REASONING OF JUDICIAL DECISIONS

A practical handbook

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

REASONING OF JUDICIAL DECISIONS

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LIST OF ACRONYMS

CCJE

Consultative Council of European Judges

CEPEJ

Council of Europe European Commission for the Efficiency of Justice

CM

Committee of Ministers of the CoE

CoE

Council of Europe

ECHR

European Convention on Human Rights (the Convention)

ECtHR

European Court of Human Rights (the Court)

Introduction

The present work was developed in the framework of the project "Support to the Constitutional Court in applying and disseminating the European Human Rights standards," with a view to providing judges and other judicial professionals with a practical and easy to use manual summarising the most essential ideas and tools relating to the drafting and reasoning of judicial decisions. This handbook also represents a versatile tool that can be used in the process of professional trainings for the justice professionals, as a useful material to guide them in the understanding of the international standards in the area of drafting of judicial decisions.

This work is structured around three main parts. In the first part, the format is that of questions and answers that allow to define the content of right and obligation to a reasoned judgment, including with reference to the applicable quality standards and the process of drafting a well - reasoned judicial decisions. This layout has the advantage of enabling a user - friendly consultation of the material proposed.

The second part contains practical guidelines related to the reasoning and logic of judicial decisions, including practical tips derived from the European Court of Human Rights (ECtHR)2s judgments on how to draft the various parts of judgements.

In the third part, specific ECtHR and national case - law is used to provide practical examples of good practices and critical instances related to judicial reasoning. Recourse to real examples of wording of judgments, both at ECtHR and national level, will help the users in viewing that drafting of judicial decisions is a process each stage of which has certain peculiarities.

Where does the right to a reasoned judgment stem from?

Article 6 of the European Convention on Human Rights (hereinafter ECHR or the Convention) guarantees the right to a fair and public hearing in both criminal and civil cases. This right encompasses, prior to the establishment of proceedings, the right of access to court and, as a result of the case, the right of the parties to have a reasoned judgment. This, irrespective of whether the decision is "right" or "wrong", Indeed, deficiencies in the court's reasoning can affect the fairness of the whole proceedings.

Depending of the perspective, that is of the party to a procedure or the judge, this aspect of fair trial can be either defined as a right (of the defendant/plaintiff), or an obligation (of the judge).

The above - mentioned is well established in the European Court of Human Rights (ECtHR)'s case - law. This reflects a principle linked to the proper administration of justice, according to which judgments of courts and tribunals should adequately state the reasons on which they are based. Failure to do so will result in a trial being "unfair"

The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case.

Without requiring a detailed answer to every argument advanced by the complainant, this obligation presupposes that parties to judicial proceedings can expect to receive a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings.

Generally, a domestic judicial decision will only be described as arbitrary, thus prejudicing proceedings, where there are no reasons provided for it at all, or where the reasons provided are based on manifest factual or legal error committed by the domestic court, resulting in a "denial of justice".

Is Article 6 ECHR the only source of the right/obligation to a reasoned judgment?

The guarantees encompassed by the Article 6 ensure procedural fairness. Consequently, Article 6 is raised by the applicants in court proceedings in conncetion to other Articles of the ECHR, which enshrine substantive rights.

Article 6 ECHR is not the only source of the obligation of courts to provide for a reasoned judgment. Similar obligations can be derived from other ECHR provisions, for instance in the criminal sphere in connection with Articles 2 (Right to life) and 3 (Prohibition of torture) - an example of which could be the need that a decision not to launch an investigation into suspicious deaths or allegations of ill - treatment be adequately reasoned - or Article 5 ECHR (Right to liberty and security), where lack of reasoning in connection with a deprivation of liberty can determine the unlawfulness of the detention ordered.

In relation to civil proceedings, Articles 8 (Right to private and family life) or 10 (Freedom of expression) ECHR also entail an obligation to providing for sufficient reasons justifying an interference into substantive rights.

Do all decisions need to be reasoned?

According to the ECHR case - law, courts should give sufficient reasons for their judgments, both for civil and criminal decisions. This raises the question whether all decisions rendered by courts should be reasoned. This depends on the provisions of each domestic law but, as a general guideline, it may be considered that, unless otherwise stated, decisions involving the management of the case (for example, a decision adjourning the hearing) do not need specific reasons. In principle, the obligation to state reasons should be reserved to interlocutory and final decisions. The extent of the obligation to give reasons varies according to the nature of a decision and the circumstances of a case.

For example, an appellate court could comply with their obligation to provide sufficient reasoning, simply by incorporating or endorsing the reasoning of a lower court when dismissing an appeal. This, however, would require two pre requisites: a) the previous decision was already sufficiently reasoned, allowing parties to make effective use of their right of appeal and b) the lower court decision addressed the essential issues which were submitted to the appelate jurisdiction.

Are there situations requiring a special duty to reason?

In the criminal sphere, as regards the reasonable foreseeability of the judicial interpretation, it must be assessed if the accused could reasonably have foreseen at the material time, if necessary, with the assistance of a lawyer, that s/he risked being charged with and convicted of the crime in question and that s/he would incur the penalty which that offence carried.

Special diligence in the reasoning in regard to the question of foreseeability is required, if:

- **the conviction would lead to a reversal of the current case - law (Del Rio Prada v. Spain, [GC])**
- **the conviction would be the first application of a criminal provision (Jorgic v. Germany).**
- **the conviction would amount to an extensive interpretation to the accused's disadvantage, eg by analogy (Vasiliauskas v. Lithuania, [GC]: interpretation of genocide)**
- **the conviction concerns a conduct that has been tolerated for a long time - de facto decriminalization (Khodorkovskiy and Lebedev v. Russia: the mere fact that other individuals were not prosecuted alone cannot render a conviction unforeseeable).**

As a general rule the requirements to the reasoning depend also on the defence, whose main arguments should be tackled. The level of scrutiny displayed by the reasons is, thus, higher the weightier the reasons advanced by the accused are.

What is the standard of reasoning obligations when assessing the compatibility of an interference with a Convention right?

Qualified rights (Articles 8 - private and family life; 9 - freedom of thought, conscience and religion; 10- freedom of expression; 11 - freedom of assembly and association; 1 of Protocol No. 1 - protection of property; 2 of Protocol No. 4 freedom of movement), can be the subject of interferences by the State. Assessment of whether the interference is justified or not is a matter of balancing conflicting rights - those of the individual and of the community at large. In order to facilitate this process, the ECtHR has developed the so called " 3 part test ", which is composed of questions to be run in sequence. Should the answer be negative, the ECtHR stops the examination of the case and establishes a breach of the provision at stake.

The 3 step test

1. Requisite of legality : was the intereference conducted in accordance with law?

Remember!

The term "law" has an autonomous meaning under the Convention and is interpreted in a substantive, rather than formalistic desigination of the legal act. This requisite of legality does not only necessitate compliance with domestic law but also relates to the quality of that law, requiring it to be compatible with the rule of law. The national law must be clear, foreseeable, adequately accessible, and must contains safeguards against arbitrariness.

2. Legitimacy : does the interference pursue legitimate aims?

Remember:

the list of legitimate aims is included in the second paragraph of each qualified right.

3. Necessity and proportionality: was the interference necessary in a democratic society? Was it proportionate to the aim pursued?

Of the three aspects of the test the last is certainly the one that is most linked with reasoning obligations. Here the basic question is whether the disputed interference is "proportionate to the legitimate aim pursued" and whether there are "sufficient and relevant" reasons that may justify the interference with the right. Within the proportionality test, the ECtHR analyses first how and to what extent the applicant was restricted in the exercise of the right affected by the interference complained of as well as what were the adverse consequences of the restriction imposed on the exercise of the applicant's right on his/her situation. Subsequently, this impact is balanced against the importance of the legitimate public interest served by the interference or the rights of others. Numerous factors are taken into consideration by the ECtHR when applying the proportionality test. Unfortunately, we cannot rely on a pre-established list of such factors. These vary from case to case, depending on the rights at stake, on the facts of the case and on the nature of the interference under examination.

However, the following factors can be cited:

- adequacy
- severity of interference/sanction
- duration
- alternatives
- procedural fairness

The "proportionality" aspect requires that State authorities, namely domestic courts, either at first instance or in the context of judicial review, have struck a fair balance among conflicting interests within their margin of appreciation (whose magnitude varies also in the light of a European consensus). This entails that all the relevant factors have been duly taken into account and weighted. This process must be fully reflected in the reasoning of the relevant decisions.

What are the human rights dimensions underpinning the obligation to provide for quality judicial decisions?

Looking at reasoning of judgments mainly from the perspective of the parties to a procedure is limiting. Indeed, proper reasoning is relevant for a variety of different interests and fulfils numerous human rights and rule of law dimensions.

Human rights/rule of law dimensions of reasoning

- Uniform application of the law and legal certainty
- Possibility to effectively defend oneself and effectively participate in court proceedings
- Good administration of justice
- Independence and the rule of law
- Shared responsibility for the protection of human rights
- Protection against arbitrariness

What is the link between reasoning of judgments and legal certainty?

Uniform application of the law and legal certainty are essential for the principle of the equality before the law. Certain divergences in interpretation can be accepted as an inherent trait of any judicial system which is based on a network of courts. Different courts may thus arrive at divergent but nevertheless rational and reasoned conclusions regarding the same legal issue raised by similar factual circumstances. Considerations of legal certainty and predictability are an inherent part of the rule of law. In a state governed by the rule of law, parties to a case justifiably expect to be treated as others and can rely on the previous decisions in comparable cases, so that they can predict the legal effects of their acts or omissions. On the other hand, when a court decides to depart from previous case law, this should clearly be stated in its decision

It should follow from the reasoning that the judge knew that the settled case law on the point was different, and it should thoroughly be explained why the previously adopted position should not stand.

What is the impact of reasoned judgments on parties?

Parties to the case are the main stakeholder in judicial proceedings and this is why we talk about the human right to a reasoned judgment. Parties to the case have placed their disagre ement before the court: not only they are entitled to a decision, but also to the detailed arguments upon which the decision is built and explanations as to how the court values the validity of evidence, which they have placed before it and of the evaluation of the disputed facts. The demand for an adequately reasoned judgment entails the court's opinion as to which facts are relevant and assumed proven or not, as well as its opinion on the submissions and legal arguments.

A coherent, well structured, clear decision fulfils the requirement of fair trial and demonstrates that a case has been heard properly. It also serves the purpose of enabling parties to consider the opportunity of an appeal and, in case they decide to impugn the decision, formulate an appropriate and effective defence. In criminal cases, it allows the accused to understand on what evidence the conviction is based and how the court estimates and values that evidence.

Well reasoned judgments are more likely to be accepted by the parties and thus, less likely to be appealed. In such cases, however, the adequate reasoning enhances the odds for the relevant court of appeal to reach a correct decision, in line with the impugned decision.

Not only parties to the case but also the general public must be able to understand judgments issued by courts and realize on which arguments a certain decision was based. This is a vital safeguard against arbitrariness.

"Justice must not only be done, but must also be seen to be done" is among most quoted aphorisms in the judicial systems of the democratic countries. It faithfully epitomizes the trust that the justice system must inspire in the public and this is not possible without proper reasoning of the court decissions. The rule of law and the avoidance of arbitrary power serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society. Moreover, public scrutiny of the administration of justice, increases the diligence of the tribunals in drafting their reasoning.

Is there a link between reasoning of judgments and impartiality of the judiciary?

In relation to the independence and impartiality of judges, it is worth recalling Point 15 of Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states, on judges: independence, efficiency and responsibilities, which states that:

> *"Judgments should be reasoned and pronounced publicly. Judges should not otherwise be obliged to justify the reasons for their judgments."*

Whilst all necessary measures should be taken to respect, protect and promote the impartiality and independence of judges, the latter cannot be considered a prerogative or privilege granted in the judges' own interest. On the contrary, independence and impartiality is recognized in the interest of the rule of law and of persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law, as well as public scrutiny of the administration of justice. Judges' impartiality and independence are essential to guarantee the equality of parties before the courts.

Are judges the only ones responsible for reasoned judgments?

Responsibility of a reasoned judgments is a primary responsibility of the judge, for which s/he can be held accountable. Judges, however, are not the only ones responsible for the quality of the performance of the judicial system, as this depends on the interaction of many actors, including prosecutors and lawyers. The idea of shared responsibility for the protection of human rights is inherently linked with the ECHR architecture and the principle of subsidiarity it is built upon This means that all judicial actors are linked by a shared responsibility for the protection of human rights. Within the Convention system there are no outsiders or insiders, and responsibility is not shifted.

Inappropriate or insufficient training of judicial actors (lawyers, bailiffs, public notaries, judicial administrators) might result in judicial decisions of inadequate quality. This is particularly true in civil proceedings in which judges typically have only limited powers to act ex officio, relying rather on the partis' submissions. They have also usually limited powers to prevent manifestly ill founded claims from being lodged with the courts.

How to reconcile the right/obligation to a reasoned judgment and reasonable length of proceedings?

One aspect of this obligation seems to be particularly relevant for judges: how to ensure the quality of judicial decisions with the equally important requirement to examine cases within reasonable time. It is recalled in this context that the Consultative Council of European Judges (CCJE) indicated in its Opinion No. 11 that:

"to achieve quality decisions in a way which is proportionate to the interests at stake, judges need to operate within a legislative and procedural framework that permits them to decide freely on and to dispose effectively of (for example) the time resources needed to deal properly with the case."

The CCJE refers to the discussion of "case management" in its Opinion No.6 (2004). Reference can also be made to the practice of the European Commission for the Efficiency of Justice (CEPEJ, which has developed useful tools of case management, including as regards the dealing with cases within reasonable time.

What is the nexus between quality judicial decision and their enforcement?

In its Opinion No. 11, the CCJE stated that to be of high quality, a judicial decision must be perceived by the parties and by society in general as being the result of a correct application of legal rules, of a fair proceeding and a proper factual evaluation, as well as being effectively enforceable. Only then will the parties be convinced that their case has been properly considered and dealt with and will society perceive the decision as a factor for restoring social harmony.

When can judgment be considered arbitrary?

Regarding the manner in which the domestic judicial decisions are reasoned, a distinct issue arises when such decisions can be qualified as arbitrary to the point of prejudicing the fairness of proceedings. Under the ECHR, this will be the case only if no reasons are provided for a decision or if the reasons given are based on a manifest factual or legal error committed by the domestic court, resulting in a "denial of justice".

What are the criteria against which the quality of a judicial decision can be checked?

The quality of judicial decisions relates not only to its substantive aspects. It also concerns the accessibility and clearness of the language used by the judge and the internal structure of the decision. These formal aspects are as important as the substance for two main reasons. Firstly, this allows better understanding and, thus, acceptance of judicial decisions by the parties. Consequently, there should be less appeals against judicial decisions, which in turn reduces the pressure on the judicial system as a whole. Additionally, clear and accessible reasoning enables any person other than the parties to better understand the case and, eventually, to use it in separate proceediings.

CEPEJ had developed the following questions as part of a checklist to guide judges in the assessment of the quality of a judicial decision

- Are the pronouncement and the reasons for the decision made by the judge comprehensible?
- Are the reasons for the decision detailed and systematic?
- Do the reasons for the decisions demonstrate a clear guidance for the parties and legal professionals of the fairness and lawfulness of the decision?
- Are there specific rules and standards used for the presentation of judicial decisions?
- Are the expectations of the parties, the lawyers, the lower or higher courts sufficiently taken into account when drafting judicial decisions?
- Are “standard” decisions and rules used for “bulk” cases?

What does clarity entail?

Clarity entails that a decision must be intelligible and drafted in clear and simple language so that the parties and the general public are able to understand it. Of course, each judge can opt for a personal style and structure. However, judicial authorities should compile good practices or render models available in order to facilitate the drafting of decisions and ensure that reasons are coherently organised in a clear style which is accessible to everyone. According to the ENCJ9 it is desirable that a judicial decision is as concise as possible. For a decision to be read, understood and have impact it has to be sharp and focused and to refrain from unnecessary detail and an academic approach.

[8] https://rm.coe.int/european-commission-for-efficiencyof-justice-cepej-checklist-for-promo/16807475cf
9 ENCJ Independence, Accountability and Quality of the Judiciary, Measuring for improvement, ENCJ Report 2019-2020, page 58

What about the content of the “reasons”?

With the reasoning the judge responds to the parties’ submissions and specifies the points that justify the decision and make it lawful. This is a guarantee against arbitrariness. Without affecting the possibility or even the obligation for judges to act on their own motion in certain contexts, judges need only respond to relevant arguments capable of influencing the resolution of the dispute.

The reasons must be **consistent, clear, unambiguous, not contradictory,** and linear, so that any reader can follow the line of thought. To assess the content of a decision, several internal and external characteristics can be considered. They partly depend on the specific national legal order.

As regards the internal characteristics, the main indicators of quality will relate to the lawfulness of the decision and the correctness of the legal analysis conducted by the judge in the process of resolving the case.

As regards the external characteristics, the quality will be assessed against the clearness of the language used by the judge; the appropriate formatting style of the judgment and the use of headings, paragraphs, and subparagraphs; the appropriate length of the judgement; the use of correct proper, geographical and other names, the appropriate translation in the language that he/she understands (in multilingual settings).

What are the standards applicable to the examination of factual issues?

In terms of content, judicial decisions include an examination of the factual issues lying at the heart of the dispute.

When examining factual issues, the judge may have to address objections to the evidence, especially in terms of its admissibility. The judge will also consider the weight of the factual evidence likely to be relevant for the resolution of the dispute.

What are the standards applicable to the examination of legal issues?

Examining the legal issues entails applying relevant rules of national, European and international law. In common law countries, decisions of higher courts that settle a legal issue serve as binding precedents in identical disputes thereafter. In civil law countries, decisions do not have this effect but can nevertheless provide valuable guidelines to other judges dealing with a similar case or issue, in cases that raise a broad social or major legal issue.

Legal certainty guarantees the predictability of the content and application of the legal rules, thus contributing in ensuring a high quality judicial system.

Can the quality of a decision be assessed on the basis of its components?

The quality of judicial decisions should be understood as the quality of the decision as a whole. Thus, it would not be conceivable to assess the qualities of certain parts of the judicial decisions (the clear language, the sound legal reasoning, the presentation of facts or the assessment of evidence). All the parts of the judgment are interdependent and cannot be artificially separated for the purposes of the assessment of their quality.

What are the stages of the drafting process?

Drafting of judicial decisions is a process that involves 2 major phases: the preparatory (judicial investigation) and the drafting of the decision.

The preparatory phase is functional to ensuring that the case is ready to be decided on the merits. Typically, this phase would include: the examination of the initial claim of the applicant (or of the joint claim in certain types of proceedings); the determination of legal facts and/or legal issues which will need to be established, and the corresponding determination of the procedural tools to achieve this; the collection of evidence and ensuring that it is sufficient; the review of the partis' submissions and/or of their requests for provisional measures, investigative steps (expertise, hearing of witnesses or review of their statements, on-site examinations, and so on). During this phase, the judge might have preliminary or final opinion of the case and of the way to resolve it. However, owing to the principles of fair trial, s/he would normally avoid expressing his or her ideas before the phase is completed. In the course of this phase, the judge might need to draft some provisional or procedural decisions (for instance, on the issue of the provisional measures; the suspension of the proceedings; on appointing experts; on scheduling hearing; on setting various deadlines to the parties to submit their observations..).

When the preliminary phase is concluded then the **drafting phase** starts. Depending on the type of proceedings, each stage might have different duration and require uneven intellectual efforts: there are cases where the legal issue at stake is rather straightforward, and others where the evidence to reach the right conclusion might be controversial, partial or otherwise difficult to assess. However, the legal issue might warrant extensive research and balancing of arguments.

Remember! During this stage, it is essential to ensure that any preconception about the case file is tested against all the evidence available and the arguments of the parties presented in support of their claims or counterclaims. This is particularly important when the judge responsible for collecting evidence is not the same who drafts the decision.

The drafting process

The knowledge of the case is closely related to the knowledge of the applicable legal framework on the basis of which the case will be decided. Thus, it is important to make sure that the drafter has in his or her possession all the legal provisions applicable to the dispute at issue, and that this legal framework is still in force and is updated .

As trivial as it may appear, the organisation of the material conditions of the work during this stage might have significant influence on its results. The work will certainly be better performed in the adequate conditions of silence, lighting and space.

1[0] In Barać and Others v. Montenegro (application No. 47974/06, judgment of 13.12.2011) when examining the applicants' cases relating to employment disputes, the domestic courts rrelied on a law which had previously been declared unconstitutional and a relevant decision to that effect already published in the Official Gazette.

Once the draft judgment is finalized, is there a need for a further control?

Once the drafting stage is finished, it is advisable can be advised to perform a control of the final draft. This control is different from the one consciously or unconsciously conducted while drafting.

The idea of the final control is based on the presumption that any legal text, even the most successful one, can be improved if reviewed by another person, or from another perspective.

As regards the review by other persons, the limits for this method of control are inherent to the functions of judges who are independent and, as such, cannot be subject to control outside the established procedural forms (appeals, appeals in cassation…). In view of the above considerations, the only viable solution **is to review of the draft judgment from another perspective.**

The first option is to review the draft judgement from the point of view of the superior court. In doing so, the drafter might first wish to imagine which grounds of appeal the losing party might most likely rely on. This, in turn, would require reviewing once again the submissions of this party with a view to identifying the arguments that might had been overlooked or insufficiently addressed. In most jurisdictions the new arguments cannot be raised in appeal, even less in cassation. Therefore, the judge should ascertain that the most relevant and decisive arguments, as required by Article 6 ECHR, are addressed. Special explanation can be added to explain why certain other arguments are not relevant for the outcome of the proceedings. Where possible, the judge might wish to check the relevant case-law of the superior court with which the appeal or the appeal in cassation might be lodged.

In order to reinforce the authority of the judgement and to avoid the risk of its quashing, the judge might wish to specifically quote the case-law of the superior court applicable to the dispute at issue.

The second option is to review the draft judgment from the point of view of the losing party. This method is similar to the previous one. The difference relates mostly to the fact that the losing party would most likely rely on much larger set of grounds of appeal than the superior court will be able, or willing, to examine. The main task during this exercise is to identify what was at stake for the losing party, and which complaints it is most likely to bring to the attention of the superior court.

What is the nexus between legal writing and legal reasoning?

There is a strong interdependence between legal writing and legal reasoning. As a particular form of human writing, legal writing operates within the system of specific rules and limits. This concerns the compliance with the rules of logic, the adherence to a certain style of legal documents existing in each country, the conformity with the legislative requirements set out in the domestic legislation and so on. If these rules are not followed, the legal drafter might reach wrong conclusions, and, thereby, affect the substantial quality of the document.

These considerations are even more indispensable for judges. By contrasts to the predictive legal writing , which is used, notably, by lawyers, their drafting is objective.

This means that the judicial decision is supposed to reflect the assessment of facts and evidence in accordance with the applicable legal framework in neutral and objective manner. Where lawyers would be permitted, within the rules set out in the legislation and their professional codes of conduct, to argue the case in a way the most beneficial to their clients, judges would have much less room for "creativity". Instead, they would be expected to assess the evidence presented to them in objective and impartial way with a view to finding the only just and lawful decision.

The above does not imply to suggest that all judges should adhere to any style of drafting. Some judges would tend to describe facts, complaints, and reasons for their decisions at some length, while others would tend to be short. Some judges would quote extensively case-law of superior courts or international sources, while others would never or rarely do it. Although domestic law typically provides some guidance to this situation, it appears that appropriate arrangements between judges are necessary to improve the interaction between them. In those countries where the separate of judges are accepted by legal tradition, dissenting judges have the floor to express their disagreement with the majority's findings.

Can ECtHR decisions be used as a model for drafting quality decisions?

The ECtHR is a unique source of standards for drafting judicial decisions. Judgments and decisions of the ECtHR, which are easily accessible and translated into several languages of the member states of the CoE, can be regarded as the "standards-settler" for the quality of judicial decisions in Europe and beyond. Irrespective of the member state against which the application is lodged, the ECtHR applies similar formatting and drafting style in its decisions. Furthermore, the case-law of the ECtHR defines the scope of each right enshrined in the Convention, helping national judges to apply the Convention properly.

What are the external factors that can influence the quality of judicial decisions?

As Opinion No. 1112 of the CCJE points out, the quality of a judicial decision "depends not only on the individual judge involved, but also on a number of variables external to the process of administering justice such as the quality of legislation, the adequacy of the resources provided to the judicial system and the quality of legal training" (para. 10).

The quality of legislation has special importance for the quality of judicial decisions because it affects them in the most direct way. Inadequate quality of legislation warrants judges to spend additional time on dealing with cases and might lead to the wrong decisions.

How to assess the quality of a law?

The quality of a law is not easy to be assessed. There are a few indicators that can help:

- clarity
- normative nature
- lack of complexity and oversimplification
- foreseeability
- accessibility

Should a law not be compliant with the provisions of the Convention, judges should use all the available tools at their disposal with a view to avoiding the application of the domestic law and to applying instead the international provisions. The resources allocated to the judiciary are undoubtedly also the precondition for the quality of judicial decisions. Inadequate funding, limited human and material resources, insufficient judicial remuneration, low number of assistants and judicial clerks can only negatively affect the quality of judgments produced within any judicial system.

[12] https://rm.coe.int/16807482bf

REASONING AND LOGIC OF DECISIONS
PRACTICAL GUIDELINES

THE LOGIC OF JUDICIAL DECISIONS

When drafting a judicial decision, it is fundamental to strictly abide by the rules of legal logic. In this context, it is important to note that the legal writing is primarily the logical writing, and the legal reasoning – the logical reasoning. The drafting of any legal text will be successful if general principles of legal logic are observed.

By contrast, if the legal document contains logical errors, this might jeopardise the very purpose of legal drafting. Therefore, the legal text shall be drafted in accordance with the rules of logic (the law of contradiction, the law of excluded middle (or third), the principle of identity). Where there is a collision of legal rules, the drafter shall determine the applicable provision on the basis of the collisional rules (lex specialis, lex posterior, lex superior).

The process of judging is a logical process

First, the judge identifies the facts relevant for the resolution of the case.

Then, s/he identifies the legal issues that need to be resolved and the applicable legal framework.

Finally, by confronting the circumstances of the case with the applicable legal provision, the judge reaches the conclusion and, thereby, resolves the dispute.

The legal logic is guiding the judge when s/he is making a reasoned link between the argument of one of the parties whereby s/he is convinced, and the evidence that was established in the course of the case examination. In this context, it should be noted that the rules of legal logic warrant that the judge uses only straightforward expressions when describing its conclusions ("the court established that…", "on the basis of this evidence, the court found that…", "therefore, the court concluded that…").

Legal logic rules are also helpful to dismiss certain arguments of the parties. Thus, the judge might identify in those arguments logical contradictions or inconsistences which are mutually irreconcilable.

The process of judging is a logical process

[12] https://rm.coe.int/16807482bf

Pertaining to the administration of evidence, the legal rules require that the judge makes a logical distinction between the circumstances that need to be proven and those which do not; from the circumstances whose existence is disputed and those in which certain details are disputed. For each situation, this logical exercise will enable the judge to determine what kind of evidence is needed and how such evidence could be obtained.

In most cases, the judge will rely on the deductive argumentation (the idea – the list of arguments in support of it – the available evidence – the conclusion). But in certain cases, the analysis can be based on the inductive argumentation (the description of situations or cases with common factual or legal characteristics – the conclusion that these situations or cases belong to the same type - the conclusion that the same legal provisions shall apply to each of those situations or cases).

Legal logic is also indispensable to judges when dealing with the collision of legal norms. In such situations, the judge should give the priority to the most recent law over the old one; to the law having the higher authority (the Convention over the domestic law), and to the special law over the general one.

The structure of judgments

The structure of judicial decisions represents the external presentation of their internal logic. The ECtHR's judgments represent a good example of the way in which judgments should be structured. The form of judgments of the Court is determined in part by the formal requirements of the Convention and of the Court's Rules of Procedure.

The judgment of the Court is typically structured into a number of sections, as follows:

(a) List of judges and dates
(b) Procedure
(c) The facts
(I) The circumstances of the case
(II) Relevant domestic law and practice
(d) The law
(I) Alleged violation
(d) The parties' submissions
(e) The Court's assessment
(f) Application of Article 41 of the Convention (where applicable)
(g) The operative part or judgment, indicating whether or not the Court is unanimous
(h) Separate and dissenting opinions (optional)

In many cases, there will be additional headings and sub-headings, since many applications raise the question of violation of more than one provision of the Convention. There may also be submissions of interveners to be summarised.

At national level judges will have of course to comply with their internal requirements. In general, however, each judgment will have:

a) an introduction
b) the reasoning
c) the operative part (decision)

Depending on the type of proceedings and the complexity of the case, the depth of each part will vary. For instance, in cases in which the facts are not disputed by the parties there will be no need to present them in some detail: a short reference to the parties' submissions could be sufficient (if compliant with national legislation). By contrast, in those cases in which the essence of the dispute relates to the establishment of facts and/or their interpretation, the judge would normally be required to devote sufficient time to provide the most exhaustive description thereof.

[8] https://rm.coe.int/european-commission-for-efficiencyof-justice-cepej-checklist-for-promo/16807475cf
9 ENCJ Independence, Accountability and Quality of the Judiciary, Measuring for improvement, ENCJ Report 2019-2020, page 58

Introduction

The introduction is intended to present the nature of the dispute and its context. Typically, this part reflects, in addition to the mandatory requisites required by the procedural laws of each country, the subject matter of the dispute and the main procedural stages of the case. This part might also indicate the main investigative measures taken in the course of the proceedings, but without description of their results ("an expertise was ordered on", "the expert report was filed with the court on"). If there are several claimants or respondents in the case, it would be useful, for the sake of brevity and clarity, to refer to each of them in the subsequent parts of the judgment by an abbreviated name ("respondent 1" and "respondent 2", etc.). The parties to the dispute should be indicated as to the date of the delivery of the judgment, even though they might have changed in the course of the proceedings. In certain cases, it might also be useful to place the dispute in the historical context.

As regards **the context of the case**, a short description of the underlying issues might be useful to enable the external reader to quickly understand the genesis of the dispute and its background and the surrounding factors. The purpose of the descriptive part is to present the factual circumstances of the case and the parties' contentions.

It is noteworthy that the presentation of the facts of the case at this stage should not be equal to their interpretation. This part of the judgment is a basis for the subsequent analysis in light of the applicable legal norms. That is the reason why it is important that the facts indicated in the descriptive part are those which were established by the judge independently of the position of a particular party.

Where there is a dispute as to the establishment of certain facts, the descriptive part should reflect the existence of such dispute (while the conclusion will be reached in the next part of the judgment). As parties to the judicial proceedings do not always present the facts of their case in a structured and easily accessible way, it is up to the judge to display good analytical skills with a view to summarising the facts.
The introduction should be complete yet concise and only relevant facts, functional to the resolution of the dispute, should be included. All other facts might be summarised under the heading "other facts", with a very short description, possibly with a clear indication that those facts are not relevant for the case.

Tips for drafting the introduction

Facts should be presented in order of importance. Such a hierarchy of facts would provide any reader with intuitively suggested importance of each fact of the case. Similarly to the ECtHR, **facts sharing similarities could be grouped** on the basis of their relevance and presented in order of importance. The ECtHR often uses the references to the "background of the case" or the "genesis of the case". For instance: "The claimant also indicated that he purchased in the past several other vehicles from the same vendor and provided supporting documents in that relation. These purchases, however, do not pertain to the present dispute". In describing the facts of the case, the ECtHR always uses the past tense, as it is reporting submissions from either the applicant or the respondent. These argumentation are not the object of any assessment.

Parties' contentions should be presented in summary with references to the evidence on which the parties rely. This presentation should be made with the aim to focus only on the most relevant and tangible arguments expressed by the parties. Rather than repeating them, the judge, just like the ECtHR, might wish to summarize the essential ideas relating to each argument using suitable expressions ("the claimant argued…", "he further contended…", "additionally, he submitted…", "the respondent disagreed…", "he pointed out that…"…). By reformulating the parties' contentions, the judge will always conduct a logical operation of separating important facts or complaints from the less important, and otherwise structure them. The precise quotation of the parties' submissions, however, might be justified in certain cases, for instance if the judge wishes to emphasize the language used by the party (if it is offensive), or if it relates to the listing of certain items which cannot be easily summarized (the list of author's songs allegedly aired in violation of the copyright). Also, judges should bear in mind that even though their judgments are published, the parties' submissions are typically not. That is why it is important to faithfully reflect in the judgment the essence of the parties' submissions.

Reasoning

As described above, during this stage the national judge enjoys full liberty to resolve the case according to his or her convictions. The only limits to this liberty are those enshrined in Article 6 ECHR.

In most legal orders this part of the judgment will contain the factual circumstances of the case as established by the court (and which might be different from the presentation submitted by the parties); the evidence supporting the conclusions of the court; the reasons why the court is not accepting certain types of evidence or certain arguments of the parties, and the reference to the applicable legal provisions.

Thus, the national judge is not required to reply to every argument raised by the parties in support of their claim. But s/he is expected to reply to the most essential of them, and to provide clear reasons why certain other arguments cannot be accepted. The reasoning cannot avoid responding to those arguments which are obviously decisive for the outcome of the case. Most importantly, it should clearly transpire from the judgment that the judge examined all the main issues of the case and analysed all the arguments the parties presented to him or to her. Failure to do so might leave the impression that the judge only partially read the submissions and omitted to respond to some of them. That would leave the parties, or at least one of them, dissatisfied with the outcome of proceedings and be the ground for lodging an appeal or an appeal in cassation.

Tips for drafting the reasoning part

When reaching a conclusion grounded on the analysis conducted, the judge might test it against a counterargument opposite to the decision reached. Then, s/he would conduct a new analysis in a reversed manner with a view to demonstrating that this counterargument is not viable, and, therefore, any other solution would be unsubstantiated and wrong.

In the reasoning part, the arguments analyzed by the ECtHR are the ones that defend or contest the impugned decision. They are mainly written in present tense. These arguments are the most important ones and ground the final decision.

Decision

The decision part is the logical continuation of the preceding parts. In this part of the judgment the judge uses his or her judicial power to order certain modification to the established legal situation. This part of the judgment must be exhaustive and unambiguous.

If the court decides to grant the claim partially, there should be a clear indication which part is granted, and which one is dismissed. In this part of the judgment the court might also be required to settle the issue of judicial fees and certain other issues. As noted above, this part is crucial for the effective enforcement of the judgment.

REASONING OF DECISIONS IN THE CASE-LAW OF THE ECTHR

REVIEW OF CASE EXAMPLES

Introduction

What follows is a short overview, divided by ECHR Articles, of some relevant cases where reasoning of judgments of national courts was scrutinized by the ECtHR. The list is non-exhaustive and serves the purpose of addressing some of the most problematic issues related to reasoning of judgments that appear to be relevant for the local context. The examples, however, also serve as general illustrations of how the ECtHR has considered the reasoning offered by the national courts not sufficient to comply with the requirements not only of Article 6 ECHR, but also other Convention provisions. In addition to their relevance, cases have also been selected on the basis of their pedagogical potential, namely their capacity to illustrate in a succinct manner, the points at stake.

For each case background information (if needed) and the facts of the case, followed by an illustration of the points scrutinized by the ECtHR and the identification of the deficiencies that led to finding a violation of the ECHR.

The selected cases, through their standard-setting provide valuable guide for national courts to ensure effectiveness implementation of human rights, thus preventing or avoid violations, especially repetitive ones. In this respect it is worth recalling that since the ECHR system is based on the concept of subsidiarity, it is the primary responsibility of national courts to ensure the effective implementation of its standards at national level. Therefore, the comparative advantages and added value of the ECHR standards on reasoning of judgements of the selected cases (issues) serve as good practices and their reasoning contributes to raising the standards of human rights observance at the national courts.

Cases are presented based on the order of the ECHR provisions. ECtHR and national cases complement, to the extent possible, each other.

ARTICLE 3 ECHR – PROHIBITION OF TORTURE, INHUMAN OR DEGRADING TREATMENT
ARTICLE 14 ECHR PROHIBITION OF DISCRIMINATION

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Decision to discontinue a case: Abdu v. Bulgaria

Background information

Article 3 ECHR comprise, firstly, an obligation to put in place a legislative and regulatory framework of protection; secondly, in certain well-defined circumstances, an obligation to take operational measures to protect spe cific individuals against a risk of treatment contrary to that provision; and thirdly, an obligation to carry out an effective investigation into arguable claims of infliction of such treatment. Generally, speaking, the first two aspects of these positive obligations are classified as "substantive", while the third aspect corresponds to the State's procedural obligations.

Facts of the case

Two Sudanese nationals are involved in a fight with two Bulgarian youths. One of the Sudanese is slightly injured. He alleged that his attackers, two skinheads, had assaulted him on racist basis. The police conducts an inves tigation into these allegations but were unable to ascertain who had start ed the fight or whether it had been racially motivated. In the absence of evidence on these two factors, the public prosecutor decided not to prose cute any of the individuals involved.

The national reasoning scrutinized by the ECtHR – critical aspects

Under the Bulgarian Criminal Code, racially motivated acts of violence against other persons constitute a criminal offence punishable by imprison ment. In this case a preliminary investigation had been promptly initiated following the incident and eye-witnesses interviewed. The prosecution, however, considered that the offence had not been made out and that, specifically, the racist motivation for the act of violence had not been estab lished.

The ECtHR assessment – the flaws of national decision and lessons learned

In finding a violation of Article 3 (procedural aspect) taken separately and in conjunction with Article 14 ECHR, the ECtHR considered that:

- The prosecuting authorities had concentrated their investigations and analysis on whether it had been the two Sudanese nationals or the two Bulgarians who had started the fight. They had therefore confined them selves to establishing the actus reus, namely the violent acts, merely noting the lack of evidence that the violence had been motivated by racist consid erations;

- The authorities, thus, had not deemed it necessary to question the witness about any remarks he might have heard during the incident, or to question the two Bulgarian youths about a possible racist motive for their actions;

- Right from the beginning of the investigation the applicant had claimed that he had suffered racist insults and the two Bulgarian youths had been described in the police report as skinheads – a group known for their extremist, racist ideology;

- The shortcomings of the investigations had been pointed out in the appeal lodged against the decision not to prosecute, drawing the prosecutor's attention to the way the two youths were dressed and the need to question them specifically about their motives;

- All the above amounted to plausible evidence pointing to a possible racist motive on the part of the applicant's attackers;

- The authorities thus failed in their duty to take all reasonable steps to investigate whether the acts of violence had been racially motivated.

ARTICLE 5 ECHR – RIGHT TO LIBERTY AND SECURITY

Pre-trial detention: Letellier v. France

Background information

Two Sudanese nationals are involved in a fight with two Bulgarian youths. One of the Sudanese is slightly injured. He alleged that his attackers, two skinheads, had assaulted him on racist basis. The police conducts an inves tigation into these allegations but were unable to ascertain who had start ed the fight or whether it had been racially motivated. In the absence of evidence on these two factors, the public prosecutor decided not to prose cute any of the individuals involved.

Facts of the case

In 1985 Mrs Monique Letellier, a mother of eight working at a bar-restaurant in La Varenne St-Hilaire (France), was living separately from her second husband. On 6 July 1985 the man was murdered by Gérard Moysan. Mrs Letellier, living at that time with another man, was taken into custody on suspicion of having incited to the murder of her separated husband.

The investigating judge charged Mrs Letellier with being accessory to murder, then on 24 December 1985 ordered her release pending trial, sub ject to court supervision. On appeal by the prosecutor the release order was set aside on 22 January 1986, and from that time on she remained in pre-tri al detention until May 1988, thus for about three years, until she was released (she was eventually convicted to three years of imprisonment and at the time of the judgment she had already served the term).

After her release in December 1985 was set aside, Mrs Letellier's repeated requests for release were the subject of judicial examinations seven times, at various dates before her trial in May 1988. All the seven judicial reviews resulted in her detention being continued.

The national reasoning scrutinized by the ECtHR – critical aspects

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The ECtHR examined if the reasons for keeping the applicant in pre-trial detention explicitly and sufficiently given as part of the pre-trial judicial decision.

It emerged that in all the seven judicial reviews, the reasons to justify con tinued pre-trial detention were few. They were explicit but completely general and did not go into the details of her case at all. They were also consistent over time and expressed in almost identical wording. These were that the measure of court supervision - that was in place when she was on release between December 1985 and January 1986 - was "inadequate" or "not effective" - "to ensure that she will appear for trial" or to counter the danger that "she may seek to evade". In all the 7 judicial reviews, a single, very clear reason was given why "she may seek to evade". No additional explanation was indicated apart from the reference to the expected severi ty of the penalty.

Public disturbance caused by the offence, which French criminal procedure allowed and still allows as a reason for pre-trial detention, was mentioned in five out of the seven decisions refusing her release pending trial, with no details given ever as to how the disturbance might manifest itself. Finally, an unspecified risk of interference with witnesses, and the indication that there would be strong evidence against her, were mentioned in half of those judicial decisions, given as reasons to keep the person charged in custody.

The ECtHR assessment – the flaws of national decision and lessons learned

In finding a **violation of Article 5 ECHR**, the ECtHR considered that the judi cial review decision contained:

- **acritical and stereotyped repetition** of the reasons provided by the lower courts;

- the motivation to abscond or the possibility to affect evidence were con sidered as static, whereas they are evolving with time;

- the **personal circumstances** of the accused were never addressed;

- **less restrictive measures,** such as court supervision, were not considered.

The latter could be discarded only following an assessment of the success of their previous application;

although the courts referred to the possible disturbance of public order, they did not consider that the victim's family never requested Mrs Letellier's pre-trial detention. Not even when pre-trial detention of Mr Moysan, whom Mrs Letellier was accused of inciting to murder, was ordered.

ARTICLE 6 ECHR – RIGHT TO A FAIR TRIAL

Reasons for dismissal from job and access to justice: K.M.C. v. Hungary

Facts of the case

Ms K.M.C. was a Hungarian civil servant whose employment at an environmental directorate was terminated in 2010. At that time the relevant legislation – no longer in force - allowed for dismissals without having to provide the reasons. A lawsuit against the dismissal was possible. The time limit for challenging this decision in a Hungarian court expired on 26 October 2010. However, without knowing the reasons behind the dismissal, the remedy could not be considered effective. The law was later declared unconstitutional. Ms K.M.C. applied to the ECtHR in Strasbourg, claiming violation of the fair trial provisions of Article 6 ECHR in that "her dismissal could not be effectively challenged in court for want of reasons given by the employer".

The national reasoning scrutinized by the ECtHR – critical aspects

In this case, no reasoning for the dismissal were provided. This was possible because the law did not foresee such obligation upon organs of the State.

The ECtHR assessment – the flaws of national decision and lessons learned

In finding a **violation of Article 6 ECHR,** the ECtHR considered that:

- national legislation allowing the withholding of reasons in decisions affecting civil rights or obligations may amount to a state's failure to ensure access to fair trial, in breach of the applicant's right "to know the reasons for her dismissal and to have her dismissal fully assessed by an independent body".

QUASHING IN SUPERVISORY REVIEW PROCEEDINGS OF A PROCEDURAL DECISION THAT HAD BECOME FINAL: SALOV V. UKRAINE

Facts of the case

The applicant is a lawyer and the legal representative of a candidate for the presidency of Ukraine in the 1999 elections. In October 1999, the applicant allegedly distributed a number of copies of a forged special edition of the Verkhovna Rada (Parliament) newspaper, which included a statement attributed to the Speaker of the Verkhovna Rada, claiming that presidential candidate and incumbent President Leonid Kuchma was dead. On 1 November 1999 the applicant was arrested and placed in detention for having disseminated false information. His petition for release was dismissed. On 7 March 2000 the District Court ordered an additional investigation to be undertaken into the circumstances of the case, having found no evidence to convict the applicant of the offences with which he was charged. However, in April 2000, the Presidium of the Regional Court allowed a protest lodged by the prosecution against the ruling of 7 March 2000 and remitted the case for further judicial consideration. The applicant was released from detention in June 2000. In July 2000, the District Court, chaired by the judge who had initially ordered an additional investigation into the facts, convicted the applicant to a five-year suspended prison sentence for interfering with the citizens' right to vote for the purpose of influencing election results by means of fraudulent behaviour.

The national reasoning scrutinized by the ECtHR – critical aspects

In this case the domestic courts gave no reasoned answer as to why the district court had originally found no evidence to convict the applicant of the offences with which he was charged and yet, subsequently found him guilty of interfering with voters' rights.

The ECtHR assessment – the flaws of national decision and lessons learned

In finding a violation of Article 6 ECHR, the ECtHR observed that:

• it was not clear why the why the applicant was convicted, after his case had been heard for the second time, on the basis of the evidence and indictment as initially submitted by the prosecution and the instructions given by the Presidium of the Regional Court, while the evidence presented by the prosecution had not changed;

• the District Court's reasons for departing from its previous findings were not sufficiently explained in the judgment of 6 July 2000. In particular:

• the national court had not addressed the doubts it had raised previously, when the case was remitted for additional investigation, in relation to the applicant's administrative liability and the charges of criminal libel;

• it was assumed in the judgment convicting the applicant that he had been sure that the information contained in the forged Holos Ukrayiny newspaper was false; however, this element of the case was not sufficiently examined in the judgment's reasoning;

• the court did not examine its previous consideration as to whether there was evidence that the applicant had actively tried to disseminate the newspaper, which he had not produced himself, as truthful information or whether he had substantially impeded the voters' judgment as to the need to participate in the elections and not to vote for a certain candidate;

• the lack of a reasoned decision also hindered the applicant from raising these issues at the appeal stage.

FAILURE BY AN APPEAL COURT TO ADDRESS THE DEFENDANTS' SUBMISSIONS AND ARGUMENTS WHEN IMPOSING AN ADMINISTRATIVE FINE: BOLDEA V. ROMANIA

Facts of the case

The applicant is a university lecturer. Following general dissatisfaction with regard to the publications produced within the department, the Dean of the Faculty raised the subject of alleged plagiarism in scientific publications. The applicant was the only participant who considered unreservedly that the publications of two authors amounted to plagiarism. The authors were issued with a verbal warning and their publications were merely held not to constitute works of scientific reference. They lodged two separate complaints against the applicant alleging defamation, which were joined by the court of first instance. The court heard evidence from the applicant and accepted his offer to prove the truth of his remarks on the basis of the Criminal Code. The applicant presented the complainants' Articles and the relevant extracts from the doctoral thesis which had allegedly been plagiarised. The court then took statements from two witnesses who had taken part in the meeting. The first witness said that the complainants' publications did not amount to plagiarism and that the applicant had made his remarks in bad faith. The second stated that he could not comment on the alleged plagiarism or the applicant's intentions in describing his colleagues as plagiarists. The court acquitted the applicant but ordered him to pay an administrative fine and to pay the complainants' costs. His appeal was dismissed.

The national reasoning scrutinized by the ECtHR – critical aspects

The Court of first instance ordered the applicant to pay an administrative fine, after having established the facts, and found that the intentional element and the public nature of the facts were met in the case. However, the court made no specific reference to the factual elements which could have justified the conclusion concerning the applicant's guilt and the public nature of the facts retained. It confined itself to asserting that "these conditions were met in the present case"- The same reasoning was endorsed in appeal.

The ECtHR assessment – the flaws of national decisions and lessons learned

In finding a violation of Article 6 ECHR, the ECtHR observed that observed that:

• the court of appeal limited itself to referring to the recitals of the judgment of the court of first instance to ground its decision. lAlthough this may constitute motivation by way of incorporation of the lower court's reasons a detailed and complete reasoned decision of the court of first instance would have been required in order to qualify the proceedings against the applicant as fair. In this case, since the reasoning was deficient, this technique could not be considered acceptable

FAILURE OF THE COURT IN CHARGE OF FILTERING PROCEDURE TO GIVE REASONS FOR ITS REFUSAL TO ADMIT A CIVIL APPEAL FOR EXAMINATION: HANSEN V. NORWAY

Facts of the case

In a property dispute linked to divorce proceedings, the applicant had appealed to the High Court against the City Court's examination of his pleas on points of law and its sudden decision to drastically shorten the hearing from three days to five hours thereby substantially reducing the time available to hear witnesses and present evidence. The High Court's jurisdiction was not limited to questions of law and procedure but extended also to questions of fact.

The national reasoning scrutinized by the ECtHR – critical aspects

The High Court refused to admit for examination the civil appeal by the applicant against the decision by the City Court considering that "it clear that the appeal will not succeed, and that its admission should therefore be refused pursuant to Article 29-13(2) of the Code of Civil Procedure".

The ECtHR assessment – the flaws of national decisions and lessons learned

The impugned decision had been taken within the framework of a filtering procedure introduced by the 2005 Code of Civil Procedure in the interests of procedural economy. It was recognised that in order to avoid that the parties and the judiciary incur considerable additional costs there was a need to stop clearly unmeritorious appeals to the High Court. Whilst the right to appellate review of a decision on the merits was deemed an important safeguard, an unlimited and extensive right in this respect could be counterproductive to the rule of law. This in principle is not in contravention with the ECHR.

In finding a **violation of Article 6 ECHR**, the ECtHR observed that:

- the lack of reasons with which the High Court refused to admit his appeal did not enable the applicant to exercise effectively his right to appeal. Indeed, the procedure before the High Court could form the subject of an appeal before a Supreme Court committee. Whilst the latter's jurisdiction did not extend to the merits of the applicant's appeal to the High Court or of the latter's refusal to admit his appeal, its review did encompass the High Court's application of the law and assessment of the evidence in as much as it related to points of procedure. It could also review whether in the light of the High Court procedure, seen as a whole, it was justifiable, from a fair hearing point of view, for the High Court to refuse admission of the appeal. This review included whether the subject matter could be adequately dealt with on the basis of the written case-file in a simplified procedure. The said review would be based on the same case-material as before the High Court. The reasoning of the High Court was thus central in enabling the applicant to consider an appeal.

ARTICLE 8 ECHR –

RIGHT TO PRIVATE AND FAMILY LIFE

Refusal to grant father access to child: Sommerfeld v. Germany

Background information

The right to private and family life also encompasses parent-child relationships, which involve potentially conflicting rights of different persons. National authorities enjoy in this area a certain margin of appreciation. This is why it is important that judicial decisions provide for "relevant" and "sufficient" reasons for each interference and has to prove that domestic courts have taken take into account the various interests at stake, amongst which also the best interest of the child.

Facts of the case

The applicant is the father of a child born out of wedlock in 1981. He acknowledged paternity of the child and lived with the child's mother until their separation in 1986, after which the mother prohibited any contact with the child. In 1990 the applicant requested the District Court to grant him a right of access. The Youth Office advised against access, which it considered would adversely affect the close relationship which the child had established with her step-father. In June 1991, the court heard the child, who stated that she did not wish to have contact with the applicant. In April 1992 it obtained a psychologist's opinion, which was unfavorable to access, and after a hearing in June 1992 at which the child repeated her opposition to access, the applicant withdrew his request. However, he submitted a new request in September 1993. The District Court heard the child, then 13 years old, who confirmed that she did not wish to have contact with the applicant. It dismissed the request, observing that under the Civil Code it could only grant a right of access if it was in the child's best interests. Referring to the statements of the parents and the child, as well as to the opinions of the Youth Office and the psychologist obtained in the earlier proceedings, the court concluded that access would not be in the child's interests. The applicant's appeal was dismissed by the Regional Court and his constitutional complaint was unsuccessful.

The ECtHR assessment – the national decision

The District Court had based its decision to prevent contacts with the child on the parents' and child's submissions, as well as on material obtained in the earlier proceedings. In the present case, the child was 13 years old when heard by the District Court judge, who had already heard her in the earlier proceedings.

The ECtHR assessment – application of key principles

In finding no violation of the procedural requirements of Article 8 ECHR, the ECtHR observed that:

- it would be going too far to say that domestic courts were always required to involve a psychological expert (a request placed by the applicant), this issue depending on the specific circumstances, having due regard to the age and maturity of the child concerned;

- having had the benefit of direct contact with the child, the national court was well placed to evaluate her statements and establish whether she was able to make her own mind;

- on that basis, the court could reasonably reach the conclusion that it was not justified to force the girl to see the applicant against her will.

Right to change name: Aktaş and Aslaniskender v. Turkey

Facts of the case

Two Turkish applicants requested to change their surnames: the first because of the need to realign its Turkish identity with the Syrian one reported in the Swiss passport issued after acquiring Swiss citizenship. The second for religious purposes, having become a Buddhist. Their requests were rejected.

The national reasoning scrutinized by the ECtHR – critical aspects

In both decisions, the national courts observed that the requests could not be granted because the chosen names were not of Turkish origin. They quoted Article 3 of Law No. 2525 on Surnames according to which:
"Names of rank and official office, of foreign tribe, race and nation as well as [names] which offend general decency or which are repulsive or ridiculous cannot be chosen as surnames."
And Section 5 of the Surname Regulations, that stipulates that "Newly adopted surnames are chosen in the Turkish language."

The ECtHR assessment – the flaws of national decisions and lessons learned

In finding a violation of Article 8 ECHR, the ECtHR observed that:

- national jurisdictions had conducted a purely formalistic examination of the legislative and statutory texts instead of taking into account the arguments and the specific and personal situations of the applicants, or balancing the competing interests at stake;

- no explanation had been given of how or why changing the applicants' names to non-Turkish ones was in any way contrary to the general interest. This was particularly obvious in the case of the first applicant, whose brother had secured a favourable decision in respect of the same name change.

ARTICLE 8 ECHR – RIGHT TO PRIVATE AND FAMILY LIFE
ARTICLE 14 ECHR – PROHIBITION OF DISCRIMINATION

Dismissal from a job and discrimination: Emel Boyraz v. Turkey

Facts of the case

The applicant was dismissed from her post as a security officer, whose examination she successfully passed 9 months earlier, on the grounds that "she did not fulfil the requirements of "being a man" and "having completed military service". The administrative authorities invested with the case observed that initially held that the requirement of "having completed military service" should be considered to apply only to male candidates and that there had been no restriction on women working as security officers in the given company. The court also noted that another woman, who had also brought a case against the same company for the same reasons as the applicant, had been appointed to the post of security officer after she had lodged a complaint. Eventually, however, the administrative authorities concluded that the activities of security officers carried certain risks and responsibilities, as the security officers had to work at nights in rural areas and since they had to use firearms and physical force in case of an attack on the premises they were guarding. They thus established that women were unable to face those risks and assume such responsibilities.

The national reasoning scrutinized by the ECtHR – critical aspects

The Supreme Administrative Court quashed the judgment of the Ankara Administrative Court holding that the requirement of "having completed military service" demonstrated that the post in question was reserved for male candidates and that this requirement was lawful having regard to the nature of the post and the public interest. The high court therefore found that the administration's decision had been in accordance with the law.

The ECtHR assessment – the flaws of national decisions and lessons learned

In finding a **violation of Article 14 (Prohibition of discrimination) in conjunction with Article 8 ECHR,** the ECtHR observed that:

- there may be legitimate requirements for certain occupational activities depending on their nature or the context in which they are carried out;

- in this case, however, neither the administrative authorities nor the Supreme Administrative Court substantiated the grounds for the requirement that only male staff be employed in the post of security officer in the local branch of the company;

- the absence of such reasoning in the Supreme Administrative Court's decision is particularly noteworthy given that only three months prior to that decision, the Supreme Administrative Court's General Assembly of Administrative Proceedings Divisions had held, in another case that there had been no obstacle to the appointment of a woman to the post of security officer in the local branch of the company;

- the mere fact that security officers in the local branch had to work on night shifts and in rural areas and might be required to use firearms and physical force under certain conditions could not in itself justify the difference in treatment between men and women;

- although the applicant had worked as security officer in such branch in the past, the reason for her subsequent dismissal from the post of security officer was not her inability to assume the risks or responsibilities of her position but the judicial decisions.

Reasons grounding amount of just satisfaction -Carvalho Pinto de Sousa Morais v. Portugal

Facts of the case

Mrs. Pinto de Sousa was admitted to the hospital and had both glands, on the left and on the right side of her vagina, permanently removed. However, shortly after being discharged from the hospital, she began to experience severe pain and problems, including urinary incontinence and fecal retention, sleeping disorders, anxiety and could not have sexual relations. Overall, she was found to have a permanent disability of 73%. Mrs. Pinto de Sousa felt frustrated, diminished as a woman and began to experience psychological problems, including depression, and considered suicide. Eventually she was informed by her private doctor that during the surgery, her left pudendal nerve had been permanently injured due to medical malpractice.

The Administrative Court, to which she resorted for compensation, found that the operation was poorly performed, and the surgeon had acted recklessly, clearly in violation of the medical legis artis and the duty of care. She was awarded € 80.000 in compensation for non-pecuniary damage and € 92.000 for pecuniary damages, of which € 16.000 was for the service of a maid that she had to pay to support her with the household tasks.

The global amount of compensation was reduced to € 50.000 by the Supreme Administrative Court. This reduction was justified by the court based on two arguments: Mrs. Pinto de Sousa had a gynaecological condition before the surgery and also at the time of the operation she already had two children and was 50 years old, an age where sexual relations are not as important as in younger years, since its significance decreases with age. With regard to pecuniary damages, the total amount was reduced to € 61.000. Regarding the latter damages, the high court considered that the amount awarded to pay the future services of a maid should be reduced from € 16.000 to € 6.000, considering that it was not proven that Mrs. Pinto de Sousa lost her capacity to take care of domestic tasks and also considering the fact that she probably only needed to take care of her husband, taking into account the age of her children.

The national reasoning scrutinized by the ECtHR – critical aspects

In determining the amount of compensation, the domestic courts made a reference to the fact that:

- "it was impossible to determine how much weight was accorded to each factor" since the applicant had suffered from a disease that caused her pain and discomfort prior to the operation;

- when the medical operation occurred Mrs. Pinto de Sousa already had two children and was 50 years old, an age at which sexual life seems not to be so important as it is in younger years, since it decreases with age;

- the amount awarded for the services of a maid was reduced on the basis of the fact that Mrs. Pinto de Sousa "probably only needed to take care of her husband" given her children's age at the material time.

The ECtHR assessment – the flaws of national decisions and lessons learned

In finding a **violation of Article 14 taken in conjunction with Article 8 ECHR,** the ECtHR observed that:

• the Supreme Administrative Court had made a general assumption that sexuality is not as important for a fifty-year-old woman and mother of two children as for someone of a younger age;

• that assumption reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as persons;

• apart from being, in a way, judgmental, the judgment omitted to take into consideration other dimensions of women's sexuality in the specific case of the applicant;

• the wording of the Supreme Administrative Court's judgment when reducing the amount of compensation in respect of non-pecuniary damage cannot be regarded as an unfortunate turn of phrase, as asserted by the Government. It is true that in lowering the amount the Supreme Administrative Court also took it for granted that the pain suffered by the applicant was not new. Nevertheless, the applicant's age and sex appear to have been decisive factors in the final decision, introducing a difference of treatment based on those grounds;

• the Court also considered the contrast between the applicant's case and the approach taken in two judgments of 2008 and 2014, which concerned allegations of medical malpractice by two male patients who were fifty-five and fifty-nine years old respectively. The Supreme Court of Justice found in those cases that the fact that the men could no longer have normal sexual relations had affected their self-esteem and resulted in a "tremendous blow" and "severe mental trauma". It follows from those cases that the domestic courts took into consideration the fact that the men could not have sexual relations and how that had affected them, regardless of their age, without considering whether they had children or not, nor took any other element into consideration.

Note: the issue upon which the ECtHR was asked to rule was not whether the actual amounts awarded to the applicant were correct. Instead, the focus of the ECtHR's scrutiny was whether the Supreme Administrative Court's reasoning led to a difference of treatment of the applicant based on her sex and age. The Court acknowledges that in deciding claims related to non-pecuniary damage within the framework of liability proceedings, domestic courts may be called upon to consider the age of claimants, as in the instant case. The question at issue here is not considerations of age or sex as such, but rather the assumption. In the Court's view, those considerations show the prejudices prevailing amongst the judiciary in Portugal already pointed out in international reports.

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ARTICLE 10 ECHR – FREEDOM OF EXPRESSION

Ban on religious books - Ibragim Ibragimov and Others v. Russia

Facts of the case

The applicant unsuccessfully challenged the imposition of ban on books by well-known classic Muslim theologian, declared extremist literature.

The national reasoning scrutinized by the ECtHR – critical aspects

In making their determination, the domestic courts merely relied on a disputed expert opinion, which went far beyond resolving merely linguistic and psychological issues and provided the crucial legal findings as to the extremist nature of the books. They summarily rejected all evidence sub mitted by the applicants, which was plainly relevant for the assessment of whether banning the books had been justified.

Relevant passages of domestic judgment in the case of the first applicant read as follows:

"It follows from that Said Nursi's books from the Risale-I Nur Collection [list of books] contain statements aiming to incite religious discord (between believers and non-believers, that is on grounds of attitude to religion) andalso statements substantiating and justifying the necessity of dissemi nating the above-mentioned statements and declarations.

The books contain verbal expressions giving humiliating depictions, an unfavourable emotional assessment and a negative evaluation of people on the basis of their attitude to religion.

The books contain propaganda about the superiority or deficiency of citi zens on the basis of their attitude to religion (believers or non-believers). They also contain statements substantiating and justifying the necessity of disseminating such ideas and world-views.

The court does not have any reason to doubt these expert reports ..."

ARTICLE 3 OF PROTOCOL NO. 1 TO THE ECHR – RIGHT TO STAND FOR ELECTIONS

Reasons given by parliamentary decision-making body in the context of a recount of ballot papers - Mugemangango v. Belgium [GC]

Facts of the case

Under Belgian electoral law, legislative assemblies are themselves compe tent to verify any irregularities during the elections, thus excluding the jurisdiction of any external court or body. Having stood for election to the Walloon Region's pParliament in 2014, the applicant failed to win a seat by just fourteen votes. Without asking for the election to be declared void and for fresh elections to be held, the applicant called for a re-examination of the ballot papers that had been declared blank, spoilt or disputed (over 20,000) and a recount of the votes validly cast in his constituency. While the Walloon Parliament's Committee on the Examination of Credentials found the applicant's complaint well-founded and proposed to hold a recount of votes, the Walloon Parliament, not yet constituted at the material time, decided not to follow that conclusion and approved all the elected repre sentatives' credentials. The applicant complained about the procedure for the examination of his complaint.

The national reasoning scrutinized by the ECtHR – critical aspects

In the applicant's case, neither the Constitution, nor the law, nor the Rules of Procedure of the Walloon Parliament as applicable at the material time, had provided for an obligation to ensure safeguards ensuring impartiality of the decision making-body, respect for adversarial principle and an obligation to provide for reasoned decisions during the examination of credentials. In practice the applicant had enjoyed the benefit of certain procedural safeguards during the examination of his complaint by the Credentials Committee. He and his lawyer had both been heard at a public sitting and the Committee had given reasons for its findings. Furthermore, the Walloon Parliament's decision likewise contained reasons and the applicant had been notified of it. This, however, **was only based on the ad hoc discretion of the decision-making body.** The Parliament, for instance, decided not to give reasons why it departed from the Committee's opinion, even though the Committee had expressed the view, on the same grounds as had been referred to by the Parliament, that the applicant's complaint was admissible and well-founded and that all the ballot papers from the applicant's constituency should be recounted.

The ECtHR assessment – the flaws of national decisions and lessons learned

In finding a violation of Article 3 of Protocol no. 1 ECHR, the ECtHR observed that:

• the procedure in the area of electoral disputes had to guarantee a fair, adversarial, objective and sufficiently reasoned decision. In particular, complainants had to have had the opportunity to state their views and to put forward any arguments they considered relevant to the defence of their interests by means of a written procedure or, where appropriate, at a public hearing;

• it had to be clear from the public statement of reasons by the relevant decision-making body that the complainants' arguments had been given a proper assessment and an appropriate response;

• in the absence of a procedure laid down in the applicable regulatory instruments, the (insufficient) safeguards afforded to the applicant had been the result of ad hoc discretionary decisions taken by the Credentials Committee and the plenary Walloon Parliament. They had been neither accessible nor foreseeable in their application;

• most of those safeguards had only been afforded to the applicant before the Credentials Committee, which did not have any decision making powers and whose conclusions had not been followed by the Walloon Parliament, without clear explanations.

Note! When safeguards afforded to the applicant have discretionary basis, they do not offer sufficient guarantees from prevention of arbitrariness!

NATIONAL EXPERIENCE CASE-LAW EXAMPLES

Introduction

The obligation of courts in Kosovo* to provide reasons for their decisions derives from the Constitution, and is further materialized through the basic procedural laws, namely: the Criminal Procedure Code, the Law on Contested Procedures, the Law on General Administrative Procedure and Law on Enforcement Procedure. Article 31 Constitution enshrines the right to fair and impartial trial, which includes the right to reasoned decision as its essential component. Article 22 Constitution provides a list of major international human rights conventions, starting from the ECHR, which are directly applicable in Kosovo*. Further, Article 53 Constitution provides that human rights guaranteed by the Constitution shall be interpreted consistent with the court decisions of the ECtHR.

The following section provides an overview of the national case-law, consisting of some landmark court decisions, which illustrate positive and negative examples on judicial reasoning. The point of reference for selection of the cases are the rights provided by the Chapter II of the Constitution.

Most of the selected cases reflect the decisions of the regular courts, which were later scrutinized by the Constitutional Court under the angle of reasoning. Few cases that have been adjudicated only by the regular courts have also been added to the list of selected cases. The selection of cases has prioritized decisions with flaws in judicial rasoning. Cases which are characterized by insufficient reasoning by all courts, including the Constitutional Court, have been explained with additiol comments by the authors of this Manual.

* All references to Kosovo whether to the territory, institutions, or population, in this text shall be understood in full compliance with United National Security Council Resolution 1244 and without prejudice to the status of Kosovo.

ARTICLE 29 CONSTITUTION
RIGHT TO LIBERTY AND SECURITY

Basic Court:
Lack of objective reasoning for ordering pre-trial detention in a case of traffic accident

Facts of the case

The case involved a female who caused a traffic accident, in which she hit a pedestrian who sustained heavy injuries. The applicant offered first health care to the injured pedestrian, informed the police and the ambulance and waited for them at the scene of the traffic accident. She went voluntarily to the police station where she was immediately arrested by the police. The case did not result in fatalities and the applicant had no criminal record, including any minor offence and the traffic offence was committed by negligence. The applicant was a journalist for one of the biggest media outlets in the Kosovo*. Following her arrest by the Police, upon the request of the State Prosecutor, the applicant was put under detention on remand for 30 days, to be released after 18 days spent in detention.

Issues at stake

The key issue in this case is whether the decision to impose pre-trial detention for a traffic accident was arbitrary, unreasoned, and disproportional. All these are elements of the right to liberty and security, enshrined in the Article 29 Constitution.

The reasoning of the Basic Court – critical aspects

The State Prosecutor requested the Basic Court to order the pre-trial detention, with the reasoning that the suspect may repeat the criminal offence, abscond or influence the witnesses. The defense objected the request of the Prosecutor, arguing that the accused was a renowned journalist, the offence was committed by negligence, and that the accused would not attempt to influence witnesses as she, herself, informed the police about the case. The defense argued also that there was no risk that the accused journalist would repeat the criminal offence (the traffic accident) and that she had never had even a traffic fine, let alone any offence related to the jeopardizing the safety of the public traffic.

The Basic Court approved the request of the Prosecutor and ordered detention on remand for 30 days.

However, the decision of the Basic Court did not meet the standard of good reasoning for the following:

- the request of the State Prosecutor was reasoned in standard language, merely referring to the specific provisions of the Criminal Procedure Code, without elaborating them;
- the decision of the Basic Court was also reasoned with general formulaic expressions, lacking sufficient objective reasoning;

The Basic Court did not elaborate the necessity of imposing pre-trial detention as opposed to less severe measures prescribed in the Criminal Procedure Code, such as house arrest, promise of the defendant not to leave his or her place of current residence; prohibition on approaching a specific place or person, bail etc.).

Note: The decision of the Basic Court was confirmed by the Appellate Court. Yet, after 18 days of detention the journalist was released from the detention (by a decision of the Basic Court).

Constitutional Court: Lack of sufficient reasoning for extended pre-trial detention

Facts of the case

The applicant was placed in detention on 31 July 2010. On 16 February 2011, the District Public Prosecutor filed an indictment against him, because of the reasonable suspicion that he had committed the criminal offences of "inciting the commission of criminal offence of aggravated murder", His detention pending trial lasted until 3 September 2012, when the District Court rendered the decision, which found him guilty and sentenced him to imprisonment. The Court of Appeals upheld the accused's appeal, ordering retrial. Consequently, as a result of the judgment of the Court of Appeals, by which the case was remanded for retrial, the second period of detention began on 26 November 2013 and continued until 6 April 2018, when the judgment of the Basic Court was rendered, by which the applicant was found guilty and sentenced to effective imprisonment. In total, the defendant (applicant) was kept in detention on remand for around 8 years and most of that period was in a pre-trial stage.

Issues at stake

The major question in this case was wether the prolonged period of time that the defendant spent in a pre-trial detention and the formulaic language of the court decisions ordering the detention, infringed the safeguards of the Article 29 Constitution [Right to Libery and Security].

The Supreme Court reasoning scrutinized by the Constitutional Court – critical aspects

The Constitutional Court found that the reasonings of the decission of Basic Court for ordering the detention, confirmed by the Court of Appeal and the Court Supreme, did not justify the continuation of detention against the defendant. In this regard, the Constitutional Court took into account that the Basic Court had reasoned that there was a well-founded suspicion of the commission of a criminal offense, so there was legal basis for the continuation of detention for the following reasons:

1) seriousness of the criminal offense;
2) the way of committing the criminal offense and the circumstances and environment in which the criminal offense was committed;
3) the fact that the relations between the family of the defendant with the family of the victim were still tense; and that
4) the risk that if released, the defendant could the criminal offense or commit similar offenses.

In relation to the continuation of detention of the applicant, the findings and reasoning of the courts of first and second instance were fully endorsed by the Supreme Court.

The Constitutional Court did not find this acceptable. Further, the Constitutional Court found that:

- the Basic Court in five decisions for extending detention had consistently applied identical reasoning;

- the reasoning of the Basic Court, confirmed by the Court of Appeal and the Court Supreme, was a generalized, stereotypical, and insufficient, lacking persuasive arguments of the concrete facts and circumstances of the case;

- the regular courts had also failed to provide concrete and sufficient justification as to why the alternative measures (less severe than detention) were not applicable in the case;

- the argument given in the decisions of three regular courts – especially the fact that relations between the families of the defendant and the victim were still strained, and it is believable that if released the defendant could repeat the criminal offense – could not be an indefinite basis for continued detention.

Therefore, the Constitutional Court concluded that the decisions of the regular courts had infringed Article 29 [Right to Liberty and Security], Constitution, in conjunction with Article 5 (Right to Liberty and Security), of the ECHR.

Note: The decision of the Basic Court was confirmed by the Appellate Court. Yet, after 18 days of detention the journalist was released from the detention (by a decision of the Basic Court).

ARTICLE 31 CONSTITUTION – RIGHT TO FAIR AND IMPARTIAL TRIAL

Constitutional Court: Failure to address the request for recusal of a judge

Facts of the case

The applicant was a company which had contractual relations with another company (partner company). Following the alleged failure of the partner company to fulfill obligations arising from this contract, the applicant initiated enforcement proceedings in the Basic Court. This request was approved by the Basic Court but after the complaint of the partner company, the Appellate Court quashed the decision and remanded the case for retrial to the Basic Court. The Basic Court, acting on the retrial, approved as grounded the objection of the partner company. Following the applicant's appeal to the Court of Appeals, the applicant also submitted a request for recusal of a judge from the review of the applicant's case. Applicant expressed doubts regarding the impartiality of the said judge.

The Court of Appeals rejected as ungrounded the applicant's appeal but did not address at all the applicant's request for recusal of the judge from the review of the case. Moreover, the applicant's case was adjudicated in the Court of Appeals only by that judge, as the sole judge.

Issues at stake

The key issue in this case was the allegation for violation of three principles, which are embodied in the right to fair and impartial trial: (i) impartiality of the court; (ii) reasoned decisions; and (iii) excessive length of proceedings.he key issue in this case was the allegation for violation of three principles, which are embodied in the right to fair and impartial trial: (i) impartiality of the court; (ii) reasoned decisions; and (iii) excessive length of proceedings.

The Court of Appeals reasoning scrutinized by the Constitutional Court – critical aspects

The Constitutional Court considered that the applicant's allegation regarding the violation of the principle of impartiality of the court were inherently related to the allegation for the lack of reasoning of the decision of the Court of Appeals. Therefore, the Court dealt with the first two allegations together.

Regarding the allegation ofof violation of the principle of impartiality of the court, the Constitutional Court emphasized that:

• the applicant had never received a response to the request for the exclusion of the judge. What is more, that particular judge whose recusal was requested by the applicant, had decided the case as a single judge. Even though the applicant raises allegations about the impartiality of the court (judge), the essence of the arguments submitted by him relate to the complete disregard by the Court of Appeals of his request for the exclusion of the judge from decision-making in his case;

• without prejudice to the truthfulness of the applicant's allegations about the lack of impartiality of the judge, it could not ignore the fact that the Court of Appeals has remained completely silent on the applicant's major allegation related to the request for the exclusion of that judge from the decision-making.

Consequently, the Constitutional Court found that the failure of the Court of Appeal to address the applicant's request for recusal of the specific judge from decision-making procedure before this court, as well as the lack of reasoning of the decision by the Court of Appeals regarding applicant's allegation of impartiality of the judge constituted an insurmountable flaw of the judgment – within the meaning of Article 31 of the Constitution, in conjunction with Article 6 ECHR.

Constitutional Court: non-translation of the autopsy of the victim in a criminal procedure

Facts of the case

The applicant was convicted by the District Court for murder and unauthorized ownership, control, possession or use of weapons. The appeal of the applicant was rejected by the Supreme Court. After few months, the applicant (then represented by another lawyer) lodged a Motion with the District Court seeking to re-open the procedure. The grounds included, but were not confined to, the fact that there was an incomplete autopsy report on the causes of death and that the autopsy report was in English only – a language that the applicant did not understand. The District Court rejected the request, arguing that the matter was res judicata and this decision was upheld by the Supreme Court, which rejected the applicant's appeal.

Issues at stake

The key issue was the allegation that the autopsy report on the deceased was in English and not in Albanian and thus the applicant and his lawyer had no opportunity to question the autopsy report, which was an important evidence in this case. This interfered with the right to effective participation at the trial as well as the principle of adversarial trial.

The reasoning of the Constitutional Court – critical aspects

The Constitutional Court reviewed the case entirely from the formalistic perspective of non-exhaustion of the legal remedies by the applicant in the procedure in regular courts, as he did not raise the issue of language of the autopsy in the initial proceedings. Consequently, the Constitutonal Court declared the application as inadmissible for non-exhaustion of judicial remedies. In reaching this conclusion, the Constitutional Court did not explain the distinction between substantive and procedural aspects of exhaustion of domestic remedies, nor did it elaborate on the circumstances of the case in light of the jurisprudence of the ECtHR which requires some level of flexibility when evaluating the exhaustion of legal remedies. Furthermore, the Constitutional Court did not conduct any analysis of the way the regular courts have applied the provisions of the Criminal Procedure Code pertaining to the motions for reopening of the criminal procedures.

Constitutional Court: the divergence of judicial practice of the Supreme Court

Facts of the case

Following a fatal accident, the applicant, who was insured by BKS insurance companym was convicted for the criminal offense of endangering public traffic. The victim's insurance company had compensated the family of the deceased in the amount of € 36,000.00. In 2015, the same company addressed to BKS a request for compensation on the basis of the right to subrogation defined through the Law on Obligatory Relations (LMD) and in the absence of an agreement with the company BKS, filed a lawsuit in the Basic Court. The Basic Court adpted a judgement, requiring BKS to pay the victim's insurance company the amount of compensation of € 36,000.00, including interests at 12% until the final payment. This decision was confirmed by the Court of Appeals and the Supreme Court. The latter, however determined that the annual interest should be eight percent (8%) per year, based on Article 382 of the LMD and not twelve percent (12%) per year, based on Article 26 of the Law on Compulsory Insurance, as the lower level courts had decided.

Issues at stake

As the Supreme Court departed from its previous practice, the facts of the case raise an issue about the principle of legal certainty and the right to a reasoned judicial decision, both of these being essential elements of the right to a fair and impartial trial (Article 31 Constitution).

The Supreme Court reasoning scrutinized by the Constitutional Court – critical aspects

Regarding the claim of violation of the principle of legal certainty, the Constitutional Court referred to the so-called test applied by the ECtHR to ascertain judicial divergence in the light of the principle of legal certainty. In light of the ECtHR test, with regards to the allegation of violation of the principle of legal certainty, the Constitutional Court found that:

- in the case under review the existence of "profound and long standing" differences regarding the consistency of the case-law of the Supreme Court has not been proven;
- there is a mechanism for the proper administration of justice and for reviewing changes in case-law;
- the Supreme Court on 1 December 2020 issued a "Legal Opinion on Interest on the Applicable Law, Amount and Time Period of Calculation";
- the possibility of conflicting decisions is an inherent trait of any judicial system which is based on a network of basic and appeal courts with authority over the area of their territorial jurisdiction;
- what law should be applied in the circumstances of the present case is the prerogative and duty of the Supreme Court; and, that,
- the role of the Supreme Court is precisely to resolve such disputes.

Henceforth, the Constitutional Court concluded that the disputed judgment of the Supreme Court had not violated the principle of legal certainty.

Regarding the allegation of violation of the right to a reasoned decision, the Constitutional Court assessed that the Supreme Court had explained why in the Applicant's case the norm setting the default interest rate of 8% applies. Further, the judgment of the Supreme Court contained a logical connection between the legal basis, the reasoning and the conclusions drawn. As a logical consequence between the legal basis, the reasoning and the conclusions it transpired that the challenged judgment of the Supreme Court meets the requirement of a reasoned decision.

Therefore, the Constitutonal Court concluded that, in the circumstances of the present case, there has been no violation of Article 31 [Right to Fair and Impartial Trial] Constitution in conjunction with Article 6.1 (Right to a fair trial) ECHR.

Constitutional Court: non-examination by the court of the written submission of a party in the criminal procedure

Facts of the case

The Special Prosecution filed an indictment against the applicant and another suspect for the criminal offense of abuse of official position. The Basic Court decided to acquit the Applicant and the other accused fron the charges. The Court of Appeal rejected as unfounded the complaint filed by the Special Prosecutor's Office. The State Prosecutor submitted a request for protection of legality in the Supreme Court, and the Supreme Court had sent a copy of the request to the applicant and other accused persons to enable them to present their response to the claims of the State Prosecutor. The applicant submitted in the Supreme Court a written submission (response) against State Prosecutor's request for protection of legality. The Supreme Court partially approved the request for protection of legality submitted by the State Prosecutor and found the applicant guilty for the criminal offence. The applicant's written submission was not examined in the judgement of the Supreme Court.

Issues at stake

Equality of arms and principle of adversarial trial were scrutinized considering that the Supreme Court had not at all examined the response of the applicant submitted to the request for protection of legality of the State Prosecutor.

The Supreme Court reasoning scrutinized by the Constitutional Court – critical aspects

In finding violation of the right to fair and impartial trial, the Constitutional Court clarified that:

- the obligation of the courts to notify the party of the exercise of the legal remedy against them by the opposing party is not a goal in itself but is a necessary procedural step to enable the parties to be treated equally;
- the parties to a court proceedings must be able to counter the claims and arguments of the opposing party and present their case effectively;
- the regular courts should not be satisfied only with the fact that the parties have received the notification for the exercise of the legal remedy against them (formalistic approach), but should ensure the parties that their views and arguments have been examined and evaluated in in an orderly manner, so as to guarantee the most effective protection against the claims raised against them (substantive approach);
- not considering the objections and arguments of the parties automatically puts them at a significant disadvantage against the opposing party;
- the Supreme Court was satisfied only with the fulfilment of the formal-procedural aspects, by only sending the notification to the applicant for the exercise of the legal remedy against him, but did not review at all the response submitted by the applicant;
- the Supreme Court did not give any reasoning in its judgment as to why the applicant's response was not taken into consideration;
- the Supreme Court had acted differently towards the other co-defendant in this case, whose response had been reviewed by the Supreme Court;
- thus, the applicant was put at a considerable disadvantage vis-à-vis the State Prosecutor, being deprived of the opportunity to have a real and substantive confrontation with the arguments and claims presented by the State Prosecutor, as opposing party in the procedure.

Consequently, the Constitutional Court concluded that the contested judgment of the Supreme Court was taken in violation of the principle of equality of arms and the adversarial principle, as essential elements of the right to a fair and impartial trial.

Constitutional Court: non-implementation of the final decision of the administrative procedure

Facts of the case

The relevant municipal authorites had issued decision for the "temporary suspension" of the applicant from his working place, Head of Fire Prevention and Investigation, until the completion of the procedure for ascertaining his disciplinary responsibility. Meanwhile, the applicant complained to the Independent Oversight Board of Kosovo (hereinafter, the IOBK). The IOBK partially approved the applicant's complaint and ordered the Municipality to conduct a new disciplinary proceeding against the applicant, in accordance with the legal provisions in force. Thus, IOBK did not require the Municipality to reinstate the applicant to his position, but to conduct and complete the disciplinary proceedings.

Meanwhile, the applicant's case was conducted in parallel administrative, contested and enforcement procedures, whereby a number of decisions were issued in favor but also against the applicant. The final decision in the case of the applicant was taken by the Court of Appeals,in 2018, which rejected the applicant's statement of claim as inadmissible due to the existence of the litispendence.

Issues at stake

The issue at stake in this case was the "temporary suspension" from work of the applicant, which lasted for fifteen years; multiple ineffective court proceedings for the realization of the applicant's right and non-execution of the final decision of the IOBK on this issue. This infringed the applicant's right to fair trial, righ to effective legal remedy and right to judicial protection of rights.

The Supreme Court reasoning scrutinized by the Constitutional Court – critical aspects

The Constitutional Court initially emphasized that the IOBK is an independent institution established by the Constitution, which has the characteristics of a tribunal for civil servants, within the meaning of Article 6 of the European Convention on Human Rights. Hence, the decisions of the KPMK are binding.

Further, the Constitutional Court specifically emphasized that:

- the decision of the IOBK in favor of the applicant was upheld in the enforcement proceedings by the Court of Appeals, as a last instance, in 2015 and 2017.
- The Constitutional Court emphasized that it would be meaningless if the legal system of the Kosovo* would allow that a final and enforceable decision in the administrative procedure remains ineffective, in disfavor of one party.
- It transpires that the applicant was unable to have a decision on his favor from the IOBK implemented, although the applicant had used legal remedies at his disposal. The Court underlined that the IOBK has the status of a tribunal for civil servants.

Consequently, the Constitutional Court held that the non-existence of effective legal remedies for the enforcement of the IOBK decision, which were confirmed by the courts, violates the right to effective legal remedies, guaranteed by Article 32 and the right to judicial protection of rights, guaranteed by Article 54 Constitution, in conjunction with the right to an effective remedy, guaranteed by Article 13 of the ECHR.

Constitutional Court: The legal status of the applicant as an official person; application of analogy in the criminal procedure; admission of electronic correspondence as evidence in criminal procedure

Facts of the case

This case was decided twice by the Constitutional Court.

The applicant was a foreign national who was director of a non-governmental organization (hereinafter: NGO), in his native country. This NGO has won a public contract for some specific public work in Kosovo*, in a bidding procedure. The Prosecutor filed an indictment against the applicant on the grounds that in co-perpetration he committed the criminal offense "fraud in office." The Basic Court found the applicant and other co-accused were guilty and sentenced him to imprisonment for a term of six months, replacing the imprisonment sentence with a fine in the amount of 10,000 euro. The Basic Court, pursuant to the Law on Public Procurement, qualified the applicant as the "company's representative," with the status of "official person." The applicant appealed this judgement, arguing that: the Basic Court unlawfully rejected to read as evidence an electronic correspondence; it was not established that the applicant has committed the criminal offense for which he was accused, namely the criminal offense of fraud in office, because at the time of the alleged committing the criminal offense he did not have the status of an official person. The Prosecution also submitted an appeal, requesting more severe sanction against the applicant. The Court of Appeals rejected the applicant's appeal and accepted the appeal of the Prosecution and increased the sentence of the applicant from six months to one year of effective imprisonment. The applicant filed a request for protection of legality with the Supreme Court, which approved as grounded the request for protection of legality submitted by the applicant and remanded the case for retrial at the Court of Appeals. The Supreme Court reasoned that the Court of Appeals changed the decision of the Basic Court at the detriment of the applicant, without holding an oral hearing. In the retrial, the Court of Appeals imposed the same sanction against the applicant. On the first allegation of the applicant, the Court of Appeals reiterated the reasoning of the Basic Court for rejecting as evidence the electronic communication between third persons, on the following grounds: it was not known from which equipment these communications were extracted; there was no expertise regarding these communications; for the admission of this evidence it was necessary in advance to have a special order from the court for their interception. Regarding the status of the accused (applicant), the Court of Appeals reasoned that the fact is that the applicant is a citizen of another country and that his organization is established in another country. Yet, from this fact it cannot be concluded that the accused (the applicant) did not have the capacity of the official person, because, according to the Law on Public Procurement his NGO had entered a bid in Kosovo* as an economic operator. The applicant filed a request for protection of legality with the Supreme Court against the judgement of the Court of Appeals, but this request was rejected.

The applicant filed a referral to the Constitutional Court against the judgment of the Supreme Court. In his referral, the applicant raised two key allegations: (i) violation of the principle of equality of arms and the principle of adversarial proceedings, as a result of the rejection of a very relevant evidence proposed by him to the courts; and (ii) erroneous interpretation of the law by the regular courts as a result of his qualification as an official person, due to the application of the analogy by the regular courts in the criminal procedure (which is expressly prohibited by the Criminal Code).

The Constitutional Court found violation of the right to fair and impartial trial, because the regular courts had failed to provide reasoning for qualifying the applicant as official person. After the retrial by the Supreme Court, which confirmed its previous decision, the applicant again submitted a request to the Constitutional Court, challenging that decision of the Supreme Court. The Constitutional Court declared the second request of the applicant inadmissible, as manifestly ill-founded.

Issues at stake

There were two key issues in this case:

1) whether the regular courts violated the principle of equality of arms and adversarial trial when they rejected the applicants request for reading (admitting) as evidence an electronic correspondence between the Deputy-Director of the organization of the applicant and the official from the public institution in Kosovo*, which was related to the bidding contract;

2) whether the Constitutional Court and regular courts made an manifestly arbitrary interpretation of law when qualifying a representative of a foreign NGO as official person in Kosovo*.

The Supreme Court reasoning scrutinized by the constitutional Court – critical aspects

The Constitutional Court, reviewed the applicant's allegation of violation of his right to fair and impartial trial, by examining separately:

• the allegation of a violation of the principle of equality of arms and the principle of adversarial proceedings as a result of the rejection of evidence proposed by the applicant;
• the allegation for the manifestly erroneous application of law in qualification of the applicant as official person, which at the same time violated the prohibition of analogy in criminal cases.

With regards to the applicant's allegation of a violation of the principle of equality of arms and the principle of adversarial proceedings, as a result of the rejection of evidence proposed by the regular courts, the Constitutional Court found that the applicant's allegations that his right to fair and impartial trial, guaranteed by Article 31 Constitution in conjunction with Article 6 ECHR are ungrounded.

The Constitutional Court, inter alia, argued that:

• The regular courts in their reasoning for refusing electronic correspondence as material evidence, referred to the provisions of the Criminal Procedure Code regarding the application of covert measures, which, according to the courts, should have been applied in this case;
• The provisions of the criminal procedure regarding the covert measures of investigation and surveillance, cannot be applied in the present case, because the abovementioned evidence in the criminal proceedings before the courts was proposed by the applicant, in the capacity of the accused and because the electronic correspondence took place before the investigation procedure.

As per above, the Constitutional Court disregarded the applicant's arguments that evidence is obtained through applicant of secret investigative and surveillance measures only when the State Prosecution seeks their security, and not when the defendant voluntarily submits electronic communications to be administered as evidence. Furthermore, the Constitutional Court also rejected applicant's allegation that the conclusion of the regular courts that "even if electronic communications were administered as evidence, the epilogue for the applicant would be the same," was entirely confusing and unacceptable, because it was not clear whether emails are considered inadmissible evidence, or that regular courts have entered the assessment of their probative value.

With regards to the qualification of the applicant as official person, the Constitutional Court found that the Supreme Court failed to substantiate the substantive allegations of the applicant and did not reason its decision regarding his qualification as an official person.

The Constitutional Court argued that:

- the Court of Appeals interpreted the notion official person referring also to the Law on Public Procurement, without giving a specific reasoning according to which paragraph of Article 107 of the Provisional Criminal Code, the applicant, as a legal entity, has the status of official person, namely did not specify what public function or what public authority was exercised by the applicant in order to be considered an official person;

- in fact, the Court of Appeals in the end only concluded that it cannot be concluded that this accused in this case does not have the capacity of an official person;

- the Supreme Court, in relation to the qualification of the applicant as an official person, had confirmed the interpretations of the lower instance courts. However, the Supreme Court did not specify what paragraph of Article 107 of the Provisional Criminal Code was applicable in this case, nor did he specify which was the public authority, and the specific duties which the applicant exercised within that authority.

The Constitutional Court avoided dealing substantially with the allegation of the applicant that the regular courts have applied analogy in the criminal proceedings – which is not allowed – because they have relied in the Law on Public Procurement to qualify the applicant as official person in the criminal proceeding.

After the above judgement of the Constitutional Court, in the retrial the Supreme Court adopted a judgement refusing (for the second time) the applicant request for the protection of legality. In this judgement, the Supreme Court referred to the findings of the Constitutional Court about the lacke of sufficient reasoning in the previous decision of the Supreme Court, with regards to the qualification of the applicant as official person. In this regard, the Supreme Court provided more elaborated reasoning with regards to the functions exercised by the applicant in his NGO. The Supreme Court also referred more precisely to the specific provisions of the Provisional Criminal Code.

The applicant again lodged a complaint in the Constitutional Court, contesting the judgement of the Supreme Court. The applicant alleged that the Supreme Court had, once again, failed to provide a reasoned decision and thus has not implemented the first judgement of the Constitutional Court.

Specifically, the applicant repeated the allegation of: (i) violation of the principle of equality of arms and the principle of adversarial proceedings, as a result of the rejection of evidence proposed by the regular courts; and (ii) manifestly erroneous application of law in qualification of the applicant as official person, which at the same time violated the prohibition of analogy in criminal cases.

In the second decision in this case, the Constitutional Court declared inadmissible the request of the applicant, reasoning that in the retrial the Supreme Court had addressed all findings of the first judgement of the Constitutional Court.

Note! The Constitutional Court in this case did not conduct an independent review of the allegations of the applicant that the regular courts have made manifestly arbitrary and erroneous interpretation of law. Instead, the Constitutional Court has focused its review on whether the Supreme Court has answered nominally (expressly) to the allegations of the applicant. Hence, the Constitutional Court did not analyze substantially whether the way in which the Supreme Court and courts of lower instances interpreted the law was correct, or it was erroneous. Consequently, the following key issues remained unanswered independently by the Constitutional Court: First, whether the representative of a foreign NGO can be qualified as official person in Kosovo*, when his organization does a commercial work won in a bidding procedure of a public institution; second, whether the application of other laws can be relied on to make legal qualifications that are essential in criminal proceedings; third, whether the electronic communication between the third persons can be admitted as evidence in the criminal proceeding if it is not obtained through covert measures, ordered by the court.

Article 107 (1) of the Provisional Criminal Code, which was applicable in the time of commission of the alleged criminal offence, stipulated that: The term "official person" means: 1) Person elected or appointed to a public entity; 2) An authorised person in a business organization or other legal person, who by law or by other provision issued in accordance with the law, exercises public authority, and who within this authority exercise specific duties; 3) person who exercises specific official duties, based on authorisation provided for by law; […]

Article 341 [FRAUD IN OFFICE] stipulated that:

1. An official person who, with the intent to obtain unlawful material benefit for himself, herself or another person, by presenting a false statement of an account or in any other way deceives an authorised person into making an unlawful disbursement shall be punished by a fine or by imprisonment of up to five years.

ARTICLE 33 CONSTITUTION – THE PRINCIPLE OF LEGALITY AND PROPORTIONALITY IN CRIMINAL CASES

Constitutional Court, Supreme Court, the Court of Appeals, Basic Court: manifestly arbitrary interpretation of law by regular courts; violation of the principle "Nullum crimen, nulla poena sine lege certa"

Facts of the case

The applicant was owner of a construction company and during the execution of works on the construction site, one of the workers had an accident resulting in his death.

The Prosecution filed an indictment against the applicant considering him as a responsible person for the safety of the workers. The Basic Court found the Applicant guilty, sentencing him to imprisonment. The Court of Appeals and the Supreme Court upheld the judgment of the Basic Court.

The Applicant addressed the Constitutional Court alleging, inter alia, violation of Article 31 [Right to Fair and Impartial Trial], Article 33 [The Principle of Legality and Proportionality in Criminal Cases] Constitution, as well as Articles 6 (Right to a fair Trial) and 7 (No punishment without law) ECHR, stating that the courts did not reason their decisions and that the analogy was applied in his case.

The Constitutional Court found that, in their decisions, the regular courts had respected the safeguards embodied in the right to fair and impartial trial, and that there was no use of analogy in his case. Henceforth, the request of the applicant was rejected as inadmissible as being manifestly ill-founded.

Issues at stake

The key issue in this case is whether the regular courts and the Constitutional Court made a manifestly arbitrary interpretation of the law, also using criminal analogy, and enacted unreasoned decision.

The reasoning of the Basic Court – critical aspects

The applicant was found guilty by the three instances of regular courts for committing the criminal offense "destroying, damaging or removing safety equipment and endangering workplace safety under the Criminal Code," and was sentenced to imprisonment term. By the same judgments, the company of the applicant was imposed a fine. The courts reasoned that from the evidence administered during the trial, there were no adequate protective measures at the construction site, for the workplace and the employer. The applicant, as owner of the company, had not fulfilled the legal requirement of creating safety conditions at work.

The applicant had challenged the court decisions, by arguing that courts had arbitrarily applied respective Articles of the the Law on Safety and Health at Work and the Criminal Code, which stipulate the responsibility of the employer for the safe and healthy working conditions at all aspects of work. In this aspect, the applicant had constantly argued that according to the law he was not the person responsible for the safety of the workplace, but that was the responsibility of another employee of the company, who was specially designated for this task. Furthermore, the applicant had argued that the courts have applied analogy in the criminal procedure, which is prohibited by the Criminal Code, by interpreting the criminal offence based on interpretation of the Law on Safety and Health at Work (not of the Criminal Code). According to him, as the offence for which the applicant was found guilty was not clearly defined in the Criminal Code, his sentence violated also the principle "nullum crimen, nulla poena sine lege certa".

Furthermore, the applicant argued that Article 3 of this Law provides that the person responsible for safety at work is defined as follows: "Individual in charge of safety and health at work - a professional employed with employer and appointed to carry out tasks closely linked to safety and health at work". So, for a person to have the status of a person responsible for safety at work must be: a) professional; b) employee: c) be assigned to perform tasks related to safety at work. Hence, the applicant argued that not by a single piece of evidence administered in the main trial it was established that the applicant, as the owner of the Company, to have the qualities required to gain the epithet of the person responsible for safety at work.

The Constitutional Court concluded that the applicant's referral was manifestly ill-founded and declared it inadmissible, thus not adjudicating on the merits of the applicant's allegations. The Constitutional Court focused its review on the manner in which the regular courts had adjudicated on this case, particularly the fact that the Supreme Court – whose judgement was challenged specifically at the Constitutional Court – had provided reasoning for the major finding in their decision. So, the Constitutional Court did not go a step further to review the findings and interpretations of the regular courts. It is important to highlight that the Supreme Court had reasoned that the applicant was the owner and responsible person in the Enterprise and Article 5 paragraph 1 of the Law in Safety and Health establishes that the employer is responsible for creating the safe and health conditions at work in all aspects of work.

ARTICLE 35 CONSTITUTION – FREEDOM OF MOVEMENT

Constitutonal Court: refusal to issued a passport for a long period of time, as a result of criminal proceedings

Facts of the case

On November 11, 2004, the Municipal Court issued a decision confirming the criminal complaint against the applicant and four other persons, for the criminal offense of aggravated theft. Almost four years later, in 2008, the Municipal Court scheduled three hearings regarding the aforementioned criminal case against the applicant and others. Despite the presence of the applicant, all the scheduled hearings were postponed due to the absence of other parties in the proceedings. After July 2008, the applicant did not receive any summons for a hearing related to the aforementioned criminal case. On April 27, 2009, the applicant submitted a request for the issuance of a passport to the Department for the Production of Documents at the Ministry of Internal Affairs. On the same day, the applicant made the payment of € 25 for the passport. However, the applicant had neither received the passport nor received any written decision rejecting his passport application. On January 13, 2010, the applicant requested the Municipal Court to issue him a certificate that he was not under investigation, for the purpose of applying for a passport. He had not received any certificate or court decision regarding the non-issuance of the passport. Instead, he had only received a "verbal rejection" of his request. On May 28, 2010, the Municipal Court issued a verdict, in the case of the applicant and others, rejecting the criminal complaint against them.

Issues at stake

The alleged violation of the applicant's freedom of movement, guaranteed by Article 35 (2) Constitution, because he was prevented from leaving the country after being refused to be issued a passport, as a consequence of a prolonged criminal proceedings which resulted in his innocence.

The Supreme Court reasoning scrutinized by the Constitutional Court – critical aspects

The Constitutional Court observed that in accordance with Article 27 of the Law on Travel Documents, the Ministry of Internal Affairs has the right to reject the application for a passport based on the court's decision, if the court requests a ban on issuing passport. However, in this case the Constitutional Court established that:

- Ministry of Internal Affairs had not enabled the applicant to receive a passport without a decision of the Ministry of Internal Affairs or the court;
- the criminal proceedings against the applicant had been pending before the Municipal Court for more than six years before the applicant had finally been released;
- therefore, the authorities had failed in their obligation under Article 2 of Protocol no. 4 ECHR to ensure that the interference with the applicant's right to leave his country is justified and proportionate;
- regarding the condition of exhaustion of legal remedies in the regular courts by the applicant, the Constitutional Court reasoned that the rule of exhaustion of legal remedies is based on the assumption that there is an effective legal remedy available. The practice based on the memorandum of understanding, implemented by the Ministry of Internal Affairs and the Municipal Court, had prevented the applicant from enjoying his right to an effective legal remedy, contrary to Article 54 Constitution in relation to Article 13 ECHR.

Consequently, the Constitutional Court concluded that there had been a violation of the applicant's right to freedom of movement, guaranteed by Article 35 Constitution in relation to Article 2, paragraph 2 of Protocol no. 4 ECHR due to the non-issuance of the passport.

ARTICLE 36 CONSTITUTION – RIGHT TO PRIVACY

Constitutional Court: non-registration of the death of son in official records

Facts of the case

The applicant's deceased son had traveled to Sweden in order to recover from a serious illness. During his stay in Sweden, the applicant's son had applied for asylum, but using a different name and the Swedish authorities had issued him the card certifying that the applicant's son is an asylum seeker, but under a different name. The applicant's son had died in a health facility in Sweden. The medical report regarding his death was issued in the name of a fictitious person.The applicant addressed to the Municipality in Kosovo*, where he had lived with his son, with a request that his deceased son be registered in the Basic Registry of the Death, based on the Civil Status Law. The Municipality rejected the applicant's request on the grounds that the documents issued by the Swedish health institutions do not coincide with those issued in the Kosovo*, because the names were different. The applicant contested the aforementioned decision, without success, in the Civil Registration Agency of the Ministry of Internal Affairs, in the Basic Court, in the Court of Appeal and in the Supreme Court. The Civil Registration Agency and the regular courts of all three judicial levels confirmed the decision of the Municipality and rejected the request of the applicant for the registration of the deceased son. They reasoned that the documents issued by the Swedish health institutions did not match those issued in the Kosovo*.

Issues at stake

The key issue in this case was the alleged violation of the right to privacy and the right to judicial protection of rights, as a consequence of applicant's inability to register his deceased son in the Basic Registry of the Death.

The Supreme Court reasoning scrutinized by the Constitutional Court – critical aspects

Initially, the Constitutional Court found that the Referral is admissible, as it found that the applicant should be recognized the status of indirect victim.

The Constitutional Court had approached this case from the perspective of distinction between the negative and positive obligations of the State with regard to the right to privacy. In this context, the Constitutional Court shed light in the obligations of the public authorities to consider the balance between the interests of the individuals, including the nature of the allegations and whether they relate to "essential aspects" of private life and the positive obligations of the State vis-à-vis the right to privacy.

In light of these conceptual delineations, the Constitutional Court observed that:

• the procedures initiated by the applicant had ended in his inability to register the fact of his son's death in the Basic Registry of the Death and this had resulted in not only the continuous suffering of his family, but also the status of unsettled civil case of his wife and son
• the circumstances of the specific case involved issues related to the applicant's right to private life and his right to judicial protection of rights and effective resolution, as guaranteed by Articles 36 and 54 Constitution and with Articles 8 (Right to respect for private and family life) and 13 (Right to effective remedy) ECHR;

• the non-registration of the deceased in the Basic Registry of the Death is directly related to the death of the deceased, as well as to the psychological and moral integrity of his family and, moreover, with the civil status of his wife and son as a result of his death;
• the applicant's family was unable to complete the psychological process of their son's death in a formal and legal sense, because in the civil registers of the state he appeared as alive;
• further, the public authorities, including the regular courts, were content with finding that the medical report confirming the death of the applicant's son was missing;
• the refusal of the applicant's son's registration in the Basic Registry of the Death, has had serious consequence of leaving the civil status of the deceased's wife and minor son ultimately unresolved;
• the regular courts had not taken into account the fact that it was not disputed that the applicant's son had died and such a fact had been confirmed by the public authorities of the Kosovo*, namely the Embassy of Kosovo* in Sweden. Rather, the regular courts had not only applied the applicable law in an extremely formal way, thus not considering either the possibility of international legal cooperation with the Swedish state or the possibilities given through the provisions of the non-contestation procedure.

Therefore, the Constitutional Court found that the refusal of registration of the death of a person in the absence of a medical report, without taking into account any of the circumstances and features of the concrete case, was not sufficiently motivated and therefore had resulted in violation of the right to privacy and the right to judicial protection of rights.

Constitutional Court: Right to privacy in adoption proceedings

Facts of the case

The applicant submitted a request to the Center for Social Work, through which she requested that her adult biological child, whom she gave up for adoption in 1989, be notified of the existence of his biological mother. The Center responded by emphasizing that there was no legal basis to notify her biological child of his adoption and that, based on the Law on the Family of Kosovo*, access to information regarding biological parents is guaranteed only to the adopted child of adult age based on his/her request. The applicant submitted a request to the Social Work Center for reconsideration of the response. As a result of the applicant's request for reconsideration of the response of the Centre for Social Work, the finding of the latter was also confirmed by the Complaints Commission within the Social and Family Policies Department in the Ministry of Labour and Social Welfare. Consequently, the Applicant filed a statement of claim with the Basic Court requesting, among other things, that the Social and Family Policy Department be obliged to inform her biological child about his/her adoption. The Basic Court rejected the applicant's claim as ungrounded, confirming the above findings of the Centre for Social Work and of the Complaints Commission within the Ministry of Labour and Social Welfare. Subsequently, the applicant filed an appeal against this Judgment of the Basic Court, with the Court of Appeals, and the latter rejected her appeal as ungrounded, confirming the finding of the first instance court. The applicant fild a request for extraordinary revision of the Judgment of the Court of Appeals filed with the Supreme Court, which was as ungrounded.

Issues at stake

The issue in this case was the right of a biological mother to notify/contact her child given for adoption, when the child has already reached the age of majority.

The Supreme Court reasoning scrutinized by the Constitutional Court – critical aspects

In rejecting the complaint, the Constitutional Court focused on the guarantees embodied in Article 36 [Right to Privacy] Constitution, in relation to Article 8 [Right to respect for private and family life] ECHR.

Against this background, the Constitutional Court emphasized that:

- the applicant's request, through which she had expressed her interest in getting to know her child given for adoption many years ago, contained elements that belong to an important part of her identity as a biological mother and which affected her right to private life, in the sense of the notion of "her private life" guaranteed by paragraph 1 of Article 36 Constitution, in relation to paragraph 1 of Article 8 ECHR;
- the decisions of the regular courts, through which the specific request of the applicant was rejected were based on the law;Pursued a legitimate aim – the protection of the rights and freedoms of the adopted child and his adoptive family; and had followed a fair balance between the interests of the adopted child, now of legal age, and the respect of his private and family right within his adoptive family;
- the Constitutional Court endorsed the reasoning of the Supreme Court, which upheld the findings of the Basic Court and of the Court of Appeals that the facts and circumstances of the adoption should not be disclosed or investigated without the consent of the adopter and the child, unless it is required for special reasons and for reasons of public interest.
- based , on the content of the relevant legal provisions in force in the Kosovo*, the purpose and the aim of the legislator in this case is to maintain the confidentiality of data, which are aimed at protecting the right of the child and his adopter to family life, in particular the unimpeded development of their family relationship. Such a right, namely for having knowledge or access to information regarding the biological parents, the legislator gives only to the biological child, who based on his/her choice and after reaching the age of majority can request information about his/her biological parents.

Hence, the Constitutional Court concludes that the contested judgment of the Supreme Court was not involved in the violation of her right to private life guaranteed by paragraph 1 of Article 36 Constitution, in relation to paragraph 1 of Article 8 ECHR.

Note! The Constitutional Court did not consider not disclosing the identity of the applicant in this case, although the case involved sensitive issue of adoption and personal life.

Citing ECtHR case-law

Where can I find the ECtHR's case-law?

Judgments of the Strasbourg Court are readily available in English and French. The Court maintains an excellent database (known as HUDOC: **https://hudoc.echr.coe.int/).** HUDOC provides access to the case-law of the Court (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), the European Commission of Human Rights (decisions and reports) and the Committee of Ministers (resolutions).

On the website of the ECtHR there are two tutorials on how to use HUDOC. The database allows for both a simple and advanced search of the Court's case-law. There are also a number of manuals and a compendium of Frequently Asked Questions. For the time being, they are only in English.

How do I search HUDOC for a particular issue?

The legal issues dealt with in each case are summarised in a list of keywords, chosen from a thesaurus of terms taken (in most cases) directly from the text of the Convention and the Protocols thereto.
Searching with these keywords will enable you to find a group of documents with similar legal content. A list of keywords is available via the Keywords tab on the HUDOC search portal.

How do I search practice of Constitutional Courts in Europe

The judgments of the Constitutional Courts in Europe are available through the: E-Bulletin on Constitutional Case-Law, and CODICES Database.

The electronic Bulletin on Constitutional Case-Law ("e-Bulletin) (https://www.venice.coe.int/WebForms/pages/?p=01_Constitutional_Justice&lang=EN#Bullettin%20of%20Constitutional%20Case-Law) regularly reports on the case-law of constitutional courts and courts with equivalent jurisdiction including case-law of the ECtHR, the Court of Justice of the European Union and the Inter-American Court of Human Rights.

The CODICES database (www.codices.coe.int) contains the full text of over 10 000 judgments from over 100 courts mainly in English and in French, but also in other languages, as well as summaries of these judgments (précis) in English and in French. CODICES contains also information on the laws on constitutional courts the constitutions and other information including court descriptions and the Joint Council on Constitutional Justice's conference reports.

How to recognize the importance of an ECtHR's judgment?

Case Reports: Judgments, decisions and advisory opinions delivered since the inception of the new Court in 1998, which have been published or selected for publication in the Court's official Reports of Judgments and Decisions. The selection from 2007 onwards has been made by the Bureau of the Court following a proposal by the Jurisconsult. The ECtHR classifies judgments according to their importance and helpfully categorises its case-law within the database as having one of three levels of importance.
Here is the key:

1 = High importance. Judgments which the Court considers make a significant contribution to the development, clarification or modification of its case-law, either generally or in relation to a particular State.
2 = Medium importance. Judgments which do not make a significant contribution to the case-law but nevertheless do not merely apply existing case-law.
3 = Low importance. Judgments with little legal interest— those applying existing case-law, friendly settlements and striking out judgments (unless these have any particular point of interest).

In which languages is the case-law available?

Judgments, decisions and other texts are available in HUDOC in one or both of the Court's official languages (English and French).

Translations into non-official languages have also been added to HUDOC. Unless otherwise indicated, translations into non-official languages are not produced by the Registry of the Court and the Registry does not check their accuracy or linguistic quality. These translations are published in HUDOC for information purposes only. Multiple translations into the same language of individual judgments or decisions may appear.

What would be the best way to search the Court's case-law?

If you already know the case:

- HUDOC database, using Case Title or Application Number

If you are looking for cases by Article, keyword or theme

- HUDOC database
- Case-law Information Note, its annual Index and all legal summaries uploaded in the HUDOC database
- Case-law guides, based on specific Articles
- Case-law research reports
- European law handbooks
- Factsheets

If you want to know the most important cases examined each month

- Case-law Information Note

If you want to know the most important cases delivered for each year

- Selection of key cases
- Overview of the Court's case-law
- Annual Index of the Case-law Information Notes

The above tools, available mainly in English, allow you to read summaries of the case-law to decide whether the case you are looking at is relevant for your decision.

All these materials are accessible from the newly developed ECHR Knowledge Sharing platform available at https://ks.echr.coe.int/en/web/echr-ks/

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