February 1997 the Jelgava police joined the two sets of criminal proceedings into one case, no. 22564195.

11. On 17 September 1997 a public prosecutor attached to the Zemgale District Court ("the Zemgale public prosecutor") informed the applicant that, following her complaint to the Prosecutor General's Office, an examination of the investigation in the criminal proceedings relating to the burglary of her property had been carried out. During the examination, serious infringements of the provisions of the Criminal Procedure Code had been detected. In that regard, according to the Zemgale public prosecutor, she had on 27 January 1997 requested the head of the Jelgava police to rectify the deficiencies indicated to him and to identify the police officers who had failed to protect the applicant's property upon her detention, as required by Article 80 of the Criminal Procedure Code. An official investigation had been carried out into the failure to protect the applicant's property and the criminal proceedings in respect of the burglary of the property. As a result, two police officers had been identified as responsible for the failure to protect the applicant's property. One of them had been disciplined and the other's professional conduct had been assessed by the professional attestation commission.

12. On 20 August 2000 the applicant wrote to the Zemgale public prosecutor, inquiring about the progress in the criminal proceedings.

13. On 26 September 2000 the Zemgale public prosecutor informed the applicant that her complaint in respect of lack of progress in the criminal proceedings was well-founded, since the Jelgava police had not carried out any investigative measures and the investigation in the criminal proceedings had been unlawfully delayed. According to the prosecutor, the head of the police at the Ministry of the Interior had been informed thereof on 25 September 2000.

14. On 20 January 2001 the applicant complained to the Prosecutor General about the inefficiency of the Zemgale public prosecutor, which had hindered the restitution of her stolen property. On 5 February 2001 the Prosecutor General informed the applicant that her complaint had been transferred to the Zemgale public prosecutor for examination.

15. On 13 February 2001, the Zemgale public prosecutor informed the applicant that the investigation in the criminal proceedings in case no. 22564195 was still in progress. She had requested the head of the Jelgava police to speed up the investigation and to carry out the instructions she had given the Jelgava police on 27 January 1997 by 25 February 2001. Thereafter, an additional examination of the conduct of the investigation was to be carried out.

16. On 12 May 2001 the applicant complained to the Prosecutor General about the lack of progress in the investigation in the criminal proceedings.

17. On 20 June 2001 the Zemgale public prosecutor confirmed that the applicant had been declared a civil claimant in the criminal proceedings in case no. 22564195, which were still ongoing.

18. On 19 July 2001 the Prosecutor General informed the applicant that her application of 12 May 2001 had been transferred for examination to the Zemgale public prosecutor on 21 May 2001.

19. On 23 July 2001 the Zemgale public prosecutor sent the applicant the decision of 20 June 2001, without answering in substance the applicant's questions about the progress in the criminal proceedings.

20. On 24 July 2001 the Zemgale public prosecutor informed the applicant that both decisions declaring her a civil claimant had been sent to her.
21. On 11 December 2001 the Jelgava police, pursuant to Article 139 § 5 of the Criminal Code, decided to acknowledge the applicant as a civil claimant in criminal proceedings no. 22564195, with a claim for LVL 32,789.10 (approximately EUR 46,840).

22. On 5 May 2005 the applicant wrote to the Zemgale public prosecutor, inquiring about the progress in the criminal proceedings.

23. On 13 May 2005 the Zemgale public prosecutor informed the applicant that her inquiries concerning criminal proceedings no. 22564195 had been transferred to the Jelgava City public prosecutor, and those concerning criminal proceedings nos. 20517495 and 2503000802 (paragraph 33, below) to the Dobele District public prosecutor.

24. On 7 June 2005 the Jelgava City public prosecutor informed the applicant that criminal proceedings no. 22564195 were still ongoing. The Jelgava Police Department had been instructed to speed up the investigation.

25. On 30 June 2005 a police officer of the Jelgava police decided to transfer the criminal case to the public prosecutor of the City of Jelgava for prosecution. It had been established by the pre-trial investigation that between 19 April and 13 June 1995, during the applicant's detention, R.Z., E.R., V.I. and I.B. had stolen and consumed food and alcoholic beverages, and stolen money, clothes, kitchen equipment and other items, which amounted to a total loss of LVL 32,798.10 (approximately EUR 46,841) to the applicant. R.Z., E.R., V.I. and I.B. had thus committed a crime under Article 139 § 5 of the Criminal Code. This decision was sent to the applicant on 1 July 2005.

26. On 8 July 2005 a prosecutor of the Prosecutor's Office of the City of Jelgava brought a charge against I.B. for burglary in the amount of LVL 2,642 (approximately EUR 3,774). A preventive measure – prohibition on changing her place of residence – was imposed on her.

27. On 17 August 2005 a prosecutor of the Prosecutor's Office of the City of Jelgava brought a charge against E.R. for burglary in the amount of LVL 2,622 (approximately EUR 3,746).

28. On 8 September 2005 a prosecutor of the Prosecutor's Office of the City of Jelgava decided to terminate the criminal proceedings in case no. 22564195 because of a lack of sufficient evidence. It was stated, inter alia, that since during questioning the applicant had

constantly increased the amount of the loss she had allegedly suffered, her statements in this respect should be treated with caution. It was established that during questioning I.B., E.R., R.Z. and V.I. had denied having burgled the applicant's property and that it was impossible, on the basis of an assessment of the evidence, to discover what had been stolen from the applicant's property, and in what circumstances. Besides, since the instigation of the criminal proceedings in 1995 no evidence had been obtained as to the persons responsible for the loss or theft of the applicant's property. The prosecutor considered that the case should be terminated on the grounds that it was impossible to obtain further evidence and to prove any charges against named individuals. According to the information provided by the Government, the decision was sent to the applicant on 14 September 2005, and she was informed that it could be appealed against to the Zemgale Regional Public Prosecutor's Office. The applicant contested that claim, stating that she had not received the decision.

2. The proceedings in respect of the burglary in Dobele

29. On 28 June 1995 the Dobele police instituted criminal proceedings in case no. 20517495 in respect of the burglary of the applicant's house in Dobele.

30. On 8 August 1995 the Dobele police acknowledged the applicant as a civil claimant for an amount of LVL 9,439 (approximately EUR 13,484).

31. On 28 February 1996 a public prosecutor of the Dobele District decided to terminate the criminal proceedings in part and to reject the applicant's civil claim in part. It was established that the accused E.R. had confessed to having stolen a few of the items declared by the applicant as stolen and was thus liable for the amount of LVL 1,005 (approximately EUR 1,436). Taking into account that the applicant could not give details of all the stolen items and their value, the prosecutor decided that the loss suffered by her should be considered approximate and, pursuant to Article 208 § 2 of the Criminal Procedure Code, decided to terminate the criminal case against E.R. in part because of the lack of evidence and to reject the applicant's civil claim in the amount of LVL 8,434 (approximately EUR 12,049) as unsubstantiated.

32. On 16 December 1996 a public prosecutor of the Dobele District decided to terminate the remainder of the criminal proceedings. She established that during the pre-trial investigation no evidence had been obtained to justify charging I.B. with the burglary. As to E.R., considering that he was serving a sentence imposed on him in another set of criminal proceedings on 25 November 1996, and was thus unable to commit new offences, the prosecutor decided to terminate the criminal proceedings against him in the remaining part.

33. On 10 December 2002 the head of the Zemgale Region Public Prosecutor's Office quashed the decision of the public prosecutor of the Dobele District to reject the applicant's civil claim in the amount of LVL 8,434 (approximately EUR 12,049) as unsubstantiated. The head prosecutor instructed that, at the pre-trial stage, it had to be checked whether the burglary could have been carried out by another person, and that the applicant herself should be questioned in detail as regards the allegedly stolen items, their description and value. The prosecutor ordered the initiation of a new criminal case, no. 2503000802, in respect of the theft of the applicant's property in the amount of LVL 8,434 (approximately EUR 12,049).

34. On 31 May 2005 the Dobele District public prosecutor informed the applicant that criminal proceedings no. 20517495 had been terminated on 16 December 1996, pursuant to

Article 208 § 4 of the Criminal Procedure Code; criminal proceedings no. 2503000802 (concerning the stolen property in the amount of LVL 8,434 (approximately EUR 12,049)) were still ongoing at the Dobele Police Department, and the perpetrator had not been identified.

35. According to a letter of the Prosecutor's Office of the Dobele District, criminal case no. 2503000802 was transferred to the Dobele District police for pre-trial investigation on 7 January 2003. The prosecutor responsible for the supervision of the investigation examined the case on 1 July 2005.

36. According to the submissions of the Government, the investigation of the criminal case is still ongoing.

3. The court proceedings instigated by the applicant

37. On 10 June 2001 the applicant filed a civil claim for damages against the State Police Authorities with the Rīga Regional Court, and asked to be exempted from court taxes because of her poor financial situation. According to the documents she submitted to the Court, she attached a copy of her pensioner's certificate of 15 May 1996, stating that she received an old-age pension in the amount of LVL 35.91 (approximately EUR 50), and the replies of the Zemgale public prosecutor of 13 February 2001, 26 September 2000 and 17 September 1997 to her complaints. She requested the court to award her compensation in the amount of LVL 250,000 (approximately EUR 357,143) for her stolen property and for the non-pecuniary damage she had suffered because the Jelgava police had acted contrary to the requirements of Article 80 of the Criminal Procedure Code.

38. On 14 June 2001 a judge of the Civil Chamber of the Rīga Regional Court informed the applicant that she had requested exemption from paying court taxes without submitting any evidence that she was financially unable to do so. The judge further noted that she had not submitted any documents confirming the circumstances on which her claim was based. The judge set a deadline of 23 July 2001 for rectification of those deficiencies.

39. On 27 June 2001 the applicant amended her claim, stating that because the police had acted contrary to the requirements of Article 80 of the Criminal Procedure Code her rights guaranteed by Article 13 of the Convention and Article 1 of Protocol No. 1 to the Convention had been violated. She again requested exemption from court taxes, attaching a copy of her pensioner's certificate and copies of the replies of the Zemgale public prosecutor of 26 September 2000 and 17 September 1997 to substantiate the claim.

40. On 29 June 2001 the judge of the Rīga Regional Court replied to the applicant that her amendments of 27 June 2001 were insufficient and that she should rectify the deficiencies by 23 July 2001.

41. On 15 July 2001 the applicant amended her claim by submitting a copy of the decision of the Jelgava police of 11 July 1995, which acknowledged her as a civil claimant and stated that in order to assess the value of the remainder of the stolen property she was to invite witnesses to give evidence.

42. On 13 August 2001 the judge of the Rīga Regional Court considered that the deficiencies indicated by him had not been rectified and, finding that the claim had not been properly submitted, returned it to the applicant without examination.

43. On 4 October 2001 the Civil Chamber of the Supreme Court, in response to the applicant's ancillary complaint of 21 August 2001, upheld the decision of the Rīga Regional Court. The court considered that the applicant had failed to submit evidence as to her financial situation and to attach documents establishing the circumstances her claim was based on. The decision was final and not subject to appeal.

II. RELEVANT DOMESTIC LAW

1. The Criminal Procedure Code (Latvijas Kriminālprocesa Kodekss), as in force until 1 October 2005

44. Article 80 stated that "if an arrested person had property or an apartment which was left unattended, the police, a public prosecutor or a court had to ensure its protection".

45. Article 101 stipulated that a civil claim could be submitted by a person who had suffered damage as a result of a crime. The civil claim could be brought against the accused or a person who was vicariously liable for the acts of the accused (paragraph 1). The civil claim could be lodged upon initiation of a criminal case, during the pre-trial investigation, or with the court before the adjudication of the case (paragraph 2). If the court stayed the adjudication, the civil claim could also be lodged before the beginning of the adjudication at the subsequent court hearing (paragraph 3). A person had the right to lodge a civil claim by way of civil proceedings if the claim had not been brought in criminal proceedings or if the claim was not adjudicated due to the termination of the criminal case or a not guilty verdict (paragraph 7).

46. Pursuant to Article 102, a person who had suffered pecuniary damage as a result of a criminal offence could bring a civil claim against an accused or a person who was vicariously liable for the acts of the accused, which would be examined by a court in conjunction with the criminal case. Further, a person who had been acknowledged as a civil claimant by a decision of the police, a public prosecutor or a court was entitled to submit a complaint in respect of acts of the aforementioned authorities.

47. Article 140 provided that a person who had suffered damage as a result of a crime could be declared a civil party during the pre-trial investigation.

48. Pursuant to Article 208 §§ 2 and 4, a criminal case or a part of it was to be terminated if a charge had not been proved and it was impossible to obtain additional evidence, and if it had been acknowledged, because of changed circumstances during the investigation of the case, that an offence committed by a person had lost its element of public danger or that that person no longer posed a danger to the public.

49. A civil claimant could submit a complaint about acts of the police to a public prosecutor. The complaint could be submitted to the prosecutor directly or through the intermediary of the person against whom the complaint was brought. A complaint submitted to a police officer had to be forwarded together with his explanations to the prosecutor within twenty-four hours (Article 220). The prosecutor had to decide on the complaint within three days

from its receipt and notify the complainant of the outcome. If the complaint was rejected, reasons therefore had to be stated. Decisions and acts of a public prosecutor could be appealed against to a higher prosecutor, who had to deal with that appeal in accordance with the aforementioned procedures (Articles 221 and 222).

50. Pursuant to Article 308, if a civil claim had been left without examination upon adjudication of a criminal case, it could be lodged de novo within civil proceedings.

2. The Criminal Code (Latvijas Krimināl kodekss), as in force until 1 April 1999

51. Article 139 § 5 stated that aggravated robbery carried a sentence of imprisonment of from six to fifteen years, with confiscation of property.

3. The Law on Civil Procedure (Civilprocesa likums), in force from 1 March 1999

52. According to Article 7 § 1, civil claims for compensation for pecuniary or non-pecuniary damage in criminal matters may be brought in accordance with the procedures prescribed by the criminal procedure law.

53. Article 96 § 3 states that a judgment in criminal proceedings is binding in civil proceedings to the extent that it concerns the determination of the offence for which a defendant has been sentenced, and the liability of the defendant.

54. The court shall stay court proceedings if adjudication of the case is not possible prior to the deciding of another matter which is required to be adjudicated in accordance with criminal procedure (the relevant part of Article 214).

4. The Civil Law (Civillikums)

55. Article 1635 stipulates that every wrongful act or failure to act per se shall give the person who has suffered damage the right to claim compensation from the wrongdoer, insofar as he or she may be held liable for such act or failure.

56. Everyone has a duty to compensate for losses he has caused through his acts or failure to act (Article 1779). A loss shall be understood to mean any deprivation which can be assessed financially (Article 1770). Losses may be either losses that have already been incurred, or losses that are expected to be incurred; they give rise to a right to compensation (Article 1771). A loss which has already been incurred may be a diminution of the value of the victim's existing property or a decrease in his or her anticipated profits (Article 1772).

5. The Constitution of Latvia (Latvijas Republikas Satversme)

57. Every person has the right to defend his rights and lawful interests in a court and, in the event of unlawful interference with his rights, everyone has the right to adequate compensation (Article 92).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

58. The applicant complained that she had lost some property as a result of the failure of the police to fulfil their duty and complained that she could not obtain redress for the damage sustained because of the lengthy and ineffective pre-trial investigation of the criminal cases and the refusal of the civil courts to adjudicate her claim against the police. She alleged a violation of Article 1 of Protocol No. 1, which, in its relevant part, reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

A. Admissibility

59. The Government contended that there were no "possessions" within the meaning of Article 1 of Protocol No. 1 during the pre-trial investigation in the criminal cases which the applicant joined as a civil party. According to the Government, the mere fact that the applicant joined the criminal proceedings as a civil claimant did not create an "enforceable claim" which could constitute a "possession" within the meaning of Article 1 of Protocol No. 1. In addition, the applicant did not have a "legitimate expectation" of obtaining effective enjoyment of a particular pecuniary asset for the purposes of Article 1 of Protocol No. 1, since the admissibility and the final amount of the civil claims had not been established by the national courts either within the criminal proceedings or in separate civil proceedings. In this respect, the Government pointed out that a claim only became enforceable once a court had accepted it in whole or in part. Moreover, they stressed that the domestic courts alone were in a position to assess the value of the applicant's claim and in particular to examine why it had been increased from LVL 763 to 32,798.10 (approximately from EUR 1,090 to 46,854) during the pre-trial investigation. The Government thus submitted that the applicant's property rights had never been established by a court judgment and that her right to compensation had never become enforceable for the purposes of Article 1 of Protocol No. 1 which, accordingly, was not applicable in the instant case. They therefore concluded that the applicant's complaint should be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention. The Government also submitted that the applicant had neither lodged appeals against the decisions of 16 December 1996 and 8 September 2005 nor lodged a civil action pursuant to Article 308 of the Criminal Procedure Code.

60. The applicant stated that the existence of her property rights had been proved by the documents relating to the pre-trial investigation of the criminal cases. As to the Government's argument that she had considerably increased the amount of her civil claim during the pre-trial investigation, the applicant submitted that on 25 May 1995, when she had been acknowledged as a civil claimant for the first time, she had been in detention and could not have known the exact amount of the loss at that time. Moreover, as her property had been left without surveillance until her release, she had sustained further damage. The applicant attached written statements by her daughter and three acquaintances, stating that she had lost property to a value of between LVL 50,000 and 100,000 (approximately between EUR 71,429 and 142,857). The applicant also submitted that she had not received the decision of 8 September 2005 to terminate the criminal investigations in respect to the burglary in Jelgava. In any event, appeals to the same authorities, to whom she had addressed her numerous complaints before without reaching any results, did not provide her with reasonable prospects of success.

61. The Court dismisses the Government's submission that the applicant did not appeal against the decision of 16 December 1996, since the head of the Zemgale Region Public Prosecutor's Office in any event ordered the initiation of a new criminal case on 10 December 2002 in that respect and those proceedings are still continuing. The Court considers that the remainder of the Government's objections are closely linked to the substance of the applicant's complaint and that their examination should therefore be joined to the merits. The Court further notes that the complaint is not inadmissible on any other grounds and therefore declares it admissible.

B. Merits

1. The parties' submissions

62. The Government submitted that even if the Court were to find Article 1 of Protocol No. 1 applicable to the present case, the State could not be held liable for the alleged interference with the applicant's rights in this connection. The Government stated that Latvia could not be held responsible for acts of individuals, in this case the alleged perpetrators of the burglaries, against whom the applicant had filed civil claims during the pre-trial investigation. The Government further reiterated their view that the applicant's alleged property rights had never been established by a court judgment and that the applicant's right to compensation had never become enforceable, so that Article 1 of Protocol No. 1 was not applicable in the instant case. Finally, the Government pointed out that although criminal case no. 225641955 had been terminated, the applicant could still lodge a civil action in order to claim damages.

63. The applicant maintained that there had been a violation of her right to peaceful enjoyment of her possessions.

2. The Court's assessment

64. The Court reiterates that the concept of "possessions" in Article 1 of Protocol No. 1 has an autonomous meaning and that Article 1 of Protocol No. 1 in substance guarantees the right of property (see Marckx v. Belgium, judgment of 13 June 1979, § 63, Series A no. 31). "Possessions" within the meaning of the above provision may be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he has at least a "legitimate expectation" of obtaining effective enjoyment of a property right (see Pine Valley Developments v. Ireland, judgment of 29 November 1991, § 51, Series A no. 222, and Kopecký v. Slovakia [GC], no. 44912/98, § 35, ECHR 2004-IX). The Court has held that its case-law does not contemplate the existence of a "genuine dispute" or "an arguable claim" as a criterion for determining whether there is a "legitimate expectation" protected by Article 1 of Protocol No. 1 (see Kopecký, cited above, § 52). For a claim to be capable of being considered as an "asset" falling within scope of Article 1 Protocol No. 1, it must have a sufficient basis in national law (see Draon v. France [GC], no. 1513/03, 6 October 2005, § 65 and Kopecký, cited above, § 52). Where that has been established, the concept of "legitimate expectation" can come into play, which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision (see Draon, cited above, § 65, and Gratzinger and Gratzingerova v. the Czech Republic (dec.), no. 39794/98, § 73, ECHR 2002-VII).

65. The Court further reiterates that the genuine, effective exercise of the right protected by Article 1 of Protocol No. 1 does not depend merely on the State's duty not to interfere, but

may require positive measures of protection, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions (see Öneryıldız v. Turkey [GC], no. 48939/99, § 134, ECHR 2004-XII, and Broniowski v. Poland [GC], no. 31443/96, § 143, ECHR 2004-V).

66. The Court notes at the outset that it has no reason to question the fact that property belonging to the applicant was stolen from her two houses in Jelgava and Dobele after she had been placed in detention. In that respect, it observes that criminal proceedings were instigated in connection with both burglaries and that it was established in the course of the criminal proceedings that property belonging to the applicant had indeed been stolen (paragraphs 25 and 31, above). Moreover, it was not disputed by the Government that the burglaries at the applicant's properties had taken place. The Court therefore considers that there has indisputably been an interference with the applicant's right to the peaceful enjoyment of her possessions. It is true, as the Government maintained, that the interference involved the acts of private individuals for whom the State bore no direct responsibility. Nonetheless, the Court notes that the authorities were under a specific statutory obligation to protect (nodrošināt aizsardzību) the applicant's premises during her detention, pursuant to Article 80 of the Criminal Procedure Code (paragraphs 6, 11 and 44, above), and that the failure of the police to comply with that obligation was recognised at the domestic level in the imposition of disciplinary measures on the police officers involved (see paragraph 11, above). However, the Court does not find it necessary to decide whether there is a sufficiently close link between that failure and the theft of the applicant's property to engage the responsibility of the State with regard to the interference with the applicant's property rights as such.

67. The Court considers that in the context of Article 1 of Protocol No. 1, when an interference with the right to peaceful enjoyment of possessions is perpetrated by a private individual, a positive obligation arises for the State to ensure in its domestic legal system that property rights are sufficiently protected by law and that adequate remedies are provided whereby the victim of an interference can seek to vindicate his rights, including, where appropriate, by claiming damages in respect of any loss sustained. Furthermore, where the interference is of a criminal nature, this obligation will in addition require that the authorities conduct an effective criminal investigation and, if appropriate, prosecution (see, mutatis mutandis, M.C. v. Bulgaria, no. 39272/98, §§ 151-153, ECHR 2003-XII). In that respect, it is clear that the obligation, like the obligation under Articles 2 and 3 of the Convention to conduct an effective investigation into loss of life or allegations of ill-treatment, is one of means and not one of result; in other words, the obligation on the authorities to investigate and prosecute such acts cannot be absolute, as it is evident that many crimes remain unresolved or unpunished notwithstanding the reasonable efforts of the State authorities. Rather, the obligation incumbent on the State is to ensure that a proper and adequate criminal investigation is carried out and that the authorities involved act in a competent and efficient manner. Moreover, the Court is sensitive to the practical difficulties which the authorities may face in investigating crime and to the need to make operational choices and prioritise the investigation of the most serious crimes. Consequently, the obligation to investigate is less exacting with regard to less serious crimes, such as those involving property, than with regard to more serious ones, such as violent crimes, and in particular those which would fall within the scope of Articles 2 and 3 of the Convention. The Court thus considers that in cases involving less serious crimes the State will only fail to fulfil its positive obligation in that respect where flagrant and serious deficiencies in the criminal investigation or prosecution can be identified (cf. ibid., §§ 167-168).

68. The Court considers, furthermore, that the possibility of bringing civil proceedings against the alleged perpetrators of a crime against property may provide the victim with a viable alternative means of securing the protection of his rights, even if criminal proceedings have not been brought to a successful conclusion, provided that a civil action has reasonable prospects of success (cf. Plotiņa v. Latvia (dec.), no. 16825/02, 3 June 2008). While the outcome of criminal proceedings may have a significant or even decisive effect on the prospects of a civil claim, whether lodged in the context of the criminal proceedings or brought in separate civil proceedings, the State cannot be held responsible for the lack of prospects of such a claim simply because a criminal investigation has not ultimately led to a conviction. Rather, the State will only fail to fulfil its positive obligations under Article 1 of Protocol No. 1 if the lack of prospects of success of civil proceedings is the direct consequence of exceptionally serious and flagrant deficiencies in the conduct of criminal proceedings arising out of the same set of facts, as outlined in the preceding paragraph.

69. The positive obligation incumbent on the State under Article 1 of Protocol No. 1 arises in relation to the original interference by third parties with the right to peaceful enjoyment of possessions; it does not in itself create any new property rights vis-à-vis the State and it arises independently of any claims which may exist against either the perpetrators of the interference or the State (where the authorities have allegedly failed to comply with a specific obligation, as in the present case). Thus, it is true, as the Government maintained that the civil claims which the applicant lodged in the respective criminal proceedings have never been adjudicated upon by the courts, and the merits of her claim against the police have never been adjudicated upon either. Therefore these claims did not constitute "possessions" within the meaning of Article 1 of Protocol No. 1. As the Court established, however, the right to a peaceful possession of property was interfered with in the circumstances of the case (see § 68). Consequently, the Court rejects the Government's objection to the effect that the applicant's complaint is incompatible ratione materiae.

70. Having established that certain positive obligations arise with respect to the interference with the property right, the Court will now proceed to consider whether the criminal proceedings, the possibility of a civil action and the applicant's action against the police provided her with sufficient protection of her property rights.

71. Turning to the circumstances of the present case, the Court notes that the investigation into the burglary in Dobele, which was begun more than thirteen years ago, is still ongoing (paragraph 36, above), while the proceedings concerning the burglary in Jelgava were terminated after more than ten years' investigation without any results (paragraph 28, above). It is true that on several occasions deficiencies in the investigation of the criminal case relating to the burglary in Jelgava were acknowledged by the domestic authorities and relevant orders were given to the investigating authorities (see, in particular, paragraphs 11, 13, 15, 24 and 33 above) and that it appears that the instructions were not carried out and that the investigation was not speeded up. Moreover, in the proceedings relating to the burglary in Dobele the head prosecutor ordered a new criminal investigation six years after the initial investigation had been terminated, due to failings in the conduct of that investigation (paragraph 33, above). Nevertheless, the Court cannot find that the deficiencies in the conduct of the criminal investigations were of such a nature and degree that the State can be considered to have failed to fulfil its obligation under Article 1 of Protocol No. 1 as far as it related to the investigation and prosecution of the crimes. In that connection, it notes in particular that the proceedings relating to the burglary in Jelgava were terminated because it had proved impossible to obtain sufficient evidence to prove charges against specific

individuals, whereas in the proceedings relating to the burglary in Dobele it does not appear to have been possible to identify the perpetrators. In these circumstances, the Court does not find it established that the failure to bring the criminal proceedings to a successful conclusion was the result of flagrant and serious deficiencies in their conduct.

72. As far as the possibility of instituting civil proceedings is concerned, the Government submitted that although the criminal case no. 225641955 in relation to the burglary in Jelgava was terminated, the applicant could still have lodged a civil action in order to claim damages. The Court observes furthermore that, according to domestic law, a final decision in criminal proceedings is not necessary in order to lodge a claim for damages by way of civil proceedings (see Plotiņa v. Latvia, cited above). Consequently, it was open to the applicant, if she considered that the criminal proceedings were ineffective and that her civil claims lodged in those proceedings were not being properly dealt with, to institute separate civil proceedings. In the light of its conclusion in respect of the conduct of the criminal investigations, the Court cannot find that civil proceedings would not have had any reasonable prospects of success. Indeed, it observes that while the criminal proceedings in relation to the burglary in Jelgava were terminated on account of lack of sufficient evidence for the purposes of a criminal conviction, certain suspects had been identified (albeit ten years later), while in the criminal proceedings in relation to the burglary in Dobele suspects were identified at an early stage. It is undisputed that the applicant could have brought separate civil proceedings against these suspects, in the context of which the burden of proof would have been less demanding. The Court considers that such proceedings would in principle have provided the applicant with appropriate protection of her interests. Moreover, the Court observes that it was open to the applicant at every stage of the criminal proceedings to opt for the possibility of instituting civil proceedings and that it was incumbent on her, if she considered the criminal investigations to be inadequate or deficient, to lodge civil actions against the suspects. Since the applicant failed to do so, the Court finds that it cannot be established that such proceedings did not constitute an appropriate means whereby the State could fulfil its positive obligations under Article 1 of Protocol No. 1.

73. In the light of the foregoing, the Court concludes that there has been no violation of Article 1 of Protocol No. 1. In these circumstances, it considers that it is unnecessary to examine further the Government's objections in so far as they relate to the applicant's failure to appeal against the decision of 8 September 2005 and to institute civil proceedings.

II. ALLEGED VIOLATION OF ARTICLES 6 AND 13 OF THE CONVENTION

74. The applicant complained under Article 6 of the Convention that she had been denied access to a court on account of the unjustified refusal of the civil courts to examine her civil claim and the lengthy and ineffective pre-trial proceedings in the criminal cases. With reference to the above deficiencies, the applicant complained under Article 13 of the Convention that the domestic remedies available to protect her rights guaranteed by Article 1 of Protocol No. 1 had proved to be ineffective in her case. The respective Articles in their relevant parts read as follows:

Article 6

> "1. In the determination of his civil rights ..., everyone is entitled to a fair... hearing within a reasonable time by [a] ... tribunal established by law...."
>
> Article 13

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

A. Admissibility

75. The Government did not submit any comments as to the applicant's complaint under Article 6 and submitted that the complaint under Article 13 was inadmissible as the relevant complaint under Article 1 of Protocol No. 1 was manifestly ill-founded.

76. The Court finds that the applicant's complaints under Articles 6 § 1 and 13 are not manifestly ill-founded within the meaning of Article 35 §§ 3 and 4. Moreover, they are not inadmissible on any other grounds and must therefore be declared admissible.

B. Merits

77. The Court notes at the outset that the claim which the applicant lodged with the Rīga Regional Court against the State police in connection with the failure of the authorities to fulfil their statutory obligation to protect her property while she was in detention (paragraph 37, above) was of a pecuniary nature and indisputably concerned a right which had a basis in national law and was a civil right within the meaning of Article 6 § 1 of the Convention (paragraphs 57-59, above).

78. The Court observes that the domestic courts declined to examine the merits of the claim, on the ground that it had not been properly submitted. The Court observes in that connection that the applicant attached the documents proving her financial situation and the relevant replies of the Zemgale public prosecutor, which, in its opinion, provided a reasonable and sufficient basis for her claim (paragraphs 39 and 41, above). It further observes that the domestic courts did not indicate to the applicant what additional documents it was necessary to submit in order to prove her financial situation and the circumstances on which her claim was based (paragraphs 38 and 40, above). It cannot accept the finding of the domestic courts (paragraphs 42 and 43, above) that the applicant did not submit sufficient evidence as regards her financial situation and the basis for her claim. The Court is thus of the opinion that the refusal of the domestic courts to examine the applicant's claim on its merits was manifestly unwarranted. Consequently, while she had formal access to a court, the refusal of the court to examine the merits of her claims deprived that access of any substance.

79. The Court concludes that there has been a violation of Article 6 § 1 of the Convention. Recalling furthermore that the guarantees of Article 13 are absorbed by those of Article 6, the Court finds that no separate issue arises under Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. Article 41 of the Convention provides:

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

A. Damage

1. The parties' submissions

81. In respect of pecuniary damage, the applicant claimed 50,000 Latvian lati (LVL) (approximately EUR 71,429) in compensation for the stolen property. According to her, this represented an approximate assessment of the amount of the loss. The applicant attached written statements by her daughter and three acquaintances, stating that she had lost property in an amount between LVL 50,000 and 100,000 (approximately between EUR 71,429 and 142,857). These statements did not contain any detailed list of items but general statements to the effect that the applicant had had a luxurious living environment.

82. She further claimed LVL 60,000 (approximately EUR 85,714) in respect of non-pecuniary damage for the psychological suffering she endured because of the violation of her rights guaranteed by the Constitution.

83. The Government did not provide any comments in this connection.

2. The Court's assessment

84. The Court does not discern any causal link between the violation found and the pecuniary damage alleged by the applicant. It therefore makes no award in this respect. However, it considers that the applicant may be considered to have suffered some non-pecuniary damage as a result of the breach of her right of access to a court which cannot be compensated by the Court's finding of a violation. The amount claimed is, however, excessive. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of 8,000 euros, plus any tax that may be chargeable on that amount.

B. Costs and expenses

1. The parties' submissions

85. The applicant claimed LVL 2,600 (approximately EUR 3,714) for the costs and expenses she had incurred at the domestic level in connection with her case and in the proceedings before the Court. Those included travel expenses for her trips to Jelgava, where she had allegedly visited local authorities. The applicant submitted confirmation that she had paid for fuel and some postal expenses. The applicant also sought LVL 2,000 (approximately EUR 2,857) in respect of costs and expenses relating to her legal representation in the proceedings before the Court as well as fees for the legal advice she sought during the examination of her case by the domestic authorities. The applicant attached a copy of a contract concluded on 10 June 1997 between her and a private person, E.E., who is not a lawyer, for legal assistance in the proceedings before the domestic authorities and the Court.

86. The Government did not provide any comments in this connection.
2. The Court's assessment

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

information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and the proceedings before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Joins to the merits the Government's preliminary objection concerning the alleged lack of any possessions and dismisses it;

2. Joins to the merits the Government's preliminary objections concerning the failure to appeal against the decision of 8 September 2005 and the failure to lodge a civil action pursuant to Article 308 of the Criminal Procedure Code;

3. Declares the application admissible;

4. Holds that there has been no violation of Article 1 of Protocol No. 1 to the Convention;

5. Holds that there has been a violation of Article 6 § 1 of the Convention and that no separate issue arises under Article 13 of the Convention;

6. Holds
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

3 CASE LAW ON CRIMINAL ASSET RECOVERY AND PROTECTION OF PROPERTY RIGHTS

3.1 Case of Air Canada v. United Kingdom

Application no. 18465/91
JUDGEMENT
5 May 1995
PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 March 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 18465/91) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by Air Canada, a company incorporated under Canadian law and registered as an overseas company in the United Kingdom, on 2 May 1991.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 (art. 6) of the Convention and Article 1 of Protocol No. 1 (P1-1) to the Convention.

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

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 March 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr F. Matscher, Mr B. Walsh, Mr C. Russo, Mr A. Spielmann, Mr S.K. Martens and Mr R. Pekkanen (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence on 11 May 1994, the Registrar received the applicant's memorial on 29 August 1994 and the Government's memorial on 2 September 1994. On 6 October 1994 the Secretary to the Commission indicated that the Delegate would submit his observations at the hearing.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 November 1994. The Court had held a preparatory meeting beforehand.

THE FACTS
I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Background to litigation

6. Between 1983 and 1987 a number of incidents gave rise to concern over the adequacy of the applicant company's security procedures at Heathrow Airport, London:

(1) Between November 1983 and September 1984 a series of consignments, believed by Customs and Excise to have contained drugs, disappeared from the Air Canada transit shed.

(2) In March 1986 809 kilograms of cannabis resin were discovered in a consignment from India (New Delhi).

(3) In May 1986 a consignment from Thailand which had been taken out of the controlled area, was intercepted and found to contain 300 kilograms of cannabis resin. Two Air Canada staff were subsequently convicted of offences connected to the importation of cannabis resin.

(4) On 11 June 1986 Customs and Excise wrote to the applicant company's Cargo Terminal Manager expressing concern about the large quantities of drugs being smuggled into the country with the assistance of Air Canada staff. In its reply Air Canada promised to improve its security.

(5) On 15 December 1986 Customs and Excise wrote to all airline operators at Heathrow and Gatwick warning them about the possible penalties if illegal imports were discovered aboard their aircraft. The letter stated, inter alia, that where an aircraft was used for the carriage of anything liable to forfeiture the Commissioners "will consider exercising their powers under the law, including the seizure and forfeiture of aircraft or the imposition of monetary penalties in lieu of such forfeiture".

(6) On 31 December 1986 Customs and Excise wrote again to the applicant company informing it that £2,000 would be deducted from Air Canada's bond pursuant to section 152 of the Customs and Excise Management Act 1979 ("the 1979 Act") for earlier breaches of security.

(7) Between November 1986 and January 1987 another consignment was removed from the Air Canada transit shed without proper authority and the applicant company failed to inform Customs and Excise for a considerable time. It was decided to deduct £5,000 from Air Canada's bond.

B. Discovery of consignment of cannabis resin

7. On 26 April 1987 a Tristar aircraft owned and operated by the applicant company and worth over £60 million, landed at Heathrow Airport, London, where it discharged cargo including a container which, when opened, was found to contain 331 kilograms of cannabis resin valued at about £800,000. The airway bill number of the container was false, the

applicant company's cargo computer did not hold any details of the consignment and no airway bill had been drawn up and despatched for it.

The aircraft was on a regular scheduled flight starting in Singapore and travelling to Toronto landing en route at Bombay and Heathrow. It was carrying both fare-paying passengers and cargo.

C. Action of the Customs and Excise Commissioners

8. On the morning of 1 May 1987 officers of the Commissioners of Customs and Excise ("the Commissioners") acting under powers conferred by section 139 (1) of the 1979 Act seized the aircraft as liable to forfeiture under section 141 (1) of the same Act. Passengers were waiting to board the aircraft.

9. On the same day the Commissioners, acting under powers contained in section 139 (5) and paragraph 16 of Schedule 3 to the 1979 Act, delivered the aircraft back to the applicant company on payment of a penalty, namely a bankers' draft for £50,000.

10. No reasons were given to the applicant company at the time for the decision either to seize the aircraft or to levy the penalty. It was only during the course of proceedings before the European Commission of Human Rights that the Government offered the earlier security problems (see paragraph 6 above) as an explanation for the actions of the Commissioners.

D. Proceedings before the High Court

11. On 20 May 1987 the applicant company gave notice of a claim disputing that the aircraft was liable to forfeiture. The Commissioners therefore brought condemnation proceedings before the court to confirm, inter alia, that the aircraft was liable to forfeiture at the time of seizure in accordance with paragraph 6 of Schedule 3 (see paragraph 18 below).

12. On 18 June 1988 an order was made by a Master of the High Court with the consent of the parties that the preliminary issues to be decided were as follows:

(1) Whether the facts that **(a)** cannabis resin was found in container ULD6075AC; and **(b)** that container had been carried by aircraft on Flight AC859 on 26 April 1987, alone constitute 'use of the aircraft for the carriage of a thing liable to forfeiture' within the meaning of section 141 (1) (a) of the Customs and Excise Management Act 1979, such as to justify its subsequent seizure on 1 May 1987;

(2) Whether it is a defence to the Plaintiffs' [the Commissioners] claim in this action if the Defendants establish that they did not know that the aforesaid container contained cannabis resin and were not reckless in failing so to discover;

(3) Whether it is a defence to the Plaintiffs' claim in this action if the Defendants establish that they could not with reasonable diligence have discovered that cannabis had been secreted and hidden or was being carried in the container, nor could they by the exercise of reasonable diligence have prevented its being secreted and hidden in the container;

(4) Whether it is necessary for the Plaintiffs to prove in this action:

i. that the Defendants knew or ought to have known that cannabis resin was on board the aircraft on 26 April 1987; and/or
ii. that the aircraft was on other than a regular scheduled and legitimate flight."

13. On 7 November 1988 giving judgment in the High Court ([1989] 2

Weekly Law Reports 589), Mr Justice Tucker concluded:

> "I cannot think that the draughtsman of the 1979 Act had the present situation in mind. I cannot believe that it was the intention of Parliament that the innocent and bona fide operator of an extremely valuable aircraft on an international scheduled flight should be at risk of having the aircraft forfeited if, unknown to him and without any recklessness on his part, some evil-minded person smuggles contraband or prohibited goods aboard the aircraft."

He answered the preliminary questions as follows:

1. No. Those facts alone do not constitute 'use of the aircraft for the carriage of a thing liable to forfeiture'.
2. Yes. It is a defence.
3. Yes. It is a defence.
4. It is necessary for the Plaintiffs to prove in this action:
   i. that the defendants knew or ought to have known that cannabis resin was on board the aircraft on 26 April 1987; or (but not and)
   ii. that the aircraft was on other than a regular scheduled and legitimate flight."

E. Proceedings before the Court of Appeal

14. On 14 June 1990 the Court of Appeal overruled the decision of the High Court (Customs and Excise Commissioners v. Air Canada, [1991] 2 Queen's Bench Division 446). Lord Justice Purchas stated as follows (at pp. 467-68):

"The wording of section 141 is, in my view, clear and unambiguous and does not permit of any implication or construction so as to import an element equivalent to mens rea [criminal intent] nor does it involve in any way any person in the widest sense whether as user, proprietor or owner but depends solely on 'the thing' being used in the commission of the offence which rendered the goods liable to forfeiture ... In my judgment the mitigating provisions included in section 152 and paragraph 16 of Schedule 3, indicate clearly that Parliament intended to trust to the Commissioners the exercise of these matters of discretion. Apart from this the exercise of this discretion will be readily open to review by the court under R.S.C. Order 53 ... I would only comment that there may well be a case to exclude inter-continental or large passenger jet aircrafts flying on scheduled flights from section 141.

> (1) in the same way as vessels over a certain size have been excluded and to provide for them in section 142 ..."

The preliminary questions were answered as follows:

1. Yes
2. No
3. No
4. No

15. Although the Court of Appeal condemned the aircraft as forfeited this did not have the effect of depriving Air Canada of ownership since it had paid the sum required for the return of the aircraft (see Schedule 3, paragraph 7 at paragraph 19 in fine below).

16. In the course of his judgment Lord Justice Purchas added (at pp. 464 and 467):

> "Mr Webb, for Air Canada, relying upon the above authorities, made the following submissions ... that in effect if not in form section 141 was a criminal provision under which severe penalties could in practice be inflicted upon the owner or proprietor of vessels, particularly large aircraft and that, therefore, under the authorities just cited there should be implied in the terms of that section a requirement that the Commissioners must establish in their condemnation proceedings knowledge of some sort in the airline by their servants or agents so as to comply with the presumption of mens rea in criminal provisions.
>
> ...
>
> In my judgment, the answer to this submission which demonstrates its fallacy is that the process which is invoked as a result of sections 141 (1), 139 and Schedule 3 is by description a civil process. This of itself would not, if all other matters militated to the contrary, prevent it from being in its nature a criminal provision. Mere words would not necessarily be conclusive although the procedure in the civil courts outlined in Schedule 3 must carry considerable weight. The matter is, however, put beyond argument by the earlier cases ... [which decide that] section 141 and its predecessor sections in the 1952 Act and the 1876 Act provided a process in rem against any vehicle, container or similar article which was in fact used in the process of smuggling ..."

In their judgments, Lord Justice Balcombe and Sir David Croom-Johnson agreed that section 141 (1) did not create a criminal offence (at pp. 468 and 469).

17. Leave to appeal to the House of Lords was refused by the Court of Appeal on that occasion and on 7 November 1990 by the House of Lords.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Customs and Excise Management Act 1979

18. Liability to forfeiture

Section 141 (1)

> "... where anything has become liable to forfeiture under the Customs and Excise Acts - any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling,

deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purpose of the commission of the offence for which it later became so liable; ... shall also be liable to forfeiture."

Schedule 3, paragraph 6

"Where notice of claim in respect of any thing is duly given in accordance with [paragraphs 3 and 4 above] the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited."

19. Powers of Commissioners after seizure

Section 139 (5)

"Subject to subsections (3) and (4) and to Schedule 3 to [the] Act any thing seized or detained under the Customs and Excise Acts shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned or forfeited, shall be disposed of in such manner as the Commissioners may direct."

Section 152

"The Commissioners may, as they see fit -

a) stay, sist or compound any proceedings for an offence or for the condemnation of any thing as being forfeited under the Customs and Excise Acts; or
b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts; or
c) after judgment mitigate or remit any pecuniary penalty imposed under those Acts ..."

Schedule 3, paragraph 16

"Where any thing has been seized as liable to forfeiture the Commissioners may at any time if they see fit and notwithstanding that the thing has not yet been condemned, or is not yet deemed to have been condemned, as forfeited -

a) deliver it up to any claimant upon his paying to the Commissioners such sum as they think proper, being a sum not exceeding that which in their opinion represents the value of the thing, including any duty or tax chargeable thereon which has not been paid ..."

Schedule 3, paragraph 7

"Where any thing is in accordance with either of paragraphs 5 or 6 above condemned or deemed to have been condemned as forfeited, then, without prejudice to any delivery up or sale of the thing by the Commissioners under paragraph 16 ..., the forfeiture shall have effect as from the date when the liability to forfeiture arose."

B. Judicial review

20. The exercise of the powers conferred on the Commissioners of Customs and Excise are subject to judicial review. The three traditional grounds for judicial review as described by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service ([1985] Appeal Cases 375 (House of Lords)) are illegality, irrationality and procedural impropriety.

> "Illegality" means that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
>
> "Irrationality" or what is often also referred to as "Wednesbury unreasonableness" applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.
>
> "Procedural impropriety" covers failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision, as well as failure to observe procedural rules that are expressly laid down even where such failure does not involve any denial of natural justice.

21. In the case of R. v. Secretary of State for the Home Department, ex parte Brind ([1991] 1 Appeal Cases 696) the House of Lords held that lack of proportionality is not normally treated as a separate ground of review under English administrative law.

Lord Ackner, while considering that an administrative decision which suffered from a total lack of proportionality would be unreasonable in the Wednesbury sense, indicated that until Parliament incorporates the Convention into domestic law, there was no basis at present upon which the proportionality doctrine applied by the European Court of Human Rights could be followed by the courts of the United Kingdom (at pp. 762-63).

Lord Lowry (at p. 767) cited with approval the following statement from Halsbury's Laws of England (vol. 1 (1) at paragraph 78):

> "Proportionality: The courts will quash exercises of discretionary power in which there is not a reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle of proportionality is well established in European law, and will be applied by English courts where European law is enforceable in the domestic courts. The principle of proportionality is still at a stage of development in English law; lack of proportionality is not usually treated as a separate ground of review in English law, but is regarded as one indication of manifest unreasonableness."

22. Judicial review proceedings in respect of decisions of the Commissioners have been brought in two cases. In R. v. Commissioners of Customs and Excise, ex parte Haworth (judgment of 17 July 1985), the High Court found that the Commissioners had acted unreasonably in that they had failed to give the owner of goods seized in a smuggling attempt the necessary information about matters held against him and no opportunity to reply thereto.

Similarly in R. v. Commissioners of Customs and Excise, ex parte Tsahl (judgment of 11 December 1989), the High Court required the Commissioners to take as the date of valuation of diamonds which they had seized, for the purpose of determining the amount of the payment for their return, the date of return rather than the date of import.

PROCEEDINGS BEFORE THE COMMISSION

23. The applicant company lodged its application (no. 18465/91) with the Commission on 2 May 1991. The applicant company complained that the seizure of its aircraft and its subsequent return on conditions, violated its right to peaceful enjoyment of its possessions as guaranteed by Article 1 of Protocol No. 1 (P1-1). It further alleged that the proceedings involved did not comply with the requirements of Article 6 para. 1 (art. 6-1) of the Convention.

24. The Commission declared the application admissible on 1 April 1993. In its report of 30 November 1993 (Article 31) (art. 31), the Commission expressed the opinion that there had been no violation of Article 1 of Protocol No. 1 (P1-1) (nine votes to five) and that there had been no violation of Article 6 (art. 6) (eight votes to six).

25. The full text of the Commission's opinion and of the dissenting opinions contained in the report is reproduced as an annex to this judgment (1).

_____

1. Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 316-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

_____

Final submissions by the government to the court

26. The Government, in their memorial, requested the Court to decide and declare that the facts disclose no breach of the applicant's rights under Article 1 of Protocol No. 1 and Article 6 (P1-1, art. 6) of the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 (P1-1)

27. The applicant company complained that the seizure of its aircraft and the subsequent requirement to pay £50,000 for its return amounted to an unjustified interference with the peaceful enjoyment of its possessions contrary to Article 1 of Protocol No. 1 (P1-1) to the Convention which reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance

with the general interest or to secure the payment of taxes or other contributions or penalties."

28. It is not in dispute between those appearing before the Court that the matters complained of constituted an interference with the peaceful enjoyment of the applicant's possessions. However there was disagreement as to whether there had been a deprivation of property under the first paragraph (P1-1) or a control of use under the second paragraph (P1-1).

A. The applicable rule

29. The Court recalls that Article 1 (P1-1) guarantees in substance the right of property and comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph (P1-1) and is of a general nature, lays down the principle of peaceful enjoyment of property. The second, in the second sentence of the same paragraph (P1-1), covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph (P1-1), recognises that the Contracting States are entitled to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

30. However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among many other authorities, the AGOSI v. the United Kingdom judgment of 24 October 1986, Series A no. 108, p. 17, para. 48).

31. The applicant considered that it had been deprived of its aircraft albeit for a temporary period and, subsequently, as a permanent measure, of the £50,000 that it was required to pay as a condition for the return of its property. There had thus been a deprivation of possessions.

32. For the Government, with whom the Commission agreed, this was not a case involving a deprivation of property since no transfer of ownership of the applicant's aircraft had taken place. The seizure and demand for payment were to be seen as part of the system for the control of the use of an aircraft which had been employed for the import of prohibited drugs.

33. The Court is of the same view. It observes, in the first place, that the seizure of the aircraft amounted to a temporary restriction on its use and did not involve a transfer of ownership, and, in the second place, that the decision of the Court of Appeal to condemn the property as forfeited did not have the effect of depriving Air Canada of ownership since the sum required for the release of the aircraft had been paid (see paragraph 15 above).

34. In addition, it is clear from the scheme of the legislation that the release of the aircraft subject to the payment of a sum of money was, in effect, a measure taken in furtherance of a policy of seeking to prevent carriers from bringing, inter alia, prohibited drugs into the United Kingdom. As such, it amounted to a control of the use of property. It is therefore the second paragraph of Article 1 (P1-1) which is applicable in the present case (see, mutatis mutandis, the above-mentioned AGOSI judgment, p. 17, para. 51).

B. Compliance with the requirements of the second paragraph

35. It remains to be decided whether the interference with the applicant's property rights was in conformity with the State's right under the second paragraph of Article 1 of Protocol No. 1 (P1-1) "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest".

36. According to the Court's well-established case-law, the second paragraph of Article 1 (P1-1) must be construed in the light of the principle laid down in the Article's (P1-1) first sentence (see, as the most recent authority, the Gasus Dosier- und Fördertechnik GmbH v. the Netherlands judgment of 23 February 1995, Series A no. 306-B, p. 49, para. 62). Consequently, an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 (P1-1) as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued.

37. In this regard the applicant considered that the interference with its property rights was not justified under Article 1 of Protocol No. 1 (P1-1). In the first place, it complained that the power to forfeit the aircraft and to require payment as a condition of its return did not depend on showing that the owner, operator or airline was in some way at fault. Indeed it pointed out that the proceedings brought before the United Kingdom courts were conducted on agreed assumptions predicated, in effect, on the fact that Air Canada had not been at fault.

Secondly, the relevant powers were exercised without a hearing before a judicial body. In particular, there existed no adequate legal safeguards to protect Air Canada from the exercise of discretion by Customs and Excise officials.

Thirdly, the temporary seizure of the aircraft was disproportionate to any wrong that might have been done, as was the requirement to pay £50,000.

38. For the Government, there were strong public interest reasons justifying the actions of the Commissioners in the present case. There had been previous occasions when inadequate Air Canada procedures had led to the carriage of dangerous drugs. Despite promises to improve their procedures they had failed to do so. The events leading to the seizure of the aircraft had involved very serious lapses in security (see paragraph 6 above). Moreover, it was noteworthy that following the events at issue there had been no further security problems with Air Canada. The Commissioners had thus acted within the margin of appreciation conferred on them by the second paragraph of Article 1 of Protocol No. 1 (P1-1) in order to encourage the adoption of higher security standards by the applicant company.

In addition, it would have been open to Air Canada, if it believed that there was no reasonable basis for the decision to require the payment of money or that there had been an abuse of power, to challenge the exercise of the Commissioners' discretion by instituting proceedings for judicial review. Had Air Canada done so the courts could have examined any disputed questions of fact as well as points of law. Moreover the Commissioners, on the basis of the existing law (see paragraphs 20-22 above), would have been obliged to provide reasons for their actions.

In sum, in the Government's submission, a fair balance had been struck in the present case.

39. The Commission also considered that judicial review proceedings could have been brought and that the actions taken were proportionate to the aim of controlling the use of aircraft involved in the importation of prohibited drugs.

40. The Court first observes that it is clear from the decision of the Court of Appeal that both the seizure of the aircraft and the requirement of payment, in the absence of any finding of fault or negligence on the part of the applicant, were in conformity with the relevant provisions of the 1979 Act (see paragraphs 18-19 above).

41. While the width of the powers of forfeiture conferred on the Commissioners by section 141 (1) of this Act is striking, the seizure of the applicant's aircraft and its release subject to payment were undoubtedly exceptional measures which were resorted to in order to bring about an improvement in the company's security procedures. These measures were taken following the discovery of a container, the shipment of which involved various transport irregularities, holding 331 kilograms of cannabis resin (see paragraph 7 above). Moreover, this incident was the latest in a long series of alleged security lapses which had been brought to Air Canada's attention involving the illegal importation of drugs into the United Kingdom during the period 1983-87 (see paragraph 6 above). In particular, Air Canada - along with other operators - had been warned in a letter dated 15 December 1986 from the Commissioners that, where prohibited goods have been carried, they would consider exercising their powers under the 1979 Act including the seizure and forfeiture of aircraft.

42. Against this background there can be no doubt that the measures taken conformed to the general interest in combating international drug trafficking.

43. The applicant, however, claimed that no reasons had been given by the Commissioners, at the time of the events complained of, to justify their actions and that they had been, in effect, judge and jury in their own cause. It was only in the course of the proceedings before the Commission that reference was made to earlier security shortcomings (see paragraph 10 above).

44. The Court cannot accept this submission. It notes that it would have been open to Air Canada to have instituted judicial review proceedings to challenge the failure of the Commissioners to provide reasons for the seizure of the aircraft or indeed to contend that the acts of the Commissioners constituted an abuse of their authority. Although not an appeal on the merits of the case, the availability and effectiveness of this remedy in respect of the exercise of discretion by the Commissioners under their statutory powers has already been noted by the Court in its AGOSI judgment (loc. cit., pp. 20-21, paras. 59-60).

Moreover, although the provision of reasons from the outset would have contributed to clarifying the situation, the applicant could not have been in any real doubt as to the reasons for the Commissioners' decision having regard to the numerous incidents concerning the various security lapses and irregularities which had occurred in the past (see paragraph 6 above) - which the applicant has not sought to deny in the proceedings before the Court - as well as the warning letter from the Commissioners which had been sent, inter alia, to Air Canada pointing out that forfeiture of an aircraft was a possibility (see paragraph 6 at point (5) above).

45. The applicant next contended that judicial review proceedings only enabled the courts to examine the "reasonableness" of the exercise of discretion. It pointed out that the courts have held that the principle of proportionality was not part of English law (see paragraph 21 above).

46. The Court recalls that on a previous occasion it reached the conclusion that the scope of judicial review under English law is sufficient to satisfy the requirements of the second paragraph of Article 1 of Protocol No. 1 (P1-1). In particular, it is open to the domestic courts to hold that the exercise of discretion by the Commissioners was unlawful on the grounds that it was tainted with illegality, irrationality or procedural impropriety (see paragraph 20 above and the above-mentioned AGOSI judgment, ibid.).

Furthermore, there have been cases in which the courts have found that the Commissioners had acted unreasonably in the exercise of their powers under the 1979 Act (see paragraph 22 above).

There is no reason to reach a different conclusion on this point in the present case notwithstanding the qualified exclusion of the proportionality principle as a separate ground of review (see paragraph 21 above).

47. Finally, taking into account the large quantity of cannabis that was found in the container, its street value (see paragraph 7 above) as well as the value of the aircraft that had been seized, the Court does not consider the requirement to pay £50,000 to be disproportionate to the aim pursued, namely the prevention of the importation of prohibited drugs into the United Kingdom.

48. Bearing in mind the above, as well as the State's margin of appreciation in this area, it considers that, in the circumstances of the present case, a fair balance was achieved. There has thus been no violation of Article 1 of Protocol No. 1 (P1-1).

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

49. The applicant further complained that it was, in effect, subjected to a criminal penalty. In the alternative, the seizure of the aircraft amounted to a determination, without court proceedings, of the company's civil rights and obligations in breach of Article 6 para. 1 (art. 6-1), the relevant part of which reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

A. Applicability

1. Criminal charge

50. Air Canada considered that it had been, in effect, fined by the Commissioners and that neither the condemnation proceedings nor the theoretical possibility of judicial review satisfied the requirements of Article 6 para. 1 (art. 6-1).

51. The Government, on the other hand, with whom the Commission agreed, pointed out that under domestic law no criminal charges had been brought and that the criminal courts had not been involved in the matter.

52. The Court agrees with the Government's observation. It is also noteworthy that the Court of Appeal specifically rejected the argument made by counsel for Air Canada that section 141 of the 1979 Act was tantamount to a criminal provision (see paragraph 16 above). In this connection, the Court of Appeal pointed out that the description of the relevant provisions as being "civil" did not preclude it from finding that a provision was, in effect, "criminal" in nature. However, the matter was resolved with reference to earlier cases which decided that section 141 provided a process in rem against, inter alia, any vehicle used in smuggling.

The Court is, for the same reasons, similarly persuaded.

Moreover, the factors referred to above - the absence of a criminal charge or a provision which is "criminal" in nature and the lack of involvement of the criminal courts - taken together with the fact that there was no threat of any criminal proceedings in the event of non-compliance, are sufficient to distinguish the present case from that of Deweer v. Belgium (judgment of 27 February 1980, Series A no. 35) where the applicant was obliged to pay a sum of money under constraint of the provisional closure of his business in order to avoid criminal proceedings from being brought against him.

53. It is further recalled that a similar argument had been made by the applicant in the AGOSI case (loc. cit.). On that occasion the Court held that the forfeiture of the goods in question by the national court were measures consequential upon the act of smuggling committed by another party and that criminal charges had not been brought against AGOSI in respect of that act. The fact that the property rights of AGOSI were adversely affected could not of itself lead to the conclusion that a "criminal charge" for the purposes of Article 6 (art. 6), could be considered as having been brought against the applicant company (loc. cit., p. 22, paras. 65-66).

54. Bearing in mind that, unlike the AGOSI case, the applicant company had been required to pay a sum of money and that its property had not been confiscated, the Court proposes to follow the same approach.

55. Accordingly the matters complained of did not involve "the determination of [a] criminal charge".

2. Civil rights and obligations

56. It has not been disputed by those appearing before the Court that the present case concerns a dispute relating to the applicant company's civil rights.

On the basis of its established case-law the Court sees no reason to differ from this view (see, the Editions Périscope v. France judgment of 26 March 1992, Series A no. 234-B, p. 66, para. 40).

B. Compliance with Article 6 para. 1 (art. 6-1)

57. The applicant further maintained that its civil rights and obligations had been determined by the procedures under the 1979 Act. It contended, in this respect also, that neither the condemnation proceedings nor the remedy of judicial review satisfied Article 6 para. 1 (art. 6-1). In particular, the proportionality of the measures complained of could not be examined in judicial review proceedings and the wider the statutory provisions under scrutiny the narrower the scope of review. Moreover the remedy was discretionary in nature.

58. In the Government's submission, the Commissioners could not forfeit the aircraft until they had taken condemnation proceedings in the High Court which the applicant had the opportunity to defend. Furthermore, it had the possibility to bring judicial review proceedings to challenge the decision to require the money payment for the return of the aircraft.

59. For the Commission, the applicant's complaint as regards the condemnation proceedings related more to the content of the rights and obligations under domestic law than to any procedural right in connection with the determination of civil rights. Further, as regards judicial review proceedings, it was not prepared to express a view in the abstract since no proceedings had actually been brought by Air Canada.

60. The Court notes that the applicant's complaint related to both the seizure of the aircraft and the payment of £50,000.

61. As regards the seizure, the relevant provisions of United Kingdom law required the Commissioners to take proceedings for forfeiture once the seizure of the aircraft had been challenged (see paragraphs 11 and 18 above). Such proceedings were in fact brought and, with the agreement of the parties, were limited to the determination of specified questions of law. In such circumstances, the requirement of access to court inherent in Article 6 para. 1 (art. 6-1) was satisfied.

62. Furthermore, it was also open to Air Canada to bring judicial review proceedings contesting the decision of the Commissioners to require payment as a condition for the return of the aircraft. As noted above (see paragraph 44 above), had such proceedings been brought, Air Canada could have sought to contest the factual grounds on which the exercise of discretion by the Commissioners was based. However, for whatever reason, such proceedings were not in fact instituted. Against this background, the Court does not consider it appropriate to examine in the abstract whether the scope of judicial review, as applied by the English courts, would be capable of satisfying Article 6 para. 1 (art. 6-1) of the Convention.

Conclusion

63. Accordingly, there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention.

FOR THESE REASONS, THE COURT

1. Holds by five votes to four that there has been no violation of Article 1 of Protocol No. 1 (P1-1);
2. Holds by five votes to four that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 5 May 1995.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD

3.2 Case of Raimondo v. Italy

Application no. 12954/87
JUDGMENT
STRASBOURG
22 February 1994

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 18 January 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12954/87) against the Italian Republic lodged with the Commission under Article 25 (art. 25) by an Italian national, Mr Giuseppe Raimondo, on 23 April 1987.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Italy recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention, Article 1 of Protocol No. 1 (P1-1) and Article 2 of Protocol No. 4 (P4-2).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Mrs Pittelli, Mr Raimondo's wife, and their three sons informed the Registrar on 7 June 1993 of the death of their husband and father. They stated that they wished to continue the proceedings and to take part in them and be represented by the lawyer whom they had appointed (Rule 30). For reasons of convenience Mr Raimondo will continue to be referred to as the "applicant", although it is now his widow and his three sons who are to be regarded as having that status (see, inter alia, the Pandolfelli and Palumbo v. Italy judgment of 27 February 1992, Series A no. 231-B, p. 16, para. 2).

Mrs Pittelli and her sons also consented to the disclosure of the identity of Mr Raimondo, who had at first been designated by the initials G. R.

3. The Chamber to be constituted included ex officio Mr C. Russo, the elected judge of Italian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 February 1993 Mr R. Bernhardt, the Vice-President of the Court, drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr Bernhardt, Mr F. Matscher, Mrs E. Palm, Mr I. Foighel, Mr F. Bigi, Mr L. Wildhaber and Mr D. Gotchev (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Italian Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 12 July 1993 and the Government's memorial on 30 July. The Delegate of the Commission did not submit observations in writing.

5. On 6 September 1993 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the decision of the President - who had given the applicant leave to use the Italian language (Rule 27 para. 3) -, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 September 1993. The Court had held a preparatory meeting beforehand.

THE FACTS
I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. Mr Giuseppe Raimondo, a building entrepreneur, lived in Davoli (Catanzaro) until his death on 11 July 1992.

Criminal proceedings were brought against him as he was suspected of belonging to a mafia-type organisation operating in the Soverato region. At the same time various preventive measures were taken concerning him.

A. The criminal proceedings

8. On 24 July 1984 the Catanzaro Public Prosecutor issued a warrant for the arrest of seventeen persons including the applicant. After initially evading arrest under this warrant, the applicant gave himself up to the authorities on 7 November 1984 and was immediately remanded in custody.

9. The investigation was closed on 24 July 1985 and Mr Raimondo was committed for trial in the Catanzaro District Court with fourteen co-defendants. His detention on remand was replaced by house arrest (arresti domiciliari).

10. On 8 October 1985, at the first hearing, the District Court ordered the joinder of the case with two others and directed that certain documents be included in the file. It then adjourned the proceedings to 16 January 1986.

On 30 January 1986 the District Court acquitted Mr Raimondo on the ground of insufficient evidence (assoluzione per insufficienza di prove) and revoked the order placing him under house arrest.

11. Giving judgment on 16 January 1987 on the appeals of the public prosecutor and Mr Raimondo, the Catanzaro Court of Appeal acquitted the latter on the ground that the material facts of the offence had not been established (perchè il fatto non sussiste). No appeal was filed in the Court of Cassation.

B. The proceedings concerning the preventive measures

1. In the Catanzaro District Court

12. On 16 January 1985 the Catanzaro Public Prosecutor applied to the District Court for an order placing Mr Raimondo under special police supervision and for the preventive seizure of a number of assets with a view to their possible confiscation (Act no. 1423 of 27 December 1956 and Act no. 575 of 31 May 1965, as amended by Act no. 646 of 13 September 1982 - see paragraphs 16-18 below). He based his application on a report by the Soverato carabinieri dated 27 December 1984.

13. On 13 May 1985 the District Court ordered the seizure of sixteen items of real property (ten plots of land and six buildings) and of six vehicles, all of which appeared to be at the applicant's disposal. The measure was entered in the relevant public registers on 15 May 1985.
On 16 October the District Court revoked the seizure of certain property belonging to third parties; on the other hand, it ordered the confiscation of some of the buildings seized of which the applicant and his wife were the owners and four vehicles, on the ground that it had not been proved that the assets in question had been "lawfully acquired". The confiscation was recorded in the register on 9 November 1985.

By the same decision Mr Raimondo was placed under special police supervision, which however did not become effective until 30 January 1986, the day on which he was acquitted by the District Court (see paragraph 10 above); he was also required to lodge a security of 2,000,000 lire as a guarantee to ensure that he complied with the constraints attaching to this measure, namely a prohibition on leaving his home without informing the police; an obligation to report to the police on the days indicated to that effect; an obligation to return to his house by 9 p.m. and not to leave it before 7 a.m. unless he had valid reasons for doing so and had first informed the relevant authorities of his intention.

2. In the Catanzaro Court of Appeal

14. On an appeal by the applicant, the Catanzaro Court of Appeal gave judgment at a private hearing on 4 July 1986. It annulled the special supervision measure and ordered the restitution of the security and the property seized and confiscated. Its decision (decreto) referred to the "disconcertingly casual way in which the contested preventive measures concerning the person and property of Mr Raimondo had been adopted thereby effectively decreeing his civil and economic death".

The decision was filed with the registry on 2 December 1986 and signed by the relevant official of the prosecuting authority on 10 December. Again on 2 December the Court of Appeal registry notified it to the competent police authorities (questura) who, on 5 December, advised the local carabinieri of the decision. The latter informed the applicant on 20 December.

The decision became final on 31 December 1986.

15. The revocation of the seizure of the real property and of the confiscation of the vehicles was entered in the relevant registers on 2 February (real property), 10 February (two cars and a van) and 10 July 1987 (a lorry).

The security was returned to the applicant on 24 April 1987.

As regards the real property that had been confiscated, the applications for the entry in the register of the revocation of the measure are dated 9 August 1991.

II. RELEVANT DOMESTIC LAW

A. The legislation in force at the material time

1. The Act of 27 December 1956

16. Act no. 1423 of 27 December 1956 ("the 1956 Act") provides for various preventive measures in respect of "persons presenting a danger for security and public morality". The relevant provisions are summarised in the Guzzardi v. Italy judgment of 6 November 1980 (Series A no. 39, pp. 17-19, §§ 46-49):

> "46. Under section 1, the Act applies to, amongst others, ... individuals who, by reason of their behaviour and style of life (tenore di vita), must be considered as habitually living, even in part, on the proceeds of crime or on the rewards of complicity therein (con il favoreggiamento), or whose outward conduct gives good reason to believe that they have criminal tendencies (che, per le manifestazioni cui abbiano dato luogo, diano fondato motivo di ritenere che siano proclivi a delinquere).
> The Chief of Police [(questore)] may send such persons a warning (diffida) ...
> ...
> 47. ...
> 48. ... [such a person] may, under section 3, be placed under special police supervision (sorveglianza speciale della pubblica sicurezza); if need be, this may be combined either with a prohibition on residence in one or more given districts or provinces or, in the case of a particularly dangerous person (particolare pericolosità), with an order for compulsory residence in a specified district (obbligo del soggiorno in un determinato comune).
> Only the District Court of the chief town of the province has power to order these measures; it will do so on the basis of a reasoned application by the [questore] to its president (section 4, first paragraph). The District Court must give a reasoned decision (provvedimento) in chambers within thirty days. It will first hear the Public Prosecutor's department and the person concerned, the latter being entitled to submit written pleadings and to be assisted by a lawyer (section 4, second paragraph).
> The prosecuting authorities and the person concerned may, within ten days, lodge an appeal which does not have suspensive effect; the Court of Appeal has to give a reasoned decision (decreto) in chambers within thirty days (section 4, fifth and sixth paragraphs). That decision may in turn and on the same conditions be the subject of a further appeal to the Court of Cassation, which must give its ruling in chambers within thirty days (section 4, seventh paragraph).
> 49. When adopting one of the measures listed in section 3, the District Court will specify for how long it is to remain in force - not less than one and not more than five years (section 4, fourth paragraph) - and will give directives with which the person in question must comply (section 5, first paragraph).
> ..."

2. The Act of 31 May 1965

17. Act no. 575 of 31 May 1965 ("the 1965 Act") supplements the 1956 Act by adding clauses directed against the Mafia (disposizioni contro la mafia). Section 1 states that it is applicable to persons - such as Mr Raimondo - against whom there is evidence showing that they belong to "mafia-type" groups (indiziati di appartenere ad associazioni mafiose).

18. The above legislation was strengthened by Act no. 646 of 13 September 1982 ("the 1982 Act") which inserted, inter alia, a section 2 ter in the 1965 Act. It makes provision for various measures to be used in the course of proceedings relating to the application of the preventive measures available under the 1956 Act in respect of a person suspected of belonging to such an organisation:

> "... the District Court may issue a reasoned decision, even of its own motion, ordering the seizure of property at the direct or indirect disposal of the person against whom the proceedings have been instituted, when there is sufficientcircumstantial evidence, such as a considerable discrepancy between his lifestyle and his apparent or declared income, to show that the property concerned forms the proceeds from unlawful activities or their reinvestment.
>
> Together with the implementation of the preventive measure the District Court shall order the confiscation of any of the goods seized in respect of which it has not been shown that they were lawfully acquired. Where the inquiries are complex, this measure may also be taken at a later date, but not more than one year after the date of the seizure.
>
> The District Court shall revoke the seizure order when the application for preventive measures is dismissed or when it has been shown that the property in question was lawfully acquired."

B. The case-law concerning the application of preventive measures, particularly of a pecuniary nature

19. In its report (paragraph 43), the Commission sets out a summary of the case-law in this area:

> " ... The existence of preventive measures is not in itself contrary to the Italian Constitution. The Constitutional Court has ruled that the basis for these measures is the need to guarantee the orderly and peaceful course of social relations, not only through a body of legislation penalising unlawful acts, but also through provisions intended to prevent the commission of such acts (Constitutional Court, judgment no. 27 of 1959 and judgment no. 23 of 1964).
>
> Because of their particular object, preventive measures do not relate to the commission of a specific unlawful act but to a pattern of behaviour defined by law as conduct indicating the existence of danger to society (Constitutional Court, judgment no. 23 of 1964).
>
> Consequently, in the Italian legal system, there is a fundamental difference between criminal penalties and preventive measures. The former constitute the response to an unlawful act and the consequences of that act; the latter are a means of preventing the commission of such an act.
> In other words, a criminal penalty relates to an offence already committed, whereas a preventive measure is intended to reduce the risk of future offences (see, mutatis mutandis, Constitutional Court, judgment no. 53 of 1968, concerning security measures).
> ...

Because criminal penalties and preventive measures are essentially different, not all the constitutional principles which should underpin the former necessarily apply to the latter. For example, the presumption of innocence enunciated in Article 27 of the Constitution does not concern preventive measures, which are not based on the criminal liability or guilt of the person concerned (Constitutional Court, judgment no. 23 of 1964).

Similarly, such measures do not fall within the scope of Article 25 para. 2 of the Constitution, which prohibits the retroactive application of criminal provisions. The violation of this principle has been alleged on a number of occasions in the Court of Cassation with regard to confiscation orders under section 2 ter of the 1965 Act. The Court of Cassation has ruled, firstly, that the above principle is not applicable to preventive measures (see, for example, Court of Cassation, Piraino judgment of 30 January 1985). Secondly, the Court of Cassation has pointed out that the impugned provision is not in fact retroactive, as it relates to the property in the possession of the person concerned at the time when confiscation is ordered (Court of Cassation, Oliveri judgment of 12 May 1986) and to the unlawful use of that property after its entry into force (Court of Cassation, Pipitone judgment of 4 January 1985).

In spite of these limitations, preventive measures remain open to thorough scrutiny of their compatibility with the Constitution.

As far back as 1956 the Constitutional Court ruled that in no case could the right to liberty be restricted except where such restriction was prescribed by law, where lawful proceedings had been instituted to that end and where the reasons therefor had been set out in a judicial decision (Constitutional Court, judgment no. 11 of 1956).

It subsequently ruled that preventive measures could not be adopted on the basis of mere suspicion and are justified only when based on the objective establishment and assessment of facts which reveal the behaviour and lifestyle of the person concerned (Constitutional Court, judgment no. 23 of 1964).

More recently it confirmed that the constitutionality of preventive measures still depends on respect of the rule of law and the possibility of applying to the courts for a remedy. Furthermore, the above two conditions are closely linked. Thus it is not enough for the law to indicate vague criteria for the assessment of danger; it must set them forth with sufficient precision to make the right of access to a court and adversarial proceedings a meaningful one (Constitutional Court, judgment no. 177 of 1980).

The case-law of the Court of Cassation is in this respect entirely consistent with that of the Constitutional Court; it affirms quite clearly that proceedings for the application of preventive measures must be adversarial and conducted with respect for the rights of the defence, any violation of those rights entailing their nullity (see, for example, Court of Cassation, judgment no. 1255 of 29 June 1984 in the Santoro case).

The Court of Cassation has dismissed a number of complaints alleging the unconstitutionality of the seizure and confiscation measures provided for in section 2 ter of the 1965 Act. In particular, it has ruled that the presumption concerning the unlawful origin of the property of persons suspected of belonging to organisations of

the mafia type is not incompatible with Article 24 of the Constitution, which guarantees the rights of the defence, since confiscation can only take place when there is sufficient circumstantial evidence concerning the unlawful origin of the property in question and in the absence of a rebuttal (Court of Cassation, previously cited Pipitone judgment).

...

With regard to the compatibility of seizure and confiscation measures with the right to free exercise of private economic activities and the right to peaceful enjoyment of private property (Articles 41 and 42 of the Constitution), the Court of Cassation has ruled that these rights are not absolute and may be limited in accordance with the general interest. This applies in connection with possessions of unlawful origin or their use (Court of Cassation, previously cited Oliveri and Pipitone judgments).

..."

20. In its opinion no. 1489/86 of 18 November 1986 the Consiglio di Stato stated that "although confiscation by definition enables the State to acquire the item of property in question ..., it does not in itself have the effect of transferring ownership to the public authorities ...". It will only have such effect if in addition the decision ordering it is irrevocable (Palermo District Court, order of 19 April 1989).

PROCEEDINGS BEFORE THE COMMISSION

21. Mr Raimondo applied to the Commission on 23 April 1987. He complained of the following: (a) the unlawfulness and the length of his detention (Article 5 paras. 1 and 3 of the Convention) (art. 5-1, art. 5-3); (b) the length of various proceedings concerning him and in particular the criminal proceedings (Article 6 para. 1) (art. 6-1); (c) the failure to respect the right to be presumed innocent inasmuch as preventive measures were applied to him (Article 6 para. 2) (art. 6-2); (d) the obligation to lodge a security in order to ensure compliance with the above measures (Article 1 of Protocol No. 4) (P4-1); (e) an interference with his property resulting from the seizure and confiscation of certain of his possessions (Article 1 of Protocol No. 1) (P1-1); and (f) the fact that he had been deprived of his right to freedom of movement (Article 2 of Protocol No. 4) (P4-2).

22. On 6 December 1991 the Commission declared the application (no. 12954/87) admissible as regards the complaints based on the applicant's right to peaceful enjoyment of his possessions, to the freedom of movement and to a decision on the application of preventive measures within a reasonable time; it found the rest of the application inadmissible. In its report of 21 October 1992 (made under Article 31) (art. 31), it expressed the following opinion:

(a) that there had been no violation of Article 1 of Protocol No. 1 (P1-1) with regard to the seizure (eighteen votes to one) and the confiscation (sixteen votes to three) of the applicant's property up to 31 December 1986 and on account of the damage occasioned by the administration of the seized and confiscated assets until that date (eighteen votes to one);

(b) that there had been a violation of Article 1 of Protocol No. 1 (P1-1) in so far as the confiscation of nine items of real property and one lorry had continued to take effect after 31 December 1986 (unanimously);

(c) that there had been a violation of Article 2 of Protocol No. 4 (P4-2) inasmuch as the applicant had been deprived of his right to freedom of movement from 4 July to 20 December 1986 (unanimously);

(d) that there had been no violation of Article 6 para. 1 (art. 6-1) as regards the length of the proceedings relating to the seizure and confiscation (unanimously).

Final submissions to the court by the government

23. In their memorial, the Government asked the Court "to hold and adjudicate that there had been no infringement either of the Convention or of Protocols Nos. 1 and 4".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 (P1-1)

24. Mr Raimondo complained of the seizure on 13 May 1985 of sixteen items of real property and six vehicles, and the confiscation of several of these assets ordered on 16 October 1985 (see paragraph 13 above). He relied on Article 1 of Protocol No. 1 (P1-1), which provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

25. In order to determine whether the contested measures amounted to controlling the "use of property" within the meaning of the second paragraph or constituted deprivation of possessions under the first paragraph, the Court will first examine their application up to 31 December 1986, when the decision of the Catanzaro Court of Appeal became final (see paragraph 14 above). It will then consider the matter of their remaining entered in the public registers subsequent to that date (see paragraph 15 above).

A. The application of the preventive measures concerning property up to 31 December 1986

26. The Government did not deny that there had been an interference with the applicant's right to peaceful enjoyment of his possessions. They contended, however, that the seizure and confiscation was justified on the basis of the exceptions allowed under Article 1 (P1-1) to the principle set forth in the first sentence of that provision.

1. The seizure

27. Like the Commission, the Court finds that the seizure was provided for in section 2 ter of the 1965 Act (see paragraph 18 above) and did not purport to deprive the applicant of his possessions but only to prevent him from using them. It is therefore the second paragraph of Article 1 of Protocol No. 1 (P1-1) which is relevant here.

In addition, the applicant did not contend that on 13 May 1985 it was unreasonable for the District Court to hold that there was sufficient circumstantial evidence to show that the possessions seized represented the proceeds from unlawful activities or their reinvestment. What he complained about is, rather, that such a drastic measure was taken at this stage of the proceedings. However, seizure under section 2 ter of the 1965 Act is clearly a provisional measure intended to ensure that property which appears to be the fruit of unlawful activities

carried out to the detriment of the community can subsequently be confiscated if necessary. The measure as such was therefore justified by the general interest and, in view of the extremely dangerous economic power of an "organisation" like the Mafia, it cannot be said that taking it at this stage of the proceedings was disproportionate to the aim pursued.

Accordingly, on this point no violation of Article 1 of Protocol No. 1 (P1-1) has been established.

2. The confiscation

28. In the applicant's submission, even if it was accepted that the confiscation had not deprived him of the ownership of his possessions, the entry in the public registers represented a form of enforcement of the measure before any decision had been given on his appeal.

29. Although it involves a deprivation of possessions, confiscation of property does not necessarily come within the scope of the second sentence of the first paragraph of Article 1 of Protocol No. 1 (P1-1) (see the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 30, para. 63, and the AGOSI v. the United Kingdom judgment of 24 October 1986, Series A no. 108, p. 17, para. 51).

According to Italian case-law, confiscation of the kind which is in issue in this case could not moreover have the effect of transferring ownership to the State until there had been an irrevocable decision (see paragraph 20 above). There was no such decision in this instance because Mr Raimondo had challenged the order of the Catanzaro District Court of 16 October 1985 (see paragraph 13 above). Here too therefore it is the second paragraph of Article 1 (P1-1) which applies.

30. Like the Government and the Commission, the Court observes that the confiscation - also provided for in section 2 ter of the 1965 Act -pursued an aim that was in the general interest, namely it sought to ensure that the use of the property in question did not procure for the applicant, or the criminal organisation to which he was suspected of belonging, advantages to the detriment of the community.

The Court is fully aware of the difficulties encountered by the Italian State in the fight against the Mafia. As a result of its unlawful activities, in particular drug-trafficking, and its international connections, this "organisation" has an enormous turnover that is subsequently invested, inter alia, in the real property sector. Confiscation, which is designed to block these movements of suspect capital, is an effective and necessary weapon in the combat against this cancer. It therefore appears proportionate to the aim pursued, all the more so because it in fact entails no additional restriction in relation to seizure.

Finally, the preventive purpose of confiscation justifies its immediate application notwithstanding any appeal.

In conclusion, the respondent State did not overstep the margin of appreciation left to it under the second paragraph of Article 1 (P1-1).

3. The surveillance of the property seized or confiscated

31. Again relying on Article 1 of Protocol No. 1 (P1-1), Mr Raimondo alleged that, as the municipal police had failed to carry out any proper surveillance, the property subject to the preventive measures had been the target of extensive vandalism.

32. The Government denied this. In view of the official status of those responsible for guarding the property - officers of the municipal police designated by the judicial authorities - no accusation of negligence against them was warranted. Furthermore in 1989 legislation had been enacted to regulate this question, firstly by protecting the interests of persons whose property was returned to them after seizure and secondly by indicating a public-interest use for property which had been seized and then confiscated on a permanent basis.

33. Like the Commission, the Court observes that any seizure or confiscation inevitably entails damage. The Commission found that the applicant's allegations did not provide a sufficiently clear basis for examining whether the actual damage sustained in the present case exceeded such inevitable damage. Before the Court the applicant did not furnish any more specific information. The Court therefore cannot but adopt the Commission's approach and hold that on this point too no violation of Article 1 of Protocol No. 1 (P1-1) has been established.

B. The fact that the contested measures remained entered in the public registers after 31 December 1986

34. According to the applicant the competent authorities delayed giving effect to the decision of the Catanzaro Court of Appeal of 4 July 1986.

35. The Government maintained that the real property and the movable goods had been returned on 2 February 1987, only two months after the above-mentioned decision had been filed with the registry. They conceded that the formalities for entering in the public registers the revocation of the contested measures had taken some time, but Mr Raimondo could and should have contacted the appropriate department with a copy of the decision revoking the measures. Article 619 of the former Code of Criminal Procedure, cited by his lawyer at the hearing, was not applicable because it concerned exclusively the cancellation by the prosecuting authorities of mortgages or seizures ordered to secure the payment of the debts of a defendant after his conviction (court costs, fine and prison expenses).

36. The Court notes in the first place that the possessions in question were returned to the applicant on 2 February 1987, two months after the Court of Appeal's decision was filed with the registry. It must nevertheless consider whether the fact that the entries remained in the relevant registers constituted an interference with the right guaranteed under Article 1 of Protocol No. 1 (P1-1).

No such interference occurred in relation to the real property seized on 13 May 1985 and three of the vehicles confiscated on 16 October 1985, because the requisite entries were made rapidly, on 2 and 10 February 1987 (see paragraph 15 above). On the other hand, there was an interference as regards the lorry and the nine items of real property confiscated on 16 October 1985 inasmuch as the entry concerning the lorry was not made until 10 July 1987 and that concerning the real property not until after 9 August 1991 (see paragraph 15 above).

It is not for the Court to determine who should have taken the appropriate steps in this case.

However, and notwithstanding the reasons advanced by the Government, the responsibility of the public authorities was engaged. The Court finds it hard to see why it was necessary to wait respectively more than seven months (2 December 1986 - 10 July 1987) and four years and eight months (2 December 1986 - 9 August 1991) before regularising the legal status of some of Mr Raimondo's possessions, when the Catanzaro Court of Appeal had ordered that all the property be returned to the owners "after the entries had been removed from the registers" (previa cancellazione delle formalità concernenti le eseguite trascrizioni).
In addition, this interference was neither "provided for by law" nor necessary "to control the use of property in accordance with the general interest" within the meaning of Article 1 of Protocol No. 1 (P1-1).

Accordingly, there has been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 4 (P4-2)

37. The applicant complained that the special police supervision under which he had been placed had constituted a violation of Article 2 of Protocol No. 4 (P4-2), according to which:

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
> ...
> 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
> ..."

38. The Government disputed this view. The decision, adopted in private session, revoking the special supervision had not acquired legal force, according to the relevant provisions, until the day on which it had been filed with the registry, namely 2 December 1986. Up to that point it had remained "a purely internal event". The Catanzaro Court of Appeal could not be criticised for failing to give its decision within thirty days, as provided for in section 4 of the 1956 Act, because that time-limit was not a mandatory one.

39. The Court considers in the first place that, notwithstanding the applicant's assertion to the contrary, the measure in issue did not amount to a deprivation of liberty within the meaning of Article 5 para. 1 (art. 5-1) of the Convention. The mere restrictions on the liberty of movement resulting from special supervision fall to be dealt with under Article 2 of Protocol No. 4 (P4-2) (see the Guzzardi v. Italy judgment, cited above, p. 33, para. 92).

In view of the threat posed by the Mafia to "democratic society", the measure was in addition necessary "for the maintenance of ordre public" and "for the prevention of crime". It was in particular proportionate to the aim pursued, up to the moment at which the Catanzaro Court of Appeal decided, on 4 July 1986, to revoke it (see paragraph 14 above).

It remains to consider the period between 4 July and 20 December 1986, when the decision was notified to the applicant (see the same paragraph). Even if it is accepted that this decision, taken in private session, could not acquire legal force until it was filed with the

registry, the Court finds it hard to understand why there should have been a delay of nearly five months in drafting the grounds for a decision which was immediately enforceable and concerned a fundamental right, namely the applicant's freedom to come and go as he pleased; the latter was moreover not informed of the revocation for eighteen days.

40. The Court concludes that at least from 2 to 20 December 1986 the interference in issue was neither provided for by law nor necessary. There has accordingly been a violation of Article 2 of Protocol No. 4 (P4-2).

III. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 OF THE CONVENTION (art. 6-1)

41. Mr Raimondo finally criticised the length of the proceedings relating to his appeal against the confiscation and the special supervision. He relied on Article 6 para. 1 (art. 6-1) of the Convention, which provides as follows:

> "In the determination of his civil rights and obligations and of any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

42. The period to be taken into consideration began on 16 October 1985, the date on which the Catanzaro District Court ordered the measures in question (see paragraph 13 above). It ended on 31 December 1986, when the decision of the Court of Appeal became final. It therefore lasted one year, two months and two weeks.

43. The Court shares the view taken by the Government and the Commission that special supervision is not comparable to a criminal sanction because it is designed to prevent the commission of offences. It follows that proceedings concerning it did not involve "the determination ... of a criminal charge" (see the Guzzardi judgment cited above, p. 40, para. 108).

On the matter of confiscation, it should be noted that Article 6 (art. 6) applies to any action whose subject matter is "pecuniary" in nature and which is founded on an alleged infringement of rights that were likewise of a pecuniary character (see the Editions Périscope v. France judgment of 26 March 1992, Series A no. 234-B, p. 66, para. 40). That was the position in the instant case.

44. However, having regard to the fact that the case came before two domestic courts, the Court does not consider the total length of the proceedings to have been unreasonable (see, mutatis mutandis, the Salerno v. Italy judgment of 12 October 1992, Series A no. 245-D, p. 56, para. 21).

It follows that there has been no violation of Article 6 para. 1 (art. 6-1).

IV. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

45. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party

allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

46. Mr Raimondo claimed compensation for pecuniary and non- pecuniary damage without giving any figures. The fact that he had to halt his construction work following the confiscation of his property and the unsatisfactory conditions in which it had been kept had resulted in substantial deterioration of the buildings and the vehicles. The imposition of the special supervision had made it difficult for him to move around and impossible for him to conduct his business. In addition, the delay in entering the revocation of the confiscation had meant that any attempt to dispose of the property in question had been bound to fail, which had led to an increase in his already heavy debts.

47. According to the Government, the applicant failed to show that the alleged violations had resulted in pecuniary damage. As regards any non-pecuniary damage, they were of the opinion that, if a violation were to be found, the finding would in itself afford sufficient just satisfaction.

48. The Delegate of the Commission considered that the applicant had undoubtedly sustained pecuniary and non-pecuniary damage. However, in the absence of any specific claim, he was uncertain of the approach to be adopted.

49. The Court dismisses the claims for pecuniary damage as the terms in which they are formulated are too vague and the information contained in the file does not help to clarify the matter. On the other hand, it takes the view that Mr Raimondo suffered some non- pecuniary damage for which it awards him 10,000,000 Italian lire.

B. Costs and expenses

50. At the hearing the applicant's lawyer sought the reimbursement of 10,552,325 lire (inclusive of value added tax) in respect of the costs and expenses incurred before the Convention institutions.

51. The Government left this matter to the discretion of the Court, but pointed out that the sum awarded should be proportionate to the degree of success, if any, of Mr Raimondo's application.

The Delegate of the Commission did not express an opinion on the question.

52. In view of the failure of some of Mr Raimondo's complaints, the Court, having regard to the available evidence and to its relevant case-law, awards him 5,000,000 lire.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that no violation of Article 1 of Protocol No. 1 (P1-1) has been established either in respect of the seizure and the confiscation of the applicant's property up to 31 December 1986 or in respect of the damage occasioned by those measures;

2. Holds that there has been a breach of that same Article (P1-1) inasmuch as the confiscation, on 16 October 1985, of a lorry and nine items of real property remained entered in the relevant registers after 31 December 1986 and that no other violation of that provision has been established;

3. Holds that there has been a violation of Article 2 of Protocol No. 4 (P4-2) at least in so far as the special police supervision of the applicant continued after 2 December 1986;

4. Holds that Article 6 (art. 6) of the Convention does not apply to the said special supervision;

5. Holds that there has been no violation of that provision as regards the length of the confiscation proceedings;

6. Holds that the respondent State is to pay to Mr Raimondo, within three months, 10,000,000 (ten million) Italian lire for non-pecuniary damage and 5,000,000 (five million) lire for costs and expenses;

7. Dismisses the remainder of the applicant's claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 February 1994.

3.3 Case of Markass Car Hire LTD v. Cyprus

Application no. 51591/99)
JUDGMENT
STRASBOURG
2 July 2002
FINAL
06/11/2002

PROCEDURE

1. The case originated in an application (no. 51591/99) against the Republic of Cyprus lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Markass Car Hire Ltd ("the applicant"), on 5 August 1999.

2. The applicant was represented by Mr C. Clerides, a lawyer practising in Nicosia. The Cypriot Government ("the Government") were represented by their Agent, Mr A. Markides, Attorney-General of the Republic of Cyprus.

3. The applicant complained under Article 6 § 1 about the length of the proceedings to set aside an ex parte interim order issued by the Nicosia District Court.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

5. By a decision of 23 October 2001 the Court declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1).

This case was assigned to the newly composed Second Section.

THE FACTS
I. THE CIRCUMSTANCES OF THE CASE

8. The applicant company is the owner and hire purchaser of a fleet of vehicles registered in Cyprus and licensed as "Z" vehicles.

9. On 1st July 1996 the District Court of Nicosia delivered judgment in a civil action lodged by the applicant against another company, Diprose Ltd, also in the car hire business. The District Court held, inter alia, that the applicant having legally terminated an agreement with Diprose, permitting the use and exploitation by the latter of the "Z" fleet of cars, it was entitled to take possession thereof and to sell them in satisfaction of a debt of 667,776 Cypriot pounds owed to it by Diprose, by way of rental under the said agreement, and to pay the remaining amount in satisfaction of debts owed by the applicant to a number of banks which had financed the purchase of the fleet by the applicant. Furthermore, the District Court ordered Diprose to deliver the cars to the applicant. Diprose obtained a stay of execution of

the judgment on condition that it regularly paid certain instalments to the applicant for the use of the vehicles which the applicant had given to it in the past for rental to third parties.

10. Diprose failed to keep up the instalments and, as a result, on 8 January 1998, the District Court of Nicosia allowed the applicant to collect the vehicles. In the meantime, Diprose had been wound up and, by letter of 11 February 1998, the liquidator declared that he was willing to return the vehicles, which apparently had been wrongfully given to another company, Kemtours Ltd, belonging to the same group as Diprose, without the consent of the applicant.

11. In the meantime, Kemtours had instituted proceedings (action 3315/98) seeking damages from the applicant for breach of the agreement which they had allegedly concluded on 3 February 1997. Kemtours contended that, under that agreement, 127 vehicles had been rented to it by the applicant but a number of them was still in the applicant's possession. Kemtours further sought to obtain a decision preventing the applicant company from interfering with Kemtours' activities under the agreement and ordering it to hand over to Kemtours a number of the vehicles which were still in the applicant's possession.

12. Whilst the applicant was in the process of collecting the vehicles, Kemtours obtained in fresh proceedings before the District Court of Nicosia, and on an ex parte basis, an interim decision which ordered the applicant to deliver the said vehicles to Kemtours. This order was issued on 31 March 1998 and served on the same date on the applicant.

13. The order was to be enforced on 13 April 1998. On that date, the applicant's lawyer appeared before the court and requested time to appeal against the order. The court fixed the case for directions on 5 May 1998 and then again on 7, 20 and 25 May in order to afford time to the parties to settle their dispute. The court invited the lawyer to file an appeal at least four days before 5 May 1998.

14. However, the applicant filed its appeal on 5 May 1998. The applicant maintained that the court had been misled by Kemtours, which had failed to disclose the real facts of the case and the previous judgment and decision of the District Court. The applicant invited the District Court to hold a hearing as soon as possible in view of the fact that the fleet of "Z" cars was worth more than 500,000 Cypriot pounds. Furthermore, the applicant alleged that the unauthorised use of the vehicles under the interim decision would entail a reduction of their value and would prevent the applicant from presenting them to the competent authorities in order to have their licenses renewed. Finally, the applicant affirmed that it had never entered into such an agreement with Kemtours.

15. As the parties had reached no settlement of the case by 27 May 1998, the District Court fixed the hearing for 8 July 1998. On this date, the judge stopped the hearing at midday, because of the "lateness of the hour", and adjourned it until 17 July 1998, during the summer recess. However, the judge pointed out that he would be working during this period.

16. The hearing started on 17 July 1998. Evidence given by Kemtours was completed on the same day.

17. According to the applicant, the hearing should have been completed in the same month or at the beginning of August 1998. However, it was repeatedly adjourned due to the illness of either the advocate for the plaintiff or the judge dealing with the case, as well as to the latter's transfer to other pending court proceedings.

18. At the end of the hearing on 17 July 1998, the applicant's lawyer had indicated five dates in July on which he could make himself available for the continuation of the hearing, but the advocate for the plaintiff declared that he would be unavailable due to other court commitments.

19. Adjournments were thus ordered until 7 and 9 September 1998 (because the advocate for the plaintiff had to undergo an operation), 5 November 1998, 12 November 1998, 17 December 1998 (due to the court's lack of time and the illness of the advocate for the plaintiff), 7 January 1999, 14 January 1999, 25 February 1999 (on which date the case was heard by another judge because the judge dealing with the case was ill), 18 March 1999, 22 April 1999, 13 May 1999, 2 June 1999, 17 June 1999, 1 July 1999, 6 July 1999, and 9 and 10 September 1999.

20. On 27 April 1999 and as a result of the repeated adjournments, the applicant filed an application for certiorari and prohibition with the Supreme Court. It sought the annulment of the interim order because of the excessive delay in the proceedings before the District Court. The applicant also alleged that the court had exceeded its jurisdiction on a matter of construction involving section 9 of the Civil Procedure Law. On 27 May 1999 the Supreme Court refused the application. On the same date the applicant appealed against that decision and, by way of a letter to the President of the Supreme Court, invited him to expedite the proceedings.

21. Following a letter from the applicant's lawyer, who complained about the delay in the proceedings, the President of the District Court assigned the case to a new judge on 10 June 1999.

22. In the meantime, on 21 April 1999, Kemtours had applied for an order of imprisonment of the applicant's managers for contempt of the interim order of 31 March 1998. Initially fixed for 2 June 1999, the hearing was adjourned until 17 June and then until 6 July 1999, because of the direct relevance of these proceedings to those concerning the interim order. Due to the summer recess both sets of proceedings were fixed for hearing on 9 and 10 September 1999.

23. On 9 September 1999 the District Court decided that the hearing relating to the interim order should precede the contempt hearing. The hearing commenced on 10 September and was adjourned until 30 September, and then until 8 October because the plaintiff's advocate had failed to summon a witness whom he wished to call to give evidence. The hearing continued on 8 and 20 October, but on 27 October it was adjourned until 9 November 1999 at the request of the plaintiff's advocate. The court rejected the objection by the applicant's lawyer's on the ground that the adjournment was granted in order to permit the other party to prepare a document which would expedite the proceedings. The hearing continued on 9, 12 and 18 November 1999 and the court heard six witnesses.

24. On 3 December 1999, when the hearing was to be resumed, the advocate for the plaintiff requested an adjournment because his bad state of health necessitated an operation abroad. The continuation of the hearing was fixed for 22 December 1999.

25. On 9 December 1999, the date on which the hearing in the contempt proceedings ought to have taken place, the District Court again ordered an adjournment until 14 January 2000

and then until 24 January because the plaintiff's advocate was hospitalised abroad. However, following a protest by the applicant's lawyer, the court affirmed that no further request for an adjournment would be granted.

26. On 21 January 2000 the District Court again adjourned the hearing until 28 February 2000 in order to give time to the newly appointed lawyer for the plaintiff to familiarise himself with the case. The applicant's lawyer did not object because he stated that he had other court commitments.
27. The hearing resumed on 28 February 2000 with the testimonies of two witnesses, thus bringing to eight the total number of witnesses heard. On 17 March 2000, the parties made their final addresses.

28. By judgment of 11 May 2000, the District Court held that the interim order was no longer in force. It declared it null and void because the plaintiff had failed to prove its allegations; it also held, at page 16 of the judgment, that the failure of Kemtour to file the Statement of Claim over a two-year period could not be attributed to the illness of the lawyer.

II. RELEVANT DOMESTIC LAW AND PRACTICE

29. Section 4 of Cap. 6 (Civil Procedure) reads as follows:

> "The court may at any time during a pending action make an order for the ...preservation, custody, sale, detention or inspection of any property being the subject of the action, or an order for preventing any loss, damage or prejudice which but for the making of the order might be occasioned to any person or property, pending a final judgment on some question affecting such person or property or pending the execution of the judgment."

30. Section 9 of Cap. 6 (Civil Procedure) reads as follows:

> "(1) Any order which the court has power to make may, upon proof of urgency or other special circumstances, be made on the application of any party to the action without notice to the other party.
> (2) Before making any such order without notice the court shall require the person applying for it to enter into a recognisance, with or without a surety or sureties as the court thinks fit, as a security for his being answerable in damages to the person against whom the order is sought.
> (3) No such order made without notice shall remain in force for a longer period than is necessary for service of notice of it on all persons affected by it and enabling them to appear before the court and object to it; and every such order shall at the end of that period cease to be in force, unless the court, upon hearing the parties or any of them, shall otherwise direct; and every such order shall be dealt with in the action as the court thinks just.
> (4) Nothing in this section shall be construed to affect or apply to the powers of the court to issue writs of execution."

31. In some recent judgments the Supreme Court has ruled that the procedure for deciding an interim order which is issued on an ex parte basis is an exceptional one and must therefore be dealt with and treated as a matter of urgency. In two cases, the Supreme Court decided that such an order must be served within two to four days and be brought before the judge for trial within seven days (judgments of 25 June 1999 and 10 September 1999). The Supreme Court found that periods of 17 and 21 days to serve the order, and give the other party an

opportunity to oppose it, were excessive. In the case of SPE Agias Fylas v. Christoforou (judgment of 4 October 1999), the Supreme Court ruled that, if a court issued an ex parte order which is not urgent, it will be set aside for excess of jurisdiction.

THE LAW
I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

32. The applicant complains about the length of the proceedings to set aside the ex parte interim order issued on 31 March 1998 by the Nicosia District Court. He alleges a violation of Article 6 § 1 of the Convention, which insofar as relevant, reads as follows:
"In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

33. The Government state that they do not purport to disagree with the applicant that proceedings concerning interim orders must be concluded as soon as possible. However, they submit that the present case raised complex factual and legal questions and required the examination of eight witnesses and of extensive documentary evidence, including 127 Government files. Most of the delays in the proceedings were caused by the bad state of health of the plaintiff's advocates. The latter's requests for adjournment of the hearing were granted with the consent of the applicant's lawyer. A delay of four months during the period from 25 February 1999 to 1 July 1999 could have been avoided had the applicant's lawyer informed the President of the District Court earlier of the problem raised by the delay in the examination of the interim order. On 1 July 1999, it was impossible to fix a hearing before September 1999 due to the summer recess. From 1 July 1999 to 17 March 2000, when the case was taken over by another judge, adjournments were not very long and were mostly due to the state of health of the plaintiff's advocate. On three occasions, the adjournments were justified by the need to summon a witness (an eight-day adjournment), the need to prepare a written account of facts disclosed by the exhibits submitted during the proceedings (a one-month adjournment) and the need to afford time to the newly appointed lawyer for the plaintiff to familiarise himself with the case (a one-month adjournment).

34. The applicant submits that the record of the proceedings presented by the Government is incomplete. In effect, certain days are missing, including 5 May 1998 and 7 January 1999, when the judge failed to attend the hearing without giving reasons. The applicant claims that the adjournment until 8 July 1998 was unacceptable, and that granted on the same date unjustified.

35. The applicant further claims that, despite the urgent character of the proceedings, several adjournments were granted on account of the illness of Kemtour's lawyer or on the District Court's own motion. The court allowed urgent proceedings to be dealt with in a very idle manner and allowed the plaintiff's lawyer to dictate its time-table.

36. The applicant stresses that the appeal of 5 May 1998 was filed in time, that is two days before the date on which the case was fixed for mention and not for hearing. On 17 July 1998 no complex factual or legal issues had arisen and, at that stage of the proceedings, the District Court could not examine the merits of the case. On that date, Kemtours had already submitted its evidence and only two or three further hearings were required to complete the proceedings. Kemtour's lawyer had expressly indicated that he needed three more days to cross-examine defence witnesses. Finally, the District Court declared null and void the interim order because the plaintiff had failed to prove its allegations; it also held, at page 16

of the judgment, that the failure of Kemtour to file the Statement of Claim over a two-year period could not be attributed to the illness of the lawyer.

37. As regards the period to be taken into consideration, the Court notes that it began on 5 May 1998, when the applicant appealed to the District Court against the ex parte interim order. The proceedings ended on 11 May 2000, with the judgment of the District Court. They thus lasted approximately two years.

38. The Court recalls that the reasonableness of the length of the proceedings must be assessed in the light of the particular circumstances of the case and with the help of the following criteria: the complexity of the case, the conduct of the parties, the conduct of the authorities dealing with the case and what was at stake for the applicant (see Laino v. Italy [GC], no. 33158/96, § 18, ECHR 1999-I).

39. The Court first notes that, according to the Supreme Court, the procedure for deciding an interim order which is issued on an ex parte basis is an exceptional one and must therefore be treated as a matter of urgency. In the present case, what was at stake for the applicant's company was its financial survival, since the interim order provided that a great number of its vehicles had to be handed over to another car hire company.

40. Secondly, the Court notes that the applicant's behaviour did not cause any delay in the proceedings. On the contrary, he often objected to the successive adjournments and even applied to the Supreme Court seeking the annulment of the interim order because of the excessive delay. The Court cannot accept the Government's argument that the applicant consented to a certain number of the adjournments. These adjournments were practically imposed on the applicant, because they were decided either on the court's own motion or because the plaintiff's lawyer was frequently unwell.

41. Thirdly, the conduct of the judicial authorities, and in particular that of the judge of the District Court who first dealt with the case, is subject to criticism: despite the urgent character of the proceedings and the imminence of the summer recess, the first hearing took place on 8 July 1998. Although the judge affirmed that he would be working during the summer recess, he held only one hearing, on 17 July 1998, during which the plaintiff completed the presentation of its evidence. However, the hearing was repeatedly adjourned until June 1999, when the case was assigned to another judge, following the applicant's protest to the President of the District Court. Despite the time which had already elapsed since the commencement of the proceedings, the second judge generously granted the requests for adjournment presented by the plaintiff's lawyer: twelve days to enable him to prepare a report, more than one month and a half because he was unwell or hospitalised abroad, and more than one month to allow the newly appointed lawyer to familiarise himself with the case.

42. The Court considers that both judges of the District Court failed to ensure the speedy conduct of the proceedings which by law, and having regard to what was at stake for the applicant, ought to have been concluded in a summary and expeditious manner.

43. Accordingly, the Court concludes that there has been a violation of Article 6 § 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. Article 41 of the Convention provides:

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

A. Damage

45. For pecuniary damage the applicant claims CYP 456,672 or CYP 415,833. The applicant relies on a valuation report prepared on its instructions by a chartered accountant. The first figure represents the valuation of the loss on a net assets basis. The applicant alleges that, had the vehicles been sold back in August 1998, their value in the open market would have been CYP 414,525, support for which is found in a report by Automobile Assessors attached to the accountant's report. Furthermore, the licences of 93 of the vehicles were sold separately from the vehicles, some of them before the judgment of May 2001, some of them afterwards, for a total amount of CYP 198,499.54. The open market value of those licences in August 1998 would have reached CYP 305,250, but by February 2001 the value had dropped. The second figure mentioned above represents the assessment of the loss of earnings. Had it not been for the interim order remaining in force from August 1998 to May 2000, the applicant would have hired these vehicles.

46. The applicant also claims CYP 10,000 for non-pecuniary damage.

47. The Government submit that the Automobile Assessors' report cannot be considered to be reliable evidence as to the actual value of the vehicles in 1998 without any inspection of the vehicles concerned. The price fixed by the report on the market value of licences is not supported by pertinent evidence and cannot be relied upon for calculating the applicant's loss with any certainty. As regards the calculation of the damage based on the loss of earnings, the Government note that, prior to the issue of the interim order, Diprose had already defaulted in their monthly instalments to the applicant and that its default had already rendered immediately payable all amounts due to the applicant and immediately enforceable the latter's right to have the vehicles delivered to it, to have them sold by public auction, and to use the proceeds of the sale for the payment of its own debts. The interim order had postponed the exercise of the right to take delivery of the vehicles and sell them in execution of the judgment, but had not necessitated the selling of the vehicles or prevented the applicant from receiving earnings by hiring them.

48. As regards non-pecuniary damage, the Government submit that the finding of a violation would constitute sufficient just satisfaction.

49. The Court cannot speculate on the price at which the cars would have been sold or on the earnings of the applicant had the domestic courts decided within a reasonable time. Therefore, the Court does not award the applicant any compensation for pecuniary damage.

50. However, the Court accepts that the applicant suffered damage of a non-pecuniary nature as well as a loss of opportunities as a result of the length of the proceedings. Making its assessment on an equitable basis, the Court awards the applicant EUR 15,000 as compensation for non-pecuniary damage.

B. Costs and expenses

51. The applicant claims CYP 8,470 for costs and expenses.
52. The Government submit that an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to quantum.

53. The Court considers that the duration of the domestic proceedings has to some extent increased the applicant's legal expenses in these proceedings. Making its assessment on an equitable basis, the Court awards the applicant 4,000 EUR under this head.

C. Default interest

54. According to the information available to the Court, the statutory rate of interest applicable in Cyprus at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 6 § 1 of the Convention;

2. Holds:
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 4,000 (four thousand euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;

3. Dismisses the remainder of the applicant's claim for just satisfaction.
Done in English, and notified in writing on 2 July 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

3.4 Case of Zlinsat, SPOL. S R.O. v. Bulgaria

Application no. 57785/00
JUDGMENT
STRASBOURG
15 June 2006
FINAL
15/09/2006

PROCEDURE

1. The case originated in an application (no. 57785/00) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Zlínsat, spol. s r.o., a limited liability company incorporated under Czech law whose registered office is in Fryšták, Dolní Ves, the Czech Republic ("the applicant company"), on 14 December 1999.

2. The applicant company was represented by Ms D. Gorbunova, a lawyer practising in Sofia, Bulgaria. The Bulgarian Government ("the respondent Government") were represented by their Agent, Ms M. Kotzeva, of the Ministry of Justice.

3. On 1 December 2004 the Court decided to give notice of the application to the respondent Government. It also transmitted a copy of it to the Czech Government, in view of the fact that the applicant company was incorporated in the Czech Republic (Article 36 § 1 of the Convention and Rule 44 § 1 (a) of the Rules of Court). Under the provisions of Article 29 § 3 of the Convention, the Court decided to examine the merits of the application at the same time as its admissibility.

4. The parties submitted observations in writing. In addition, third-party comments were received from the Czech Government ("the third-party Government"), who exercised their right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 (b) of the Rules of Court). The respondent Government, but not the applicant company, replied to these comments (Rule 44 § 5).

5. On 1 April 2006 this case was assigned to the newly constituted Fifth Section (Rule 25 § 5 and Rule 52 § 1).

THE FACTS
I. THE CIRCUMSTANCES OF THE CASE

6. In September 1995 the Sofia Municipal Council decided to privatise a hotel owned by the Sofia Municipality, and situated in Gorna Banya, Sofia. In July 1996 the Sofia Municipal Privatisation Agency opened a procedure for the privatisation of the hotel through negotiations with potential buyers. At the close of the procedure only one company had submitted a privatisation bid. On 8 May 1997 that company assigned its rights under the privatisation procedure to the applicant company.

7. On 10 May 1997 the applicant company entered into a privatisation contract with the Sofia Municipal Council, whereby it bought the hotel. It agreed to pay 425,000 United States dollars (USD) and also agreed to make, during the following five years, investments in the

amount of USD 1,500,000. The applicant company also undertook to create forty-five new jobs. Clause 8(7) of the contract stipulated that the applicant company was barred from disposing of the hotel for five years without the express consent of the Sofia Municipal Council. Clause 10 of the contract, however, stipulated that the applicant company could convey the hotel as non-cash consideration for shares in a limited liability company, if it held at least 67% of such a company's shares.

8. In a decision of 7 July 1997 the Sofia City Prosecutor's Office, acting pursuant to an article in the weekly newspaper Capital published in its issue of 25 May 1997, and to complaints by employees and leaseholders of hotel premises, ordered the suspension of the performance of the privatisation contract. It relied on Article 185 § 1 of the Code of Criminal Procedure of 1974 ("the CCrP") and on section 119(1)(6) of the Judicial Power Act of 1994 (see paragraphs 37 and 38 below), and reasoned that the privatisation procedure had been tainted by a breach of paragraph 8 of the transitional and concluding provisions of the Transformation and Privatisation of State and Municipally-Owned Enterprises Act of 1992 (see paragraph 44 below). There were also indications that certain interested parties had not been properly notified of the privatisation terms. The latest valuation of the hotel prior to the privatisation had been conducted under circumstances which called into question the objectivity of the officials involved. These facts could only be elucidated through a criminal investigation. The prosecution authorities were also bound to exercise their powers under Article 27 § 1 of the Code of Civil Procedure of 1952 ("the CCP") (see paragraph 40 below). In these circumstances, the performance of the obligations in the privatisation contract would disturb public order, lead to the commission of offences by officials and economic offences, and cause considerable damage.

9. The decision was served on the chairperson of the Sofia Municipal Council and on the Sofia Municipal Privatisation Agency, but not on the applicant company.

10. The mayor of Sofia appealed against the decision to the Chief Prosecutor's Office, arguing that the privatisation contract could only be set aside by a court. In a decision of 25 July 1997 the Chief Prosecutor's Office dismissed the appeal, reasoning that the lower prosecutor's office had correctly found that measures – consisting of the suspension of the performance of the contract – had to be taken to prevent the future commission of offences and that it was bound to seek the annulment of the contract by a court.

11. The mayor of Sofia further appealed to the Chief Prosecutor. In a decision of 28 August 1997 the Chief Prosecutor rejected the appeal, fully endorsing the reasoning of the lower prosecutor's offices and noting that a criminal investigation had been opened into the matter.

12. The applicant company was not served copies of the above decisions and was apparently not aware of these developments.

13. In the meantime, on 12 August 1997, the Sofia Municipality handed possession of the hotel over to the applicant company. On 18 August 1997 the mayor of Sofia ordered that all prior leaseholders be removed from the hotel premises.

14. On an unspecified date the Sofia City Prosecutor's Office apparently opened a criminal investigation against an official of the Sofia Municipality or the municipal company which previously owned the hotel. The charges apparently included abuse of office.

15. In a decision of 2 October 1997 the Sofia City Prosecutor's Office, relying on Article 185 § 1 of the CCrP and on section 119(1)(6) of the Judicial Power Act of 1994, ordered the police to remove the applicant company's officers, subcontractors and agents from the hotel, which was to be placed in the custody of a State-owned company. It also ordered the police to seize all accounting and other documents relating to the returns obtained by the company since it had taken possession of the hotel, and to notify its officers that any attempt to regain possession of the hotel would constitute an offence under Article 323 § 2 of the Criminal Code of 1968 (see paragraph 45 below). It reasoned that by undertaking these measures despite the fact that it had ordered the suspension of the performance of the privatisation contract and had commenced an action under paragraph 8 of the transitional and concluding provisions of Transformation and Privatisation of State and Municipally-Owned Enterprises Act of 1992 and a criminal investigation, the Sofia Municipality had seriously breached section 119(2) of the Judicial Power Act of 1994 (see paragraphs 35 and 44 below) and had infringed important public interests and public order.

16. This decision was served on the Sofia Municipality, but not on the applicant company. The company learned about it on 6 October 1997, when the police arrived at the hotel, removed its officers and agents from the premises, and warned its manager that any attempt to regain possession of the hotel would constitute an offence under Article 323 § 2 of the Criminal Code of 1968 (see paragraph 45 below).

17. The Sofia Municipality appealed against the decision to the Chief Prosecutor's Office, arguing that it had been unlawful, as the applicant company was the rightful owner of the hotel and there were no legal grounds for its eviction. In a decision of 27 November 1997 the Chief Prosecutor's Office dismissed the appeal. It found that the performance of the privatisation contract had been suspended and that an action had been commenced by the Sofia City Prosecutor's Office aiming to annul the contract. The legal basis of the decision appealed against were Article 185 § 1 of the CCrP and section 119(1)(6) of the Judicial Power Act of 1994. The fact that a civil action had been commenced and that a criminal investigation had been opened indicated that there was a risk that an offence would be committed. The legality of the decision was not affected by the fact that it had not been served on the applicant company.

18. Meanwhile, on 17 September 1997, the Sofia City Prosecutor's Office, exercising its powers under Article 27 § 1 of the CCP (see paragraph 40 below), brought a civil action against the Sofia Municipality and the applicant company, seeking the annulment of the privatisation contract. It argued that it had been entered into under manifestly disadvantageous conditions, within the meaning of paragraph 8 of the transitional and concluding provisions of Transformation and Privatisation of State and Municipally-Owned Enterprises Act of 1992. The price paid for the hotel had been below its real market value. The penalties stipulated in the contract in the event of a failure of the applicant company to perform its investment obligations were negligible. The applicant company was allowed to convey the hotel as non-cash consideration for shares in a limited liability company despite the prohibition to dispose of the hotel for five years. The contract made no provision for its rescission in the event of non-performance. Finally, the performance of the contract was questionable in view of the fact that the negotiations had initially been conducted with another company, while the applicant company had intervened in the process later.

19. On 9 December 1997 the Sofia Municipality made a request for a declaratory judgment to the effect that the decisions of the Sofia City Prosecutor's Office had been made without a

legal basis, were ultra vires and thus null and void, and did not entail any legal consequences. In a final decision of 11 February 1998 the Sofia City Court rejected the request as inadmissible, holding that it was not connected with the subject-matter of the original action, as it concerned acts which post-dated the execution of the contract, and that it was not sufficiently precise, as it did not specifically identify all impugned decisions of the Sofia City Prosecutor's Office. The court went on to say that it had no jurisdiction to rule on the lawfulness of prosecutors' decisions and actions in civil proceedings.

20. In a judgment of 3 April 1998 the Sofia City Court dismissed the Sofia City Prosecutor's Office's action. It held, inter alia, that the price at which the hotel had been sold was not unreasonable. It took into account not only the cash amount paid to the Sofia Municipal Council, but also the investment and job creation commitments. The court went on to say that there was no legal prohibition on the use of privatised property as non-cash consideration for shares. There was nothing to prevent the parties to the contract to agree that the applicant company was free to do so under certain conditions. The Sofia City Prosecutor's Office's arguments concerning the possibility of such a transaction were immaterial, as the court's task was not to hypothesise about future events, but to decide on the basis of concrete facts. The court further found that the lack of any clauses in the contract for its rescission did not render it manifestly disadvantageous, since in the event of non-performance it could be rescinded by virtue of the law. The penalties provided by the contract for non-performance were immaterial since the Sofia Municipal Council could in any event claim compensation for its actual damages by law. The court thus did not find it established that the contract had been entered into under manifestly disadvantageous conditions.

21. The Sofia City Prosecutor's Office appealed to the Sofia Court of Appeals. Its appeal was not endorsed by the Sofia Appellate Prosecutor's Office, which argued in an additional memorial that the Sofia City Court had correctly disposed of the case.

22. In a judgment of 4 March 1999 the Sofia Court of Appeals upheld the Sofia City Court's judgment, with similar reasoning.

23. Despite its previous stance, the Sofia Appellate Prosecutor's Office lodged an appeal on points of law with the Supreme Court of Cassation, apparently on the express instructions of the Supreme Cassation Prosecutor's Office (the successor entity of the Chief Prosecutor's Office).

24. A hearing was held on 28 June 1999, at which a prosecutor of the Supreme Cassation Prosecutor's Office maintained the appeal.

25. In a final judgment of 30 July 1999 the Supreme Court of Cassation upheld the lower court's judgment, fully confirming its reasoning.

26. In the meantime, while the proceedings before the Supreme Court of Cassation were pending, on 17 May 1999 the applicant company appealed to the Sofia Appellate Prosecutor's Office against the Sofia City Prosecutor's Office decisions of 7 July and 2 October 1997. It argued that they were unlawful and that the Sofia City Prosecutor's Office reliance on Article 185 § 1 of the CCrP had been misplaced. It filed the appeal through the Sofia City Prosecutor's Office.

27. In a letter of 22 June 1999 the Sofia City Prosecutor's Office informed the applicant company that the decisions had already been unsuccessfully appealed before the Chief Prosecutor's Office and the Chief Prosecutor and sent the applicant company copies of the latter's decisions. It noted that there were no new facts warranting the rescission or variation of the impugned decisions.
28. On 6 July 1999 the applicant company filed its appeal directly with the Sofia Appellate Prosecutor's Office.

29. In a decision of 9 July 1999 the Sofia Appellate Prosecutor's Office rejected the appeal. It reasoned that the decisions of 7 July and 2 October 1997 had already been appealed against before the Chief Prosecutor's Office and the Chief Prosecutor, which had rejected the appeals. It had therefore no competence to examine them.

30. On 24 August 1999 the applicant company applied to the Sofia City Prosecutor's Office, asking it to rescind its decisions of 7 July and 2 October 1997. It argued that the dismissal of the action against it by means of a final judgment was a fresh fact indicating that the privatisation contract had not been entered into under manifestly disadvantageous conditions and that no State or public interests had been prejudiced thereby. Moreover, the prohibition to use the hotel had already lasted two years, without any justification, in breach of its right under Article 1 of Protocol No. 1 to peacefully enjoy its possessions.

31. In a letter of 14 September 1999 the Sofia City Prosecutor's Office informed the applicant company that there was no need to rescind the decision of 2 October 1997, but that the final judgment of the Supreme Court of Cassation was binding upon the parties to the case and they should comply with it.

32. In a letter of 5 October 1999, a copy of which was sent to the applicant company, the Sofia City Prosecutor's Office notified the police that following the Supreme Court of Cassation's judgment the decisions of 7 July and 2 October 1997 were no longer enforceable.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Prosecutor's Office

1. Overview

33. The Prosecutor's Office („прокуратурата") is part of the judicial branch (Article 117 § 2 of the Constitution of 1991). Its structure mirrors that of the courts (Article 126 § 1 of the Constitution of 1991). Prosecutors are appointed, promoted, demoted and dismissed the way judges are, and enjoy the same tenure and immunities (Articles 129, 131, and 132 § 1 of the Constitution of 1991). The task of the Prosecutor's Office is to ensure the enforcement of the law by (i) prosecuting persons who have allegedly committed criminal offences, (ii) overseeing the execution of penalties and coercive measures, (iii) seeking the annulment of unlawful decisions and instruments, and (iv) participating, where provided by law, in civil and administrative proceedings (Article 127 of the Constitution of 1991).

34. Section 112 of the Judicial Power Act of 1994 („Закон за съдебната власт") provides that the Prosecutor's Office is unified and centralised, that each prosecutor is subordinate to the respective senior prosecutor, and that all prosecutors are subordinate to the Chief Prosecutor (the latter is also provided by Article 126 § 2 of the Constitution of 1991). The

Chief Prosecutor may issue directives and give instructions relating to the Prosecutor's Office's activity (sections 111(3) and 114 of the Judicial Power Act of 1994). The Chief Prosecutor oversees the work of all prosecutors, and the prosecutors of the appellate and the regional prosecutor's offices oversee the work of their subordinate prosecutors (section 115(1) and (2) of the Judicial Power Act of 1994). Higher prosecutors may perform all acts which are in the competence of their subordinate prosecutors. They may also stay or revoke their decisions in the cases provided for by law (section 116(2) of the Judicial Power Act of 1994). The higher prosecutors' written orders are binding on their subordinate prosecutors (section 116(3) of the Judicial Power Act of 1994).

35. Prosecutors' decisions issued within their competence and in accordance with the law are binding on all state officials and private persons (section 119(2) of the Judicial Power Act of 1994). Prosecutors may give orders to the police (section 119(4) of the Judicial Power Act of 1994).

36. Prosecutors are immune from civil liability for the damage they have inflicted while discharging their duties, unless in so doing they have committed a publicly prosecutable criminal offence (Article 132 § 1 of the Constitution of 1991 and section 134(1) of the Judicial Power Act of 1994).

2. Powers of the Prosecutor's Office to take measures to prevent the commission of criminal offences

37. Article 185 § 1 of the CCrP (repealed in 2003) provided that "the [criminal investigation authorities] shall be bound to take the necessary measures to prevent a criminal offence, for which there is reason to believe that it will be committed. [These measures may include] the temporary impounding of the means which could be used for committing the offence". The new Code of Criminal Procedure of 2005, which entered into force on 29 April 2006 and superseded the CCrP, does not contain a provision similar to that of the former Article 185 § 1 of the CCrP.

38. Section 119(1)(6) of the Judicial Power Act of 1994 provides that in carrying out their duties prosecutors "may take all measures provided for by law, if they have information that a publicly prosecutable criminal offence or other illegal act may be committed". The text of section 119(1)(6) of the Judicial Power Act of 1994 closely matches that of section 7(1) of the repealed Prosecutor's Office Act of 1980 („Закон за прокуратурата"), which provided that in case he or she "had information that a criminal offence or another illegal act might be committed, the prosecutor shall issue a warning and take all legally permissible measures to prevent those".

39. There is no reported case-law on the exact import of these texts. During their 2002 visit to Bulgaria the Committee for the Prevention of Torture were told, while visiting a psychiatric hospital, that prosecutors had relied on Article 185 § 1 of the CCrP to order the confinement of individuals there (CPT/Inf (2004) 21, p. 53, § 150 in limine and footnote 12).

3. Powers of the Prosecutor's Office to institute civil proceedings to safeguard the public interest

40. Article 27 § 1 of the CCP, as worded at the material time, provided that prosecutors could, inter alia, commence a civil action on behalf of another person or entity if they considered that this was necessary to protect the State or the public interest.

4. Review of prosecutorial action

41. By section 117 of the Judicial Power Act of 1994, prosecutors are independent of the courts in the performance of their duties. Section 116(1) of the same Act provides that "all decisions and actions of a prosecutor may be appealed before the higher prosecutor's office, unless they are subject to judicial review", which is the case in respect of some of their decisions made in the course of criminal investigations (for instance under Articles 153a § 3, 237 § 3 and 239 § 7 of the CCrP).

42. Article 181 § 1 of the CCrP provides that prosecutors' decisions are appealable before the higher prosecutor. The appeal may be filed either through the prosecutor whose decision is appealed against, or directly with the higher prosecutor. In the former case, the appeal must be forwarded immediately to the competent prosecutor together with a written opinion by the lower prosecutor (Article 182 of the CCrP). The filing of the appeal has no suspensive effect unless the competent prosecutor decides otherwise. The higher prosecutor must rule on the appeal within three days of its receipt (Article 183 of the CCrP).

43. The Supreme Administrative Court has held that prosecutors' decisions are generally not subject to judicial review, because they are not administrative decisions as the Prosecutor's Office is part of the judicial branch, its task is the defence of legality, it is a centralised structure, and all prosecutorial decisions and actions may be appealed before the higher prosecutors. Unlike the decisions of the administrative authorities, which are subject to judicial review unless otherwise provided by statute, prosecutors' decisions may be scrutinised by the courts only in the cases expressly provided for by law, which is not the case in respect of decisions made under section 119 of the Judicial Power Act of 1994 (опр. № 10697 от 25 ноември 2003 г. по адм. д. 4844/2003 г., ВАС, пето отделение; опр. № 3815 от 27 април 2005 г. по адм. д. № 3033/2005 г., ВАС, петчленен състав; опр. № 5065 от 2 юни 2005 г. по адм. д. № 11114/ 2004 г., ВАС, петчленен състав).

B. The Transformation and Privatisation of State and Municipally-Owned Enterprises Act of 1992

44. Paragraph 8 of the transitional and concluding provisions of that Act („Закон за преобразуване и приватизация на държавни и общински предприятия"), now superseded by new legislation, provided that all contracts disposing of State or municipal property which had been entered into under manifestly disadvantageous conditions could be annulled.

C. Relevant provisions of the Criminal Code of 1968

45. By Article 323 § 2 of the Criminal Code of 1968, it is an offence for any person to take possession of an immovable property from which they have been lawfully removed.

D. Civil remedies against unlawful state action

1. The State Responsibility for Damage Act of 1988

46. The principal enactment in this field is the State Responsibility for Damage Act of 1988 („Закон за отговорността на държавата за вреди, причинени на граждани“). Its section 1, as worded until 31 December 2005, provided as follows:

> "1. The State shall be liable for the damage suffered by private persons as a result of unlawful decisions, actions or omissions by its organs and officers, committed in the course of or in connection with the performance of administrative action.
>
> 2. Compensation for damage flowing from unlawful decisions under [subsection 1] may be claimed after the decisions concerned have been annulled [in prior proceedings]. If the damage flows from an administrative decision which is null and void or from a act or omission which is unlawful, the nullity of the decision or the unlawfulness of the act or the omission shall be established by the court having cognisance of the claim for compensation."

47. Section 1 was amended with effect from 1 January 2006 and now expressly provides that juristic persons may also claim compensation under the Act. Previously the courts construed this provision as allowing only natural persons to claim compensation (реш. № 1307 от 21 октомври 2003 г. по гр.д. № 2136/2002 г., ВКС, пето г.о.; тълк. реш. № 3 от 22 април 2005 г. по гр.д. № 3/2004 г., ОСГК на ВКС).

2. The Obligations and Contracts Act of 1951

48. The general rules of the law of torts are set out in sections 45 to 54 of the Obligations and Contracts Act of 1951 („Закон за задълженията и договорите“). Its section 45(1) provides that everyone is obliged to make good the damage which they have, through their fault, caused to another. Section 49 provides that a person who has entrusted another with performing a job is liable for the damage caused by that other person in the course of or in connection with the performance of the job.

49. Juristic persons are not liable under section 45(1) of the Act, as they cannot act with mens rea. They may, however, be vicariously liable under section 49 thereof for the tortuous conduct of individuals employed by them (пост. № 7 от 30 декември 1959 г., Пленум на ВС).

50. One of the prerequisites of the liability in tort under sections 45 to 50 of the Act is the wrongfulness of the impugned conduct (реш. № 567 от 24 ноември 1997 г. по гр.д. № 775/1996 г., ВС, петчленен състав).

THE LAW

I. ADMISSIBILITY OF THE APPLICATION

A. Alleged failure to exhaust domestic remedies

51. The respondent Government submitted that the applicant company had not exhausted the remedies available to it under Bulgarian law, as required by Article 35 § 1 of the Convention. Although as a legal entity it had no recourse to compensation under the State Responsibility

for Damage Act of 1988, it could have made a claim under section 45 of the Obligations and Contracts Act of 1951. After all three levels of court had ruled in its favour, dismissing the action brought by the Sofia City Prosecutor's Office and recognising it as the legitimate owner of the hotel, it could have claimed compensation for not being able to use and manage the property while the prosecutors' decisions had been effective.
52. The applicant company submitted that it could have only availed itself of the remedy suggested by the Government if the prosecutors' decisions had been annulled. However, they had not been annulled pursuant to the appeals to the higher prosecutors, nor was there any possibility for their setting aside by a court, as evidenced by the Sofia City Court's reasoning in its decision of 11 February 1998.

53. The third-party Government submitted that, while they were not familiar with the exact wording of the legal provisions invoked by the respondent Government, they assumed that these applied to the relations between private parties. It was thus unclear whether they presented sufficient grounds to hold the State liable for prosecutorial action. Nor did it seem that the applicant company could, in the circumstances, sue the Sofia Municipality for breach of contract.

54. The Court notes at the outset that it was conceded by the respondent Government that the avenue of redress under section 1 of the State Responsibility for Damage Act of 1988 was not available to the applicant company at the material time, because it is a juristic person, whereas proceedings under that Act could, until 1 January 2006, only be brought by individuals (see paragraphs 46 and 47 above).

55. As regards the remedy to which the respondent Government pointed – a tort action under section 45(1) of the Obligations and Contracts Act of 1951 (see paragraph 48 above), the Court notes that under Bulgarian law the tortfeasor under that provision can only be a natural person, not a legal entity (see paragraph 49 above). It follows that the applicant company would not have been able to successfully bring proceedings against the State or the Sofia City Prosecutor's Office under that provision. Even assuming that the applicant company could have sued the prosecutors who made the decisions in issue in their personal capacity, which is fairly dubious (see paragraph 36 above), according to the Court's case-law suing a private individual cannot be regarded as a remedy in respect of an act on the part of the State (see Pine Valley Developments Ltd and Others v. Ireland, judgment of 29 November 1991, Series A no. 222, p. 22, § 48; and Iatridis v. Greece [GC], no. 31107/96, § 47 in fine, ECHR 1999-II).

56. Insofar as the respondent Government may be taken to submit that the applicant company could make a claim under section 49 of the Obligations and Contracts Act of 1951, which deals with tortuous liability for another's conduct, the Court observes that apparently one of the prerequisites for prosecuting successfully such a claim under Bulgarian law is establishing the wrongfulness of the conduct causing the damage (see paragraph 50 above). However, there is nothing to suggest that the prosecutors' decisions in issue contravened Bulgarian law. They were upheld by the higher prosecutors, whereas the courts would refuse to examine their lawfulness in a civil action, such as a one in tort, as is apparent from the reasoning of the Sofia City Court's decision of 11 February 1998 (see paragraphs 10, 11, 17 and 19 above). It thus seems that any such claim would have no prospects of success. The Court furthermore notes that the respondent Government did not refer to any domestic court judgments or doctrinal opinions in corroboration of their averment that such a claim would provide an effective remedy in the circumstances, whereas it is incumbent on a Government

claiming non-exhaustion to satisfy the Court that the remedy it points to was effective and available in theory and in practice at the relevant time (see, as a recent authority, Sejdovic v. Italy [GC], no. 56581/00, § 46, ECHR 2006-...).

57. It follows that the respondent Government's objection must fail.

B. Alleged loss of the applicant company's victim status

58. The respondent Government argued that the application before the Court was moot, as the applicant company had won the case commenced against it by the Sofia City Prosecutor's Office.

59. The applicant company submitted that its application related to the facts that no judicial review was available in respect of the prosecutors' decisions interfering with its property rights and that it could not use and manage the hotel, nor receive compensation for that impairment. The national courts' judgments in the action brought by the Sofia City Prosecutor's Office did not touch upon these issues, as they were not part of the subject-matter of the case.

60. The third-party Government did not comment on this issue.

61. The Court considers that the respondent Government's submission is to be taken as an averment that the applicant company had lost its victim status under Article 34 of the Convention on account of the favourable end of the civil proceedings against it. It observes, however, that the company's complaint under Article 1 of Protocol No. 1 relates to the prosecutors' decisions which interfered with its property rights. These decisions were not part of the matters under examination in the civil proceedings against the company, as the Sofia City Court refused to entertain the request for a declaration of their unlawfulness (see paragraph 19 above). It is true that the discontinuation of the operation of the prosecutors' decisions following, and possibly as a result of, the conclusion of these proceedings, brought the interference with the company's possessions to an end. However, it did not eliminate the intervening impossibility to use and manage the hotel for more than two years (see, mutatis mutandis, Potop v. Romania, no. 35882/97, § 37, 25 November 2003). Moreover, the company's grievances concern not only the interference with its possessions, but also the alleged impossibility, in breach of Article 6 § 1 of the Convention, to obtain judicial review of the prosecutors' decisions which brought about that interference (see, mutatis mutandis, Brumărescu v. Romania [GC], no. 28342/95, § 50, ECHR 1999-VII). Consequently, the favourable outcome of the proceedings for annulling the privatisation contract does not seem to have provided any redress in respect of the violations alleged in the present case.

62. It should also be noted that the authorities did not acknowledge at any point, either expressly or in substance, the alleged violations.

63. The respondent Government's second objection must therefore likewise be dismissed.

C. The Court's decision on admissibility

64. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that, as found above, it is not inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

65. The applicant company complained under Article 6 § 1 of the Convention that the prosecutors' decisions interfering with its right to use its possessions could not be reviewed by a court.

66. Article 6 § 1 reads, as relevant:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

A. The parties' submissions

67. The respondent Government submitted that the prosecutors' decisions were appealable before the higher prosecutors. They could also be reviewed by a court when the criminal proceedings reached the judicial stage, whereas it was obvious that there existed no possibility for their judicial review before that. On the other hand, once the national courts had dismissed the action brought by the Sofia City Prosecutor's Office in a final judgment, all prior prosecutors' decisions had ceased to be in force. The applicant company's demands that these decisions be expressly set aside by their issuing authorities were thus pointless. The said decisions had been rendered invalid through the civil proceedings, which had ensured the requisite access to a court.

68. The applicant company disputed the respondent Government's averment that the prosecutors' decisions were reviewable by a court. That was the case only in respect of criminal, not of civil proceedings as those at issue in the instant case, as was evident from the refusal of the Sofia City Court to entertain the Sofia Municipality's request for a declaratory judgment. The courts' judgments in the civil proceedings against the company did not address the lawfulness of the prosecutors' decisions and did not in fact set them aside.

69. The third-party Government submitted that apparently no possibility for judicial review of the prosecutors' decisions existed, as they could only be hierarchically appealed before the higher prosecutors. According to them, the alleged indirect effect of the courts' judgments delivered in the proceedings for annulling the privatisation contract was not sufficient.

B. The Court's assessment

1. Applicability

70. The first matter for decision is the applicability of Article 6 § 1.

(a) Criminal charge

71. The Court notes that the measures taken by the Sofia City Prosecutor's Office did not involve a finding of guilt, but were rather designed, as is apparent from the wording of the provisions on which they were grounded and the reasons given, to prevent the future commission of offences and safeguard the public interest in the privatisation process (see paragraphs 8, 15, 37 and 38 above). They were thus not comparable to a criminal sanction (see, mutatis mutandis, Arcuri and Others v. Italy (dec.), no. 52024/99, ECHR 2001-VII, with

further references). Furthermore, it does not appear from the file that any relevant criminal charges were brought against officers of the applicant company or any third party. Even assuming, however, that to be the case, this does not attract the application of Article 6 § 1 under its criminal limb in respect of the applicant company (see AGOSI v. the United Kingdom, judgment of 24 October 1986, Series A no. 108, p. 22, § 65 in fine).

(b) Civil rights and obligations

72. It remains to be established whether the measures taken by the Sofia City Prosecutor's Office against the applicant company concerned its civil rights and obligations, within the meaning of Article 6 § 1 (see, mutatis mutandis, Allan Jacobsson v. Sweden (no. 1), judgment of 25 October 1989, Series A no. 163, pp. 19-21, §§ 66-74). The Court observes on this point that the ordered suspension of the performance of the privatisation contract and the eviction of the applicant company from the hotel had a clear and decisive impact on its capability to use and operate it, which was undoubtedly an exercise of a civil right (see, mutatis mutandis, Fredin v. Sweden (no. 1), judgment of 18 February 1991, Series A no. 192, p. 20, § 63). The Court also finds that a real dispute existed, in particular with regard to the lawfulness of the Sofia City Prosecutor's Office's decisions: before the higher levels of the Prosecutor's Office, the applicant company – as well as the Sofia Municipality – claimed that these decisions were not in conformity with the relevant legal provisions (see paragraphs 10, 11, 26 and 28 above; see also Skärby v. Sweden, judgment of 28 June 1990, Series A no. 180-B, p. 37, § 28 in fine). The outcome of this dispute, which was determined solely by the various levels of the Prosecutor's Office, was directly decisive for the company's exercise of the right to use and manage the hotel. It follows that Article 6 § 1, under its civil head, was applicable.

2. Compliance

73. Under Article 6 § 1 it is necessary that, in the determination of civil rights and obligations, decisions taken by authorities which do not themselves satisfy its requirements be subject to subsequent control by a judicial body that has full jurisdiction (see, among many other authorities, Fischer v. Austria, judgment of 26 April 1995, Series A no. 312, p. 17, § 28; and Credit and Industrial Bank v. the Czech Republic, no. 29010/95, § 68, ECHR 2003-XI (extracts)).

74. Therefore, the first issue which needs to be settled by the Court is whether the various prosecutor's offices involved could, in the circumstances, be considered as tribunals conforming to the requirements of Article 6 § 1. This assessment is to be carried out without regard to their role in criminal proceedings, where they are clearly not one, as a plurality of powers cannot in itself preclude an institution from being a tribunal in respect of some of them (see H. v. Belgium, judgment of 30 November 1987, Series A no. 127-B, p. 35, § 50).

75. A tribunal, within the meaning of Article 6 § 1, is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner (ibid., p. 34, § 50). It must also satisfy a series of requirements – independence, in particular of the executive, impartiality, duration of its members' terms of office, and guarantees afforded by its procedure – several of which appear in the text of Article 6 § 1 (see, as a recent authority, Mihailov v. Bulgaria, no. 52367/99, § 37, 21 July 2005, with further references).

76. The Court notes that the Prosecutor's Office is independent of the executive and that prosecutors enjoy the same tenure and immunities as do judges (see paragraph 33 above). However, that cannot be seen as dispositive, as an independent and impartial tribunal within the meaning of Article 6 § 1 exhibits other essential characteristics – such as the guarantees of judicial procedure (see Benthem v. the Netherlands, judgment of 23 October 1985, Series A no. 97, p. 18, § 43 in limine) – which are lacking here. It should firstly be noted in this connection that the Sofia City Prosecutor's Office made the impugned decisions of its own motion, whereas a tribunal would normally become competent to deal with a matter if it is referred to it by another person or entity. Moreover, it appears that the making of the decisions did not have to be – and was, in fact, not – attended by any sort of proceedings involving the participation of the entity concerned, i.e. the applicant company. The law made no provision for the holding of hearings, and did not lay down any rules on such matters as the admissibility of evidence or the manner in which the proceedings were to be conducted (see H., cited above, p. 35, § 53). Finally, it appears from the wording of the relevant legal provisions (see paragraphs 37 and 38 above) that the Sofia City Prosecutor's Office enjoyed considerable latitude in determining what course of action to pursue, which appears hardly compatible with the notions of the rule of law and legal certainty inherent in judicial proceedings (see, mutatis mutandis, Sovtransavto Holding v. Ukraine, no. 48553/99, § 82, ECHR 2002-VII).

77. It is true that appeals could be made against these decisions to the higher levels of the Prosecutor's Office. However, they were the hierarchical superiors of the Sofia City Prosecutor's Office (see, mutatis mutandis, Benthem, cited above, p. 18, § 43 in fine) and part and parcel of the same centralised system under the overall authority of the Chief Prosecutor (see paragraph 34 above; see also, mutatis mutandis, Vasilescu v. Romania, judgment of 22 May 1998, Reports of Judgments and Decisions 1998-III, pp. 1075-76, § 40; and, as an example to the contrary, H. v. Belgium, cited above, p. 35, § 51). In this connection, the Court notes that it found, albeit in a different context, that similar appeals to the various levels of the Prosecutor's Office were not an effective remedy under Article 13 of the Convention, as they were, inter alia, hierarchical (see Djangozov v. Bulgaria, no. 45950/99, § 56, 8 July 2004; and Osmanov and Yuseinov v. Bulgaria, nos. 54178/00 and 59901/00, § 39, 23 September 2004). Moreover, it appears that the appeals procedure was not attended by due procedural safeguards (see paragraph 42 above; and H. v. Belgium, cited above, p. 35, § 53).

78. The Court further notes that in its judgment in the case of Assenov and Others v. Bulgaria it found that Bulgarian prosecutors could not be considered as officers authorised by law to exercise judicial power, within the meaning of Article 5 § 3 of the Convention, as they could subsequently act in criminal proceedings against the person whose detention they had confirmed (see Assenov and Others v. Bulgaria, judgment of 28 October 1998, Reports 1998-VIII, pp. 2298-99, §§ 144-50). It considers that a similar rationale should apply in the present case. The decisions ordering the suspension of the performance of the privatisation contract and the applicant company's eviction from the hotel were made by the Sofia City Prosecutor's Office of its own motion. It then brought, in exercise of its powers under Article 27 § 1 of the CCP, a civil action against the company, seeking the annulment of that same privatisation contract (see paragraphs 8, 15 and 18 above). It could thus hardly be deemed as sufficiently impartial for the purposes of Article 6 § 1 (see, mutatis mutandis, Procola v. Luxembourg, judgment of 28 September 1995, Series A no. 326, p. 16, § 45). The same goes for the higher levels of the Prosecutor's Office, which upheld these decisions and subsequently acted against the applicant company in the proceedings before the Sofia Court

of Appeals and the Supreme Court of Cassation (see paragraphs 23 and 24 above). The mere fact that the prosecutors acted as guardians of the public interest cannot be regarded as conferring on them a judicial status or the status of independent and impartial actors (see, mutatis mutandis, Merit v. Ukraine, no. 66561/01, § 63, 30 March 2004).
79. In view of the foregoing, the Court concludes that the various prosecutor's offices involved cannot, in the circumstances, be regarded as independent and impartial tribunals providing the guarantees required by Article 6 § 1.

80. It follows that in order for the obtaining situation to be in compliance with that provision, the prosecutors' decisions should have been subject to review by a judicial body having full jurisdiction. However, the Court notes that domestic law, as is apparent from the wording of the relevant provisions and from their reading by the Supreme Administrative Court, excludes judicial review of prosecutors' decisions made in exercise of their powers under the provisions on which they relied in the instant case (see paragraphs 41 and 43 above).

81. Insofar as the respondent Government argued that the requisite degree of judicial scrutiny was afforded through the civil action brought by the Sofia City Prosecutor's Office against the applicant company, the Court notes that the Sofia City Court expressly refused to examine the lawfulness of the prosecutors' decisions in these proceedings (see paragraph 19 above). This was only natural, as the issue to be decided therein – whether the privatisation contract with the applicant company had been made under manifestly disadvantageous conditions – was entirely different from that of the lawfulness of the impugned prosecutors' decisions. Consequently, the courts did not touch upon that issue in their reasoning or in the operative provisions of their judgments. Therefore, the respondent Government's suggestion that these proceedings could in a way be regarded as an appeal against the Sofia City Prosecutor's Office's decisions cannot be accepted by the Court (see, mutatis mutandis, Werner v. Austria, judgment of 24 November 1997, Reports 1997-VII, p. 2511, § 49). It is true that after their completion the Sofia City Prosecutor's Office eventually stated that its decisions were no longer operative (see paragraphs 31 and 32 above). However, this was by no means a direct result of a binding decision of the courts in these proceedings.

82. The Court is similarly unable to accept the respondent Government's averment that judicial review was available in the form of an appeal against the prosecutors' decisions to a criminal court if and when the criminal proceedings would reach the judicial stage. The decisions in issue were not made in the context, but prior to the institution of any criminal proceedings, and the respondent Government did not provide any examples from the national courts' case-law which would indicate that they are indeed reviewable in such proceedings. On the contrary, it appears from the Supreme Administrative Court's jurisprudence that only a limited number of prosecutors' decisions made after the institution of criminal proceedings were reviewable by a court, pursuant to express provisions of the CCrP (see paragraph 43 above). The existence of an alleged judicial remedy must be sufficiently certain, failing which it will lack the accessibility and effectiveness required for the purposes of Article 6 § 1 (see I.D. v. Bulgaria, no. 43578/98, § 54, 28 April 2005; and Capital Bank AD v. Bulgaria, no. 49429/99, § 106, 24 November 2005).

83. The Court thus finds that the prosecutors' decisions in the case at hand – which were decisive for the applicant company's use and possession of the hotel at least until the end of the civil action against it – were not subject to judicial scrutiny, as required by Article 6 § 1.

84. The final question which needs to be resolved is whether the impossibility to seek judicial review of these decisions was not warranted in terms of the inherent limitations on the right of access to a court implicit in Article 6 § 1 (see Capital Bank AD, cited above, § 109). The Court notes in this connection that the respondent Government did not advance any reasons justifying the lack of access to a court. The rationale applied by the Supreme Administrative Court in rejecting as inadmissible applications for judicial review of prosecutors' decisions was confined to arguments relating to the status of the Prosecutor's Office (see paragraph 43 above). However, as the Court found above, that Office cannot be seen as being an independent and impartial tribunal within the meaning of Article 6 § 1. In these circumstances, the Court finds no justifiable reasons for excluding judicial review of its decisions interfering, as in the present case, with civil rights and obligations.

85. There has therefore been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

86. In the view of the applicant company, the facts underlying its complaint under Article 6 § 1 of the Convention also gave rise to a violation of Article 13 thereof, which provides:
"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

87. The Court does not consider it necessary to rule on this submission, because, where the right claimed is a civil one, the requirements of Article 13 are less strict than, and are absorbed by, those of Article 6 § 1 (see Allan Jacobsson (no. 1), p. 21, § 78; Vasilescu, p. 1076, § 43; and Capital Bank AD, § 121, all cited above).

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

88. The applicant company complained that the ordered suspension of the performance of the privatisation contract and its eviction from the hotel had been unlawful. It relied on Article 1 of Protocol No. 1 to the Convention, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. The parties' submissions

89. The respondent Government submitted that the applicant company had not been deprived of the ownership of the hotel, which it had already acquired by virtue of the privatisation contract, but had only been barred from using and managing it for a limited period of time. Following the conclusion of the civil proceedings against it it could have freely accessed the hotel.

90. In the respondent Government's view, the statutory provisions which had served as a basis for the impugned prosecutors' decisions were sufficiently clear and foreseeable and precluded any arbitrary action. Moreover, the aim of the decisions had been legitimate and the means used to that end had been proportionate. The statutory provisions in issue laid down general rules. They empowered the Prosecutor's Office to take all necessary measures to prevent the commission of criminal offences, including impounding of the means which could be used for perpetrating the offence. Since the possession of property alone could, in certain cases where the relevant privatisation regulations had been breached, constitute a criminal offence, the authorities were under a duty to intervene. The offence sought to be forestalled was one which could possibly be committed by the applicant company. At the same time, the only means to establish whether or not the municipal officials had already offended had been to suspend the performance of the privatisation contract. The prosecutors' right to request the annulment of a contract in case it violated general rules existed in other legal systems. For instance, under the French system the public prosecutors could also bring proceedings to protect the general interest. The Bulgarian practice in the privatisation domain was thus fully compatible with the universally acknowledged principles of nullity. Since the definition of the general interest was reserved for the national authorities – the legislature and the courts –, the provisions in issue did not fall foul of the requirements of the Convention. The prescribed procedures ensured sufficient safeguards against arbitrary action, such as a possibility to appeal to the higher levels of the Prosecutor's Office and to a court in the event the criminal proceedings reached the judicial phase. The lack of suspensive effect of these appeals did not deprive them of their effectiveness. Moreover, all higher prosecutors had fully upheld the decisions in issue as lawful. The applicant company's request for them to be rescinded following the end of the civil proceedings against it had been misguided, as they had then already been rendered invalid.

91. The applicant company submitted that it did not challenge the powers of a prosecutor to take measures to prevent the commission of offences as such. However, this power had to be based on sufficient grounds, subject to scrutiny, not unduly violative of private interests, and accompanied by guarantees against arbitrariness. For more than seven years the competent prosecutors had not indicated which had been the offence which they had sought to prevent, who would have committed it and why it had been necessary to impound the hotel to avert it. No criminal charges had been preferred before a court. No criminal proceedings had been brought against the applicant company either. That option was unavailable under Bulgarian law anyway, since legal entities could not incur criminal liability. Finally, there was nothing to show that the prosecutors' decisions had become moot after the end of the civil proceedings against the applicant company; it had thus correctly requested their rescission.

92. The third-party Government submitted that the respondent Government had not provided any information or materials, such as judgments of the domestic courts, which could indicate with some level of certainty the scope of the prosecutors' powers under the provisions relied on in the instant case. These provisions spelled out general rules for preventing the commission of criminal offences. It was however unclear what offence, if any, could be committed by the applicant company in taking possession of the hotel. On the other hand, it did not seem that any relevant criminal proceedings had been opened against officials of the Sofia Municipality or officers of the applicant company.

B. The Court's assessment

1. Scope of the complaint

93. The Court notes at the outset that the applicant company's complaint did not concern the institution of civil proceedings against it by the Sofia City Prosecutor's Office, but merely that Office's decisions ordering the suspension of the performance of the privatisation contract and the eviction of the company from the hotel it had purchased thereby. It is hence unnecessary to consider, as suggested by the respondent Government, the prosecutors' powers to seek the annulling, by the courts, of privatisation contracts allegedly made in breach of the State's interests. The Court will accordingly confine its examination to the impugned decisions of the Sofia City Prosecutor's Office.

2. Applicability of Article 1 of Protocol No. 1

94. It was not in dispute between those appearing before the Court that the decisions complained of constituted an interference with the peaceful enjoyment of the applicant company's possessions. However, the parties disagreed on the exact nature of that interference.

95. The Court notes that the company's eviction from the hotel amounted to a temporary restriction on its use and did not entail a transfer of ownership. It does not therefore consider that the case involves a deprivation of property (see, mutatis mutandis, Air Canada v. the United Kingdom, judgment of 5 May 1995, Series A no. 316-A, pp. 15-16, § 33).

96. In addition, it transpires from the reasoning of the decisions in issue and the surrounding circumstances that the eviction sought to forestall the divestiture of State assets under allegedly grossly disadvantageous conditions (see paragraphs 6-8 and 15 above). As such, it amounted to a control of the use of property. It is therefore the second paragraph of Article 1 of Protocol No. 1 which is applicable in the present case (ibid., p. 16, § 34).

3. Compliance with Article 1 of Protocol No. 1

97. The first and most important requirement of Article 1 of Protocol No. 1, whichever the applicable rule thereof, is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only "subject to the conditions provided for by law" and the second paragraph recognises that the States have the right to control the use of property by enforcing "laws". Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see Iatridis v. Greece [GC], no. 31107/96, § 58, ECHR 1999-II; Carbonara and Ventura v. Italy, no. 24638/94, § 63, ECHR 2000-VI; and Capital Bank AD, cited above, § 133).

98. The requirement of lawfulness, within the meaning of the Convention, means not only compliance with the relevant provisions of domestic law, but also compatibility with the rule of law. It thus presupposes that the rules of domestic law must be sufficiently precise and foreseeable (see Hentrich v. France, judgment of 22 September 1994, Series A no. 296-A, pp. 19-20, § 42; and Beyeler v. Italy [GC], no. 33202/96, § 109, ECHR 2000-I). It also implies that the law must provide a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention (see Capital Bank AD, cited

above, § 134, with further references). It would be contrary to the rule of law for the legal discretion granted to the authorities in areas affecting fundamental rights to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion and the manner of its exercise with sufficient clarity, so as to give the affected individuals and entities adequate protection against arbitrary interference (see, mutatis mutandis, Hasan and Chaush v. Bulgaria [GC], no. 30985/96, § 84, ECHR 2000-XI, with further references). Finally, the concepts of lawfulness and the rule of law in a democratic society command that measures affecting fundamental human rights be accompanied by appropriate procedural safeguards. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures (see AGOSI v. the United Kingdom, judgment of 24 October 1986, Series A no. 108, p. 19, § 55; Hentrich, cited above, p. 21, § 49; and Jokela v. Finland, no. 28856/95, § 45, ECHR 2002-IV).

99. The provisions on which the Sofia City Prosecutor's Office relied to order the suspension of the performance of the privatisation contract and the eviction of the applicant company from the hotel, former Article 185 § 1 of the CCrP and section 119(1)(6) of the Judicial Power Act of 1994, appear on their face to be rather concerned with situations where it is necessary to impound physical things which may serve for the commission of a criminal offence or are intended for use in illegal activities (see paragraphs 37 and 38 above). According to the applicant company, as well as the Sofia Municipality, that Office's decisions in the case at hand fell outside the purview of these provisions and were thus unlawful in terms of Bulgarian law (see paragraphs 10, 11, 17, 19 and 91 above). According to the Government, the very possession of a thing could constitute an offence, with the result that the decisions were lawful (see paragraph 90 above). The Court would be usurping the function of the national courts were it to attempt to make an authoritative statement on this issue of domestic law. It is, however, required under the Convention to determine whether that law lays down with reasonable clarity the essential elements of the authorities' powers (see Malone v. the United Kingdom, judgment of 2 August 1984, Series A no. 82, p. 36, § 79). It notes in this connection that the above-mentioned statutory provisions used particularly vague terms (see paragraphs 37 and 38 above), which made it almost impossible to foresee under what conditions the competent prosecutors will choose to act and what measures they will take in the event they considered, without independent control, that an offence might be committed. It is true that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. However, there is no reported case-law interpreting and clarifying the exact import of the provisions at issue, in all probability on account of the impossibility of judicial review of prosecutors' decisions as the ones at hand (see paragraphs 41 and 43 above). As a result, these rules, which appear to be of general application, serve as a catchall, giving the Prosecutor's Office unfettered discretion to act in any manner it sees fit, which may in some cases have serious and far-reaching consequences for the rights of private individuals and entities (see paragraph 39 above). This discretion and the concomitant lack of adequate procedural safeguards, such as elemental rules of procedure and, as already found by the Court (see paragraphs 77, 78 and 81-83 above), review by an independent body, and the resulting obscurity and uncertainty surrounding the powers of the Prosecutor's Office in this domain, lead the Court to conclude that the minimum degree of legal protection to which individuals and legal entities are entitled under the rule of law in a democratic society was lacking. It follows that the interference with the applicant company's possessions was not lawful, within the meaning of Article 1 of Protocol No. 1.

100. This conclusion makes it unnecessary to ascertain whether the other requirements of that provision have been complied with (see Iatridis, cited above, § 62).

101. There has therefore been a violation of Article 1 of Protocol No. 1 to the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. Article 41 of the Convention provides:

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

A. Damage

103. The applicant company claimed USD 2,729,660 as compensation for pecuniary damage. This amount broke down as follows:

(i) USD 140,618 in respect of the material damage which the hotel sustained during the two years it was left unattended. According to an expert report drawn up by a damage assessment firm, 75% of the building were unfit for use and 82% to 90% of its installations were inoperative;

(ii) USD 2,587,827 in respect of loss of profits. That amount was arrived at on the basis of another expert report drawn up by an accounting firm;

(iii) USD 1,214 in respect of missing equipment, as ascertained in the first expert report.

104. The applicant company submitted that the damage claimed was the direct result of its eviction from the hotel and the fact that the building was left unattended. It produced two expert reports, the first describing and assessing the damage to the hotel at the end of 1999, and the other estimating the loss of profits stemming from the impossibility to operate the hotel during the period 1997-99.

105. The respondent Government submitted that the applicant company's claims were not in line with the Court's case-law on the impounding of assets during the pendency of judicial proceedings. According to this case-law, no compensation was due for periods during which a piece of property was seized, even by a prosecutor. Consequently, no obligation arose for the State to make good the alleged loss of profits resulting from the eviction during the pendency of the civil action against the applicant company. The only period in respect of which the applicant company could validly claim compensation was that which followed the dismissal of the action in a final judgment. However, it was evident that no interference with its possessions had occurred at that time, as the prosecutors' decisions had become moot after the favourable end of the civil proceedings. Furthermore, the applicant company's claim was clearly excessive and based on unreliable expert reports. The first expert report produced by the applicant company, relating to the material damage to the hotel, was not signed, but merely sealed. The other expert report, relating to the alleged loss of profits, did not set out the underlying methodology, as was customary for such forensic reports, and was, moreover, unsupported by evidence. It was likewise unsigned. As there was thus no individual responsible for the truthfulness of the conclusions in the expert reports, they could not be deemed reliable.

106. In the circumstances of the case, the Court considers that the question of the application of Article 41 of the Convention is not ready for decision as regards pecuniary damage and reserves it, due regard being had to the possibility that an agreement between the respondent State and the applicant company will be reached (Rule 75 § 1 of the Rules of Court).

B. Costs and expenses

107. The applicant company sought the reimbursement of USD 5,505 it had incurred for costs and expenses. This amount broke down as follows:

(i) USD 165 in attorney fees for five and a half hours of legal work before the Sofia City and Appellate Prosecutor's Offices and USD 1,985 for seventy-seven hours of legal work on the Strasbourg proceedings, at the rates of USD 5, 10, 30 per hour, depending on the type of work;

(ii) USD 2,000 in fees for procuring expert reports on the extent of the damages sustained by the applicant company;

(iii) USD 1,060 for translation costs (allegedly USD 180 and 240 Bulgarian levs (BGN) for the translation of the above-mentioned expert reports, and BGN 1,080 for the translation of other documents);

(iv) USD 115 for postage;

(v) USD 80 for copying, telephone and fax expenses.

108. The respondent Government did not comment.

109. According to the Court's case-law, applicants are entitled to the reimbursement of their costs and expenses only insofar as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, and converting the applicant company's claim into euros (EUR), the Court considers it reasonable to award the sum of EUR 2,400, plus any tax that may be chargeable, covering attorney fees, translation of documents other than the expert reports, postage and copying, telephone and fax expenses (see items (i), (iii), (iv) and (v) in paragraph 107 above).

110. As to the amount claimed in respect of the expert reports and their translation into English (see items (ii) and (iii) in paragraph 107 above), the Court considers that this part of the applicant company's claim for costs and expenses is closely linked to its claim for pecuniary damages and is accordingly not ready for decision either. Therefore, the Court likewise reserves the question of the application of Article 41 of the Convention in so far as the costs incurred for the expert reports and their translations are concerned (see Kehaya and Others v. Bulgaria, nos. 47797/99 and 68698/01, § 97, 12 January 2006).

C. Default interest

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

FOR THESE REASONS, THE COURT

1. Declares unanimously the application admissible;

2. Holds unanimously that there has been a violation of Article 6 § 1 of the Convention;

3. Holds by six votes to one that it is not necessary to rule on the allegation of a violation of Article 13 of the Convention;

4. Holds unanimously that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

5. Holds unanimously

(a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 2,400 (two thousand four hundred euros) in respect of costs and expenses, to be converted into Bulgarian levs at the rate applicable at the date of settlement, plus any tax that may be chargeable on that amount;

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

6. Holds unanimously that the question of the application of Article 41 of the Convention is not ready for decision in so far as pecuniary damage and costs for the expert reports and their translation are concerned;

accordingly,

(a) reserves the said question;

(b) invites the respondent Government and the applicant company to submit, within six months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;

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

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

Done in English, and notified in writing on 15 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

3.5 Case of Frizen v. Russia

Application no. 58254/00
JUDGMENT
STRASBOURG
24 March 2005
FINAL
30/11/2005

PROCEDURE

1. The case originated in an application (no. 58254/00) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mrs Nina Ivanovna Frizen, on 24 March 2000.

2. The Russian Government ("the Government") were represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged a violation of her property rights, in that the car of which she had been the legal owner had been taken from her without any legal basis.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 4 December 2003, the Court declared the application admissible.

6. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

7. Neither the applicant nor the Government filed written observations on the merits. The Chamber decided that no hearing on the merits was required (Rule 59 § 3).

THE FACTS
I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1951 and lives in Krasnoyarsk.

9. In January 1995 a limited liability company, Telemediaservice ("TMS"), hired the applicant as an accountant.

A. Loan agreement

10. In 1996 TMS granted the applicant an interest-free loan for the purchase of a Toyota Land Cruiser car. The terms and conditions of the loan were set out in a loan agreement of 10 June 1996 signed by the applicant and the director-general of TMS, Mr Yevseyev. The loan was for 266,847,000 Russian roubles[*] ("RUR") over a period of eighty-four months. On 13 June 1996 the total amount was transferred directly to the bank account of the car dealer.

11. On 30 September 1996 the State Road Inspectorate of the Krasnoyarsk Region registered the purchased car in the applicant's name.

12. According to an undated certificate signed by the new TMS director-general, Ms Yakovleva, the applicant reimbursed seven instalments of RUR 3,200 (after denomination) between June 1996 and January 1997 and one additional instalment of RUR 490 in May 1999, to the total of RUR 22,890.

B. Conviction of the applicant's husband

13. On 27 November 1998 the Tsentralniy District Court of Krasnoyarsk convicted Mr Yevseyev and the applicant's husband, Mr Frizen, of large-scale fraud. The applicant was a witness at the trial. It was established that the accused, while holding managerial positions in the State telecommunication company MTTS, had founded the TMS company that acted as a broker in the procurement of telecommunication equipment for MTTS. They used the MTTS's funds to make advance payments under the contracts for the purchase of telephones signed by TMS and then sold these telephones to MTTS at inflated prices. The court found:
"Being managers of MTTS, Frizen and Yevseyev... used their position... to take advantage of the cash flow of [the MTTS] for their personal gain. Moreover, relatives of the defendants were simultaneously employees of the TMS and MTTS and they received a salary from both companies. It was established by the court... that the salary of the TMS employees, loans and dividends were paid out of money that had been taken from [the MTTS]".

14. The court noted that the applicant had not shown the loan agreement to the investigator and held:

> "As it was established by the court that the loans for the purchase of cars had been granted to Yevseyev and [the applicant] unlawfully, at the expense of [the MTTS], without appropriate documentation, the court considers it necessary to order forfeiture of the cars as compensation for the damage (обратить в возмещение ущерба)".

15. The court sentenced both Mr Frizen and Mr Yevseyev to four years' imprisonment and issued confiscation orders in respect of their property. It also recovered RUR 4,076,387 from them and ordered forfeiture of the TMS company's cash funds and the applicant's and Mr Yevseyev's cars as compensation for the damage.

C. Civil proceedings brought by the applicant

16. In December 1997 the applicant's car was seized. On 12 April 1999 certain household items in the applicant's flat were also seized.

17. The applicant brought a civil action, seeking to lift the seizure order in respect of her household items and the car.

18. On 23 August 1999 the Oktyabrskiy District Court of Krasnoyarsk granted the applicant's action in respect of the household items but upheld the seizure of the car, finding as follows:

> "The court has established that on 10 June 1996 the TMS company and [the applicant] concluded a loan agreement, by the terms of which [the applicant] was granted a loan of RUR 266,847,000... It is true that, according to the sale certificate of 9 July 1996

and a copy of the vehicle registration card, the car at issue was registered in [the applicant's] name. However, the court considers that the plaintiff's arguments to the effect that she is the legal owner of the car... are unsubstantiated because the judgment of the Tsentralniy District Court of Krasnoyarsk of 27 November 1998... had established that the loan for the purchase of that car had been granted unlawfully and, accordingly, the car had been forfeited as compensation for damage."

19. On 6 October 1999 the Civil Division of the Krasnoyarsk Regional Court, on an appeal by the applicant, upheld the judgment of 23 August 1999. The court justified the seizure of the car in the following terms:

"The [first-instance] court correctly refused [the applicant's] claim... because the circumstances showing that [the applicant] had purchased the car from her own (borrowed) money had not been confirmed... [T]here is no evidence that the borrowed funds were used for the purchase of the car, the loan was only reimbursed from [the applicant's] salary and the last instalment was paid on 1 January 1997".

II. RELEVANT DOMESTIC LAW AND PRACTICE

20. The Civil Code of the Russian Federation provides:

"Article 243 - Confiscation

1. Where the law so provides, property may upon a court decision be taken away from its owner without compensation by way of punishment for commission of a crime or another offence (confiscation).
2. Where the law so provides, a confiscation order may be issued in administrative proceedings. The decision on confiscation made in the administrative proceedings may be appealed against to a court."

21. The Criminal Code of the Russian Federation provides that "punishment shall be imposed on a person found guilty of commission of a crime". Article 44 (g) provides that confiscation is a form of punishment. Article 52 defines confiscation of property as the "compulsory withdrawal, in whole or in part, without compensation, of the property owned by the convicted person".

22. The RSFSR Code on Administrative Offences (in force at the material time) provided for the confiscation of things by means of which the administrative offence had been committed or which had been the object of the offence.

23. The RSFSR Code of Criminal Procedure (in force at the material time) provided that instruments of the crime which belonged to the defendant (Article 86 § 1) and criminally acquired money and other valuables were to be forfeited whereas other items were to be returned to their lawful owner (Article 86 § 4).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

24. The applicant complained that her car had been confiscated for offences of which she had not been convicted and without any legal basis. She invoked Article 1 of Protocol No. 1, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Submissions of the parties

25. The applicant submitted that she had not been a defendant in the criminal proceedings against her husband and she had not caused the damage for which he had been held accountable. Pursuant to the court judgment, the car was seized from her husband who was not its owner; nor was it in their joint ownership because it had been purchased at her own expense. The loan agreement, to which she was a party, was never terminated by a court or by the parties and her debt is still recoverable.

26. The Government claimed that the applicant had been deprived of her property "in the public interest and in accordance with the conditions provided for by law", without further elaboration of this argument, and that such deprivation was "necessary" to cover the damage caused by the applicant's husband. They further submitted that the application should be considered "as an abuse of the right of application [because] it is aimed at restitution of the property seized under the court's verdict in her husband's criminal case".

B. The applicable rule

27. Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, inter alia, to control the use of property in accordance with the general interest. The three rules are not, however, distinct in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, as a recent authority, Broniowski v. Poland [GC], no. 31443/96, § 134, ECHR 2004-...).

28. The Court observes that the "possession" at issue in the present case is the applicant's car, of which she was the sole legal and registered owner and in respect of which the domestic courts issued a forfeiture order. It is not in dispute between the parties that the order amounted to an interference with the applicant's right to peaceful enjoyment of her possessions and that Article 1 of Protocol No. 1 is therefore applicable. It remains to be determined whether the impugned measure was covered by the first or second paragraph of that Convention provision.

29. The parties did not take a clear stance on the question as to which rule of Article 1 of Protocol No. 1 the case should be examined under. The applicant submitted that the vehicle in question was only for her personal use and that it was not used to commit any offence. The Government did not contest these submissions. The Court sees no reason to find otherwise,

the instant case being distinguishable from the cases where the domestic authorities ordered forfeiture of physical things which had been the object of the offence (obiectum sceleris) (see, for example, AGOSI v. the United Kingdom, judgment of 24 October 1986, Series A no. 108, § 51) or by means of which the offence had been committed (instrumentum sceleris), even where such things belonged to third parties (see, for example, C.M. v. France (dec.), no. 28078/95, 26 June 2001; and Air Canada v. the United Kingdom, judgment of 5 May 1995, Series A no. 316-A, § 34).

30. The Government further contended that the reason behind the confiscation order was that the car had been paid for with unlawfully obtained money. The applicant replied that she should not have been held liable for the damage caused by her husband.

31. As regards the proceeds of the criminal offence (productum sceleris), the Court recalls that it has dealt with a case where the confiscation order followed on from the applicant's prosecution, trial and ultimate conviction (see Phillips v. the United Kingdom, no. 41087/98, §§ 9-18, ECHR 2001-VII) and with cases in which a confiscation measure was imposed independently of a criminal charge in respect of the applicant's assets that were deemed to have been unlawfully acquired (see Riela and Others v. Italy (dec.), no. 52439/99, 4 September 2001; Arcuri and Others v. Italy (dec.), no. 52024/99, 5 July 2001; and Raimondo v. Italy, judgment of 22 February 1994, Series A no. 281-A, § 29) or intended for use in illegal activities (see Butler v. the United Kingdom (dec.), no. 41661/98, 27 June 2002). In the former situation the Court accepted that the confiscation order constituted a "penalty" within the meaning of the second paragraph of Article 1 of Protocol No. 1 (Phillips v. the United Kingdom, cited above, § 51, and, mutatis mutandis, Welch v. the United Kingdom, judgment of 9 February 1995, Series A no. 307-A, § 35), whilst in the latter cases it found that the impugned interference was to be considered from the standpoint of the State's right "to control the use of property in accordance with the general interest" (see the authorities cited above). As regards the instant case, the Court finds that it is not necessary to determine whether it falls into the first or second category because, in either situation, it is the second paragraph of Article 1 of Protocol No. 1 which applies.

C. Compliance with the requirements of the second paragraph

32. It remains to be determined whether the interference was in accordance with the domestic law of the respondent State and whether it achieved a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, among many other authorities, Former King of Greece and Others v. Greece [GC], no. 25701/94, § 89, ECHR 2000-XII, with further references).

33. In this connection the Court recalls that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be "lawful": the second paragraph recognises that the States have the right to control the use of property by enforcing "laws". Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention. It follows that the issue of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights only becomes relevant once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary (Iatridis v. Greece, judgment of 25 March 1999, Reports 1999-II, § 58).

34. The Court considers that the existence of public-interest considerations for the forfeiture of the applicant's vehicle, however relevant or appropriate they might have appeared, did not dispense the domestic authorities from the obligation to cite a legal basis for such decision. It observes that the domestic courts did not refer to any legal provision authorising the forfeiture, either in the criminal proceedings against the applicant's husband or in the civil proceedings which she initiated.

35. Furthermore, in their observations on the admissibility and merits of the application of 2 July 2003, the Government did not invoke, explicitly or by reference, any domestic legal provision on which the decision to confiscate the applicant's car had been based. Nor did they submit any subsequent written observations on the merits.

36. The Court recalls that its power to review compliance with domestic law is limited as it is in the first place for the national authorities to interpret and apply that law. Therefore, having regard to the Russian authorities' consistent failure to indicate a legal provision that could be construed as the basis for the forfeiture of the applicant's property, the Court finds the impugned interference with the applicant's property rights cannot be considered "lawful" within the meaning of Article 1 of Protocol No. 1. This finding makes it unnecessary to examine whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

37. There has therefore been a violation of Article 1 of Protocol No. 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. Article 41 of the Convention provides:

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

39. The Court points out that under Rule 60 of the Rules of Court any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents or vouchers, "failing which the Chamber may reject the claim in whole or in part".

40. On 4 December 2003, after the present application had been declared admissible, the Court invited the applicant to submit her claims for just satisfaction by 2 February 2004. She did not submit any such claims within the specified time-limit.

41. In these circumstances, the Court makes no award under Article 41.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 1 of Protocol No. 1;

2. Decides to make no award under Article 41 of the Convention.

3.6 Case of Novikov v. Russia

Application no. 35989/02)
JUDGMENT
STRASBOURG
8 June 2009
FINAL
06/11/2009

PROCEDURE

1. The case originated in an application (no. 35989/02) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Andrey Georgiyevich Novikov ("the applicant"), on 2 July 2002.

2. The applicant, who had been granted legal aid, was represented by Ms V. Bokareva and Mr M. Rachkovskiy, lawyers practising in Moscow. The Russian Government ("the Government") were represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights.

3. On 7 March 2006 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS
I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1963 and lives in the town of Blagoveshchensk, Amur Region.

A. Seizure and storage of the fuel

5. On 30 November 1998 the Amur regional police stopped a car. During an inspection of the car, the police discovered a large quantity of aviation fuel. As the driver was unable to produce a certificate for the fuel he was transporting, the police (officer S) seized 22,622 litres of fuel. The police entrusted it for safe keeping to a Belogorsk technical college and later to military unit no. 62266.

6. As the fuel allegedly belonged to a private company OPIUMIK (the "company"), officer S required the company director, Mr P, to produce a document confirming that the fuel had been acquired lawfully. Mr P submitted an invoice dated 1 August 1998. Criminal proceedings were, however, instituted against Mr P on suspicion of forgery of this invoice.
The Belogorsk town prosecutor subsequently discontinued the proceedings on the ground that only the forgery of official documents was punishable under the Criminal Code. No decision was taken regarding the fate of the fuel.

7. As can be seen from the domestic courts' findings (see paragraph 15 below), in the meantime, officer S decided not to institute any criminal proceedings in relation to the seized fuel. However, on 2 February 1999 the Belogorsk deputy prosecutor set aside this decision

and ordered an additional inquiry. There is no indication that this inquiry led to any prosecution or that any decision was taken in relation to the seized fuel.

8. The company thus attempted to regain possession of its fuel. By a letter of 17 May 1999 the Belogorsk deputy prosecutor informed the company that the fuel had not been attached to the criminal case file against Mr P as evidence and thus no decision had to be taken. He invited Mr P to collect the fuel through the police department. On an unspecified date, however, the company learnt from the Amur police department that the fuel had been stolen when it had been stored in the military unit.

9. Meanwhile, the national authorities endeavoured to identify the officials responsible for the loss of the fuel. Criminal proceedings were instituted against officer S for abuse of power, as well as against the commander of the military unit and officer St, who had allegedly misappropriated the fuel in the military unit. On 18 December 1999 the Belogorsk town military prosecutor discontinued the proceedings against officer St and the head of the military unit because there was no indication of a criminal offence. On 8 April 2000 the proceedings against officer S were discontinued because his participation in the disappearance of the fuel had not been proven.

10. It does not appear that any criminal or other investigation continued thereafter in relation to the seized but missing fuel. No further claim was lodged in respect of it by the company or any other person or legal entity. Nor does it appear that the company made any attempts to obtain compensation after 17 May 1999 (cf. paragraph 8 above). Instead, the company chose to assign the related claims to the applicant (see below).

B. Assignment agreement

11. On 26 October 2001 the company transferred title to the seized fuel to the applicant. On 25 November 2001 the parties amended the assignment agreement, indicating that the assignment included a claim in respect of any damage or loss caused by the authorities on account of the seizure of the fuel, as well as a claim for compensation in respect of unjustified enrichment on the same account and a claim for return of the fuel. The amended agreement also stated that the signing of that agreement "annulled the company's debt of 50,000 Russian roubles under a contract dated 20 October 2000".

12. The company informed the regional police department of the transfer of title. Since 27 October 2001 the applicant has unsuccessfully requested the police department to return the fuel.

C. Proceedings in the commercial courts

13. In November 2001 the applicant sued the Amur Regional Treasury, claiming compensation for the damage incurred as a result of the seizure and loss of the fuel. The Commercial Court of the Amur Region designated the Ministry of the Interior as the proper respondent, with the applicant's consent. The court also gave the regional police department, the military unit and the company leave to intervene as third parties in the proceedings.

14. By judgment of 14 March 2002 the Commercial Court of the Amur Region dismissed the applicant's action. The court held as follows:

> "Under an assignment agreement of 26 October 2001 the OPIUMIK company transferred all its rights to the fuel to [the applicant]...The assignment did not contravene Articles 158, 388 and 389 of the Civil Code... The fuel had been seized in relation to the accusation of forgery against Mr P...
> [T]he criminal prosecution against officer S was discontinued ...The fuel was misappropriated by officer St, against whom proceedings were discontinued on 18 December 1999...
> [T]he responsibility of an officer of the Ministry of the Interior for unlawful seizure of the company's fuel must be established by a final judgment in a criminal case. The commercial court, under Article 22 of the Code of Arbitration Procedure, does not have the right to assess the lawfulness or unlawfulness of the actions (failure to act) of the investigating authorities and the prosecutor's office.
> The plaintiff did not submit any evidence showing that the seizure of the fuel by the officer of the Amur regional police department had been declared unlawful by a court and that [the officer] was responsible for the loss of the fuel.
> The action must be dismissed because there was no fault on the part of the person who allegedly caused the damage."

15. The applicant appealed contending that the absence of a criminal conviction in respect of the officer had been irrelevant and that the respondent and the military unit had entered into a contract for storage of the fuel seized from the company. On 15 April 2002 the Appellate Division of the Commercial Court of the Amur Region upheld the judgment of 14 March 2002. The court stated inter alia as follows:

> "Officer S acted lawfully when he inspected and seized the fuel...Having verified whether the fuel had been lawfully acquired, officer S decided not to bring criminal proceedings; on 2 February 1999 the Belogorsk deputy prosecutor set aside this decision and ordered an additional inquiry...
> Officer S's failure to observe the procedure for inspection and transfer of the fuel for safe-keeping purposes has no direct causal link with the loss of the fuel..."

Lastly, the appeal court made the following observations in relation to the military unit:

> "Military unit no. 62266 received the seized fuel for storage ... in accordance with Article 84 § 2 of the RSFSR Code of Criminal Procedure. Under Article 906 of the Civil Code of the Russian Federation the military unit became civilly liable vis-à-vis the plaintiff for the safe keeping of the fuel. Under Article 902 § 1 of the Civil Code of the Russian Federation, in the event of the loss of the fuel [the military unit] had to compensate the plaintiff for the resulting damage, unless otherwise provided by the law."

The appeal judgment became final on the same date.

16. On 11 June 2002 the Commercial Court of the Far Eastern Circuit, sitting as a cassation-instance court, upheld the judgments of 14 March and 15 April 2002. The court noted that the seizure of the fuel had been due to the absence, at the time, of any document confirming the company's title to it. The court held that the plaintiff had not proved that the investigator had been responsible for the damage caused.

D. Proceedings in the courts of general jurisdiction (the civil courts)

17. In the meantime, on 29 April 2002 the applicant brought proceedings in the Blagoveshchensk Town Court of the Amur Region against, inter alia, the military unit. He claimed that the authorities' failure to return the fuel or to pay compensation be declared unlawful.

18. By a judgment of 12 November 2003 the Town Court rejected the applicant's claim. The court held that the fuel seizure had been carried out by officer S before any criminal proceedings had been initiated because of the need to conduct urgent investigative measures, namely a crime-scene inspection, in compliance with the RSFSR Code of Criminal Procedure (see paragraph 26 below). The Town Court also held as follows:

> "As established in the judgment of the commercial court, during the seizure of the fuel the OPIUMIK company had not supplied any document to confirm the lawfulness of its acquisition. Later Mr P submitted a forged invoice, which gave rise to criminal proceedings against him. An agreement dated 2 November 1998 between the OPIUMIK company and a Mr G for the purchase of 22,622 litres of fuel was produced before this court. It cannot be accepted as a proof of the lawfulness of the fuel acquisition because the content of that agreement does not correspond to the materials in the criminal case which had been discontinued. Nor does it correspond to Mr P's deposition in the criminal proceedings, to the invoice or the expert report no. 141-k of 17 February 1999 which stated that the handwritten inscriptions in invoice no. 983 of 1 August 1998 had been done by Mr P. The Court rejects as unfounded Mr P's allegation that the documents in the criminal file and his deposition had been obtained under duress. Besides, the Court considers that Mr P's and [the applicant's] arguments are intended to challenge the circumstances already determined by the final judgment of the commercial court, in particular as regards the lawfulness of the fuel acquisition by the company...The Court concludes that no evidence has been adduced to confirm [it]. The Court does not accept [the applicant's] argument that the commercial court had confirmed the lawfulness of the fuel acquisition; such matter had not been contested before the commercial court...
>
> The grounds for compensation in respect of damage caused by the investigating authorities, including a claim for restitution of the fuel, are regulated by Articles 1069 and 1070 of the Civil Code. Those grounds were also examined by the commercial courts and cannot be subject to a re-examination in the present case. No legal relationship (обязательственные отношения) was established between [the applicant] on the one hand and the military unit, the Ministry of Defence or the Ministry of the Interior on the other. Hence, his claims ... should be rejected."

Lastly, the court found that the applicant had missed the statutory time-limit under Article 256 of the Code of Civil Procedure for bringing the matter before the courts of general jurisdiction.

19. On 9 January 2004 the Amur Regional Court upheld the judgment. The court considered that the commercial court's judgment of 14 March 2002 had dismissed the applicant's claims, inter alia, due to his failure to produce evidence confirming the lawfulness of the fuel acquisition. Neither was the civil court provided with any proof that the company had had title to the fuel.

E. Other unrelated proceedings

20. A commercial court issued a private company with an enforcement order for a sum of money against a State-owned enterprise. The company did not submit the writ within the statutory time-limit and bailiffs refused to enforce the judgment. The company assigned the claim to the applicant, who then requested the commercial court to designate him as creditor in respect of the above judicial award and to restore the time-limit for lodging the enforcement order. In 2002 the commercial court rejected both requests. The applicant did not appeal.

21. The applicant also requested a court of general jurisdiction to designate him as creditor in respect of the assigned award and to award him compensation for the damage sustained. On 26 February 2003 the Primorye Regional Court, at final instance, disallowed the first claim because it had already been determined on 24 October 2002 by the final decision of the commercial court. On 12 March 2003 the Regional Court, at final instance, dismissed the claim for damages on the ground that the applicant's title had never been confirmed by a court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Civil Code

22. The Civil Code of the Russian Federation, in force from 1 January 1995, provided as follows:

Article 1069 Responsibility for damage caused by State agencies, agencies of local self-government and their officials

> "Damage caused to an individual or a legal entity as a result of the unlawful actions (failure to act) of State agencies, agencies of local self-government or officials of these agencies, including as a result of the issuance of an act of a State agency or agency of local self-government which is contrary to a law or any other legal act, shall be subject to compensation. The damage shall be compensated for at the expense, respectively, of the Treasury of the Russian Federation, the treasury of the region of the Russian Federation, or the treasury of the municipal authority."

Article 1070 Responsibility for damage caused by the unlawful actions of agencies of inquiry and preliminary investigation, prosecutor's offices and the courts

> "1. Damage caused to an individual as a result of his or her wrongful conviction or unlawful criminal prosecution, or the unlawful application, as a preventive measure, of remand in custody or of a written undertaking not to leave a specified place, or the unlawful imposition of an administrative penalty in the form of arrest or corrective labour, shall be compensated for in full at the expense of the Treasury of the Russian Federation and in certain cases, stipulated by law, at the expense of the treasury of the subject of the Russian Federation or of the municipal authority, irrespective of any fault by the officials of the agencies of inquiry or preliminary investigation, prosecutor's offices or courts, in accordance with the procedure established by law.
>
> 2. Damage caused to an individual or a legal entity as a result of the unlawful activity of agencies of inquiry or preliminary investigation or prosecutor's offices, which has not entailed the consequences specified in paragraph 1 of this Article, shall be

compensated for on the grounds and according to the procedure provided for by Article 1069 of this Code...”

23. Article 385 of the Code required the person or entity making an assignment to supply the new creditor with the documents certifying the assignor’s claims. On 30 October 2007 the Supreme Commercial Court of Russia issued an information note summarising the existing case-law on various aspects of the interpretation and application of the provisions of the Civil Code on the assignment of claims and liabilities. In particular, it noted that the invalidity or invalidation of the claim assigned did not imply the invalidity of the assignment agreement. At the same time, it noted that the former gave the assignee the right to sue the assignor under Article 390 of the Civil Code. Nor did the Civil Code prevent the assignment of a future claim or one that was still non-existent when an assignment agreement was signed. The Supreme Court also noted that the assignor’s failure to provide the assignee with documents certifying the former’s entitlement or claim did not mean that the entitlement or claim had not been conferred on the assignee.

24. Under the Civil Code, an obligation to keep or store items arises under a contract (Article 886) or if provided for by law (Article 906).

B. RSFSR Code of Criminal Procedure

25. The RSFSR Code of Criminal Procedure of 1961, in force at the material time, provided as follows:

Article 84 Safe keeping of material exhibits

“... Material exhibits must be stored in a criminal case. If items of evidence, owing to their size or for any other reason, cannot be stored in the criminal case file, their picture must be taken; if possible, [they] must be sealed and stored in a place specified by the investigator, prosecutor, court...”

Article 85 Period for storing material exhibits

“Material exhibits shall be stored until the trial judgment becomes final or until expiry of the time-limit for lodging an appeal against a decision by which proceedings are discontinued...

Material exhibits which can be damaged easily and whose return to their owner is impossible should be given to appropriate entities for use in accordance with [the exhibits’] purpose. If necessary, items of the same type and quality shall be returned to the owner as compensation, or the owner shall be paid a sum equivalent to their value.”

26. Article 178 of the Code provides that an investigator may inspect the crime scene or other locations, premises or items for the purpose of detecting physical evidence of the crime or clarifying the circumstances. In urgent situations, the inspection may be carried out before criminal proceedings are instituted. In such situations, the proceedings should be instituted immediately after the inspection.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

27. Referring to Articles 6 and 17 of the Convention and Article 1 of Protocol No. 1, the applicant complained about the seizure of the fuel by the authorities, their failure to return it and the courts' refusal to award him compensation. The Court will examine this complaint under Article 1 of Protocol No. 1, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

1. Exhaustion of domestic remedies

28. The Government claimed that the applicant should have lodged a claim against the military unit in the commercial courts.

29. The applicant admitted that his 2002 claim before the commercial court had been directed against the Treasury and the regional police department as a third party to the proceedings. The court had decided to examine the applicant's claim as being directed against the Ministry of the Interior, and had reclassified the police department, the Treasury and the military unit as third parties (see paragraph 14 above). The merits of the applicant's claim had been examined by the commercial courts. Thus, he should be considered as having exhausted the domestic remedies.

30. The Court observes that in 2003 the applicant sued the Russian authorities, including the military unit, before the courts of general jurisdiction (civil courts). Both the Town and Regional Courts took cognisance of the merits of the applicant's claims and rejected them as unfounded. Their reasoning was not confined to the compatibility of the applicant's complaint with the formal requirements (see paragraph 18 above). The Court finds that since the domestic courts examined the substance of the applicant's complaint he cannot be said to have failed to exhaust domestic remedies on account of his failure to raise the same claims against the military unit before the commercial courts (see Dzhavadov v. Russia, no. 30160/04, § 27, 27 September 2007, with further references). Nothing in the Government's submissions suggests that the same claim in the commercial courts would have a better prospect of success. It follows that the complaint cannot be declared inadmissible for non-exhaustion of domestic remedies.

2. The applicant's status as a "victim" of the alleged violation and the existence of interference and of "possessions" within the meaning of Article 1 of Protocol No. 1

31. The Government also contended that the applicant had not been a victim of the alleged violation on account of the findings made in the judgments of 12 November 2003 and 9 January 2004 (see paragraph 18 above). In substance, they claimed in this connection that the

applicant had not acquired any title to the fuel and thus could have no valid claim against the authorities.

32. The applicant submitted that the company's or the applicant's title to the fuel had not been contested in the commercial court proceedings. The civil court judgment of 12 November 2003 should not have challenged the relevant findings made by the commercial court. The civil court indicated that the applicant had adduced evidence confirming the ownership title to the fuel; however, that evidence had been rejected as contradicting the findings of the criminal investigation.

33. The Court reiterates that the term "victim" in Article 34 of the Convention denotes the person directly affected by the act or omission which is at issue (see, among other authorities, Mişcarea Producătorilor Agricoli pentru Drepturile Omului v. Romania, no. 34461/02, § 34, 22 July 2008). It also reiterates that Article 1 of Protocol No. 1 applies only to a person's existing possessions and does not guarantee the right to acquire possessions (see Marckx v. Belgium, 13 June 1979, § 50, Series A no. 31). Consequently, a person who complains of a violation of his or her right under Article 1 of the Protocol must first show that such a right existed; a "claim" can only fall within the scope of that Article if it is sufficiently established to be enforceable (see OAO Plodovaya Kompaniya v. Russia, no. 1641/02, § 27, 7 June 2007; Zhigalev v. Russia, no. 54891/00, § 146, 6 July 2006; Uskova v. Russia (dec.), no. 20116/02, 24 October 2006; and Grishchenko v. Russia (dec.), no. 75907/01, 8 July 2004). The assignment of a debt is capable in principle of amounting to such a "possession" (see Nosov v. Russia (dec.), no. 30877/02, 20 October 2005; Gerasimova v. Russia, no. 24669/02, §§ 18-22, 13 October 2005; and Regent Company v. Ukraine, no. 773/03, § 61, 3 April 2008; see also OOO Rusatommet v. Russia (dec.), no. 12064/04, 27 November 2008). Thus, the Court has to ascertain whether the assignment in the present case resulted in the acquisition by the applicant of a "possession" or a "claim" within the meaning of Article 1 of the Protocol.

34. The Court observes at the outset that the 2002 commercial court judgments acknowledged that the assignment agreement was compliant with the requirements of the Civil Code. They contain no further argument or analysis on the issue of ownership of the fuel. The Court considers that had the matter been raised in the commercial court proceedings, the commercial courts would have certainly addressed this specific argument in their judgments. Since no party to the proceedings apparently contested it, the courts at three levels of jurisdiction proceeded on the assumption that the company had been the lawful owner of the fuel when they established and subsequently confirmed the relevant factual findings.

35. The Court further observes that in 2003 the court of general jurisdiction rejected the applicant's claims, concluding that he had not proved that the company had had any title to the fuel before signing the assignment agreement in respect of it. The first-instance court held that the fuel purchase contract concluded in 1998 between the company and Mr G could not confirm that the company had acquired the fuel lawfully because the contract "did not correspond to the materials in the criminal case which had been discontinued" or to other materials, including the company director's deposition made in the criminal proceedings. The Town Court refused to accept Mr P's and the applicant's arguments concerning the lawfulness of the fuel purchase, expressly stating that to do so would challenge the factual findings previously made in that respect by the commercial courts. However, in the same judgment, the civil court indicated that the company's title had not been contested before the

commercial court. As the Court has already noted above, the commercial court decisions indeed contained no findings as to the title to the fuel in question.

36. Furthermore, the Court notes that there was no other judicial decision refuting the company's title to the fuel. No court invalidated the purchase or assignment agreements in the present case. Neither does it appear that Russian law prevented the assignment of claims arising under tort law, including those engaging State liability. Although the Court notes that the 1998 purchase contract was adduced apparently for the first time only in the 2003 proceedings, it cannot but note as well that the civil court furnished no explanation as to why this contract contradicted the conclusions made during the criminal investigation, which resulted in the discontinuation of the criminal proceedings for forgery against the company director. There is no indication that the criminal inquiry resulted in any finding that the title to the fuel had been conferred on an entity other than the company in question.
37. Lastly, it is noted that Article 385 of the Civil Code required the person or entity making an assignment to supply the new creditor with the documents certifying the assignor's claims (see paragraph 23 above). The applicant was provided with a copy of the purchase contract dated 2 November 1998. It is also noted that under the assignment agreement dated 26 October 2001, as amended on 25 November 2001, the company transferred title to the seized fuel to the applicant, including a claim in respect of any damage or loss caused by the authorities on account of the seizure of the fuel, as well as a claim for compensation in respect of unjustified enrichment on the same account and a claim for restitution of the fuel. In the Court's opinion, the applicant could not have been required in the circumstances of the case to furnish any further documents certifying the validity of the claim assigned to him.

38. Being sensitive to the subsidiary nature of its role, the Court nevertheless is not bound by the findings of domestic courts and may depart from them where this is rendered unavoidable by the circumstances of a particular case (see, for instance, Matyar v. Turkey, no. 23423/94, § 108, 21 February 2002, and Khamidov v. Russia, no. 72118/01, § 135 et seq., ECHR 2007-... (extracts)). In the circumstances of the case, the Court is satisfied that the applicant could be considered as having an enforceable claim against the authorities on the basis of the assignment agreement.

39. Thus, Article 1 of Protocol No. 1 is applicable in the present case and the applicant may in this respect claim to be a victim within the meaning of Article 34 of the Convention.

3. Conclusion

40. The Court concludes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits
1. Submissions by the parties

41. The applicant argued that the seizure of the fuel had been unlawful because there had been no decision issued by an investigator or prosecutor under Article 84 of the RSFSR Code of Criminal Procedure (CCrP) (see paragraph 25 above). Furthermore, the decision to discontinue the proceedings against Mr P had not included a ruling on what was to happen to the fuel, in breach of Article 85 of the CCrP. Article 84 of the CCrP governed relations between the authorities, the safe keeper of movable property and its owner, where the

property in question was attached as physical evidence in criminal proceedings. The fuel in question had not constituted such evidence. The retention of the fuel thereafter amounted to a deprivation of property. Nor had the seizure of the fuel or its retention pursued any legitimate aim.

42. The Government submitted that the fuel had been seized for inspection under Article 178 of the CCrP (see paragraph 26 above). The above measure amounted to lawful control of use rather than a deprivation of property. The Government contended that the commercial court had rejected the applicant's claim for lack of jurisdiction because claims against officers of the Ministry of the Interior, including claims arising out of the alleged unlawful seizure of property in the framework of criminal proceedings, were to be examined by the courts of general jurisdiction. The commercial court had indicated that the applicant should have directed his claims against the military unit rather than the Ministry of the Interior. The storage contract was regulated by Article 84 of the CCrP and Article 906 of the Civil Code (see paragraphs 24 and 25 above). It was incumbent on the military unit under Article 902 of the Civil Code to pay damages for any loss caused to the applicant's property.

2. The Court's assessment

43. Having established that the applicant had "possessions" under Article 1 of Protocol No. 1, the Court has to determine whether the interference complained of was in compliance with the requirements of that provision.

44. The Court does not have to determine whether the circumstances of the case should be classified as a deprivation of possessions or control of use. Neither does it have to take a stance as to whether the inspection and seizure of the fuel was in compliance with Russian law. Even assuming that the above acts were lawful and pursued a legitimate aim, the Court considers that the authorities' failure to return the fuel or pay compensation is disproportionate.

45. The Court reiterates that there must be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the State. That requirement is expressed by the notion of a "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see Edwards v. Malta, no. 17647/04, § 69, 24 October 2006, with further references).

46. The Court has previously held that it does not follow from Article 1 of Protocol No. 1 that an applicant's acquittal of the criminal charges must of itself give rise to an entitlement to compensation for any loss alleged to have been suffered as a result of the impounding of his chattels during the period of the investigation (see Adamczyk v. Poland (dec.), no. 28551/04, 7 November 2006, and Andrews v. the United Kingdom (dec.), no. 49584/99, 26 September 2002; see also, mutatis mutandis, Simonjan-Heikinheino v. Finland (dec.), no. 6321/03, 2 September 2008). However, in Karamitrov and Others v. Bulgaria (no. 53321/99, § 77, 10 January 2008) the Court considered with reference to Article 13 of the Convention that "when the authorities seize and hold chattels as physical evidence the possibility should exist in domestic legislation to initiate proceedings against the State and to seek compensation for any damage resulting from the authorities' failure to keep safe the said chattels in reasonably good condition" (compare Islamic Republic of Iran Shipping Lines v. Turkey, no. 40998/98, §§ 87, 96-103, ECHR 2007-...; Immobiliare Saffi v. Italy [GC],

no. 22774/93, §§ 46 and 57, ECHR 1999-V; Urbárska Obec Trenčianske Biskupice v. Slovakia, no. 74258/01, § 126, ECHR 2007-... (extracts), and Housing Association of War Disabled and Victims of War of Attica and Others v. Greece, no. 35859/02, § 39, 13 July 2006).

47. It is uncontested that the fuel was not attached as evidence to the criminal case against Mr P or any other criminal proceedings, for instance on account of its misappropriation or theft (see paragraphs 6 - 10 and 26 above). The Court observes and it is not in dispute between the parties that the fuel had either been consumed or been lost through the fault of a public authority, a fact also acknowledged by the national courts. Despite the above findings, the Russian courts refused to award any compensation to the applicant.

48. Although it is within the province of the national courts to interpret and apply national law, the Court cannot but note the contradictory findings made by the commercial and civil courts in relation to the applicant's claim under the general provisions of the Civil Code concerning tort liability and its specific provisions concerning State liability (see paragraph 22 above).

49. The commercial court examined and rejected the claim for lack of evidence that the seizure of the fuel "had been declared unlawful" and that officer S was responsible for its loss. The appeal court upheld the first-instance judgment and held that the breaches of the law committed by officer S during the inspection and seizure of the fuel had had no direct causal link to the loss of the fuel or to any damage caused to the applicant. It found that the applicant had adduced no evidence that any unlawful actions on the part of the respondent, the Ministry of the Interior, had caused him damage. Lastly, the appeal court held that the applicant and the military unit had entered into a legal relationship under Article 906 of the Civil Code for storage of the fuel (see paragraph 15 above). Thus, it concluded that any damage caused to the fuel during the storage period should have been imputable to the keeper. Subsequently, the cassation-instance court upheld the judgments given by the courts below. In that connection, the Court cannot but note that it was the commercial court's own decision to designate, though with the applicant's consent, the Ministry of the Interior as a proper respondent in relation to the applicant's claims.

50. Following the commercial court's instructions, the applicant sued the military unit in a civil court. However, unlike the commercial courts, the Town Court concluded in its judgment of 12 November 2003 that there had been no legal relationship between the applicant and the authorities, including the military unit (see paragraph 18 above).

51. It follows from the above that although the applicant had an opportunity to bring proceedings against the State, the national courts made contradictory findings in relation to the factual and legal grounds for the applicant's claim for compensation while acknowledging the fact that the impossibility to return the fuel was imputable to a public authority. In the light of the above considerations, the Court considers that the Russian courts' refusals to award the applicant compensation for the loss sustained as a result of the authorities' failure to safe-keep his property amounted in the circumstances of the case to a disproportionate interference with his "possessions" under Article 1 of Protocol No. 1.

52. There has therefore been a violation of that provision.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

53. The applicant also complained in substance under Article 6 of the Convention that in the 2002 commercial court proceedings he had been ordered to prove the fault of the State officials for the damage sustained and that the domestic courts had designated the Ministry of the Interior as the respondent and then dismissed his action because it should have been lodged against a different authority.

54. Lastly, referring to unrelated proceedings (see paragraphs 20 and 21 above) the applicant complained that the authorities had failed to enforce a judicial award and that he had been denied access to a court.

55. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. Article 41 of the Convention provides:

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

A. Damage

57. The applicant claimed 452,440 Russian roubles (RUB) for the value of the fuel seized by the authorities and RUB 109,490 in inflation losses for the period from 1998 to 2006. He also claimed RUB 1,809,790 in respect of non-pecuniary damage.

58. The Government considered that no just satisfaction should be awarded to the applicant. They submitted that his pecuniary claim for the value of the fuel should be rejected in view of the findings made by the civil courts. The non-pecuniary award should not in any event exceed the award made by the Court in Baklanov v. Russia, no. 68443/01, § 51, 9 June 2005.

59. First, the Court reiterates its above finding that since October 2001 the applicant had a valid claim in respect of the fuel, which had been seized by the national authorities in 1998, and that their failure to return it or pay compensation amounted to a disproportionate interference in breach of Article 1 of Protocol No. 1. Having regard to the information provided by the applicant and uncontested by the Government, the Court awards the applicant 13,300 euros (EUR) in respect of pecuniary damage on account of the value of the fuel, plus any tax that may be chargeable on that amount. At the same time, the Court rejects as unfounded the applicant's claim for inflation losses.

60. Lastly, the Court considers that the finding of a violation constitutes just satisfaction in so far as the applicant's non-pecuniary claim is concerned.

B. Costs and expenses

61. The applicant claimed EUR 2,640 for the legal services of his two representatives before the Court.

62. The Government considered that the applicant had made no claims under this head.

63. The Court observes that each representative claimed EUR 1,320 for twenty-six hours' work. It is noted that an amount of EUR 850 was already paid to the lawyers by way of legal aid under Rule 91 § 1 of the Rules of Court. The applicant did not submit a copy of any agreement showing that he had already incurred the above expenses or was under a legally enforceable obligation to pay any fee to his lawyers (see Salmanov v. Russia, no. 3522/04, § 98, 31 July 2008). The Court therefore rejects the applicant's claim under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Declares the complaint concerning the authorities' failure to return the fuel or to pay compensation admissible and the remainder of the application inadmissible;

2. Holds that there has been a violation of Article 1 of Protocol No. 1;

3. Holds
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 13,300 (thirteen thousand three hundred euros) in respect of pecuniary damage, plus any tax that may be chargeable, to be converted into Russian roubles at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. Dismisses the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 18 June 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

3.7 Case of OAO Plodovaya Kompaniya v. Russia

Application no. 1641/02
JUDGMENT
STRASBOURG
7 June 2007
FINAL
12/11/2007

PROCEDURE

1. The case originated in an application (no. 1641/02) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by OAO Plodovaya Kompaniya, an open joint-stock company incorporated in Russia ("the applicant"), on 20 December 2001.

2. The applicant was represented by Mr M. de Guillenchmidt, a lawyer practising in Paris. The Russian Government ("the Government") were represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged that the final decision in its civil case before the commercial courts was quashed by way of supervisory review in violation of Articles 6, 13 and 14 of the Convention and of Article 1 of Protocol No. 1 to the Convention.

4. By a decision of 23 May 2006, the Court declared the application admissible.

5. The applicant and the Government each filed further written observations (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 in fine), the parties replied in writing to each other's observations.

THE FACTS
I. THE CIRCUMSTANCES OF THE CASE

6. In 1966 the Ministry of Foreign Trade of the USSR created a State Export and Import Agency "Soyuzplodoimport" (Всесоюзное экспортно-импортное объединение «Союзплодоимпорт»). Its assets included the trademarks to a number of brands of alcohol (such as Vodka Stolichnaya, Vodka Moskovskaya and their derivatives).

7. On 5 January 1990 the agency was reorganised into the State Foreign Trade Agency "Soyuzplodoimport" (Всесоюзное внешнеэкономическое объединение «Союзплодоимпорт»).

8. On 20 January 1992 the applicant company was set up in the form of a closed joint-stock company. It was called the "Foreign Trade Stock Company 'Soyuzplodoimport'" (Внешнеэкономическое акционерное общество закрытого типа «Союзплодоимпорт», VAO "Soyuzplodoimport"), and was registered with the relevant state agency, namely the Moscow Registration Chamber. According to its memorandum of association, it was set up by several founders, including the State Foreign Trade Agency "Soyuzplodoimport", which held 3,880 of its 17,000 shares. The memorandum of association provided that the applicant company was a "successor" to the State Foreign Trade Agency "Soyuzplodoimport".

9. In 1998 the applicant company converted into an open joint-stock company.

10. On 24 December 1999 the general shareholders' meeting of the applicant company adopted a new memorandum of association. The company name was changed to OAO "Plodovaya Kompaniya" (ОАО «Плодовая компания»). The new memorandum of association contained a declaration that the applicant company was the successor of the State Foreign Trade Agency "Soyuzplodoimport".

11. In the above period the applicant company notified the trademark registration authority that the trademarks of the State Foreign Trade Agency "Soyuzplodoimport" had changed ownership through succession and consequently obtained trademark certificates in its own name. It subsequently used the trademarks as collateral in a number of commercial transactions with third parties.

12. On 31 October 2000 the Deputy Prosecutor General challenged the applicant company's new memorandum of association, particularly the declaration of succession, before the Commercial Court of Moscow.

13. On 21 December 2000 the Commercial Court of Moscow declared the provision on succession null and void. It held that the applicant company had had no legal grounds to claim succession to the State Foreign Trade Agency "Soyuzplodoimport". The applicant company had been set up as a new company and not converted from an existing one. It held that a mere declaration by the applicant company in its founding memorandum of association was insufficient to enable it to become the successor of another company. Likewise, it found that, although the applicant company had de facto acted as a successor before the trademark registration authorities and courts of arbitration, this was irrelevant to the establishment of corporate succession.

14. On 19 February 2001 the Appellate Board of the Commercial Court of Moscow examined the applicant company's appeal. Without entering into the merits it quashed the first-instance judgment and terminated the proceedings on the ground that the prosecutor's office did not have standing to bring proceedings. This decision entered into force on the same day. It was not appealed against either by a cassation appeal or by a separate appeal.
15. On 18 April 2001 the Moscow Registration Chamber registered the change of name of the State Foreign Trade Agency "Soyuzplodoimport". Its new name was the Federal State Unitary Enterprise "Soyuzplodoimport" (Федеральное государственное унитарное предприятие «Внешнеэкономическое объединение Союзплодоимпорт»).

16. On 13 June 2001 the Deputy Prosecutor General submitted a request for supervisory review of the decision of 19 February 2001.

17. The applicant company was summoned to the hearing before the supervisory instance, but those summons were not served on it because it could not be found at its official address. The representatives of the applicant company learned about the hearing, however, submitted written comments on the merits of the case and attended the hearing.

18. On 16 October 2001 the Presidium of the Supreme Commercial Court of Russia examined the case in supervisory review proceedings. The applicant company was represented by the company's president, who made oral submissions before the Presidium.

19. The Presidium quashed the decision of 19 February 2001 and reinstated the first-instance judgment of 21 December 2000. On the procedural point, it held that the prosecutor's office was entitled by law to represent the State in proceedings before commercial courts where public or State interests were involved. It found that the proceedings at issue concerned State property, and that this provided sufficient grounds for the prosecutor to intervene. As to the merits of the case, the Presidium upheld the finding that the applicant company was not entitled to claim succession to the State Foreign Trade Agency "Soyuzplodoimport" because there had been no decision on the latter's conversion, and the applicant company itself had been created as a new entity and not as a result of any reorganisation of an existing legal person. Accordingly, the provisions on succession made in its memorandums of association were null and void. This decision entered into force on the same day and was not subject to further appeal.

II. RELEVANT DOMESTIC LAW

A. Corporate succession

20. The Civil Code of the Russian Federation provides that a legal person may be reorganised or liquidated upon a decision of its founders or its management body as authorised in its constitutional documents, or by a competent court in the circumstances provided for by law (Articles 57 and 61). In the event of reorganisation in a form of merger, conversion or accession, the assets of the legal person that ceases to exist are transferred pursuant to an act of transfer to a newly created legal person and, in the latter case – to an existing legal person. In the event of reorganisation in a form of division or separation, the assets of the reorganised legal person are divided and transferred pursuant to a separation balance sheet (Article 58). In the event of liquidation the legal person ceases to exist without succession (Article 61).

B. Supervision review in proceedings before commercial courts

21. The Code of Commercial Procedure (no. 70-FZ of 5 May 1995, in force at the material time) established that final judgments and decisions of all commercial courts of the Russian Federation were amenable to supervisory review initiated on an application by the President of the Supreme Commercial Court or his deputy or by the Prosecutor General of the Russian Federation or his deputy (Articles 180 and 181). The Code did not list the grounds for lodging an application for supervisory review: it merely specified that it could be lodged "also in connection with a request by a party to the proceedings" (Article 185 § 1). The summoning of parties to the hearing before the Presidium of the Supreme Commercial Court was to be at the discretion of the Presidium (Article 186 § 2). There was no time-limit for lodging an application for supervisory review, and, in principle, such applications could be lodged at any time after a judgment had become final.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

22. The applicant company complained that there had been a violation of its right to the peaceful enjoyment of its possessions, in particular the assets of its alleged predecessor corporation. In particular, it contended that the supervisory review had resulted in their claim

to be the holder of the alcohol trademarks being declared void. It relied on Article 1 of Protocol No. 1, which provides:

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

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

23. The Government denied that there had been an interference with the applicant's possessions. They disputed the applicant's title to the disputed trademarks or to any other assets which it had allegedly acquired from the State Foreign Trade Agency "Soyuzplodoimport". Furthermore, they pointed out that the judicial decision quashed by the supervisory instance had been a procedural one and did not confer any right or entitlement on the applicant company and did not create any legitimate expectation to acquire them. Accordingly, its reversal could not deprive the applicant company of any possessions within the meaning of Article 1 of Protocol No. 1.

24. In contrast, the applicant company maintained that, as a result of the supervisory review proceedings and of the entire dispute resolution process before the commercial courts, it had been deprived of its possessions, notably of all the assets of its alleged predecessor, the State Foreign Trade Agency "Soyuzplodoimport".

25. The Court notes, firstly, that the subject matter of the parties' dispute before the domestic instances, and of the applicant's claims before the Court, was the existence of the universal legal succession between the State Foreign Trade Agency "Soyuzplodoimport" and the applicant company. The question of ownership of individual assets, such as trademarks, was not as such contested in the impugned proceedings and subsequently does not call for the Court's assessment.

26. The Court further notes that the applicant company laid claim to the alleged corporate succession, which presupposes the existence of a bilateral deed between two companies or a unilateral deed from a reorganised company by which assets are reassigned. However, the applicant company has not presented any proof of the intention of the State Foreign Trade Agency "Soyuzplodoimport" to convert itself into another company or to reorganise itself so as to separate from its assets in favour of the applicant company. On the contrary, the Court considers it established that the State Foreign Trade Agency "Soyuzplodoimport" continued to exist in its original corporate form until 2001, when it was re-registered as a Federal State Unitary Enterprise "Soyuzplodoimport".

27. The Court also finds it pertinent that the applicant company has never succeeded in having its title to the legal succession established in domestic judicial proceedings. No court judgment has determined this point in the applicant company's favour. In its decision of 19 February 2001, the appeal instance did not resolve the dispute in substance and took only a procedural decision to exclude the public prosecutor from participation in the proceedings. In this context, the Court reiterates its established case-law that a "claim" can constitute a "possession" within the meaning of Article 1 of Protocol No. 1 only if it is sufficiently

established to be enforceable (see Burdov v. Russia, no. 59498/00, § 40, ECHR 2002-III and Stran Greek Refineries and Stratis Andreadis v. Greece, judgment of 9 December 1994, Series A no. 301-B, p. 84, § 59). In the circumstances of the instant case, it considers that at no stage of the domestic proceedings was there a judicial decision such as to establish the applicant company's claim to "possessions" within the meaning of Article 1 of Protocol No. 1.

28. Accordingly the decisions of the Russian courts cannot be considered as an interference with the applicant's "possessions" within the meaning of Article 1 of Protocol No. 1.

29. It follows that there has been no violation of Article 1 of Protocol No. 1 to the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AND OF ARTICLES 13 AND 14 IN CONJUNCTION WITH ARTICLE 6 § 1 OF THE CONVENTION

30. The applicant company complained under Article 6 § 1 of the Convention and under Articles 13 and 14 in conjunction with Article 6 § 1 that the final decision of the Appellate Board of the Commercial Court of Moscow of 19 February 2001 had been quashed by way of supervisory review, in violation of the principle of legal certainty. It also complained that the proceedings before the Presidium of the Supreme Commercial Court of Russian Federation had been conducted in violation of the principle of equality of arms, in that the State, as a party to proceedings, had exercised its extraordinary power to institute supervisory review whilst the applicant company had no such possibility. Finally, it complained that it had not been summoned to take part in the proceedings.

31. In so far as relevant, the Convention Articles relied on by the applicant provide:

Article 6 (right to a fair hearing)

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

Article 13 (right to an effective remedy)

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

Article 14 (prohibition of discrimination)

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

32. The Government responded that there had been no violation of the applicant's right to a fair trial. They considered that it had been necessary to quash the decision of the appellate instance because it had been taken in breach of the domestic law. They also considered that the principle of legal certainty had not been violated, in that the supervisory review was instituted shortly after the appeal decision and thus constituted the next stage of the proceedings. They referred to Article 187 of the Code of Commercial Procedure, which provided that a case could be reviewed on points of law in supervisory review proceedings.

Moreover, the applicant had been aware that such a possibility existed under domestic law and therefore it could not rely on the appeal decision as a final judicial act. They further added that the relevant legislation had changed, in particular through the 2002 Code of Commercial Procedure, which introduced time-limits for initiating supervisory review.

33. The applicant company maintained its complaints. It considered that the appellate court's decision had been quashed on supervisory review in violation of the principle of legal certainty.

34. The Court recalls that Article 6 § 1 extends only to a dispute ("contestation") over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the existence of a right but also to its scope and the manner of its exercise; and, finally, the outcome of the proceedings must be directly decisive for the right in question (see Hamer v. France, judgment of 7 August 1996, Reports 1996-III, pp. 1043-44, § 73; and Zhigalev v. Russia, no. 54891/00, §§ 159-62, 6 July 2006). As the Court has consistently held, mere tenuous connections or remote consequences are not sufficient to bring Article 6 § 1 into play (see Balmer-Schafroth and Others v. Switzerland, judgment of 26 August 1997, Reports of Judgments and Decisions 1997-IV, p. 1357, § 32; Athanassoglou and Others v. Switzerland [GC], no. 27644/95, § 43, ECHR 2000-IV; Gorraiz Lizarraga and Others v. Spain, no. 62543/00, § 43, ECHR 2004-III; and Association de Défence des Intérêts du Sport v. France (dec.), no. 36178/03, 10 April 2007).

35. The Court refers to its finding above that the applicant company was defending in commercial proceedings a claim of corporate succession which had no basis in domestic law (see paragraphs 25-27 above). In view of this finding the Court considers that for the purposes of Article 6 of the Convention the applicant did not have a "civil right" recognisable under domestic law. Therefore there was no basis for the rights guaranteed by Article 6 § 1 to arise.

36. It follows that there has been no violation of Article 6 § 1 of the Convention.

37. Having regard to the above conclusion the Court finds no separate issues under Articles 13 and 14 of the Convention.

FOR THESE REASONS, THE COURT

1. Holds unanimously that there has been no violation of Article 1 of Protocol No. 1 to the Convention;

2. Holds by six votes to one that there has been no violation of Article 6 of the Convention;

3. Holds unanimously that no separate issues arise under Articles 13 and 14 of the Convention.

Done in English, and notified in writing on 7 June 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

3.8 Case of Khodorkovskiy and Lebedev v. Russia (Summary)

Applications 11082/06 and 13772/05
Judgment
25.7.2013
[Section I]

Article 7
Article 7-1

Nullum crimen sine lege
Interpretation of offence of tax evasion derived by reference to other areas of law: ***no violation***

Article 6
Criminal proceedings

Article 6-1
Impartial tribunal
Alleged lack of impartiality of trial judge who had already taken procedural decisions adverse to defence and had sat in trial of co-accused: ***no violation***

Article 6-3-b
Adequate facilities
Adequate time
Need for applicants to study large volume of evidence in difficult prison conditions, but supported by highly qualified legal team: ***no violation***

Article 6-3-c
Defence through legal assistance
Systematic perusal by prison authorities and trial judge of communications between accused and their lawyers: ***violation***

Article 6-3-d
Examination of witnesses
Refusal to allow defence to cross-examine expert witnesses called by the prosecution or to call their own expert evidence: ***violation***

Article 8
Article 8-1
Respect for family life
Respect for private life
Imprisonment in penal colonies thousands of kilometres from prisoners' homes: ***violation***

Article 18
Restrictions for unauthorised purposes
Allegedly politically motivated criminal proceedings against applicants: ***no violation***

Article 34
Hinder the exercise of the right of petition
Disciplinary and other measures against the lawyers acting for applicants in case pending before European Court: ***failure to comply with Article 34***

FACTS

Before their arrest the applicants were senior managers and major shareholders of a large industrial group which included the Yukos oil company. They were among the richest men in Russia. Mr Khodorkovskiy, the first applicant, was also politically active: he allocated significant funds to support opposition parties and funded several development programmes and NGOs. In addition, Yukos pursued large business projects which went against the official petroleum policy.
In 2003 the applicants were arrested and detained on suspicion of the allegedly fraudulent privatisation of one of the companies in the group. Subsequently tax and enforcement proceedings were brought against Yukos oil company, which was put into liquidation. New charges were brought against the applicants relating to alleged tax evasion through the registration of trading companies, which in fact had no business activities, in a low-tax zone, and through allegedly false income tax returns. In 2005 the applicants were found guilty of most of the charges. They were sentenced to nine years' imprisonment and ordered to pay the State the equivalent of over EUR 500,000,000 in respect of unpaid company taxes. Their prison sentences were reduced to eight years on appeal. Both applicants were sent to serve their sentences in remote colonies, thousands of kilometres from their Moscow homes.
In their applications to the European Court, the applicants complained of various breaches of the Convention, in particular of their right to a fair trial (Article 6 § 1) and of their right not to be tried of an offence that was not an offence when it was committed (Article 7).

LAW

Article 6 § 1: Both applicants complained of several distinct breaches of this provision. The first group of their arguments concerned alleged bias on the part of the presiding judge. The second group to procedural unfairness, in particular: a lack of time and facilities to prepare the defence, an inability to enjoy effective legal assistance, and an inability to examine prosecution evidence or adduce evidence for the defence.

(a) Impartiality

The applicants claimed that procedural decisions taken by the judge during their trial were indicative of bias, that the judge had herself been under investigation during their trial and that she was biased because of her previous findings in the case of another top Yukos manager.
As to the first point, the Court had to have stronger evidence of personal bias than a series of procedural decisions unfavourable to the defence. There was nothing in the trial judge's decisions to reveal any particular predisposition against the applicants. As to the second point, the allegation that the trial judge was herself under investigation was based on rumour, and could not found a claim of impartiality. As to the final point – the fact that the judge had already sat in a case concerning another senior Yukos manager – the Court had previously clarified that the mere fact that a judge had already tried a co-accused was not, in itself, sufficient to cast doubt on the judge's impartiality. Criminal adjudication frequently involved judges presiding over various trials in which a number of co-accused stood charged and the

work of criminal courts would be rendered impossible if, by that fact alone, a judge's impartiality could be called into question. An examination was, however, needed to determine whether the earlier judgments contained findings that actually prejudged the question of the applicant's guilt. The judge in the applicants' case was a professional judge, a priori prepared to disengage herself from her previous experience in the other manager's trial. The judgment in the manager's case did not contain findings that prejudged the question of the applicants' guilt in the subsequent proceedings and the judge was not bound by her previous findings, for example as regards the admissibility of evidence, either legally or otherwise.

Conclusion: no violation (unanimously).

(b) Fairness of the proceedings

(i) Article 6 § 1 in conjunction with Article 6 § 3 (b): *Time and facilities for the preparation of the defence* – The second applicant had had eight months and twenty days to study over 41,000 pages of his case-file, and the first applicant five months and eighteen days to study over 55,000 pages. The Court noted the complexity of the documents, the need to make notes, compare documents, and discuss the case-file with lawyers. It also took account of the breaks in the schedule of working with the case-file, and of the uncomfortable conditions in which the applicants had had to work (for example, they had been unable to make photocopies in prison or to keep copies of documents in their cells and there had been restrictions on their receiving copies of documents from their lawyers). However, the issue of the adequacy of time and facilities afforded to an accused had to be assessed in the light of the circumstances of each particular case. The applicants were not ordinary defendants: they had been assisted by a team of highly professional lawyers of great renown, all privately retained. Even if they were unable to study each and every document in the case file personally, that task could have been entrusted to their lawyers. Importantly, the applicants were not limited in the number and duration of their meetings with their lawyers. The lawyers were able to make photocopies; the applicants were allowed to take notes from the case-file and keep their notebooks with them. Indeed, the applicants, who both had university degrees, were senior executives of one of the largest oil companies in Russia and knew the business processes at the heart of the case arguably better than anybody else. Thus, although the defence had had to work in difficult conditions at the pre-trial stage, the time allocated to the defence for studying the case file was not such as to affect the essence of the right guaranteed by Article 6 §§ 1 and 3 (b).

The Court further examined the conditions in which the defence had had to work at the trial and during the appeal proceedings. In particular, at some point the judge had decided to intensify the course of the trial and hold hearings every day. However, it had not been impossible for the applicants to follow the proceedings and the defence had been able to ask for adjournments when necessary.

At the appeal stage the defence had had over three months to draft written pleadings and to prepare for oral argument. Although the defence had had to start preparing their appeal without having the entirety of the trial materials before them and although there had been doubts as to the accuracy of the trial record, the Court was not persuaded that any such inaccuracies had made the conviction unsafe. Furthermore, the defence was aware of the procedural decisions that had been taken during the trial and what materials had been added. They had audio recordings of the trial proceedings and could have relied on them in the

preparation of their points of appeal. The difficulties experienced by the defence during the appeal proceedings had thus not affected the overall fairness of the trial.

Conclusion: no violation (unanimously).
(ii) Article 6 § 1 in conjunction with Article 6 § 3 (c): *Lawyer-client confidentiality* – The applicants had claimed that that their confidential contacts with their lawyers had been seriously hindered. The Court reiterated that any interference with privileged material and, *a fortiori*, the use of such material against the accused in the proceedings should be exceptional and justified by a pressing need and would always be subjected to the strictest scrutiny.
As to the applicants' complaint that one of their lawyers had received summonses from the prosecution, the Court noted that the lawyer concerned had refused to testify and that his refusal had not led to any sanctions against him. Accordingly, in the particular circumstances of the present case, lawyer-client confidentiality had not been breached on account of that episode.

In contrast, by carrying out a search of that lawyer's office and seizing his working files, the authorities had deliberately interfered with the secrecy of lawyer-client contacts. The Court saw no compelling reasons for that interference. The Government had not explained what sort of information the lawyer might have had, how important it was for the investigation, or whether it could have been obtained by other means. At the relevant time the lawyer was not under suspicion of any kind. Most significantly, the search of his office had not been accompanied by appropriate procedural safeguards, such as authorisation by a separate court warrant, as required by the law. The search and seizure were thus arbitrary.
Another point of concern was the prison administration's practice of perusing all written documents exchanged between the applicants and their lawyers during the meetings in the remand prison. Such perusal had no firm basis in the domestic law, which did not specifically regulate such situations. Furthermore, notes, drafts, outlines, action plans and other like documents prepared by the lawyer for or during a meeting with his detained client were to all intents and purposes privileged material. Any exception from the general principle of confidentiality was only permissible if the authorities had reasonable cause to believe that professional privilege was being abused in that the contents of the document concerned might endanger prison security or the safety of others or was otherwise of a criminal nature. In the present case, however, the authorities had taken as their starting point the opposite presumption, namely that all written communications between a prisoner and his lawyer were suspect. Despite there being no ascertainable facts to show that either the applicants or their lawyers might abuse professional privilege, the measures complained of had lasted for over two years. In the circumstances the rule whereby defence working documents were subject to perusal and could be confiscated if not checked by the prison authorities beforehand was unjustified, as were the searches of the applicants' lawyers.

Finally, as regards the conditions in which the applicants had been able to communicate with their lawyers in the courtroom the trial judge had requested the defence lawyers to show her all written documents they wished to exchange with the applicants in accordance with the prison authorities' security arrangements. While checking drafts and notes prepared by the defence lawyers or the applicants the judge might have come across information or arguments which the defence would not wish to reveal and which could have affected her opinion about the factual and legal issues in the case. In the Court's opinion, it would be contrary to the principle of adversarial proceedings if the judge's decision was influenced by arguments and information which the parties did not present and did not discuss at an open trial. Furthermore, the oral consultations between the applicants and their lawyers could have

been overheard by the prison escort officers. During the adjournments the lawyers had had to discuss the case with their clients in close vicinity of the prison guards. In sum, the secrecy of the applicants' exchanges, both oral and written, with their lawyers had been seriously impaired during the hearings.

Conclusion: violation (unanimously).

(iii) Article 6 § 1 in conjunction with Article 6 § 3 (d): *Taking and examination of evidence* – As regards the applicants' complaints that evidence from two experts consulted by the prosecution had been admitted without the applicants being able to challenge it, the Court noted, firstly, that the fact that the prosecution had obtained an expert report without any involvement of the defence did not of itself raise any issue under the Convention, provided that the defence subsequently had an opportunity to examine and challenge both the report and the credibility of those who prepared it, through direct questioning before the trial court.
In response to the Government's submission that the defence had not shown why it had been necessary to question the expert witnesses, the Court stated that, contrary to the situation with defence witnesses, an accused was not required to demonstrate the importance of a prosecution witness. If the prosecution decided to rely on a particular person's testimony as being a relevant source of information and if the testimony was used by the trial court to support a guilty verdict, the presumption arose that the personal appearance and questioning of the person concerned were necessary, unless the testimony was manifestly irrelevant or redundant. The two experts had clearly been key witnesses since their conclusions went to the heart of some of the charges against the applicants. The defence had taken no part in the preparation of the experts' report and had not been able to put questions to them at an earlier stage. In addition, the defence had explained to the district court why they needed to question the experts and there were no good reasons for preventing them from coming to the court. Even if there were no major inconsistencies in the report, questioning experts could reveal possible conflicts of interest, insufficiency of the materials at their disposal or flaws in the methods of examination.

The applicants had also complained of the trial court's refusal to admit expert evidence (both written and oral) proposed by the defence for examination at the trial. The Court noted that the trial court had refused to admit certain expert evidence which it deemed irrelevant or useless. In that connection, the Court reiterated that the requirement of a fair trial did not impose an obligation on trial courts to order an expert opinion or any other investigative measure merely because a party had sought it and, having examined the nature of the reports in question, the Court was prepared to accept that the primary reason for not admitting certain of them was their lack of relevance or usefulness which matters were within the trial court's discretion to decide. However, two audit reports (by Ernst and Young and Price Waterhouse Coopers) were in fact rejected for reasons related not to their content but to their form and origins. Unlike the other expert evidence the defence had sought to adduce, these reports were non-legal and concerned essentially the same matters as the reports produced by the prosecution and so were relevant to the accusations against the applicants. By excluding that evidence, the trial court had put the defence in a disadvantageous position as the prosecution had been entitled to select experts, formulate questions and produce expert reports, while the defence had had no such right. Furthermore, in order effectively to challenge a report by an expert the defence had to have the same opportunity to introduce their own expert evidence.

The mere right of the defence to ask the court to commission another expert examination did not suffice. In practice, however, the only option that had been available to the applicants

under Russian law had been to obtain oral questioning of "specialists" at the trial, but "specialists" had a different procedural status to "experts", as they had no access to primary materials in the case and the trial court refused to consider their written opinions. In the circumstances, the decision to exclude the two audit reports had created an imbalance between the defence and the prosecution in the area of collecting and adducing "expert evidence", thus breaching the equality of arms between the parties.

Conclusion: violation (unanimously).

Article 7

(a) ***Alleged procedural obstacles to prosecution***

The applicants had claimed that by virtue of a Constitutional Court ruling of 27 May 2003 they could not be held criminally liable for tax evasion before their tax liability had been established in separate proceedings. The Court was not persuaded that the applicants' understanding of that ruling was correct. In any event, the alleged "procedural obstacles" did not mean that the acts imputed to the applicants were not defined as "criminal offences" when they were committed. There had therefore been no violation of Article 7 on that account.

(b) ***Novel interpretation of the concept of "tax evasion"***

The applicants had argued that they had suffered from a completely novel and unpredictable interpretation of the provisions (Articles 198 and 199 of the Criminal Code) under which they were convicted. The Court observed that while those provisions defined tax evasion in very general terms, by itself such a broad definition did not raise any issue under Article 7. Forms of economic activity were in constant development, and so were methods of tax evasion. In order to define whether particular behaviour amounted to tax evasion in the criminal-law sense the domestic courts could invoke legal concepts from other areas of law. The law in this area could be sufficiently flexible to adapt to new situations, provided it did not become unpredictable. Thus, although in the criminal-law sphere there was no case-law directly applicable to the transfer-pricing arrangements and allegedly sham transactions at the heart of the applicants' case, the concept of sham transaction was known to Russian law and the courts had the power to apply the "substance-over-form" rule and invalidate a transaction as sham under the Civil and Tax Codes. The Court reiterated that in this area it was not called upon to reassess the domestic courts' findings, provided they were based on a reasonable assessment of the evidence. In the present case, despite certain flaws, the domestic proceedings could not be characterised as a flagrant denial of justice.

The Court next turned to the question whether the substantive findings of the domestic courts were arbitrary or manifestly unreasonable.

(i) ***Charges under Article 199 of the Criminal Code*** *(trading companies' operation in the low-tax zone and the technique of "transfer pricing")* – While acknowledging that legitimate methods of tax minimisation could exist, the Court noted that the scheme deployed by Yukos was not fully transparent and that some elements of the scheme that might have been crucial for determining the companies' eligibility for tax cuts had been concealed from the authorities. For instance, the applicants had never informed the tax authorities of their true relation to the trading companies. The benefits of the trading companies had been returned to

Yukos indirectly. All business activities which had generated profit were in fact carried out in Moscow, not in a low-tax zone. The trading companies, which existed only on paper, had no real assets or personnel. Tax minimisation was the sole reason for the creation of the trading companies in the low-tax zone. Such behaviour could not be compared to that of a *bona fide* taxpayer making a genuine mistake. Finally, it was difficult for the Court to imagine that the applicants, as senior executives and co-owners of Yukos, had not been aware of the scheme or that the trading companies' fiscal reports did not reflect the true nature of their operations.

Thus, the applicants' acts could reasonably be interpreted as submitting false information to the tax authorities, thus constituting the *actus reus* of the offence of tax evasion.

(ii) ***Charges under Article 198 of the Criminal Code*** *(personal income-tax evasion)* – In so far as the personal income tax evasion was concerned, the applicants had argued that they had given consulting services to foreign firms and that the tax cuts they had received as "individual entrepreneurs" were legitimate. However, the domestic courts had concluded that such service agreements were in fact *de facto* payments for the applicants' work in Yukos and its affiliated structures that would normally have been taxable under the general taxation regime and that the applicants had knowingly misinformed the tax authorities about the true nature of their activities. Those conclusions were not unreasonable or arbitrary.

(c) ***Application of allegedly dormant criminal law***

Lastly, the Court did not accept the applicants' argument that the authorities' failure to prosecute and/or convict other businessmen who had been using similar tax-minimisation techniques had made such techniques legitimate and excluded criminal liability. While in certain circumstances a long-lasting tolerance of certain conduct, otherwise punishable under the criminal law, could grow into *de facto* decriminalisation of such conduct, this was not the case here, primarily because the reasons for such tolerance were unclear. It was possible that the authorities had simply not had sufficient information or resources to prosecute the applicants and/or other businessmen for using such schemes. It required a massive criminal investigation to prove that documents submitted to the tax authorities did not reflect the true nature of business operations. Finally, there was no evidence that tax minimisation schemes used by other businessmen had been organised in exactly the same way as that employed by the applicants. The authorities' attitude could not therefore be said to have amounted to a conscious tolerance of such practices.

In sum, Article 7 of the Convention was not incompatible with judicial law-making and did not outlaw the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development was consistent with the essence of the offence and could reasonably be foreseen. While the applicants may have fallen victim to a novel interpretation of the concept of tax evasion, it was based on a reasonable interpretation of the domestic law and consistent with the essence of the offence.

Conclusion: no violation (unanimously).

Article 8

The applicants had complained that their transfer to penal colonies situated thousands of kilometres from their homes had made it impossible for them to see their families. The Court accepted that the situation complained of constituted interference with the applicants' private

and family lives and was prepared to accept that the interference was lawful and pursued the legitimate aims of preventing disorder and crime and of securing the rights and freedoms of others.

As to whether it was necessary in a democratic society, the Curt noted, firstly, that it was very likely that the rule set out in the Russian Code of Execution of Sentences, which provides for convicts in areas where prisons were overpopulated to be sent to the next closest region (but not several thousand kilometres away), had not been followed in the applicants' case. It was hardly conceivable that there were no free places for the applicants in any of the many colonies situated closer to Moscow. The Court stressed that the distribution of the prison population must not remain entirely at the discretion of the administrative bodies and that the interests of convicts in maintaining at least some family and social ties had to somehow be taken into account. In the absence of a clear and foreseeable method of distribution of convicts amongst penal colonies, the system had failed to provide a measure of legal protection against arbitrary interference by public authorities and had led to results that were incompatible with respect for the applicants' private and family lives.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1

The first applicant had complained that, after convicting him of corporate-tax evasion, the trial court had made an award of damages which overlapped with the claims for back payment of taxes that had been brought against Yukos. The Court found, firstly, that the first applicant's obligation to pay certain outstanding taxes could be considered an interference with his possessions falling within the scope of Article 1 of Protocol No. 1.

However, it was unnecessary for the Court to examine separately the first applicant's claim that the State had been awarded the same amount of outstanding corporate taxes twice, as in any event, the interference did not have a lawful basis. The Court accepted that where a limited-liability company was used merely as a façade for fraudulent actions by its owners or managers, piercing the corporate veil may be an appropriate solution for defending the rights of its creditors, including the State. However, there had to be clear rules allowing the State to do this if the interference was not to be arbitrary. Neither the Russian Tax Code at the material time nor the Civil Code permitted the recovery of a company's tax debts from its managers. Furthermore, the domestic courts had repeatedly interpreted the law as not allowing liability for unpaid company taxes to be shifted to company executives. Finally, the trial court's findings regarding the civil claim were extremely short and contained no reference to applicable provisions of the domestic law or any comprehensible calculation of damages, as if it was an insignificant matter. In sum, neither the primary legislation then in force nor the case-law allowed for the imposition of civil liability for unpaid company taxes on the company's executives. The award of damages in favour of the State had thus been arbitrary.

Conclusion: violation (unanimously).

Article 18 (*alleged political motivation for prosecution*)

The Court reiterated that the whole structure of the Convention rested on the general assumption that public authorities in the member States acted in good faith. Though

rebuttable in theory, that assumption was difficult to overcome in practice: an applicant alleging that his rights and freedoms were limited for an improper reason had to show convincingly that the real aim of the authorities was not the same as that proclaimed. Thus, the Court had to apply a very exacting standard of proof to such allegations.

That standard had not been met in the applicants' case. While the circumstances surrounding it could be interpreted as supporting the applicants' claim of improper motives, there was no direct proof of such motives. The Court was prepared to admit that some political groups or government officials had had their own reasons for pushing for the applicants' prosecution.

However, that was insufficient to conclude that the applicants would not have been convicted otherwise. In the final reckoning, none of the accusations against them even remotely concerned their political activities. Elements of "improper motivation" which may have existed in the instant case did not make the applicants' prosecution illegitimate from beginning to end: the fact remained that the accusations against the applicants of common criminal offences, such as tax evasion and fraud, were serious, that the case against them had a "healthy core", and that even if there was a mixed intent behind their prosecution, this did not grant them immunity from answering the accusations.

Conclusion: no violation (unanimously).

Article 34: The first applicant had further complained that, in order to prevent him from complaining to the European Court, the authorities had harassed his lawyers.

In the Court's opinion, there was a significant difference between the first applicant's allegations under Article 18 and those under Article 34. In so far as his prosecution and trial were concerned, the aims of the authorities for bringing the first applicant to trial and convicting him were evident and did not require further explanation. By contrast, the aim of the disciplinary and other measures directed against his lawyers was far from evident. The Court had specifically invited the Government to explain the reasons for the disbarment proceedings, extraordinary tax audit and denial of visas to the first applicant's foreign lawyers, but the Government had remained silent on those points. In such circumstances it was natural to assume that the measures directed against the first applicant's lawyers were linked to his case before the Court. In sum, the measures complained of had been directed primarily, even if not exclusively, at intimidating the lawyers working on the first applicant's case before the Court. Although it was difficult to measure the effect of those measures on his ability to prepare and argue his case, it was not negligible.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 3 of the Convention on account of the fact that the second applicant appeared at his trial in a metal cage and no violation of that provision in respect of the conditions of his detention in the remand prison; a violation of Article 5 § 3 of the Convention in respect of the length of the second applicant's pre-trial detention and a violation of Article 5 § 4 on account of delays in the review of his detention.
Article 41: EUR 10,000 to the first applicant in respect of non-pecuniary damage; the second applicant's pecuniary claims were rejected in full.

(See also *Khodorkovskiy v. Russia*, 5829/04, 31 May 2011, Information Note 141; and *OAO Neftyanaya Kompaniya Yukos v. Russia*, 14902/04, 20 September 2011, Information Note 144)

4 CASE LAW ON PROTECTION OF WHISTLEBLOWERS

4.1 Case of Guja v. Moldova

Application no. 14277/04
JUDGMENT
STRASBOURG
12 February 2008

PROCEDURE

1. The case originated in an application (no. 14277/04) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Iacob Guja ("the applicant") on 30 March 2004.

2. The applicant was represented by Mr V. Gribincea and Mr V. Zamă, lawyers practising in Chişinău and members of the non-governmental organisation Lawyers for Human Rights. The Moldovan Government ("the Government") were represented by their Agents, Mr V. Pârlog and Mr V. Grosu.

3. The applicant alleged a breach of his right to freedom of expression under Article 10 of the Convention, in particular the right to impart information, as a result of his dismissal from the Prosecutor General's Office for divulging two documents which in his opinion disclosed interference by a high-ranking politician in pending criminal proceedings.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 28 March 2006 a Chamber of that Section decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility. On 20 February 2007 a Chamber composed of Nicolas Bratza, President, Josep Casadevall, Giovanni Bonello, Ljiljana Mijović, Kristaq Traja, Stanislav Pavlovschi and Lech Garlicki, judges, and Lawrence Early, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

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

6. The applicant and the Government each filed observations on the admissibility and merits. The parties replied in writing to each other's observations.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 6 June 2007 (Rule 59 § 3).

THE FACTS
I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, Mr Iacob Guja, was born in 1970 and lives in Chişinău. At the material time he was the Head of the Press Department of the Prosecutor General's Office.

A. Background to the case

9. On 21 February 2002 four police officers (M.I., B.A., I.P. and G.V.) arrested ten persons suspected of offences related to the parliamentary elections; one of them was also suspected of being the leader of a criminal gang. Later the suspects were released from detention and complained to the Prosecutor's Office of ill-treatment and illegal detention by the four police officers. As a result of their complaint, a criminal investigation was initiated against the police officers on charges of, inter alia, ill-treatment and unlawful detention.

10. In June 2002 the four police officers wrote letters, which they signed jointly, to President Voronin, Prime Minister Tarlev and the Deputy Speaker of Parliament, Mr Mişin, seeking protection from prosecution. They set out their views on the criminal proceedings and complained that the actions of the Prosecutor's Office were abusive. They asked for the legality of the criminal charges that had been brought against them to be verified. On 21 June 2002 Mr Mişin forwarded the letter he had received, with an accompanying note, to the Prosecutor General's Office. The note was written on the official headed paper of the Parliament and was not marked as being confidential. It stated as follows:

> "Dear Mr Rusu,
>
> A question arises after reading this letter: is the Deputy Prosecutor General fighting crime or the police? This issue is made even more pressing by the fact that the policemen concerned are from one of the best teams in the Ministry of the Interior, whose activity is now being blocked as a result of the efforts of employees of the Prosecutor General's Office. I ask you personally to intervene in this case and solve it in strict compliance with the law."

11. In January 2003 Mr Voronin visited the Centre for Combating Economic Crime and Corruption where he discussed, inter alia, the problem of the undue pressure some public officials were putting on law-enforcement bodies in respect of pending criminal proceedings. The President made a call to fight corruption and asked law-enforcement officers to disregard any attempts by public officials to put them under pressure. The declarations of the President were made public by the media.

12. On an unspecified date the criminal proceedings against the police officers were discontinued.

B. The leaking of documents

13. A few days after Mr Voronin made his call to fight corruption, the applicant sent to a newspaper, the Jurnal de Chişinău, copies of two letters ("the letters") that had been received by the Prosecutor General's Office.

14. The first was the note written by Mr Mişin (see paragraph 10 above). The second had been written by Mr A. Ursachi, a deputy minister in the Ministry of the Interior, and was

addressed to a deputy prosecutor general. It was written on the official headed paper of the Ministry of the Interior and was not marked confidential. It stated, inter alia:

> "... Police Major M.I. [one of the four officers, see paragraph 9 above] was convicted on 12 May 1999 ... of offences under Articles 116 § 2 [illegal detention endangering life or health or causing physical suffering], 185 § 2 [abuse of power accompanied by acts of violence, the use of a firearm or torture] and 193 § 2 [extracting a confession by acts of violence and insults] of the Criminal Code and sentenced to a fine of 1,440 Moldovan lei (128 euros). Under section 2 of the Amnesty Act, he was exempted from paying the fine.
> ... on 24 October 2001, Major M.I. was reinstated in his post at the Ministry of the Interior."

C. The article in the Jurnal de Chişinău

15. On 31 January 2003 the Jurnal de Chişinău published an article entitled "Vadim Mişin intimidating prosecutors". The article stated, inter alia:

> "At the end of last week, during a meeting at the Centre for Combating Economic Crime and Corruption, the President called on law-enforcement institutions to cooperate in the fight against organised crime and corruption and asked them to ignore telephone calls from senior public officials concerning cases that were pending before them.
> The President's initiative is not accidental. The phenomenon has become very widespread, especially during the last few years, and has been the subject of debate in the mass media and in international organisations.
> Recently the press reported on the case of the Communist Parliamentarian A.J., who had attempted to influence a criminal investigation in respect of an old friend and high-ranking official at the Ministry of Agriculture who had been caught red-handed. However, no legal action was taken. ...
> Also, the press reported that Mr Mişin had requested the Prosecutor General to sack two prosecutors, I.V. and P.B., involved in the investigation into the disappearance of the Chief of the Information Technology Department, P.D., apparently after they had found evidence implicating officials of the Ministry of the Interior in wrongdoing.
> The results of the internal investigation into the activities of these two prosecutors are not yet known. However, sources at the Prosecutor's Office have told this newspaper that even though I.V. and P.B. have not been found guilty, they have been asked to leave at the insistence of someone in authority.
> Now, while the declarations of the President concerning trading in influence are still fresh on peoples' minds, we reveal a new investigation concerning high-ranking officials.
> The Deputy Speaker of Parliament is attempting to protect four police officers who are under criminal investigation. Mr Mişin's affinity with policemen is not new, since his background is in the police force. Our sources stated that this is not the only case in which Mr Mişin has intervened on behalf of policemen in trouble with the law.
> ...
> The Ciocana Prosecutor's Office initiated criminal proceedings against four police officers ... after they had used force during the unlawful arrest of a group of people.
> ... [The] police officers assaulted the detainees by punching and kicking them ... Furthermore, it was found that one of the officers had made false statements in the police report on the arrest ... The four police officers were also being investigated for forcibly extracting confessions ...

The investigation lasted for more than a year. When it was almost over ... the police officers started to seek protection from those in authority.
...
On 20 June 2002 the police officers wrote letters to President Vladimir Voronin, Prime Minister Vasile Tarlev and the Deputy Speaker of Parliament, Vadim Mişin, asking them to intervene to end the investigation, which they said was unwarranted.
...
The first to react to their letter was the Deputy Speaker of Parliament, Vadim Mişin. On 21 June 2002 ... he sent the Prosecutor General a letter in which, in a commanding tone, he asked him personally to intervene in the case of the four policemen. Even though he instructed the Prosecutor General to get involved in this case 'in strict compliance with the law', the tone of the letter clearly shows that he was giving an order for the case to be examined very quickly.
As a result of the intervention of the State's most influential figures, the Prosecutor General's Office discontinued the criminal investigation against the policemen and ordered an internal investigation into the correctness of the decision to bring criminal proceedings against them ...
...
... Sources from the Ministry of the Interior confirmed that officer M.I. [one of the four policemen] had [previously] been convicted by the Court of Appeal, and ordered to pay a criminal fine of 1,440 Moldovan lei. In accordance with the Amnesty Act, he was exempted from paying the fine. Moreover, on 24 October 2001 ... he was reinstated at the Ministry of the Interior.
Without commenting on the judgment of the Court of Appeal, we wish to make some remarks. M.I. was convicted on the basis of Articles 116, 185 and 193 of the Criminal Code of abuse of power, forcibly extracting confessions and unlawful detention. For these offences, the Criminal Code lays down sentences of one to five years' imprisonment. He was only given a fine.
Moreover, the Ministry of the Interior reinstated him while he was still under investigation."

16. The newspaper article was accompanied by photographs of the letters signed by Mr Mişin and Mr Ursachi.

D. The reaction of the Prosecutor General's Office

17. On an unspecified date the applicant was requested by the Prosecutor General to explain how the two letters had come to be published by the press.

18. On 14 February 2003 the applicant wrote to the Prosecutor General, admitting that he had sent the two letters to the newspaper. He stated, inter alia:
"My act was a reaction to the declarations made by the [President] concerning the fight against corruption and trading in influence. I did this because I was convinced that I was helping to fight the scourge of trading in influence (trafic de influenţă), a phenomenon which has become increasingly common of late.
I believed and still believe that if each of us were to help uncover those who abuse their position in order to obstruct the proper administration of justice, the situation would change for the better.

Further, I consider that the letters I handed over to the Jurnal de Chişinău were not secret. My intention was not to do a disservice to the Prosecutor's Office, but on the contrary to create a positive image of it."

19. On an unspecified date a prosecutor, I.D., who was suspected of having furnished the letters to the applicant, was dismissed.

20. On 17 February 2003 the applicant wrote a further letter to the Prosecutor General, informing him that the letters had not been obtained through I.D. He added:
"If the manner in which I acted is considered a breach of the internal regulations, then I am the one who should bear responsibility.
I acted in compliance with the Access to Information Act, the Prosecuting Authorities Act and the Criminal Code. I believed that the declarations of the [President] decrying acts of corruption and trading in influence were sincere. To my great regret, I note that the Prosecutor General's Office has elevated a letter from a public official (which in my opinion is a clear example of direct political involvement in the administration of justice) to the status of State secret. This fact, coupled with I.D.'s dismissal, concerns me and causes me seriously to doubt that the rule of law and human rights are respected in the Republic of Moldova."

21. On 3 March 2003 the applicant was dismissed. The letter of dismissal stated, inter alia, that the letters disclosed by the applicant to the newspaper were secret and that he had failed to consult the heads of other departments of the Prosecutor General's Office before handing them over, in breach of paragraphs 1.4 and 4.11 of the Internal Regulations of the Press Department (see paragraph 31 below).

E. The reinstatement proceedings brought by the applicant

22. On 21 March 2003 the applicant brought a civil action against the Prosecutor General's Office seeking reinstatement. He argued, inter alia, that the letters he had disclosed to the newspaper were not classified as secret in accordance with the law; that he was not obliged to consult the heads of other departments before contacting the press; that he had given the letters to the newspaper at the newspaper's request; and that his dismissal constituted a breach of his right to freedom of expression.

23. On 16 September 2003 the Chişinău Court of Appeal dismissed the applicant's action. It stated, inter alia, that the applicant had breached his obligations under paragraph 1.4 of the Internal Regulations of the Press Department by not consulting other departmental heads and under paragraph 4.11 of the Regulations by disclosing secret documents.

24. The applicant appealed. He relied on the same arguments as in his initial court action. He also argued that the disclosure of the letters to the newspaper had not in any way prejudiced his employer.

25. On 26 November 2003 the Supreme Court of Justice dismissed the appeal on the same grounds as the Chişinău Court of Appeal. Referring to the applicant's submissions concerning freedom of expression, the Supreme Court stated that obtaining information through the abuse of one's position was not part of freedom of expression (dreptul la exprimare nu presupune dobândirea informaţiei abuziv, folosind atribuţiile de serviciu).

26. Neither the Prosecutor General's Office nor the Deputy Speaker of Parliament, Mr Mişin, appear to have contested the authenticity of the letters published in the Jurnal de Chişinău or the truthfulness of the information contained in the article of 31 January 2003 or to have taken any further action.

F. The criminal complaint by the Jurnal de Chişinău

27. Since the Prosecutor General's Office did not react in the manner the Jurnal de Chişinău had anticipated after the publication of the article on 31 January 2003 (see paragraph 15 above), the latter initiated court proceedings for an order requiring the Prosecutor General's Office to initiate a criminal investigation into Mr Mişin's alleged interference in an ongoing criminal investigation. The newspaper argued, inter alia, that, under the Code of Criminal Procedure, newspaper articles and letters published in newspapers could serve as a basis for the institution of criminal proceedings and that the Prosecutor General was under a duty to order an investigation.

28. The newspaper's action was dismissed by the Râşcani District Court on 25 March 2003 and by the Chişinău Regional Court on 9 April 2003. The courts found, inter alia, that the newspaper did not have legal standing to lodge a complaint and that, in any event, the article of 31 January 2003 was merely a newspaper article expressing a personal point of view, not an official request to initiate a criminal investigation.

G. The follow-up article by the Jurnal de Chişinău

29. On 14 March 2003 the Jurnal de Chişinău published a follow-up to its article of 31 January 2003 entitled "Mişin launches crackdown on prosecutors". The piece described the events that had followed the publication of the first article and stated that Mr Mişin had been infuriated by the article and had ordered the Prosecutor General to identify and punish those responsible for disclosing his note to the press. The Prosecutor General had acquiesced and declared war on subordinates who refused to tolerate political intervention in the workings of the criminal-justice system. The article stated that the actions of the Prosecutor General were in line with the general trend that had been observed in recent years of replacing people with considerable professional experience who were not prepared to comply with the rules instituted by the new government with people from dubious backgrounds. It claimed that sources from the Prosecutor General's Office had told the newspaper that the Prosecutor General's Office had received systematic indications from Mr Mişin and the advisers to the President concerning who should be employed or dismissed. In the previous year alone, thirty experienced prosecutors had been dismissed from the Chişinău Prosecutor's Office.
The article also gave an account of the applicant's dismissal as a result of pressure from Mr Mişin, and stated that sources at the Prosecutor General's Office had told the newspaper that the Office had received dozens of letters from Mr Mişin and V.S. (another high-ranking public official) in connection with ongoing criminal investigations.
According to the newspaper's sources, two prosecutors had been dismissed at the insistence of Mr Mişin because they had discovered incriminating material against him during an investigation into the disappearance of an important businessman, P.D. After their dismissal that criminal investigation had been brought to an end.

II. RELEVANT NON-CONVENTION MATERIALS

A. Domestic law and practice

1. The Labour Code

30. Article 263 § 1 of the Labour Code provided at the material time that employees of the central public authorities could be dismissed for a serious breach of their professional duties.

2. The Internal Regulations of the Press Department of the Prosecutor General's Office

31. Paragraphs 1.4 and 4.11 of the Internal Regulations of the Press Department of the Prosecutor General's Office read as follows:

> "1.4 The Press Department shall plan and organise, in conjunction with the editorial offices of newspapers, magazines and radio and television stations and with the heads of other departments of the Prosecutor General's Office, items for publication in the mass media concerning the activities of the Prosecutor General's Office.
> ...
> 4.11 [The Head of the Press Department] is responsible for the quality of the published materials, the veracity of the information received and supplied, and for preserving confidentiality in accordance with the legislation of the Republic of Moldova."

32. At the material time neither the Internal Regulations of the Prosecutor's Office nor Moldovan legislation contained any provision concerning the disclosure by employees of acts of wrongdoing committed at their place of work.

3. The Criminal Code and the Code of Criminal Procedure

33. The Criminal Code at the material time contained in Article 190 § 1 a provision prohibiting any interference with a criminal investigation. It stated:

> "Any interference with a criminal investigation, namely the illegal exercise of influence in any form over the person carrying out the investigation ... shall be punished with imprisonment of up to two years or a fine of up to one hundred times the minimum wage."

34. Article 90 of the Code of Criminal Procedure provided at the material time that, inter alia, information about offences contained in newspaper articles or notes or letters published in a newspaper could constitute a ground for a prosecutor to commence a criminal investigation.

35. Article 122 of the Code of Criminal Procedure provided that, at the investigation stage, materials from a criminal file could not be disclosed except with the authorisation of the person in charge of the investigation.

4. The organisation of the prosecuting authorities in Moldova

36. According to Article 125 of the Constitution, prosecutors are independent.

37. The relevant provisions of the Prosecuting Authorities Act read as follows.

Section 3: The fundamental principles governing the activity of the Prosecutor's Office

"(1) The Prosecutor's Office:

– shall exercise its functions independently of the public authorities ... in accordance with the law; ...

(3) ... Prosecutors and investigators are precluded from membership of any political party or other socio-political organisations and shall only be accountable before the law ..."

Section 13: The Prosecutor General

"(1) The Prosecutor General shall:

(i) be appointed by Parliament on a proposal by the Speaker of Parliament for a term of office of five years; and

(ii) have a senior deputy and ordinary deputies, who shall be appointed by Parliament on the basis of his or her proposals ..."

5. The Petitions Act and the Status of Members of Parliament Act

38. The Petitions Act requires civil servants or government bodies to reply to written requests within thirty days. If they lack competence, they must forward the request to the competent body within three days.

39. The relevant provisions of the Status of Members of Parliament Act of 7 April 1994 provide:

Section 22(1)

"Members of parliament shall have the right to contact any State body, non-governmental organisation or official about problems pertaining to the activity of a member of parliament and to participate in their examination."

Section 23(1)

"Members of parliament, in their capacity as representatives of the supreme legislative authority, shall have the right to demand the immediate cessation of any unlawful conduct. In case of necessity they may request official bodies or persons to intervene to bring an end to the unlawful conduct ..."

B. Reports concerning the separation of powers and independence of the judiciary in Moldova

40. The relevant part of the 2004 report of the International Commission of Jurists (ICJ) on the rule of law in Moldova stated:

"... The mission to Moldova carried out by the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists (ICJ/CIJL) has concluded that, despite efforts by the post-independence Moldovan government to reform its system of justice, the rule of law suffers serious shortcomings that must be addressed. The ICJ/CIJL found that the breakdown in the separation of powers has again resulted in a judiciary that is largely submissive to the dictates of the government. The practice of 'telephone justice' has returned. The executive is able to substantially influence judicial appointments through the Supreme Council of Magistracy that lacks independence. Beyond allegations of corruption, the Moldovan judiciary has substantially regressed in the last three years, resulting in court decisions that can pervert the course of justice when the interests of the government are at stake ..."

41. The 2003 Freedom House report on Moldova stated, inter alia, that:

> "... In 2002, the principle of the rule of law was under challenge in Moldova ... Also affecting the fragile balance of power among the legislative, executive, and judicial branches of government in 2002 were a series of judicial nominations based on loyalty to the ruling party, the dismissal of the ombudsman, and attempts to limit the independence of the Constitutional Court.
>
> ...
>
> In April [2002], the Moldovan Association of Judges (MAJ) signalled that the government had started a process of 'mass cleansing' in the judicial sector. Seven judges lost their jobs ...
>
> The situation worsened when President Voronin refused to prolong the mandates of fifty-seven other judges ..."

42. The 2003 report by Open Society Justice Initiative and Freedom House Moldova stated, inter alia, the following:

> "... there has been instituted the practice of 'taking under control' certain files, presenting interest to the Communist leaders or to state authorities. This practice implies the following: the High Council of the Magistracy (HCM) or the Supreme Court (both institutions are chaired by the same person) receives instructions from the President's office, from government or Parliament, referring to the concerned case and required solution (such instructions also exist in oral form). Following these instructions, the Supreme Court or HCM addresses directly to the chairman of the court, where the particular case is being considered with the order to 'take under personal control' the examination of one or other particular file. The so-called 'taking under control' in fact represents direct instructions on solutions for specific cases."

C. Materials of the United Nations

43. The relevant provision of the Termination of Employment Convention no. 58 of the International Labour Organisation, which was ratified by Moldova on 14 February 1997, reads:

Article 5

> "The following, inter alia, shall not constitute valid reasons for termination:
>
> ...
>
> (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
>
> ..."

44. The relevant provision of the United Nations Convention against Corruption, which was adopted by the General Assembly by resolution no. 58/4 of 31 October 2003 and which has been in force since 14 December 2005, reads:

Article 33 – Protection of reporting persons

> "Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent

authorities any facts concerning offences established in accordance with [the] Convention."

At the date on which this judgment was adopted, the Convention had been signed by 140 countries and ratified or acceded to by 77 countries, not including the Republic of Moldova.

D. Materials of the Council of Europe

45. The relevant provision of the Council of Europe's Criminal Law Convention on Corruption of 27 January 1999 reads:

"Preamble

The member States of the Council of Europe and the other States signatory hereto,

...

Emphasising that corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society;

...

Have agreed as follows:

...

Article 22 – Protection of collaborators of justice and witnesses

Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:

(a) those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise cooperate with the investigating or prosecuting authorities;

(b) witnesses who give testimony concerning these offences."

The Explanatory Report to this convention states as follows with regard to Article 22:

"111. ... the word 'witnesses' refers to persons who possess information relevant to criminal proceedings concerning corruption offences as contained in Articles 2-14 of the Convention and includes whistle-blowers."

This convention was signed by Moldova on 24 June 1999 and came into force in respect of Moldova on 1 May 2004.

46. The relevant provision of the Council of Europe's Civil Law Convention on Corruption of 4 November 1999 reads:

"Preamble

The member States of the Council of Europe, the other States and the European Community, signatories hereto,

...

Emphasising that corruption represents a major threat to the rule of law, democracy and human rights, fairness and social justice, hinders economic development and endangers the proper and fair functioning of market economies;

Recognising the adverse financial consequences of corruption to individuals, companies and States, as well as international institutions;

...

Have agreed as follows:

...

Article 9 – Protection of employees

Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities."

The Explanatory Report to this convention states with regard to Article 9:

"66. This Article deals with the need for each Party to take the necessary measures to protect employees, who report in good faith and on the basis of reasonable grounds their suspicions on corrupt practices or behaviours, from being victimised in any way.

67. As regards the necessary measures to protect employees provided for by Article 9 of the Convention, the legislation of Parties could, for instance, provide that employers be required to pay compensation to employees who are victims of unjustified sanctions.

68. In practice corruption cases are difficult to detect and investigate and employees or colleagues (whether public or private) of the persons involved are often the first persons who find out or suspect that something is wrong.

69. The 'appropriate protection against any unjustified sanction' implies that, on the basis of [the] Convention, any sanction against employees based on the ground that they had reported an act of corruption to persons or authorities responsible for receiving such reports, will not be justified. Reporting should not be considered as a breach of the duty of confidentiality. Examples of unjustified sanctions may be a dismissal or demotion of these persons or otherwise acting in a way which limits progress in their career.

70. It should be made clear that, although no one could prevent employers from taking any necessary action against their employees in accordance with the relevant provisions (e.g. in the field of labour law) applicable to the circumstances of the case, employers should not inflict unjustified sanctions against employees solely on the ground that the latter had reported their suspicion to the responsible person or authority.

71. Therefore the appropriate protection which Parties are required to take should encourage employees to report their suspicions to the responsible person or authority. Indeed, in many cases, persons who have information of corruption activities do not report them mainly because of fear of the possible negative consequences.

72. As far as employees are concerned, this protection provided covers only the cases where they have reasonable ground to report their suspicion and report them in good faith. In other words, it applies only to genuine cases and not to malicious ones."

This convention was signed by Moldova on 4 November 1999 and came into force in respect of Moldova on 1 July 2004.

47. The relevant provisions of the Recommendation on Codes of Conduct for Public Officials adopted by the Committee of Ministers of the Council of Europe on 11 May 2000 (Rec(2000)10) read:

Article 11

"Having due regard for the right of access to official information, the public official has a duty to treat appropriately, with all necessary confidentiality, all information and documents acquired by him or her in the course of, or as a result of, his or her employment."

Article 12 – Reporting

"...
5. The public official should report to the competent authorities any evidence, allegation or suspicion of unlawful or criminal activity relating to the public service coming to his or her knowledge in the course of, or arising from, his or her employment. The investigation of the reported facts shall be carried out by the competent authorities.
6. The public administration should ensure that no prejudice is caused to a public official who reports any of the above on reasonable grounds and in good faith."

THE LAW

48. The applicant complained that his dismissal for the disclosure of the impugned letters to the Jurnal de Chişinău amounted to a breach of his right to freedom of expression and in particular of his right to impart information and ideas to third parties. Article 10 of the Convention reads as follows:

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

I. THE ADMISSIBILITY OF THE CASE

A. The complaint under Article 6 of the Convention

49. In his initial application, the applicant submitted a complaint under Article 6 of the Convention about the failure of the domestic courts to consider the arguments he had made in the reinstatement proceedings. However, in his subsequent submissions, the applicant asked the Court not to proceed with the examination of that complaint. Accordingly the Court will not examine it.

B. The complaint under Article 10 of the Convention

50. The Government did not contest the authenticity of the letter that had been sent by Mr Mişin to the Prosecutor General. However, they argued that there had been no interference with the applicant's right to freedom of expression because he was not the author of the articles that had been published in the Jurnal de Chişinău and had not been dismissed for exercising his freedom of expression but simply for breaching the internal regulations of the Prosecutor General's Office. In their view, since the applicant's complaints were in essence related to his labour rights, Article 10 was inapplicable.

51. The applicant argued that Article 10 was applicable in the present case, irrespective of the fact that he was not the author of the letters that had been sent to the newspaper. Relying on the cases of Thoma v. Luxembourg (no. 38432/97, ECHR 2001-III) and Jersild v.

Denmark (23 September 1994, Series A no. 298), he submitted that the Court had already found that freedom of expression also covered the right to disseminate information received from third parties.

52. The Court reiterates that the protection of Article 10 extends to the workplace in general and to public servants in particular (see Vogt v. Germany, 26 September 1995, § 53, Series A no. 323; Wille v. Liechtenstein [GC], no. 28396/95, § 41, ECHR 1999-VII; Ahmed and Others v. the United Kingdom, 2 September 1998, § 56, Reports of Judgments and Decisions 1998-VI; and Fuentes Bobo v. Spain, no. 39293/98, § 38, 29 February 2000).

53. The applicant sent the letters to the newspaper, which subsequently published them. Since Article 10 includes the freedom to impart information and since the applicant was dismissed for his participation in the publication of the letters, the Court dismisses the Government's preliminary objection.

54. The Court considers that the applicant's complaint under Article 10 of the Convention raises questions of fact and law which are sufficiently serious for their determination to depend on an examination of the merits, and no grounds for declaring it inadmissible have been established. The Court therefore declares the application admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraph 4 above), the Court will immediately consider the merits of these complaints.

II. THE MERITS OF THE CASE

A. Existence of an interference

55. The Court found in paragraph 53 above that Article 10 was applicable to the present case. It further holds that the applicant's dismissal for making the letters public amounted to an "interference by a public authority" with his right to freedom of expression under the first paragraph of that Article.

56. Such interference will constitute a breach of Article 10 unless it was "prescribed by law", pursued one or more legitimate aims under paragraph 2 and was "necessary in a democratic society" for the achievement of those aims.

B. "Prescribed by law"

57. In his initial submissions, the applicant argued that the interference had not been prescribed by law since the law relied upon by the domestic authorities was not sufficiently foreseeable. However, in his subsequent oral pleadings he did not pursue this point.
58. The Court notes that the applicant was dismissed on the basis of Article 263 § 1 of the Labour Code for having violated paragraphs 1.4 and 4.11 of the Internal Regulations of the Press Department of the Prosecutor General's Office (see paragraph 31 above). However, since the parties did not argue this point further before the Court, it will continue its examination on the assumption that the provisions contained in paragraphs 1.4 and 4.11 of the Internal Regulations satisfied the requirement for the interference to be "prescribed by law".

C. Legitimate aim

59. The applicant argued that the interference did not pursue any legitimate aim. The Government submitted that the legitimate aims pursued in this case were to maintain the authority of the judiciary, to prevent crime and to protect the reputation of others. The Court, for its part, is ready to accept that the legitimate aim pursued was the prevention of the disclosure of information received in confidence. In so deciding, the Court finds it significant that at the time of his dismissal the applicant refused to disclose the source of the information, which suggests that it was not easily or publicly available (see Haseldine v. the United Kingdom, no. 18957/91, Commission decision of 13 May 1992, Decisions and Reports (DR) 73). The Court must therefore examine whether the interference was necessary in a democratic society, in particular whether there was a proportionate relationship between the interference and the aim thereby pursued.

D. "Necessary in a democratic society"

1. The parties' submissions

(a) The applicant

60. According to the applicant, the disclosure of the letters had to be regarded as whistle-blowing on illegal conduct.

61. He pointed firstly to the fact that he had acted in good faith and that, when he disclosed the letters to the newspaper, he was convinced that they contained information concerning the commission of a serious offence by the Deputy Speaker of Parliament. The only reason for him disclosing them was to help fight corruption and trading in influence. He disagreed that the purpose of Mr Mişin's note had simply been to pass the police officers' letter to the Prosecutor General in accordance with the Petitions Act (see paragraph 38 above) and with the contention that Mr Mişin's actions had been in accordance with sections 22 and 23 of the Status of Members of Parliament Act (see paragraph 39 above). He further argued that the letters were not part of a criminal case file.

The applicant contended that, in the light of the manner in which the Prosecutor General and his deputies were appointed and in view of the predominant position of the Communist Party in Parliament, the Prosecutor General's Office was perceived by the public as being strongly influenced by Parliament. The independence of the Prosecutor General's Office was guaranteed in theory but not in practice. In the applicant's submission, the Prosecutor General could be dismissed at will by Parliament without any reasons being given. In the years 2002-03 more than thirty prosecutors who were not considered loyal to the Communist Party had been dismissed. Moreover, Mr Mişin, who was one of the leaders of the ruling party and the Deputy Speaker of Parliament, was also perceived as systematically using his position to influence the outcome of judicial proceedings.

The applicant added that the language of the letter written by Mr Mişin unequivocally suggested that its author intended to influence the outcome of the criminal proceedings against the four police officers. Such conduct constituted an offence under Article 190 § 1 of the Criminal Code (see paragraph 33 above). The applicant also pointed to the fact that, after receiving the letter in question, the Prosecutor General had ordered the reopening of the criminal investigation and shortly thereafter the criminal proceedings had been discontinued.

According to the applicant, the fact that the four police officers decided to ask State representatives at the highest level to investigate the legality of the criminal charges against them indicated the existence of a practice in the Republic of Moldova that was contrary to the principle of the separation of powers. It was highly unlikely that police officers dealing with the investigation of crime would be unaware that the authorities to whom they had addressed their letters had no judicial functions.

According to the applicant, the information disclosed by him was thus of major public interest.

62. In order to disclose the information, he had had no alternative but to go to a newspaper. As there was no whistle-blowing legislation in Moldova, employees had no procedure for disclosing wrongdoing at their place of work. It would have been pointless to bring the problem to the attention of the Prosecutor General as he lacked independence. Even though he had been aware of Mr Mişin's letter for about six months, it would appear that he had simply concealed its existence while at the same time complying with its terms. The refusal of the Prosecutor's Office to initiate criminal proceedings against Mr Mişin after the publication of the newspaper articles (see paragraphs 15 and 29 above) supported the view that any disclosure to the Prosecutor's Office would have been in vain. Furthermore, the applicant had had reasonable grounds for fearing that the evidence would be concealed or destroyed if he disclosed it to his superiors.

The applicant also submitted that it would have been unreasonable to expect him to complain to Parliament because 71 of its 101 members were from the ruling Communist Party and there was no precedent of an MP from that party being prosecuted for a criminal offence. Moreover, between 2001 and 2004 no initiative by the opposition that was contrary to the interests of the ruling party had ever been successful in Parliament.

63. The applicant also complained about the severity of the sanction that had been imposed on him and pointed out that it was at the highest end of the range of possible penalties.

(b) The Government

64. In the Government's view, the disclosure in question did not amount to whistle-blowing.
65. They considered that the letters were internal documents to which the applicant would not normally have had access by virtue of his functions. He had thus effectively "stolen" them. Moreover, the letters disclosed by the applicant were confidential and part of a criminal file. Under the Code of Criminal Procedure, materials in a criminal file could not be made public without the authorisation of the person conducting the investigation (see paragraph 35 above).

The applicant's good faith was questionable also because the letter written by Mr Mişin could not reasonably be considered to have put undue pressure on the Prosecutor General. The expression "I ask you personally to intervene in this case and solve it in strict compliance with the law" was a normal form of communication between different State bodies in accordance with the law. Mr Mişin had simply passed the letter received from the four police officers to the competent body – the Prosecutor General's Office – in accordance with the Petitions Act (see paragraph 38 above) and the Status of Members of Parliament Act (see paragraph 39 above). Under the latter Act, an MP had the right, inter alia, to examine

petitions from citizens, to pass them to competent authorities, to participate in their examination and to monitor compliance with the law.

There was no causal link between Mr Mişin's letter and the subsequent decision to discontinue the criminal proceedings against the four police officers. In the Government's submission, the Prosecutor General's Office was a truly independent body whose independence was guaranteed by the Constitution and law of Moldova (see paragraphs 36 and 40 above).

Moreover, the applicant had not given the domestic courts the same reason for his actions as he had given his employer (see paragraphs 18 and 20 above). In the Government's view, this also indicated a lack of good faith on his part and showed that the real motive behind the disclosure was not the fight against corruption but an attempt to embarrass those concerned.

66. Since, as outlined above, Mr Mişin was not attempting to put pressure on the Prosecutor General, the information contained in his letter was not of public interest.

67. Moreover, the applicant had not disclosed the information to a competent authority and had acted hastily. There had been no information of an urgent or irreversible nature concerning life, health or the environment. The applicant was entitled to make a disclosure externally only if it was not possible to do so internally. Any such disclosure should in the first instance have been to the top echelons of the Prosecutor General's Office and thereafter to the Parliament (including the parliamentary commissions, factions and opposition), rather than going directly to the press.

In support of their submission, the Government sent the Court copies of several complaints that had been lodged by citizens with the Parliament concerning alleged illegalities in employment and other matters. All the complaints appeared to have been forwarded by the Parliament to the competent organs, such as the Prosecutor General's Office and the Superior Council of Magistrates, without any other parliamentary involvement.

The Government argued that twenty-one states in the United States of America did not afford protection to disclosures made to the media, while in the United Kingdom protection for external whistle-blowing was possible only in extremely rare and strictly defined circumstances.

68. In view of the nature of the duties and responsibilities of civil servants, the margin of appreciation enjoyed by the States in interfering with their right to freedom of expression was very large. The Government submitted, lastly, that the severity of the penalty was proportionate to the gravity of the applicant's acts.

2. The Court's assessment

(a) The general principles applicable in this case

69. The central issue which falls to be determined is whether the interference was "necessary in a democratic society". The fundamental principles in that regard are well established in the Court's case-law and have been summed up as follows (see, among other authorities, Jersild v. Denmark, cited above, § 31; Hertel v. Switzerland, 25 August 1998, § 46, Reports 1998-VI; and Steel and Morris v. the United Kingdom, no. 68416/01, § 87, ECHR 2005-II):

"(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' ... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."

70. The Court further reiterates that Article 10 applies also to the workplace, and that civil servants, such as the applicant, enjoy the right to freedom of expression (see paragraph 52 above). At the same time, the Court is mindful that employees have a duty of loyalty, reserve and discretion to their employer. This is particularly so in the case of civil servants since the very nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion (see Vogt, cited above, § 53; Ahmed and Others, cited above, § 55; and De Diego Nafría v. Spain, no. 46833/99, § 37, 14 March 2002).

71. Since the mission of civil servants in a democratic society is to assist the government in discharging its functions and since the public has a right to expect that they will help and not hinder the democratically elected government, the duty of loyalty and reserve assumes special significance for them (see, mutatis mutandis, Ahmed and Others, cited above, § 53.) In addition, in view of the very nature of their position, civil servants often have access to information which the government, for various legitimate reasons, may have an interest in keeping confidential or secret. Therefore, the duty of discretion owed by civil servants will also generally be a strong one.

72. To date, however, the Court has not had to deal with cases where a civil servant publicly disclosed internal information. To that extent the present case raises a new issue which can be distinguished from that raised in Stoll v. Switzerland ([GC], no. 69698/01, ECHR 2007-V),

where the disclosure took place without the intervention of a civil servant. In this respect the Court notes that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest. The Court thus considers that the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large. In this context, the Court has had regard to the following statement from the Explanatory Report to the Council of Europe's Civil Law Convention on Corruption (see paragraph 46 above):

> "In practice corruption cases are difficult to detect and investigate and employees or colleagues (whether public or private) of the persons involved are often the first persons who find out or suspect that something is wrong."

73. In the light of the duty of discretion referred to above, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public (see, mutatis mutandis, Haseldine, cited above). In assessing whether the restriction on freedom of expression was proportionate, therefore, the Court must take into account whether there was available to the applicant any other effective means of remedying the wrongdoing which he intended to uncover.

74. In determining the proportionality of an interference with a civil servant's freedom of expression in such a case, the Court must also have regard to a number of other factors. In the first place, particular attention shall be paid to the public interest involved in the disclosed information. The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest (see, among other authorities, Sürek v. Turkey (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV). In a democratic system, the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence (see Fressoz and Roire v. France [GC], no. 29183/95, ECHR 1999-I, and Radio Twist, a.s. v. Slovakia, no. 62202/00, ECHR 2006-XV).

75. The second factor relevant to this balancing exercise is the authenticity of the information disclosed. It is open to the competent State authorities to adopt measures intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith (see Castells v. Spain, 23 April 1992, § 46, Series A no. 236). Moreover, freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable (see, mutatis mutandis, Morissens v. Belgium, no. 11389/85, Commission decision of 3 May 1988, DR 56, p. 127, and Bladet Tromsø and Stensaas v. Norway [GC], no. 21980/93, § 65, ECHR 1999-III).

76. On the other side of the scales, the Court must weigh the damage, if any, suffered by the public authority as a result of the disclosure in question and assess whether such damage outweighed the interest of the public in having the information revealed (see, mutatis

mutandis, Hadjianastassiou v. Greece, 16 December 1992, § 45, Series A no. 252, and Stoll, cited above, § 130). In this connection, the subject matter of the disclosure and the nature of the administrative authority concerned may be relevant (see Haseldine, cited above).

77. The motive behind the actions of the reporting employee is another determinant factor in deciding whether a particular disclosure should be protected or not. For instance an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection (ibid.). It is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other, more discreet, means of remedying the wrongdoing was available to him or her.

78. Lastly, in connection with the review of the proportionality of the interference in relation to the legitimate aim pursued, attentive analysis of the penalty imposed on the applicant and its consequences is required (see Fuentes Bobo, cited above, § 49).

79. The Court will now assess the facts of the present case in the light of the above principles.

(b) Application of the above principles in the present case

(i) Whether the applicant had alternative channels for the disclosure

80. The applicant argued that he did not have at his disposal any effective alternative channel for the disclosure, while the Government argued that, on the contrary, the applicant could have raised the issue with his superiors in the first instance and later with the Parliament or the Ombudsman if necessary.

81. The Court notes that neither the Moldovan legislation nor the internal regulations of the Prosecutor General's Office contained any provision concerning the reporting of irregularities by employees (see paragraph 32 above). It appears, therefore, that there was no authority other than the applicant's superiors to which he could have reported his concerns and no prescribed procedure for reporting such matters.

82. It also appears that the disclosure concerned the conduct of the Deputy Speaker of Parliament, who was a high-ranking official, and that despite having been aware of the situation for some six months the Prosecutor General had shown no sign of having any intention to respond but instead gave the impression that he had succumbed to the pressure that had been imposed on his office.

83. As to the alternative means of disclosure suggested by the Government (see paragraph 67 above), the Court finds that it has not been presented with any satisfactory evidence to counter the applicant's submission that none of the proposed alternatives would have been effective in the special circumstances of the present case.

84. In the light of the foregoing, the Court considers that in the circumstances of the present case external reporting, even to a newspaper, could be justified.

(ii) The public interest in the disclosed information

85. The applicant submitted that Mr Mişin's note constituted evidence of political interference in the administration of justice. The Government disagreed.

86. The Court notes that the police officers' letter requested Mr Mişin to verify the legality of the criminal charges brought against them by the Prosecutor's Office (see paragraph 10 above). Mr Mişin reacted by sending an official letter to the Prosecutor General. The Government submitted that Mr Mişin's actions were in compliance, inter alia, with the Status of Members of Parliament Act. In this context the Court considers it necessary to reiterate that in a democratic society both the courts and the investigation authorities must remain free from political pressure. Any interpretation of any legislation establishing the rights of members of parliament must abide by that principle.
Having examined the note which Mr Mişin wrote to the Prosecutor General, the Court cannot accept that it was intended to do no more than to transmit the police officers' letter to a competent body as suggested by the Government (see paragraph 65 above). Moreover, in view of the context and of the language employed by Mr Mişin, it cannot be excluded that the effect of the note was to put pressure on the Prosecutor General's Office, irrespective of the inclusion of the statement that the case was to be "examined in strict compliance with the law" (see paragraph 10 above).

87. Against this background, the Court notes that the President of Moldova has campaigned against the practice of interference by politicians with the criminal-justice system and that the Moldovan media has widely covered the subject (see paragraph 11 above). It also notes the reports of the international non-governmental organisations (see paragraphs 40-42 above), which express concern about the breakdown of separation of powers and the lack of judicial independence in Moldova.

88. In the light of the above, the Court considers that the letters disclosed by the applicant had a bearing on issues such as the separation of powers, improper conduct by a high-ranking politician and the government's attitude towards police brutality (see paragraphs 10 and 14 above). There is no doubt that these are very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate.

(iii) The authenticity of the disclosed information

89. It is common ground that the letters disclosed by the applicant to the Jurnal de Chişinău were genuine (see paragraph 26 above).

(iv) The detriment to the Prosecutor General's Office

90. The Court observes that it is in the public interest to maintain confidence in the independence and political neutrality of the prosecuting authorities of a State (see, mutatis mutandis, Prager and Oberschlick v. Austria, 26 April 1995, § 34, Series A no. 313). The letters sent by the applicant to the newspaper were not written by officials of the Prosecutor General's Office and, according to the Government, the letter from Mr Mişin was a normal communication between State bodies which had not affected the decision of the Prosecutor General's Office to discontinue the proceedings against the police officers. Nevertheless, the conclusion drawn by the newspaper in its articles that the Prosecutor General's Office was

subject to undue influence may have had strong negative effects on public confidence in the independence of that institution.

91. However, the Court considers that the public interest in having information about undue pressure and wrongdoing within the Prosecutor's Office revealed is so important in a democratic society that it outweighed the interest in maintaining public confidence in the Prosecutor General's Office. It reiterates in this context that open discussion of topics of public concern is essential to democracy, and regard must be had to the great importance of not discouraging members of the public from voicing their opinions on such matters (see Barfod v. Denmark, 22 February 1989, § 29, Series A no. 149).

(v) Whether the applicant acted in good faith

92. The applicant argued that his sole motive for disclosing the letters was to help fight corruption and trading in influence. This statement was not disputed by his employer. The Government, on the other hand, expressed doubt about the applicant's good faith, arguing, inter alia, that he had not given this explanation before the domestic courts.

93. On the basis of the materials before it, the Court does not find any reason to believe that the applicant was motivated by a desire for personal advantage, held any personal grievance against his employer or Mr Mişin, or that there was any other ulterior motive for his actions. The fact that he did not make before the domestic courts his submissions about the fight against corruption and trading in influence is, in the Court's opinion, inconclusive since he may have been focused on challenging the reasons advanced by his employer for dismissing him and might well have considered it unnecessary to refer to matters that his employer did not dispute.

94. Accordingly, the Court comes to the conclusion that the applicant's motives were as stated by him and that he acted in good faith.

(vi) The severity of the sanction

95. Finally, the Court notes that the heaviest sanction possible was imposed on the applicant. While it had been open to the authorities to apply a less severe penalty, they chose to dismiss the applicant, which undoubtedly is a very harsh measure (see Vogt, cited above, § 60). This sanction not only had negative repercussions on the applicant's career but it could also have a serious chilling effect on other employees from the Prosecutor's Office and discourage them from reporting any misconduct. Moreover, in view of the media coverage of the applicant's case, the sanction could have a chilling effect not only on employees of the Prosecutor's Office but also on many other civil servants and employees.

96. The Court observes that the Government have argued that the applicant had in fact "stolen" the letter, which in their view was secret and part of a criminal file. The Government also stated that Mr Mişin's letter had not placed any undue pressure on the Public Prosecutor. It was a normal communication between State bodies and was unconnected with the decision to discontinue the proceedings against the police officers. In these circumstances, the Court finds that it is difficult to justify such a severe sanction being applied.

(c) Conclusion

97. Being mindful of the importance of the right to freedom of expression on matters of general interest, the right of civil servants and other employees to report illegal conduct and

wrongdoing at their place of work, the duties and responsibilities of employees towards their employers, and the right of employers to manage their staff – and having weighed up the other different interests involved in the present case – the Court comes to the conclusion that the interference with the applicant's right to freedom of expression, in particular his right to impart information, was not "necessary in a democratic society".
Accordingly, there has been a violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

98. Article 41 of the Convention provides:

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

A. Damage

99. The applicant claimed 15,000 euros (EUR) in respect of pecuniary and non-pecuniary damage made up as follows: EUR 6,000 for loss of earnings for the period of unemployment after his dismissal, EUR 6,000 for lost career prospects and EUR 3,000 for non-pecuniary damage.

100. The Government contested the claim and argued that the applicant's claims were ill-founded and excessive.
101. The Court considers that the applicant must have suffered pecuniary and non-pecuniary damage as a result of his dismissal. Making its assessment on an equitable basis, it awards him EUR 10,000.

B. Costs and expenses

102. The applicant's representatives claimed EUR 6,843 for legal fees, of which EUR 4,400 was claimed in respect of Mr Gribincea and EUR 2,443 in respect of Mr Zamă. They submitted a detailed time sheet and a contract indicating that the lawyers' hourly rates were EUR 80 and EUR 70 respectively. The calculation in the time sheet did not include time spent on the complaint under Article 6, which was subsequently withdrawn by the applicant.

103. They argued that the number of hours they had spent on the case was not excessive and was justified by its complexity and the fact that the observations had to be written in English.

104. As to the hourly rate, the applicant's lawyers argued that it was within the limits recommended by the Moldovan Bar Association, which were between EUR 40 and 150.

105. The applicant's representatives also claimed EUR 2,413 for expenses linked to the hearing of 6 June 2007, which sum included travel expenses, visa costs, insurance costs and a subsistence allowance.

106. The Government contested the amount claimed for the applicant's representation. They said that it was excessive and disputed the number of hours that the applicant's lawyers had

spent on the case and the hourly rates, notably that charged by Mr Zamă, who, in their opinion, lacked the necessary experience to command such high fees.

107. As to the other expenses claimed by the applicant, the Government argued that they should have been claimed from the Court.

108. The Court reiterates that in order for costs and expenses to be included in an award under Article 41 of the Convention, it must be established that they were actually and necessarily incurred and were reasonable as to quantum (see, for example, Amihalachioaie v. Moldova, no. 60115/00, § 47, ECHR 2004-III). In the present case, regard being had to the itemised list that has been submitted and the complexity of the case, the Court awards the entire amount claimed by Mr Gribincea, EUR 1,600 for Mr Zamă's fee and the entire amount claimed by the applicant's representatives for the expenses incurred in connection with the hearing of 6 June 2007.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY

1. Declares the application admissible;

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

3. Holds
(a) that the respondent State is to pay the applicant, within three months, EUR 10,000 (ten thousand euros) in respect of pecuniary damage and non-pecuniary damage and EUR 8,413 (eight thousand four hundred and thirteen euros) in respect of costs and expenses, plus any tax that may be chargeable, which sums are to be converted into the currency of the respondent State at the rate applicable at the date of payment;

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

4. Dismisses the remainder of the applicant's claim for just satisfaction.
Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 February 2008.

4.2 Case of Marchenko v. Ukraine

Application no. 4063/04
JUDGMENT
STRASBOURG
19 February 2009
FINAL
19/05/2009

PROCEDURE

1. The case originated in an application (no. 4063/04) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Mykhaylo Illarionovych Marchenko ("the applicant"), on 19 December 2003.

2. The Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev.

3. The applicant alleged, in particular, that he had been subjected to an unfair trial resulting in his unfair conviction for defamation.

4. On 12 April 2007 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS
I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1946 and lives in Pasiky-Zubrytski.

A. Events which led to criminal charges against the applicant

6. Since 1974 the applicant has worked as a teacher in the Lviv Boarding School no. 6 for Children with Language Disorders ("the School"). In 1995 he was elected head of the school branch of the "VOST" - one of the two trade unions represented in the School.

7. On 12 January 1996 the local Board of Education employed Mrs P. to serve as a director, notwithstanding opposition from some staff, in particular the VOST members.

8. In May 1996 Mrs P. dismissed an employee, who was a VOST member, without the consent of the VOST. Subsequently, in 1998, this employee was reinstated as a result of a court action brought on her behalf by the VOST.

9. On 6 June 1996 Mrs P. refused to sign a collective agreement, signed by the VOST and the head of the second trade union present at the School.

10. On an unspecified date in late 1996, a former School driver who had been dismissed by Mrs P. for incompetence submitted a written statement to the applicant, alleging that in April 1996 Mrs P. had ordered him to unload ten boxes of humanitarian aid intended for the School

at her father's estate and that on many occasions she had used the school vehicle for personal purposes.

11. In early 1997 the applicant in his capacity as a trade union leader made several applications to the Control Inspection Department (*Контрольно-ревізійне управління*, a public audit service, scrutinising the use of funds by State-owned entities, "the KRU"), alleging that Mrs P. had abused her office and misused School property and funds. In particular he stated that Mrs P. had appropriated ten boxes of humanitarian aid, the School's TV set, other video equipment and bricks from the school boundary wall which had been demolished. On several occasions the applicant also complained about the situation to Mr U., the regional leader of the VOST.

12. In response to these complaints in 1997 the KRU held several inquiries into the use of the School funds.

13. In its report of 28 February 1997, the KRU stated that there were no serious instances of mismanagement of the School's property.

14. The KRU's report of 26 March 1997, however, revealed certain shortcomings on the part of the School administration in the handling of humanitarian aid, charity and the **bricks.** However, no evidence was found that any of the humanitarian aid or charity monies or any bricks had been appropriated by Mrs P.

15. In April 1997 the applicant on behalf of the School branch of the VOST, Mr U. on behalf of the Regional VOST, and Mr N. on behalf of the local branch of the Ukrainian Conservative Party made a criminal complaint against Mrs P. to the Lychakivsky District Prosecutor's Office ("the Prosecutor's Office") a criminal complaint against Mrs P., referring largely to the same circumstances as in the VOST's complaints to the KRU. On 28 April 1997 the Prosecutor's Office dismissed this complaint for want of evidence of criminal conduct on Mrs P.'s part. On 17 June 1997 a second criminal complaint was dismissed on the same ground. However, criminal proceedings were initiated into the circumstances of the disappearance of the TV set and the video equipment.

16. On 26 May 1997 several representatives of the Regional VOST picketed the Lychakivsky District Administration protesting against the alleged abuses by Mrs P. The participants in the picket carried placards with various slogans criticising Mrs. P. and her deputy Mrs N., as well as their supporters within the local administration. The slogans concerning Mrs P. read as follows: "*Mrs P. and Mrs N. - return humanitarian aid and 20,000 bricks from the school wall to the disabled children*"; "*Boarding school no. 6 director Mrs P. and her clique of VOST persecutors [should be submitted] to court*"; and "*Mrs P. and Mrs N., sticky hands off the disabled children of Boarding school no. 6*".

B. Criminal proceedings against the applicant

17. In May 1998 Mrs P. brought a private prosecution against the applicant. She complained, in particular, that in his letters to the KRU and the Prosecutor's Office the applicant had falsely accused her of abuse of office and misappropriation of public funds and that he had organised and participated in the picket of 26 May 1997, during which the demonstrators displayed offensive placards. Mrs P. further concluded that the applicant's actions fell within

the ambit of Article 125 § 2 (defamation in print) and § 3 (false accusation of serious crimes) and Article 126 (insult) of the Criminal Code of 1960 in force at the material time.

18. On 14 May 1998 a judge of the Lychakivsky District Court of Lviv found that the applicant's conduct *vis-à-vis* Mrs P. fell within the ambit of Article 125 § 1 of the Criminal Code (simple defamation) and Article 126, and initiated criminal proceedings against the applicant. The judge further ordered that the applicant be placed under an undertaking not to abscond.

19. In the course of the investigation, the charges against the applicant were re-qualified from Article 125 § 1 to Article 125 § 3.

20. On 12 November 1999 the Prosecutors' Office notified the applicant of his indictment under Article 125 § 3 and Article 126 of the Criminal Code.

21. On 15 November 1999 the investigation prepared a final bill of indictment under these provisions and gave the applicant access to the case file before its transfer for court proceedings.

22. On 26 January 2000 the Lychakivsky District Court held the first hearing in the applicant's case.

23. In March 2000 the applicant's case was transferred to the Shevchenkivsky District Court of Lviv ("the Shevchenkivsky Court").

24. On 26 June 2001 the Shevchenkivsky Court found the applicant guilty of an offence under Article 125 § 3 as charged and dropped charges under Article 126 as redundant. It sentenced him to one year's imprisonment suspended for one year and to a fine of 200 Ukrainian hryvnas (UAH). The court also allowed Mrs P.'s civil claim in part and ordered the applicant to pay her UAH 1,000 in non-pecuniary damages and UAH 100 in legal fees.

25. In its judgment the court established that in numerous letters signed by the applicant, Mrs P. had been baselessly accused of misappropriation of public funds. The court also found that the applicant had initiated and participated in the picketing of 26 May 1997, referring to various pieces of evidence, including submissions by several School employees that they had seen him during the picket holding a slogan.

26. The applicant appealed against the judgment of 26 June 2001. He alleged in particular that the prosecution had failed to prove that he had intentionally disseminated falsehoods. Furthermore, no attention had been accorded to the fact that he had acted in his official capacity as a local VOST leader, empowered by the union members to inform the authorities about Mrs P.'s official misconduct and that according to the findings of the KRU and the law-enforcement authorities his accusations had not been entirely baseless. The applicant further denied any involvement in the picketing, referring to his absence on the photographs of the picket made by the plaintiff as well as to a doctor's certificate concerning his inpatient treatment until 27 May 1998. He also alleged that the case could not be considered under § 3 of Article 125 of the Criminal Code, as pursuant to the decision of 14 May 1998 criminal charges filed by Mrs P. under this provision had been re-qualified as charges under § 1 of Article 125.

27. On 21 August 2001 the Lviv Regional Court of Appeal heard the case in the applicant's absence and upheld the judgment of 26 June 2001. It found, in particular, that the applicant's guilt, including in respect of participation in the picketing, had been proved by numerous sources of evidence. In particular, several School employees attested to having seen the applicant holding a slogan during the picketing and his doctor stated that his treatment had not precluded him from leaving the hospital premises.

28. The applicant filed eleven cassation appeals, which were dismissed due to his failure to follow formalities envisaged by law. On 25 April 2003 a judge of the Supreme Court declared the applicant's twelfth appeal in cassation, in which he raised essentially the same arguments as in his appeal, admissible.

29. On 13 November 2003 the Supreme Court upheld the previous judgments.

II. RELEVANT DOMESTIC LAW

1. Criminal Code of 1960

30. The text of Article 125 of the Code read as follows:

> Defamation [*Наклеп*], namely the intentional dissemination of falsehoods aimed at damaging the reputation of another shall be punishable by ...
> Defamation in print ... shall be punishable by ....
> Defamation linked with an unfounded accusation of committing a grave offence shall be punishable by up to five years' imprisonment.

31. Article 126 of the Code provided as follows:

> "Insult [*Образа*], namely the intentional humiliation of the honour and dignity of a person expressed in an indecent form shall be punishable by ..."

32. Following a process of legislative reform, the New Ukrainian Criminal Code of 5 April 2001 no longer classifies defamation and insult as criminal offences.

2. Code of Criminal Procedure

33. The text of Article 27 of the Code of Criminal Procedure (governing the private prosecution proceedings, as in force before 21 June 2001) may be found in the judgment of 10 August 2006 in the case of *Lyashko v. Ukraine* (no. 21040/02, § 23).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION ON ACCOUNT OF FORMULATION OF THE CHARGES

34. The applicant complained that he had been found guilty of an offence with which he had not been charged. He referred to Article 4 of Protocol No. 7 in this regard. The Court, which is master of the characterisation to be given in law to the facts of the case, finds that this complaint falls to be examined under Article 6 §§ 1 and 3 (a) and (b) of the Convention, which read as follows:

> "...Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;...."

35. The Government argued that the applicant's complaint, as formulated, could not be read as stating that fair trial guarantees had been compromised. They further submitted that the applicant's rights under Article 6 of the Convention had been duly observed in every way.

36. The applicant disagreed. He maintained that the criminal proceedings against him were generally unfair. He further noted that he had not been able to understand fully the nature and the scope of charges against him and to prepare his defence accordingly. In particular, he had been indicted under Article 125 § 3 of the Criminal Code, while the criminal proceedings had been initially instituted with reference to Article 125 § 1 of the same Code.

37. The Court reiterates that the rights guaranteed under Article 6 § 3 (a) must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. It further notes that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 52, ECHR 1999-II). The Court also considers that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence (ibid., § 54).

38. Turning to the facts of the case, the Court notes that the court hearings in the applicant's case, leading to his eventual conviction under Article 125 § 3 of the Criminal Code of 1961 in force at the material time, were held between January 2000 and June 2001. In the meantime, the applicant had been notified of his indictment under the above criminal provision on 12 November 1999 and had further been given full access to the case file on 15 November 1999. In these circumstances the Court finds that the applicant has not made out a valid claim concerning lack of proper notification of the charges against him or availability of necessary time and facilities for preparation of his defence. This part of the application is therefore manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

39. The applicant further complained that his conviction for defamation was contrary to Articles 10 and 11 of the Convention. The Court finds that the applicant's right to freedom of expression is at the heart of this complaint, which falls to be examined under Article 10 of the Convention. The relevant provision reads as follows:

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

rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

40. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

41. The applicant contended that his conviction was not "necessary in a democratic society". As a union leader, not only did he have the right, but he was under a direct duty to bring up the information concerning Mrs P.'s purported abuses. His complaints about her official misconduct directed to the competent authorities and to the Head of the Regional VOST had been drafted in good faith and pursued legitimate public interest. As regards the picketing, the applicant had neither organised it nor had taken part in it or designed the slogans. He could not therefore be held responsible for any dissemination of defamatory information during this action, which, according to his information, had been organised by the Regional VOST and the local branch of the Conservative Party.

42. The Government acknowledged that the applicant's conviction for defamation constituted interference with his rights guaranteed under Article 10 of the Convention. They maintained, however, that this interference was in accordance with the law, pursued a legitimate aim, namely the protection of Mrs P.'s reputation, and was necessary in a democratic society. In this regard they submitted that the applicant had overstepped the limits of permissible criticism of a civil servant, in particular, as he had directly accused Mrs P. of having committed serious criminal offences, thereby undermining her right to presumption of innocence. Furthermore, the financial penalties imposed on the applicant had not been disproportionate to his income, and the prison sentence was not long and in any case the applicant had not served it.

2. The Court's assessment

43. The Court notes at the outset that the domestic judicial authorities referred to two sets of facts as the basis for the applicant's conviction: the letters which he had sent to the KRU and the prosecutor's office demanding investigations into Mrs P.'s purported official misconduct and the picket of 26 May 1997, which he had organised and taken part in.

44. The Court finds it indisputable that the applicant's conviction for defamation under Article 125 § 3 of the Criminal Code constituted interference with his rights guaranteed under Article 10 of the Convention; and that this interference was in accordance with the law and pursued the legitimate aim of protecting Mrs P.'s reputation. It remains to be determined whether this interference was "necessary in a democratic society" or whether, in the circumstances of the present case, a fair balance was struck between the protection of the applicant's freedom of expression and Mrs P.'s reputation, a right which, as an aspect of private life, is protected by Article 8 of the Convention (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 90-91, ECHR 2004-XI).

45. In this regard the Court considers at the outset that the applicant was directly accusing Mrs P. of misappropriation of public funds and property, as well as abuse of her office as a director of a State boarding school. Notwithstanding the particular role played by the applicant in his capacity as union representative, as well as that his statements, which related to official conduct of a public employee, were as such a matter of public concern, the Court finds that he had a duty to react within limits fixed, *inter alia*, in the interest of "protecting the reputation or rights of others", including the presumption of innocence (see *Constantinescu v. Romania*, no. 28871/95, § 72, ECHR 2000-VIII). Moreover, the applicant was obliged to have regard to the duty of loyalty, reserve and discretion owed by him to his employer (see, for example, *Guja v. Moldova* [GC], no. 14277/04, § 70, ECHR 2008-...).

46. The Court further states that the signalling by an employee in the public sector of illegal conduct or wrongdoing in the workplace must be protected, in particular where the employee concerned is a part of a small group of persons aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large (see *Guja*, cited above, § 72). In the light of the duty of discretion referred to above, such disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public (see *Guja*, § 73).

47. In light of these principles, the Court finds that, as regards the fact that the applicant signed several letters to the KRU and the prosecutors' office demanding investigations into Mrs P.'s official conduct, he cannot be reproached for doing so in bad faith, in particular, as he had acted on behalf of his trade union and presented various materials in support of his allegations. The Court finds, therefore, that, in so far as the interference with the applicant's freedom of expression was based on the above letters addressed to the competent authorities, its "necessity" in the present case has not been established.

48. In so far as the applicant's conviction was, however, based on his participation in the picketing of 26 May 1997, the Court notes that the applicant's contention that he had personally not organised and not participated in the action was rejected by the domestic courts of three levels of jurisdiction following adversary proceedings, in the course of which a wide range of evidence, including witness statements, was examined. In the absence of any *prima facie* evidence of procedural unfairness, the Court is not in a position to review this factual conclusion.

49. The Court further notes that the picketing took place following the inquiry by the KRU, revealing some mismanagement of the school property and a further investigation by the prosecutors' office into the allegation of official misconduct against Mrs P. On 28 April 1997 the latter, however, resulted in refusal to institute criminal proceedings against Mrs P. for want of inculpating evidence. One allegation (appropriation of the School video equipment) subsequently led to initiation of criminal proceedings. However, no evidence had been either adduced by the applicant or collected by the prosecution to implicate Mrs P. in the incident. According to the case file materials neither the applicant nor his supporters ever attempted to employ any procedural means available under domestic law to challenge the inefficiencies of the investigations by the KRU or the law-enforcement officials and the refusals to institute criminal proceedings against Mrs P.

50. In the meantime, some slogans displayed during the picketing in front of the District Administration building were phrased in particularly strong terms, directly accusing Mrs P. of misappropriation of School property (see § 16 above). The Court finds that these accusations could, in the circumstances, be taken as allegations of fact, which, in the absence of sufficient proof of their validity could reasonably be deemed defamatory and undermining of Mrs P.'s right to be presumed innocent of serious offences.

51. Regard being had to the nature of the accusations against Mrs P. displayed in the slogans, the applicant's duty of discretion *vis-à-vis* his employer and the fact that he engaged in the public picketing before exhausting other procedural means of complaining about Mrs P.'s official misconduct, the Court accepts that the domestic authorities acted within their margin of appreciation in considering it necessary to convict the applicant for defamation, in so far as his actions concerned organisation of and participation in the picketing. What remains to be determined is whether the interference in issue was proportionate to the legitimate aim pursued, in view of the sanctions imposed (see *Constantinescu*, cited above, § 110).

52. In this regard the Court notes that, besides being ordered to pay fine and a sum in compensation to Mrs P., the applicant was sentenced to one year's imprisonment. The Court considers that, while the Contracting States are permitted, or even obliged, by their positive obligations under Article 8 of the Convention to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals' reputations, they must not do so in a manner that unduly hinders public debate concerning matters of public concern, such as misappropriation of public funds (see, *mutatis mutandis*, *Cumpănă and Mazăre*, cited above, § 113). It further considers that the circumstances of the instant case – a classic case of defamation of an individual in the context of a debate on a matter of public interest – presented no justification for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect on public discussion, and the notion that the applicant's sentence was in fact suspended does not alter that conclusion particularly as the conviction itself was not expunged (see, *mutatis mutandis*, *Cumpănă and Mazăre*, cited above, § 116 and *Salov v. Ukraine*, no. 65518/01, § 115, ECHR 2005-VIII (extracts)).

53. Overall, the Court finds that, in convicting the applicant in respect of the letters he sent to KRU and the prosecutor's office, and in imposing a lengthy suspended prison sentence at the end of the proceedings, the domestic courts in the instant case went beyond what would have amounted to a "necessary" interference with the applicant's freedom of expression.

54. There has therefore been a violation of Article 10 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

55. The applicant also complained under Article 6 § 1 and 3 (c) of the Convention that he had not been duly summoned for the hearing before the Court of Appeal and that the criminal proceedings against him had lasted an unreasonably long time. Lastly, he relied on Article 13 of the Convention and Article 2 of Protocol No. 7 without further specification.

56. Having considered the applicant's submissions in the light of all the material in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

57. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 1, 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. Article 41 of the Convention provides:

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

A. Damage

59. The applicant claimed pecuniary damage in the amount of the fine and the compensation paid by him to Mrs P. as well as 820 euros (EUR) in medical expenses allegedly sustained on account of stress caused by his unfair criminal persecution. He also claimed EUR 5,000 in respect of non-pecuniary damage.

60. The Government contested these claims as unsubstantiated.

61. Regard being had to the nature of the violation found in the present case, the Court finds no causal link between it and the pecuniary damage claimed by the applicant. It therefore dismisses the claim for pecuniary damage. The Court accepts, on the other hand, that the applicant has suffered non-pecuniary damage – such as distress and frustration resulting from violation of his right under Article 10 of the Convention – which cannot be sufficiently compensated by the mere finding of a violation of the Convention. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,000 under this head.

B. Costs and expenses

62. The applicant also claimed UAH 5,800 in legal fees, translation and copying expenses and UAH 336.74 in postal expenses incurred in connection with his correspondence with the Court as well as with various domestic authorities. He presented receipts for the postal services.

63. The Government submitted that the applicant's claim was substantiated only in so far as it related to his correspondence with the Court.

64. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 50 covering costs under all heads.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 10 admissible and the remainder of the application inadmissible;

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

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros) in respect of non-pecuniary damage and EUR 50 (fifty euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant, to be converted into the currency of Ukraine at the rate applicable at the date of settlement;

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

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

Done in English, and notified in writing on 19 February 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

4.3 Case of Tillack v. Belgium

Application no. 20477/05
JUDGMENT
STRASBOURG
27 November 2007
FINAL
27/02/2008

PROCEDURE

1. The case originated in an application (no. 20477/05) against the Kingdom of Belgium, lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Hans Martin Tillack ("the applicant"), on 30 May 2005.

2. The applicant was represented by Mr I. Forrester and Mr T. Bosly, lawyers practising in Brussels. The Belgian Government ("the Government") were represented by their Agent, Mr D. Flore, Senior Adviser, Federal Justice Department. The German Government, having been informed of their right to take part in the proceedings (Article 36 § 1 of the Convention and Rule 44 § 1 of the Rules of Court), did not respond.

3. In his application, Mr Tillack alleged in particular that search and seizure operations carried out at his home and at his place of work had violated Article 10 of the Convention.

4. On 29 August 2006 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS
I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1961 and lives in Berlin.

66. He is a journalist on the German weekly magazine *Stern*. From 1 August 1999 until 31 July 2004 he was assigned to Brussels to report on the policies of the European Union and the activities of the European institutions.

7. On 27 February and 7 March 2002 *Stern* published two articles by the applicant based on confidential documents from the European Anti-Fraud Office (OLAF). The first article reported on allegations by a European civil servant concerning irregularities in the European institutions. The second concerned the internal investigations OLAF had carried out into those allegations.

8. A rumour began to circulate within OLAF that the applicant had paid 8,000 euros (EUR) or German marks (DEM) to a European civil servant in exchange for this information.

9. On 12 March 2002 OLAF, suspecting the applicant of having bribed a civil servant in order to obtain confidential information concerning investigations in progress in the

European institutions, opened an internal investigation to identify the person who had disclosed the information to the applicant.

10. The minutes of an OLAF Supervisory Committee meeting held on 9 and 10 April 2002 stated in particular:

> "The members of the Supervisory Committee noted that the journalist's articles were not at all aggressive in tone but hinted at the real situation, as was often the case with individuals. They were surprised that OLAF's press release referred to a payment for such information. Consequently, they wished to be informed whether such a payment had been made and whether any serious evidence existed in this regard."

11. In a letter of 24 March 2003 written in the course of his inquiry into a complaint (no. 1840/2002/GG) filed by the applicant against OLAF, the European Ombudsman indicated that the suspicions that the applicant had bribed an OLAF official had originated from "information from reliable sources, including members of the European Parliament".

12. On 30 September 2003 OLAF issued a press release entitled "OLAF clarification regarding an apparent leak of information". The press release was worded as follows:

> "On 27 March 2002, the European Anti-Fraud Office (OLAF) issued a press release announcing that it had opened an internal investigation under Regulation 1073/1999 into an apparent leak of confidential information included in a report prepared within OLAF. It stated that according to information received by the Office, a journalist had received a number of documents relating to the so-called '... affair', and that it was not excluded that payment might have been made to somebody within OLAF (or possibly another EU institution) for these documents. OLAF's enquiries have not yet been completed but to date, OLAF has not obtained proof that such a payment was made."

13. On 30 November 2003 the European Ombudsman issued his decision. He had already submitted a draft recommendation to OLAF on 18 June 2003. The decision, which essentially reproduced the conclusions set out in the draft, stated in particular:

> "...
>
> 1.7 ... by publishing this press release, OLAF has not adequately implemented the Ombudsman's draft recommendation. Instead of withdrawing the allegations of bribery, OLAF simply states that 'to date' it has not found sufficient evidence to support these allegations. The wording of this press release thus implies that OLAF considers it possible that evidence supporting these allegations could still emerge. In these circumstances, the action taken by OLAF is manifestly inadequate to remedy the instance of maladministration that the Ombudsman has identified. A critical remark will therefore be made in this respect.
>
> ...
>
> **4. Conclusion**
>
> 4.1 On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:
>
> By proceeding to make allegations of bribery without a factual basis that is both sufficient and available for public scrutiny, OLAF has gone beyond what is proportional to the purpose pursued by its action. This constitutes an instance of maladministration."

14. On 11 February 2004 OLAF lodged a complaint with the Belgian judicial authorities, submitting a report on the internal investigation it had carried out. It also referred the matter to the German judicial authorities.

15. Consequently, on 23 February 2004, an investigation was opened in respect of a person or persons unknown for breach of professional confidence and bribery involving a civil servant.

16. On 19 March 2004, at the request of the investigating judge, the applicant's home and workplace were searched by the Belgian judicial authorities. Almost all of the applicant's working papers and tools were seized and placed under seal (sixteen crates of papers, two boxes of files, two computers, four mobile telephones and a metal cabinet). It appears that the search warrant was not handed to the applicant but was read out to him. No inventory of the items seized was drawn up. On that occasion, the criminal investigation department apparently led the applicant to believe that the search was in response to a complaint lodged by OLAF, which suspected him of having bribed a European civil servant in order to obtain confidential information. According to the applicant, the authorities subsequently lost a whole crate of papers, which was not found until more than seven months later, in November 2004.

17. On 29 March and 15 April 2004 the applicant applied to the Principal Public Prosecutor at the Brussels Court of Appeal for leave to consult the investigation file. His application was refused in a letter dated 17 June 2004.

18. The applicant applied again on 28 June 2004, to no avail.

19. In the meantime, on 24 March 2004, he had applied to the investigating judge to have the measures relating to the seizure discontinued.

20. By an order of 8 April 2004 the investigating judge rejected his application.

21. The applicant appealed, alleging, *inter alia*, a breach of Article 10 of the Convention.

22. The Indictment Division upheld the order on 22 September 2004, holding as follows:

> "The question whether or not protection of the confidentiality of sources of information used by journalists constitutes a right inherent in press freedom, and, if so, whether that right has an absolute value or is subject to restrictions, has not yet been established in law.
>
> The actual wording of Article 10 of the European Convention on Human Rights does not recognise the protection of journalistic sources, a right which has developed through the case-law of the European Court of Human Rights, albeit without having been enshrined as an absolute value according to legal authorities (see, to this effect, the judgment of the European Court of Human Rights in the case of *Ernst and Others v. Belgium*, 15 July 2003, no. 33400/96, *Human Rights Information Bulletin* no. 60, July-October 2003, pp. 4-5).
>
> Recent legislative initiatives tend to acknowledge that journalists are entitled to protect their sources of information, although the exercise of this right does not give rise to immunity from prosecution or from civil liability (see in this connection the

Bill granting journalists the right not to disclose their sources of information, passed by the Belgian House of Representatives on 6 May 2004, and the opinion of the National Council of Justice on the legislative proposals to grant journalists the right to protect their sources of information, approved by the General Assembly on 4 February 2004).

The investigative measure complained of is, admittedly, an interference in the rights guaranteed by Article 10 of the ECHR. It was, however, lawfully ordered by the competent investigating judge in connection with the matter referred to him.
It pursues legitimate aims since, in the context of the information in the case file brought to the attention of the court, whereby the applicant is charged as principal or joint principal in a case of bribery intended to secure the disclosure of confidential information, its purpose is to 'verify whether the protection of confidentiality applies to a lawful or unlawful source; the latter must be overridden by a superior value, namely the prevention of crime' (written application by the Principal Public Prosecutor of 18 June 2004, p. 14).

As is rightly noted by the investigating judge, it is not acceptable that the right to protect sources can be used to cover up offences, since this would deprive that right of its purpose, notably the provision of accurate and reliable information to the public, and would be likely to jeopardise public safety by creating *de facto* impunity (see to this effect the judgment of the European Court of Human Rights of 15 July 2003, *JLMB*, 2003, p. 1524).
...
In the instant case, as the investigating judge noted in the order appealed against, in particular on page 3, paragraph 2.3.1, the requirements of the investigation still dictate that the orders for items to be seized and placed under seal should be maintained, being justified by the ongoing duty to investigate, the sole manifest aim of which is to verify the good faith of the applicant in seeking to establish the truth in the context of the preventive measures underlying the referral to the investigating judge.
The arguments advanced by the applicant in his submissions to this court, which cannot substitute its own findings for those of the court below, do not give rise to any doubt in this respect.

It follows that the appeal is unfounded."

23. The applicant appealed on points of law. Relying in particular on Articles 6, 8 and 10 of the Convention, he submitted that freedom of expression included the freedom to seek out and collect information, essential aspects of journalistic activity. According to the applicant, that meant that journalists' sources were to be protected and kept confidential and that the judicial authorities were prohibited from taking measures or decisions intended to force journalists or organs of the press to reveal their sources. The applicant also complained that since he had not had access to the investigation file, he had been unable to inspect the evidence deemed to be serious and relevant which had been used to justify the search.

24. By a judgment of 1 December 2004 the Court of Cassation dismissed the appeal. It held that Article 10 of the Convention authorised restrictions on freedom of expression, that the search and seizure were provided for by the Code of Criminal Procedure and that the Indictment Division had given sufficient and adequate reasons for its decision. The Court of Cassation further held that the lawfulness of a search was not dependent upon the existence

of strong evidence of the guilt of the person at whose home or workplace the search was carried out. It was sufficient for the investigating judge to have evidence suggesting that that these premises might be harbouring documents or items useful in establishing the truth concerning the offences mentioned in the search warrant. Consequently, the objection raised by the applicant was outside the scope of the review of the lawfulness of the investigation and did not constitute a ground permitted by law to support an appeal on points of law under Article 416 § 2 of the Code of Criminal Procedure, and was therefore inadmissible.

25. In the meantime, on 1 and 4 June 2004, the applicant had lodged two applications with the Court of First Instance of the European Communities. The first sought the annulment of the complaint filed by OLAF and compensation for the harm allegedly caused to the applicant's career and reputation. The second sought a temporary injunction prohibiting OLAF from inspecting any document seized during the searches at issue. By an order of 15 October 2004 the President of the court dismissed the applications. The President ruled that OLAF's decision to forward the report on the internal investigation had no binding legal effect and could not therefore be the subject of an action for annulment. He stressed in particular that OLAF's conclusions set out in a final report could not automatically give rise to the opening of judicial or disciplinary proceedings, given that the competent authorities remained free to decide on the action to be taken in relation to the report. As regards the applicant's application for interim measures, he ruled that there was no causal link between the alleged harm and OLAF's action and that it had not been established that OLAF had acted in breach of the principles of good administration and proportionality.

26. The applicant appealed. By an order of 19 April 2005 the President of the Court of Justice of the European Communities upheld the order.

27. In the context of those proceedings, the applicant received a copy of OLAF's complaint but not of the other documents in the criminal file. At that time, he had not been charged in Belgium. On 17 November 2006 the Hamburg public prosecutor informed the applicant's counsel that the investigation in Germany had been closed without any charges being brought.

28. On 12 May 2005 the European Ombudsman drafted a special report for the European Parliament following the draft recommendation he had addressed to OLAF in connection with a fresh complaint filed by the applicant (2485/2004/GG). In the complaint the applicant alleged that during the inquiry into complaint no. 1840/2002/GG, OLAF had provided incorrect information that was prone to mislead the Ombudsman; he requested the latter to conduct a new inquiry.

29. In his above-mentioned report, the Ombudsman stated that the alleged remarks by the members of the European Parliament (see paragraph 11 above) had probably never been made. They were rumours circulated by another journalist, Mr G., which the Director General of OLAF had not bothered to check with the members of the European Parliament concerned.

30. In his recommendation, the Ombudsman concluded that OLAF should acknowledge that it had made incorrect and misleading statements in its submissions to the Ombudsman in the context of the latter's inquiry into complaint no. 1840/2002/GG.

II. RELEVANT DOMESTIC AND EUROPEAN LAW

31. Article 458 of the Belgian Criminal Code provides:

> "Medical practitioners, surgeons, health officers, pharmacists, midwives and all other persons who, by reason of their status or profession, are guardians of secrets entrusted to them and who disclose them, except where they are called to give evidence in legal proceedings (or to a parliamentary commission of inquiry) or where the law requires them to do so, shall be liable to imprisonment for between eight days and six months and a fine ranging from one hundred to five hundred francs."

32. The relevant provisions of the Code of Criminal Procedure read as follows:

Article 87

> "The investigating judge may, if required to do so or of his own motion, visit the home of the accused to search papers, effects and, in general, any items that may be deemed useful in establishing the truth."

Article 88

> "Similarly, the investigating judge may visit any other places at which he suspects that the items referred to in the preceding paragraph may have been hidden."

33. Article 8 of Regulation EC No. 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by OLAF provides as follows in respect of confidentiality and data protection:

> "1. Information obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions.
> 2. Information forwarded or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given by the provisions applicable to the institutions of the European Communities.
> Such information may not be communicated to persons other than those within the institutions of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity.
> ..."

34. Article 16 of the same Regulation provides that it is binding in its entirety and directly applicable in all Member States.

35. Paragraph 4 of Article 280 of the EEC Treaty states as follows;

> "The Council, acting in accordance with the procedure referred to in Article 251, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the protection of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

36. The applicant alleged that the searches and seizures carried out at his home and place of work had violated his right to freedom of expression as provided under Article 10 of the Convention, the relevant part of which reads as follows:

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

A. Admissibility

37. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other ground. Accordingly, it must be declared admissible.

B. Merits

1. Arguments of the parties

(a) The applicant

38. Firstly, the applicant maintained that the proceedings had not been directed against him in any way. Criminal law must be interpreted strictly and, since it had not been shown that the conditions for application of Article 458 of the Criminal Code had been met, the Government's contention that that Article was applicable in the instant case had to be rejected. Furthermore, professional secrecy as enshrined in Article 8 of Regulation EC No. 1073/1999 did not equate to professional secrecy for the purposes of Article 458 of the Criminal Code, since the latter Article was intended to protect the interests of individuals and concerned personal data which had come to a person's knowledge in the performance of his or her duties. The professions satisfying the relevant criteria were those which, owing to the nature of their activities, placed those who carried them out in a situation in which they would become aware of hidden aspects of private life (for example, medical practitioners, ministers of religion, lawyers or notaries). The information allegedly disclosed by the OLAF official, assuming that it was covered by professional secrecy under the Regulation, had in no way concerned personal matters relating to the private life of an individual for the purposes of Article 458 of the Criminal Code.

39. European civil servants were not explicitly covered by Article 458, as was manifestly obvious from the text itself.

40. The Regulation, despite being directly applicable in the Belgian legal order, had been adopted on the basis of Article 280 of the EEC Treaty (see paragraph 35 above), from which it followed that the Regulation in question did not seek to define or redefine any particular

provision of the Belgian Criminal Code. This simply confirmed that failure to observe the professional secrecy by which OLAF officials were bound did not constitute an offence under Belgian criminal law.

41. Article 8 § 2 of the Regulation, which dealt with professional secrecy, provided that the information covered by such secrecy "shall enjoy the protection given by the provisions applicable to the institutions of the European Communities". Accordingly, no reference was made to the provisions of domestic law. A breach of the duty of non-disclosure to which the Staff Regulations of Officials of the European Communities referred or of the professional secrecy to which European civil servants were subject by virtue of the Regulation was punishable in disciplinary rather than criminal proceedings.

42. The applicant challenged both the lawfulness and the legitimacy of the searches complained of. Relying on the case-law as it had stood at the time of the searches, he argued firstly that although the Protection of Journalists' Sources Act of 7 April 2005 had been passed after the searches had been carried out, it was applicable by analogy in the instant case. In his submission, that Act had set forth in law the principles reaffirmed on many occasions by the Court, which had already been applied in the Belgian legal system. The applicant further argued that the searches had been unlawful as they had not been carried out in pursuit of any of the aims referred to in paragraph 2 of Article 10, but merely in order to discover the applicant's source, that is to say, the name of the OLAF official who had breached professional secrecy, or evidence of possible bribery.

43. As to whether the interference had been necessary, the applicant pointed out that no charges had ever been brought against him, the searches having been carried out in respect of a person or persons unknown. In his submission, the fact that the published articles contained confidential information proved at most that an OLAF official had probably disclosed confidential information. However, that fact did not provide evidence of any offence by a third party, let alone by the applicant. Moreover, the judicial authorities had failed to check the information referred to in OLAF's interim report before conducting the searches complained of. Such an attitude constituted unacceptable negligence. The report could in no way be treated as a criminal complaint, but merely as the transmission of information by OLAF to the Belgian authorities. The forwarding of this report had not given rise to any obligation on the part of the judicial authorities, which had to assume full responsibility for checking the accuracy of the information contained therein and determining whatever action they considered appropriate to take on it. The report was not in itself sufficient proof of the lawfulness and legitimacy of the searches.

44. The applicant added that the report had been worded in hypothetical terms and based exclusively on rumours. A simple reading of the text showed that OLAF had obtained only one witness statement, that of J.G., who had said that for the sum of EUR or DEM 8,000, the applicant had obtained confidential information from an OLAF official working at the material time for a European Commissioner and for the Commission spokesperson, who had both been criticised in the articles published by the applicant. Faced with the clear lack of impartiality of the only witness statement on which the OLAF report was based, the investigating judge should, at the very least, have questioned J.G. to confirm his allegations before ordering the searches. In the applicant's view, such checks had been all the more necessary since the searches had not concerned an ordinary individual but a journalist. Moreover, the Belgian courts had taken the view that the conviction of a journalist for

handling information disclosed in breach of professional confidence or for aiding and abetting such a breach should be regarded as contrary to Article 10.

45. The applicant further complained that the seizures carried out had been disproportionate. In support of his argument, he pointed out that the judicial authorities had not been able, either during the searches or subsequently, to provide him with an inventory of the items seized, on the pretext that it would be too burdensome to draw up a full list. Moreover, the authorities had lost a crate of documents, which the police had not found until more than seven months later, in November 2004.

46. The applicant lastly contended that to cooperate with the investigating judge and provide documents possibly revealing the identity of his source would have been inconsistent with his obligations as a journalist, as laid down in the Declaration of the Rights and Duties of Journalists adopted in Munich on 25 November 1971 by the International Federation of Journalists, the Code of the Principles of Journalism adopted by the Belgian Association of Newspaper Publishers, the National Federation of Weekly Newspapers and the Belgian General Association of Professional Journalists, and the Resolution on journalistic freedoms and human rights adopted in December 1994 at the fourth European Ministerial Conference on Mass Media Policy.

(b) The Government

47. Referring to the relevant provisions of the Code of Criminal Procedure and to the Court's conclusions in its *Ernst and Others v. Belgium* judgment (no. 33400/96, 15 July 2003), the Government submitted that it was futile for the applicant to contest the legal basis for the interference. As regards the applicant's claim that the breach of professional secrecy by a European civil servant did not constitute an offence under Belgian law, the Government pointed out that Article 458 of the Criminal Code imposed a duty of professional secrecy on "all ... persons who, by reason of their status or profession, are guardians of secrets entrusted to them". European civil servants, including OLAF officials, were guardians, by reason of their profession, of secrets entrusted to them; Article 458 of the Criminal Code therefore applied expressly to them. Furthermore, and above all, Article 8 of Regulation (EC) No. 1073/1999, directly applicable in the Member States, made OLAF officials subject to professional secrecy, and the crucial issue in the present case was that there was an obligation on OLAF officials to observe professional secrecy. As regards the applicant's initial allegation that the searches complained of were illegal on the ground that bribery could not justify either a search or a seizure, the Government noted the applicant's subsequent statement that "corruption constitutes a crime which, from a theoretical point of view, and in certain conditions defined by law, may justify searches under Belgian law".

48. The Government further submitted that the legitimacy of the interference had been established; the measures complained of had been intended to prevent the disclosure of information received in confidence and to prevent disorder and crime. Since the searches and seizures had been carried out in the context of the investigation conducted by the judicial authorities, it could not be disputed that they had pursued a legitimate aim.

49. As to whether the interference had been necessary, the Government drew the Court's attention to one factor that in their submission fundamentally set this case apart from other cases dealt with by the Court concerning the protection of journalistic sources, namely the applicant's conduct. In the instant case, the purpose of the searches and seizures had been not

only to reveal the identity of the person who had breached the duty of professional secrecy by which he was bound, but also to find evidence that the applicant had offered and accepted bribes as principal or joint principal. The protection of sources could not be relied upon to cover up offences committed by journalists and to grant them immunity from prosecution. In *Fressoz and Roire v. France* ([GC], no. 29183/95, §§ 52 and 55, ECHR 1999-I), the Court itself had stressed that the press must not go beyond certain limits and must obey the criminal law and act in accordance with professional ethics.

50. In the Government's submission, observance of criminal laws and the fight against corruption constituted an "overriding public interest" that had to prevail over the protection of sources. In the instant case, the articles published by *Stern* magazine and written by the applicant contained confidential information based on confidential documents emanating from OLAF. The investigating judge had had serious and precise information leading him to presume that the applicant had bribed a civil servant in order to obtain additional information. This presumption had been all the more legitimate since the information in question came from OLAF, a European agency with a sound reputation specifically engaged in the fight against corruption.

51. OLAF had taken care to carry out an internal investigation before lodging its criminal complaint. The investigating judge had therefore had every reason to believe that the offences complained of by OLAF were not merely allegations made and circulated recklessly. The measures at issue had therefore not been intended as a means of "fishing" for offences as yet unknown, but had sought to reveal the truth as to the applicant's alleged misconduct. The national courts had furthermore approved the choice made by the investigating judge. The Court of Cassation had remarked that in order to assess the lawfulness of a search, "it [was] sufficient for the investigating judge to have evidence suggesting that the premises might be harbouring documents or items useful in establishing the truth concerning the offences mentioned in the search warrant". The obvious conclusion was that at the material time there had been relevant evidence to justify the impugned measures.

52. Lastly, the Government submitted that the impugned measures had complied with the principle of proportionality. They contended that the national courts were better placed than the Court to assess the proportionality of such measures and that it was extremely tricky to rule on questions of this nature, which were entirely dominated by the factual circumstances of each case. They concluded that the Court's supervision could only be marginal. They further submitted that no criticism could be attached to the fact that the search had lasted eight hours since it would clearly be unreasonable to expect the authorities to survey the premises in a short period of time. They pointed out that a cabinet had been sealed at the scene following the applicant's refusal to hand over the key to open it. The authorities had even suggested that the applicant tell them which documents he needed most so that they could examine them first.

2. The Court's assessment

(a) General principles

53. Freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. Protection of journalistic sources is one of the cornerstones of freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public on

matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest (see *Goodwin v. the United Kingdom*, 27 March 1996, § 39, *Reports of Judgments and Decisions* 1996-II; *Roemen and Schmit v. Luxembourg*, no. 51772/99, § 57, ECHR 2003-IV; and *Ernst and Others*, cited above).

54. The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports* 1997-I, and *Fressoz and Roire*, cited above, § 45).

55. As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In cases concerning the press, such as the present one, the national margin of appreciation is circumscribed by the interest of a democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued (see, *mutatis mutandis*, *Goodwin*, cited above, § 40, and *Worm v. Austria*, 29 August 1997, § 47, *Reports* 1997-V).

(b) Application of the above-mentioned principles in the instant case

56. In the present case, the Court considers that the searches at the applicant's home and place of work undoubtedly amounted to an interference with his rights under paragraph 1 of Article 10. The Government admitted as much.

57. Such interference will breach Article 10 unless it was "prescribed by law", pursued one or more legitimate aims under paragraph 2 and was "necessary in a democratic society" to achieve those aims.

(i) Prescribed by law

58. The Court, reiterating that it is primarily for the national authorities to interpret and apply domestic law, considers that the searches were indeed prescribed by law, namely by the various provisions of the Code of Criminal Procedure referred to by the Government (see paragraph 32 above). The way in which these provisions were applied in the present case may affect the Court's assessment of the necessity of the measure (see *Ernst and Others*, cited above, § 97).

(ii) Legitimate aim

59. In the Court's opinion, the interference pursued the "legitimate aim" of preventing disorder and crime and also sought to prevent the disclosure of information received in confidence and to protect the reputation of others.

(iii) Necessary in a democratic society

60. The main issue is whether the impugned interference was "necessary in a democratic society" to achieve that aim. It must therefore be ascertained whether the interference met a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient.

61. The Court notes that the facts of the case are similar to those in the cases of *Roemen and Schmit* and *Ernst and Others* cited above. The Government submitted that this case differed from the others on account of the conduct of the applicant, who had not been a passive party in the leak of confidential information but had brought it about himself by bribing the OLAF official. The Court notes that OLAF opened an internal investigation to reveal the identity of the official who had disclosed this information to the applicant and published a press release in which it informed the public that it could not be ruled out that a payment might have been made to one of its officials (see paragraphs 9 and 12 above). OLAF even told the European Ombudsman, in the course of the inquiry into complaint no. 1840/200 GG filed by the applicant against OLAF, that the suspicions of bribery had arisen out of information from reliable sources, including members of the European Parliament (see paragraph 11 above). In his decision of 30 November 2003 the European Ombudsman concluded that by proceeding to make allegations of bribery without a factual basis that was both sufficient and available for public scrutiny, OLAF had gone beyond what was proportional to the purpose pursued by its action, which constituted an instance of maladministration (see paragraph 13 above).

62. Since the internal investigation was not able to determine who was responsible for the leak, OLAF filed a complaint against the applicant on 11 February 2004 with the Belgian judicial authorities, which opened an investigation into bribery of a civil servant (see paragraphs 14-15 above). On 19 March 2004 the applicant's home and place of work were searched (see paragraph 16 above).

63. It is clear that, at the time when the searches in question were carried out, their aim was to reveal the source of the information reported by the applicant in his articles. Since OLAF's internal investigation did not produce the desired result, and the suspicions of bribery on the applicant's part were based on mere rumours, as revealed by the European Ombudsman's inquiries on two occasions in 2003 and 2005, there was no overriding requirement in the public interest to justify such measures.

64. They therefore undoubtedly impinged on the protection of journalists' sources. The fact that the searches and seizures apparently proved unproductive did not deprive them of their purpose, namely to establish, for the benefit of OLAF, the identity of the person responsible for disclosing the confidential information (see, *mutatis mutandis*, *Ernst and Others*, cited above, § 100).

65. The Court emphasises that the right of journalists not to disclose their sources cannot be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, to be treated with the utmost caution. This applies all the more in the instant case, where the suspicions against the applicant were based on vague, unsubstantiated rumours, as was subsequently confirmed by the fact that he was not charged (see paragraph 27 above).

66. The Court further notes the amount of property seized by the authorities: sixteen crates of papers, two boxes of files, two computers, four mobile telephones and a metal cabinet. No inventory of the items seized was drawn up. The police even apparently lost a whole crate of papers, which were not found until more than seven months later (see paragraph 16 above).

67. The Court is thus of the opinion that while the reasons relied on by the national courts may be regarded as "relevant", they were not "sufficient" to justify the impugned searches.

68. It concludes that the measures complained of are to be considered disproportionate and, accordingly, that they breached the applicant's right to freedom of expression enshrined in Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

69. The applicant complained of a violation of his right to a fair trial. He relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal."

70. The applicant submitted that there had been a breach of the principle of equality of arms both before the Indictment Division and before the Court of Cassation, since those courts, in refusing to discontinue the seizures complained of, had ruled that the complaint by OLAF was well-founded. He also complained that he had not had access to the investigation file.

71. The Court reiterates that equality of arms requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent. The Court cannot see anything in the complaint, as formulated by the applicant, that might undermine this equality. Furthermore, according to the information in the case file, the applicant was never charged or committed for trial. On the basis of the information produced, the Court finds no appearance of a violation of this provision of the Convention.

72. It follows that this complaint must be dismissed as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

73. Article 41 of the Convention provides:

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

A. Non-pecuniary damage

74. The applicant submitted that he had suffered damage not only as a result of having been deprived of his working documents and information media that had been removed by the

police but also as a result of his loss of credibility in the eyes both of the public and of anyone who might be able to provide him with information as a journalist. Confidence in his ability to protect the anonymity of his sources, a vital part of a journalist's profession, had been irrevocably shaken. He maintained that as a result, he was no longer in a position to cover the work of the European Commission as he had done in the past, since his potential sources of information no longer had any confidence in his ability to keep their identities secret. Furthermore, the searches carried out at his home and place of work had damaged his honour. Lastly, he submitted that he was unable to carry on his work in decent conditions, since approximately one thousand pages of documents useful for his work had been seized.

He claimed 25,000 euros (EUR) *ex aequo et bono* in respect of the non-pecuniary damage thus sustained.

75. The Government submitted as their main argument that if the Court were to find that a violation could be attributed to the Belgian State, it would be for the applicant to establish before the national courts the damage he had sustained. It followed from the settled case-law of the Court of Cassation that by virtue of the principles governing redress for damage arising out of a legislative error ranking as a tort, reparation must be made for the fault committed by the State. In the alternative, the Government submitted that the applicant had furnished no evidence to support his claims.

76. The Court has no doubt that in the circumstances of the case, the searches and seizures carried out at the applicant's home and place of work caused him anxiety and distress. Ruling on an equitable basis, as required by Article 41, the Court awards him the sum of EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

77. The applicant asserted that the costs and fees of his lawyers relating to his representation amounted to EUR 116,422.43, although the services actually provided by his counsel were considerably in excess of that amount. His employer had agreed to advance that sum. He submitted that half of the services provided related to his representation before the Belgian courts and before the Court. He sought a lump sum of EUR 50,000.

78. The Government submitted that the applicant had not explained in sufficient detail how he had arrived at that exact figure.

79. The Court reiterates that costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI). Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see *Van de Hurk v. the Netherlands*, 19 April 1994, § 66, Series A no. 288).

80. The Court notes that the applicant has submitted three invoices to it (amounting to a total of EUR 98,864.66) in relation to steps taken by his lawyers in 2004 and his representation before the Belgian authorities. The Court does not doubt that the purpose of such steps was essentially to secure redress for the Convention violations alleged before the Court. It further notes the applicant's statement that a large part at least of his lawyers' fees has been advanced by *Stern* magazine.

81. Having regard to the circumstances of the case and ruling on an equitable basis as required by Article 41 of the Convention, the Court finds it reasonable to award EUR 30,000, plus VAT, in respect of all costs incurred in Belgium and in Strasbourg.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 10 of the Convention admissible and the remainder of the complaint inadmissible;

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

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage and EUR 30,000 (thirty thousand euros) in respect of costs and expenses, plus any tax that may be chargeable on the above amounts;

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

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

Done in French and notified in writing on 27 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.