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APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS FOR PROTECTION OF ENVIRONMENTAL RIGHTS AND THE ENVIRONMENT

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Посібник становить собою перше україномовне видання аналітичного огляду практики Європейського суду з прав людини у справах, що стосуються довкілля. Автори аналізують судові рішення за окремими статтями Конвенції про захист прав людини і основоположних свобод, зміст яких ЄСПЛ креативно розширив на ситуації, коли несприятливі фактори довкілля спричинили порушення конвенційних прав, чи коли такі права були обмежені в інтересах збереження довкілля. Даний посібник складається із двох розділів. Перший присвячений основним принципам діяльності та умовам звернення до ЄСПЛ в екологічних справах, а також питанням природи і значення рішень ЄСПЛ для національного права і практики в Україні. Другий розділ аналізує безпосередньо практику ЄСПЛ з питань, що стосуються довкілля. В якості додатків у посібнику надано офіційні тексти рішень у справах щодо України, а також неофіційні переклади резюме чи прес-релізів, підготовлених Секретаріатом ЄСПЛ.

Призначено для широкого кола юристів-практиків, суддів, а також для активістів природоохоронного руху України.

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З 36 **Application** of the European Convention on Human Rights for Protection of Environmental Rights and the Environment (manual) / Y. Aleksyeyeva, O. Melen-Zabramna, D. Skrylnikov. — Manuscript Publishing House — Lviv, 2016. — 228 p.

The manual constitutes the first Ukrainian edition of the analytical review of the case-law of the European Court of Human Rights in cases relating to the environment. The authors analyze court judgments under specific articles of the Convention for the Protection of Human Rights and Fundamental Freedoms, the content of which was creatively expanded by the ECHR to include situations when unfavourable environmental factors caused violations of rights under the Convention, or when such rights were limited for the sake of environmental protection. The manual consists of two chapters. The first one is dedicated to the main principles of activities and the criteria for application to the ECHR in environmental matters as well as to the issues of the nature and importance of the judgments of the ECHR for national legislation and practice in Ukraine. The second chapter directly analyzes the case-law of the ECHR in the issues relating to the environment. Official texts of decisions in cases against Ukraine as well as non-official translations of summaries or press releases prepared by the Secretariat of the ECHR are provided as annexes in the manual.

Meant for a wide range of practicing lawyers including judges as well as activists of the environmental movement in Ukraine.

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INTRODUCTION

Legal regulation in the sphere of environmental protection and securing the right to its safety for life and health in Ukraine is quite a branched and detailed one. Nevertheless, in practice preservation of the elements of environment and protection of environmental rights constitutes not an easy task, which is not always solved even by the national judicial system.

In such situations lawyers of the Environment–People–Law recommend using international mechanisms and tools, including application to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the European Convention or Convention) and its unique mechanism — the European Court of Human Rights (hereinafter referred to as the ECHR)[1].

The ECHR is a particularly interesting mechanism for protecting environmental rights of Ukrainians for three major reasons. First, the ECHR is, in fact, the only international court the procedure of which envisages the possibility of addressing for private persons, and not just member states of the Convention. It is entitled to confirm the facts of violation of rights protected under the Convention, to award payment of just satisfaction as well as to bind the governments to take measures to correct individual situations of applicants and systemic violations. Second, even though the Convention does not expressly guarantee the right to a sound and healthy environment, during last two decades the ECHR interpreted some of its provisions to address cases of environmental degradation. Third, unlike some Western European countries which still keep arguing on the scope of application of the Convention in domestic litigation against the third parties, that is concerning the issue whether the Convention is binding for courts and not just parties to the Convention, in 2006 the Parliament of Ukraine recognized the ECHR' case-law as the source of law — binding precedents for Ukrainian courts to follow while adjudicating cases between individuals, legal entities and Ukrainian authorities[2].

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[1] The Parliament of Ukraine ratified the European Convention on July 17, 1997 (the Convention took effect for Ukraine on September 11, 1997) and thus acknowledged the competence of the ECHR in hearing cases submitted against Ukraine.

[2] Article 17 of the Law of Ukraine *On Enforcement of Judgments and Application of the Practice of the European Court of Human Rights.*

The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in 1950 — in the period when environmental protection was not on the agenda for international regulation. The Convention was not meant for environmental protection, therefore the provisions of the Convention do not secure the right to the environment safe for life and health[3]. No wonder that the first environmental cases heard in the issue of violation of rights under the Convention in the 60–70 ies were considered to be obviously ungrounded. Along with that, starting with the 90ies the ECHR has been very creative in interpreting the provisions of the Convention. In one of its judgments the ECHR indicated that the Convention is a "living instrument" and "must be interpreted in the light of present-day conditions"[4]. Thus, for instance, the content of the right to life has evolved from negative obligation not to deprive intentionally a human being from his/her life to a positive obligation of a State to take appropriate steps to safeguard the lives of those within their jurisdiction in conditions of risk caused by environmental pollution[5]. Article 8 of the Convention that was primarily directed at the protection of private and family life from state interference now creates a positive obligation for governments to respond in cases of people's living in degrading or polluted environment, including in sanitary protection zones of enterprises[6].

Currently, protection of environmental rights and the environment has been reflected in the case-law of the ECHR, in particular, in cases in which violation of the right to life (Article 2), right to respect for private and family life (Article 8), right to peaceful enjoyment of possessions (Article 1 of Protocol 1), right to a fair trial (Article 6), right to an effective remedy (Article 13) and right to freedom of expression (Article 10) has been established. Article 8 of the Convention has undergone the most significant development in the direction of the right to safe environment.

In judgments in cases *Lopez Ostra v. Spain, Guerra v. Italy, Fadeyeva v. Russia* the ECHR established violation of Article 8 of the Convention and awarded the applicants the just satisfaction as well as made it binding for a country to take due measures to restore the right to respect for private and family life violated as the result of environmental pollution, and thus laid down the foundation for the protection of environmental rights in the ECHR. In the case of Heathrow Airport the ECHR, striking the balance between economic and environmental

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[3] Council of Europe: Committee of Experts for the Development of Human Rights, Final Activity Report on Human Rights and the Environment, (2005), Strasbourg, art. 7

[4] Case of Tyrer v. the United Kingdom, 25.04.1978, http://hudoc.ECHR.coe.int/eng?i=001-57587

[5] Case of Öneryıldız v. Turkey, 30.11.2004, http://hudoc.ECHR.coe.int/eng?i=001-67614

[6] Case of Dubetska and others v. Ukraine, 10.02.2011 p., http://zakon0.rada.gov.ua/laws/show/974_689

interests, decided in favour of economic welfare. One of the judges in his dissenting opinion indicated that environmental rights had not been known back in 1950, but the ECHR is prone to think that Article 8 embraces the right to a healthy environment and, correspondingly, therefore to protection against pollution and nuisances caused by harmful chemicals, offensive smells, noise… The Court should keep on developing environmental rights the same as other accompanying rights under the Convention[7]. Such approach of at least some judges who did not constitute the majority gives hope for further expansion of the range of possibilities in protecting environmental rights using the Convention. Along with that, even existing agreements in the sphere of recognition and protection of the rights to a safe environment contribute a lot to filling up the gaps available in the environmental legislation and the practice of its application in Ukraine.

Acknowledging the ECHR' case-law as an obligatory source of law in Ukraine, the legislator has changed the legal system for the sake of inclusion of the European standards of human rights protection into it. To develop the rule of law principle, the Verkhovna Rada of Ukraine has stated that all the judgments of the ECHR made against any of the member states of the Council of Europe are binding for Ukrainian courts, that is serve as legal precedents.

This manual consists of two chapters. The first one is dedicated to the main principles of activities and the criteria of resorting to the ECHR in environmental matters as well as to the issues of the nature and value of the ECHR case-law for national legislation and practice in Ukraine. The second chapter directly analyzes the case-law of the ECHR in specific cases.

The number of judgments of the ECHR in cases relating to violation of human rights due to certain environmental factors is limited to tens of them, and against Ukraine there are only three such cases. That is why in this edition the authors use among their materials all the judgments available in the sphere regardless of the country-respondent. To give the reader an opportunity to get acquainted with such judgments in a more detailed way, the manual includes full texts of judgments relating to Ukraine, as well as Ukrainian translations of official legal summaries and press releases issued by the Secretariat of the ECHR. All full texts of decisions of the ECHR are available in the HUDOC data base[8], and in cases relating to Ukraine they can also be found on the site of the Ministry of Justice of Ukraine[9].

The authors of the manual hope that it will be of use for a wide range of practicing lawyers, including judges, as well as for the activists of environmental movement of Ukraine.

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[7] Case of Hatton and Others v. the United Kingdom, 8.07.2003, joint dissenting opinion of Judges Costa, Ress, Turmen, Zupancic and Steiner, http://hudoc.ECHR.coe.int/eng?i=001-61188

[8] See: [Electronic resource]. — Access mode: http://hudoc.ECHR.coe.int/

[9] See: [Electronic resource]. — Access mode: http://www.minjust.gov.ua/9329

CHAPTER 1

SOME ASPECTS OF THE WORK OF THE EUROPEAN COURT OF HUMAN RIGHTS

1.1. CONDITIONS FOR APPLICATION TO THE ECHR WITH ENVIRONMENTAL CASES

As of December 31, 2015, 64,850 applications were pending with the ECHR, half of them relating to violations made by the following three countries: Ukraine, Russia and Turkey. Currently, about 22 % are cases against Ukraine[10], which is the highest figure among all the member states of the Convention.

"Popularity" of the European Court of Human Rights among ordinary citizens brought about problems with ECHR's workload and, correspondingly, with long case hearing procedure with the ECHR. Therefore, over the last decade attempts have been made to make the procedure of filing cases with the ECHR more complicated, to narrow the admissibility criteria. For instance, Protocol No. 14[11], that took effect on June 1, 2010, set a new admissibility criterion relating to significance of disadvantages caused to the applicant and aimed at reduction of the number of applications submitted by persons who suffered no significant disadvantages. Protocol No. 15 dated June 24, 2013 envisages reduction of the periods for application to the ECHR from six to four months from the date the final decision of the national court was taken. That Protocol has also introduced minor changes into the Preamble of the European Convention on Human Rights by including a reference to the subsidiarity principle to it as well as the doctrine

[10] The ECHR in fact and figures, 2015. http://www.ECHR.coe.int/Documents/Facts_Figures_2015_ENG.pdf

[11] LAW On Ratification of Protocols No. 12 and No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms as of February 9, 2006 http://zakon3.rada.gov.ua/laws/show/3435-15

of the limits of freedom of discretion. Protocol No. 16 dated October 2, 2013 allows the parties to address the ECHR with the request to give advisory opinion on questions of principle relating to interpretation or application of the rights and freedoms defined by the Convention and the protocols thereto. National courts or tribunals can request the ECHR to give advisory opinions to them only in relation to cases which are under hearing there. Protocols No. 15 and No. 16 have not been ratified by Ukraine and by a sufficient number of the parties to the Convention for it to take effect as yet.

The ECHR tries to provide maximum assistance and promotion to prospective applicants in their applications to court, therefore detailed information on the application procedure and all the court procedures is provided on the ECHR's web-site in Ukrainian: http://www.ECHR.coe.int/Pages/home.aspx?p=applicants/ukr. Those available resources describe in a very detailed way all the requirements for applying to the ECHR relating to obvious cases of infringement of fundamental human rights and freedoms, still the practice of the ECHR confirms to the possibility of application to court and using provisions of the Convention for "non-standard" cases relating to environmental protection or influence of the environment, environmentally hazardous facilities on citizens as the result of which the rights fixed in the Convention are violated or there is a risk of their violation.

We consider it expedient to describe the main requirements to be followed in applying to the ECHR in "environmental" cases relating to such environmental pollution that poses a threat or directly affects life, health, private life of citizens, their housing or property as well as cases relating to violation of procedural rights envisaged by art.6, 13 of the Convention.

1. Who can act as an applicant

Art. 34 of the Convention

The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.

Thus, a person who considers that (s)he personally and directly has become the victim of the violations of the rights and guarantees set forth in the Convention or the Protocols thereto can apply to the ECHR. The term "victim" in article 34 of the Convention stands for a person or persons who have directly or indirectly become victims as the result of the claimed violation. Thus, article 34 refers not only to an individual or individuals who have directly become victims as the result of the claimed violation, but also to any indirect victims to whom

the violation has possibly brought damages or who have a significant personal interest in its termination. The notion "victim" is interpreted autonomously and independently of the national norms relating to interest or capacity to file a claim, even if the ECHR has to take into account the fact that the applicant was a party in the national proceedings. This notion does not presuppose availability of damages[12]. A legal entity, an association of citizens can act as an applicant in case the rights of these subjects are violated. There are exceptions when the ECHR takes for consideration applications submitted by non-governmental organizations who have not been victims of the violations.

In the case *Centre for legal resources on behalf of Valentin Campeanu v. Romania*[13] the application was submitted by a non-governmental organization (NGO) on behalf of Valentin Campeanu who died in 2004 at the age of 18 in a mental health clinic. Court ruled that under the exceptional circumstances of the case and with due account of the serious nature of the applications, the NGO was entitled to act as a representative of Valentin Campeanu, though the very organization was not a victim of the violation envisaged by art. 2 and 13 of the Convention.

In its judgment in the case *Sdruženi Jihočeské Matky v. Czech Republic*[14] the ECHR primarily pointed out that the applicant organization was a legal entity that could not be acknowledged a victim of violations of such personal rights as the right to life and health since only individuals can be the subjects of violation of such right. It also cannot refer to the right to respect for its "housing" in the sense of article 8 of the Convention solely on the grounds that its office is located not far from the station it criticizes since the result of encroachment of that right are the inconveniences and concern that only individuals can have. Also, taking into account the fact that the applicant organization has not indicated whether it possesses or rents the property located close to Temelin Nuclear Power Plant, it may not bring claims to be entitled under the Czech legislation to protect its property from the influence of the plant. Correspondingly,

[12] Practical manual on admissibility of applications, Council of Europe\European Court of Human Rights, 2014.

[13] Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, 17.07.2014, http://hudoc.ECHR.coe.int/eng?i=001-145577

[14] Sdružení Jihočeské Matky c. la République tchèque, 10.07.2006, http://hudoc.ECHR.coe.int/eng?i=001-76707

the applicant organization has not proven either availability of sufficient interference into its personal "civil" right, or availability of a real serious contestation of the right to respect for its property. Still, the ECHR acknowledges that with its actions the applicant organization tried to protect individual rights of its members fixed in the national legislation, therefore such organization-applicant can get the status of a victim in the sense of Article 34 of the Convention. Still, the ECHR did not consider it in the case in a detailed way.
The Court has also underlined that the Convention does not envisage the bringing of an *actio popularis* for the interpretation of the rights it contains or permit individuals to complain about a provision of a domestic law simply because they consider, without having been directly affected by it, that it may contravene the Convention[15].

Examples of cases heard by the ECHR involving individuals and legal entities as applicants in "environmental" cases are provided in Chapter 2.

For the application to be accepted by the ECHR, it must meet the admissibility criteria set out in Article 35 of the Convention.

Article 35. Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

The first requirement for the application is exhaustion of all the domestic legal remedies. Domestic remedies include accessible and efficient procedures determined by the legislation, which can ensure termination of violations or damage compensation. In Ukraine to challenge the decisions, actions, inactivity of the authorities one may first address a high-level administrative body (administrative review, which is not obligatory) or address the court right away. Following the practice of the European Court of Human Rights non-judicial procedures, addresses to the parliament, president, government, ministers, prosecutor's officer or ombudsman are not regarded as remedies that have to be used prior to applying to the ECHR. It is also important to know that when domestic remedies are not available or inefficient, that is they cannot ensure final protection of violated rights, individuals may apply to the European Court of Human Rights without using them. That rule is also not applied in case it is proven that in the

[15] Practical guide on admissibility criteria, Council of Europe\European Court of Human Rights, 2014. Para 29. http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf

administrative practice actions incompatible with the Convention are repetitive, and official state authorities are tolerant about this, thus any proceedings become fruitless and inefficient. For instance, there is no point addressing the national court if the right of the applicant guaranteed by the Convention is violated as the result of effect of the law which cannot be challenged by him/her in court. One may also address the European Court of Human Rights in case of long delays with the court case hearing in national courts, without waiting for their judgment.

Paragraph 1 of Article 35 refers only to *domestic* proceedings; it does not make it binding to exhaust all remedies available on the international level. The duty to submit the application within six months after the date the final judgment is taken on the national level requires clarification of the content of the term "final judgment" and beginning and expiry of the period. As a rule, final judgment stands for the judgment of the national court that took effect and is final. Normally, that is the judgment of the high specialized court that has heard the case upon the cassation appeal of the party (parties)[16].

The six-month-period starts with the date when the applicant and/or his/her representative has been sufficiently made acquainted with the final national court decision. If the applicant was not present when the final court decision was announced or did not know about it, or did not have a chance to get acquainted with it right after it was announced, the six-month-period starts with the date (s)he comes to know of the judgment.

If it is understandable right from the beginning that the applicant does not have any effective remedy, the six-month-period starts from the date of claimed actions or from the date when the applicant comes to know about them or starts witnessing their negative consequences or harm. The terms "ongoing conditions" stands for the conditions resulting from long-term actions taken by state or on behalf of the state from which the applicants suffer. The fact that the event causes

[16] T. Ihnateko in the article: *Judgments of the ECHR as the grounds for reconsidering a specific case of the Supreme Court of Ukraine: restoration of the infringed right or formality?* indicates: In the above decisions the European Court states that "cassation appeal in the Supreme Court of Ukraine can be treated as an efficient remedy of the infringed right, therefore judgments of that instance constitute the beginning of counting the period of applying to the European Court. Exceptions here were administrative cases in relation to which the European Court has indicated that the High Administrative Court of Ukraine is the final instance and there is no need to address the Supreme Court of Ukraine in order to exhaust domestic remedies.

Taking into account the fact that currently the Supreme Court of Ukraine already is not a cassation (final) instance, but it only reconsiders court judgments in cases set by the procedural law of Ukraine, one can tell that after judgment of the High Specialized Court of Ukraine is received, there are all the grounds to apply to the European Court of Human Rights simultaneously with applying to the Supreme Court of Ukraine if there are legal grounds for that. The source: http://radako.com.ua/news/rishennya-iespl-yak-pidstava-dlya-pereglyadu-konkretnoyi-spravi-vsu-vidnovlennya-porushenogo

serious long-term consequences does not mean that it creates the "ongoing conditions". If the claimed violation creates a long-term situation against which there are no remedies in the domestic legislation, the six-month-period starts from the date the situation is over. While the situation is on, the rule of the six-month-period of application submission is not applied[17].

Rule 47 of the Rules of the ECHR that came into effect on January 1, 2014 determines that under paragraph 1 of Article 35 of the Convention the application is considered to have been submitted starting with the date when the application form filled out following the requirements set out in the Rule is sent to the ECHR. The application must contain all the data indicated in its corresponding parts and be accompanied by copies of the necessary supporting documents. But for cases envisaged by Rule 47 of the Regulations, only fully completed application form suspends the run of the six-month-period (Practical guidance on application submission, § 1)[18].

Besides, the applicant should follow the rules and procedures of national legislation. If an application could not have been reviewed by national courts because the applicant failed to lodge it within the time-limit prescribed by national law, then such an application before the Strasbourg Court may be declared inadmissible. When the applicant is complaining before national courts, he (she) must raise at least the substance of the Convention violation he (she) is alleging before the ECHR[19].

Article 35. Admissibility criteria

2. The Court shall not deal with any application submitted under Article 34 that: a) is anonymous; or b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly illfounded, or an abuse of the right of individual application; or b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

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[17] Practical manual on admissibility of applications, Council of Europe\European Court of Human Rights, 2014.

[18] More detailed information on the application procedure can be found at: http://www.ombudsman.gov.ua/ua/page/applicant/court/appeal.html

[19] http://www.echr.coe.int/Documents/COURtalks_Inad_Talk_ENG.PDF

The most frequent reason for application rejection by the ECHR is the fact that the application is manifestly illfounded. In fact, usage of the term "manifestly" in article 35, paragraph 3 a) can lead to some confusion: in its literal sense it may mean that the application can be considered inadmissible for those grounds only in case it is obvious for the reader right away that it is speculative and has no grounds. That may happen in case the application discloses no appearance of a violation or if there is settled or abundant case-law in similar or identical situations also finding no violation.

The application can be manifestly illfounded if the applicant failed to provide sufficient evidence to support the facts and the legal arguments which are raised. Application may be declared inadmissible if it is so confused that it is objectively impossible for the Court to make sense of the complaints made. The same applies to far-fetched complaints and to those that have clearly been invented or that are manifestly contrary to common sense[20].

Paragraph 3 b) of Article 35 contains three different elements. That, primarily, is the very admissibility criterion: the ECHR can announce any application inadmissible if the applicant has not indicated any significant disadvantage. Then go two subparagraphs of safeguard clauses. First, the ECHR cannot announce the application inadmissible if respect for human rights requires considering the application on the merits. Secondly, no application can be rejected because of the new criterion if it has not been properly considered by the domestic tribunals.

The new admissibility criterion was added to the criteria fixed in article 35 when Protocol No. 14 took effect on June 1, 2010. Introduction of the new criterion was considered necessary due to ongoing increasing workload of the ECHR. That criterion provides the ECHR with an additional means of focusing on cases requiring hearing on the merits. In other words, it provides the ECHR with the opportunity to reject cases considered "of minor importance", following the principle under which judges do not have to hear such cases.

The main element of the new criterion is identification of whether the applicant has suffered a "significant disadvantage". That notion is based on the idea that violation of the right, no matter how real it was from a purely legal point of view, should reach the minimum level of gravity for its consideration by the international court to be justified. Violations of purely technical nature or minor ones, regardless of their formal nature, do not deserve being controlled by the European Court of Human Rights. Determination of the minimum level is relative and depends on the circumstances of the case in general. Seriousness of the violation is determined both by the subjective opinion of the applicant and objective importance of the case. Violation of the Convention can be related to important matters of principle and, thus, cause significant disadvantages, regardless of material interests.

[20] http://www.echr.coe.int/Documents/COURtalks_Inad_Talk_ENG.PDF

To determine the minimum disadvantages justifying hearing of the case by the ECHR, the court takes into account the nature of the right to violation of which the application refers, seriousness of the claimed violation and/or potential consequences of this violation for the applicant's personal life. To assess the circumstances, the ECHR should, in particular, determine the importance or the results of the domestic proceedings. In many cases significance of the disadvantages is determined judging by the financial dimensions of the issue under consideration and importance of the case for the applicant. Financial dimension is assessed not only from the point of view of moral disadvantages to which the applicant refers.

If the ECHR, being guided by the above principles, has established absence of significant disadvantages, it still has to check whether one of the two paragraphs of the safeguard clause set out in paragraph 3 b) of article 35 makes its binding to still consider the claim on the merits. The second element is paragraph-safeguard clause due to which the application will not be announced inadmissible in case respect for human rights guaranteed by the Convention and the Protocols thereto requires hearing of the case on the merits. As it is indicated in paragraph 39 of the explanatory report to Protocol No. 14, the goal of application of the new admissibility criterion is the striving to avoid rejection of cases which, in spite of their mundane nature, raise serious issues of application or interpretation of the Convention or important issues relating to the national law.

Finally, paragraph 3 b) of Article 35 does not allow to dismiss the application due to inadmissibility if the case that has not been duly heard by the domestic court. The aim of the rule which is called by the authors of the Convention as the "second safeguard paragraph" is the guarantee of the need for each case to be heard by the court instance either on the national or international levels. As it has already been noted above, this second paragraph of the safeguard clause will be removed when Protocol No. 15 containing an amendment to the Convention takes effect. The second paragraph of the safeguard clause also aims to avoid rejection of the application for justice. This paragraph coordinates well with the principle of subsidiarity under Article 13 of the Convention that requires availability of the right to an effective remedy for violations made by the national authority[21].

Normally, the ECHR applies a hierarchical approach to checking admissibility criteria following the sequence, but there are some exceptions. For instance, in the case *Finger v. Bulgaria*[22], the court refused to consider whether the applicant had suffered a significant disadvantage in case of a claimed too long court proceedings since the court was of the opinion that safeguard clauses two and three were present in the case.

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[21] Practical manual on admissibility of applications, Council of Europe\European Court of Human Rights, 2014.

[22] Case of *Finger v. Bulgaria*, 10.05. 2011. http://hudoc.ECHR.coe.int/eng?i=001-104698

Thus, applying to the ECHR is not quite an easy task, and even a very serious environmental case can be rejected by the ECHR due to non-observance of the requirements for applying and admissibility criteria. Currently, the statistics of the ECHR speaks for itself. Thus, during 2014, 52,758 applications were submitted to the court. 23 % of them were rejected due to non-observance of Rule 47 of the Rules of the ECHR that came into effect on January 1, 2014. The most typical grounds for rejection were non-submission of the claim on the developed application form, non-submission of documents confirming the judgment or actions to which the applicant refers and which (s)he contests; absence of application on violations, absence of admissibility criteria observance statements, absence of a documentary confirmation of performance of the duty of using all available domestic remedies. Besides that, in the past it was enough to send a letter with the essence of the claim in order to suspend the 6-month-period. Now the date of dispatch of the full application with all the documents is necessary to terminate the 6-month-period. Quite often the applicants sending the application at the end of the 6-month-period do not have time to resend to the ECHR the necessary documents upon getting the letter about incompleteness of the application since they risk missing the 6-month-period. In 2014, only 8 % of applications were rejected because the period expired. In 2015, 43,135 applications were acknowledged inadmissible, which means increase by 48 % as compared to 2014[23].

1.2. NATURE OF THE ECHR'S CASE-LAW AND ITS APPLICATION BY NATIONAL COURTS

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) has undergone significant changes since the date of its signing in 1950. Sixteen protocols have been adopted since the date the first text of the Convention came into effect. Those protocols have not only expanded the rights guaranteed by the Convention, but have also significantly changed and improved the efficiency of the mechanism of the Convention enforcement. As the result of such changes, the ECHR has become a permanent body open for direct access of Europeans, citizens of 47 countries-signatories of the Convention (including Ukraine) as well as non-governmental organizations.

Under Article 19 of the Convention amended by Protocol 11, to ensure following by the high contractual parties of their commitments under the Con-

[23] http://www.ECHR.coe.int/Documents/Stats_analysis_2015_ENG.pdf

vention and the Protocols thereto, the European Court of Human Rights is set up to function on a permanent basis. Procedural provisions on the nature and legal effect of judgments of the ECHR have been left unchanged. Under Article 44 of the Convention, judgments of the ECHR are final. Under Article 46 high contractual parties shall abide by the final judgments of the ECHR in any cases to which they are parties. It is worth noting that neither the primary text of the Convention, nor its current one contain any provision that would make it binding for the parties to follow the ECHR's case-law while adjudicating cases in domestic courts. Along with that, the content of concise provisions of the Convention is disclosed in specific judgments of the court. Interpretation of the provisions of the Convention set out in the ECHR case-law opens up the framework and content of obligations under the Convention, which are often difficult to see while reading the text of the Convention[24].

Courts of some European countries apply the ECHR case-law (in cases against those countries) when cases are heard by national courts as a judicial precedent — the source of law obligatory for application. For example, the Supreme Court of Sweden considers judgments of the ECHR court to be precedents that are of higher legal effect than its own previous judgments, and therefore acknowledges the court case-law and, correspondingly, the European Convention as norms of direct effect in the system of Swedish national legislation[25]. The Federal Constitutional Court of Germany expands the effect of Article 46 of the Convention not only to the state government, but national courts as well. In one of its judgments the Federal Constitutional Court of Germany has established that the ECHR's case-law reflects the current condition of the Convention law: "since the legal effects of Strasbourg judgments are binding on the state party as a whole, and in accordance with the rule of law principle enshrined in the Basic Law, such judgments are binding on all the state authorities of Germany, including the courts. The Federal Constitutional Court of Germany has found that the decision of the […Appellate] Court has violated the rule of law principle because the appellate judges had not taken proper account of the ECHR judgment, despite being constitutionally obliged to do so" [26].

And though supreme courts of Sweden and Germany recognized the court practice of the ECHR *in relation to those countries as the source of law, they said*

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[24] Polakiewicz, The Execution of Judgments of the European Court of Human Rights, in: Fundamental Rights in Europe: The European Convention on Human Rights and its Member States (1950–2000), Blackburn/Polakiewicz (Eds.), 2001, ст. 72–73.

[25] The application of the European Convention on Human rights in domestic Scandinavian law by Søren Stendererup Jensen, p. 94–95, www.cenneth.com/sisl/pdf/35-3.pdf.

[26] Frank Hoffmeister, Germany: Status of European Convention on Human Rights in domestic law — *Germany-Oxford Journals, Journal of Constitutional Law, Volume 4, Number 4,* ст. 722–731, http://icon.oxfordjournals.org/cgi/reprint/4/4/722.

nothing about the great number of judgments of the ECHR made in cases filed against other European countries. *Formally, the* ECHR's case-law as such is not binding on the countries that were not parties to the case, but judgments relating to other countries sooner or later stimulate counties to change their legislation or practice[27]. *Unlike countries of the Western Europe, some Eastern European countries like Ukraine and Georgia have recognized and officially enshrined universal application of the* ECHR's case-law. *In Georgia, for example, courts must apply not just the Convention, but the* ECHR's case-law, *that is all the judgments interpreting provisions of the Convention and contributing to its correct application*[28].

2. Application of the ECHR's case-law in Ukraine

The Verkhovna Rada of Ukraine ratified the European Convention almost twenty years ago. Under the law of Ukraine *On International Treaties of Ukraine* as of April 29, 2004 current international treaties of Ukraine, the consent to the binding nature of which has been granted by the Verkhovna Rada of Ukraine, constitute a part of the national legislation and are applied following the procedure envisaged for the norms of the national legislation. If an international treaty of Ukraine that has come into effect following the set procedure determines other rules than the ones envisaged in the corresponding legislative act of Ukraine, rules of the international treaty shall be applied[29]. Thus, according to the Ukrainian legislation, the European Convention on the scale of hierarchy of laws is ranked between the Ukrainian Constitution and the laws of Ukraine, that is only the Constitution is of higher legal effect than the Convention. In Ukraine the European Convention creates duties not just for the government, but for all the parties of the corresponding legal relations. Still application of the Convention apart from ECHR judgments that give content to its provisions is senseless from the practical point of view.

The issue of application of the ECHR's case-law and its place in the hierarchy of the sources of law is a bit more complicated, though not impossible to settle. What source of law should be applied — judgment of the ECHR or a certain law of Ukraine, if there is collision between them — is a tough question for Ukrainian lawyers. Ukraine is among countries of the continental system of law, and the national system is not used to recognizing court precedents as the source of law, therefore lawyers-researchers are still discussing the legal effect of court precedent as compared to other sources of law.

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[27] Iain Cameron, An introduction to the European Convention on Human Rights, 4th Ed. 2002, ст. 47.

[28] Georgia State's Positive Obligation in Securing Protection of Human Rights/Georgian Law Review 5'2002–2'3 at http://www.geplac.org/publicat/law/glr02n2-3e./p_405e.pdf.

[29] Article 19 of the Law of Ukraine *On International Treaties*.

The author keeps to the standpoint of domestic specialists who express their ideas that the Convention guarantees the highest values of mankind, that fundamental rights and freedoms interpreted by the ECHR constitute the essence of both international and national law, that Convention enshrines the highest values of mankind: fundamental human rights and freedoms interpreted by the European Court of Human Rights definitely constitute a nucleus of both supranational and national law, therefore common values in question here are not creation of a certain culture changing from epoch to epoch, or subjective views of some individuals, but constitute a general civilization, general cultural values, regardless of nations, ideologies, religions. It is this circumstance that is considered to be the ground for acknowledging the priority of the norms of the Convention and the ECHR's case-law over the norms of national legislation. And implementation of the Convention and ECHR's case-law is considered to be a long-awaited way of resolving conflicts in law in disputes dealing with the rights guaranteed by the Convention and preventing violation of provisions of the Convention by Ukraine in future[30].

Such views do not in any way run counter to provisions of the national legislation. In particular, Law No. 475/97-BP as of July 17, 1997, under which ratification of the Convention took place, envisages that "Ukraine completely recognizes in its territory [...] relating to acknowledging as binding and without conclusion of a special agreement the jurisdiction of the European Court of Human Rights in all the issues relating to the interpretation and application of the Convention".

In 2006, special Law of Ukraine *On Enforcement of Judgments and Application of the Case-Law of the European Court of Human Rights* No. 3477-IV was adopted. In its preamble the legislator confirms the need to introduce European human rights standards into the Ukrainian judicial and administrative practices as well as to create preconditions for reducing the number of applications submitted to the European Court of Human Rights against Ukraine. Under that Law Ukraine has not just undertaken the commitment to enforce judgments made with its participation, but also additional commitments relating to the whole ECHR's case-law, viz.&: under Article 17, while hearing cases, Ukrainian courts should apply the Convention and the ECHR's case-law as the source of law. In other words, under the provisions of the above law, judgments made against other countries are binding and must be applied by Ukrainian national courts. All judgments made by the ECHR against Great Britain, France, Poland or any

[30] Some issues of application of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Practice of the European Court of Human Rights in Ukraine. — The leading specialists of expert and methodology unit of the Secretariat of the Governmental Ombudsman for the matters relating to the European Court of Human Rights— I. Ilchenko, at http://www.minjust.gov.ua/0/14103.

other country of the Council of Europe constitute an obligatory source of law for Ukrainian courts.

The law also sets the procedure of translation, dissemination and reference for the judgments of the ECHR. Thus, to take measures of general nature the state ensures translation and publication of full texts of judgments made against Ukraine in Ukrainian in legal editions specializing in the issues of judicial practice. The edition should be popular in the professional legal environment (p. 1 of art. 6). Provision of judges with a published translation of full texts of judgments is the duty of the state authority responsible for organizational and material support of courts (p. 4 of art. 6). Under art. 18, in case there is no translation of a court judgment — that is if it is necessary to make a reference to the judgment in a case against any other member state of the Convention — court uses original text of the judgment (in English or French).

As it has been noted by the author above, Ukraine belongs to the continental law system. Court judgments in Ukraine do not create legal norms, and are binding only on the parties of the dispute in question as settled by court. After the Law of Ukraine *On Enforcement of Judgments and Application of the Practice of the ECHR* was adopted, the High Commercial Court of Ukraine published information letter No. 01-8/451 as of July 24, 2008, indicating that commercial courts must apply all the decisions and judgments of the ECHR while settling commercial cases[31]. Formally, provisions of the law have a direct effect and should be enforced. Along with that, such methodological indication of the high court aims to draw attention of judges of commercial courts who face the issues of human rights in their activities on a rare basis to such provision of the law.

The recent codes of procedure — the Code of Administrative Procedure of Ukraine and the Code of Criminal Procedure of Ukraine — envisage using the practice of the ECHR while administering justice. Both the Code of Administrative Procedure of Ukraine[32] and the Code of Criminal Procedure of Ukraine[33] link application of the ECHR's case-law to the rule of law principle, according to which humans, their rights and freedoms are recognized as the highest values and determine the content and direction of state activities.

The Supreme Court of Ukraine in its decisions also consistently pays attention to using the ECHR's case-law. Thus, in decision of the Plenum of the Supreme Court of Ukraine as of February 27, 2009 No. 1 *On Court Practice in Cases Relating to Protection of Dignity and Honour of an Individual as well as*

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[31] Information Letter of the High Commercial Court of Ukraine *On Amending the Information Letter of the High Commercial Court of Ukraine as of November* 18, *2003 No. 01-8/1427 On the Convention for the Protection of Human Rights and Fundamental Freedoms of the Year 1950 and Jurisdiction of the European Court of Human Rights"*.

[32] The Code of Administrative Procedure of Ukraine, 2005, article 8.

[33] Code of Criminal Procedure of Ukraine, 2013, articles 8, 9.

Business Reputation of an Individual and Legal Entity it is indicated that taking into account provisions of art. 9 of the Constitution and with due account of the ratification of the Convention and adoption of Law No. 3477-IV, courts must apply the Convention and judgments of the European Court of Human Rights as the source of law. Also, p. 12 of decision of the Plenum of the Supreme Court of Ukraine as of December 18, 2009 No. 14 *On Court Judgments in Civil Cases* indicates that in the reasons for each judgment there must be references to the Convention and judgments of the European Court of Human Rights which constitute the source of law under Law No. 3477-IV and are subject to application.

The authors of new research and methodological manuals for judges[34] also indicate that Law No. 3477-IV envisages application of the Convention and the ECHR's case-law by courts as the source of law, but there are no provisions which would prevent from application of judgments or decisions of the ECHR made in relation to other countries, therefore the use of judgments against Ukraine in the manual is caused only by the considerations of accessibility and convenience for readers who, in case it is necessary to address the full text can face certain difficulties, since they do not have a command of the official languages of the Council of Europe.

In 2015, the Ukrainian Helsinki Human Rights Union published the results of the research "Precedent UA – 2015" on the application of judgments of the ECHR by Ukrainian courts[35]. The study has shown that as of 2015 judges of all instances do not just know, but also actively use the ECHR's case-law in their activities. Thus, as of today one can tell that the ECHR's case-law should be used while preparing statements of claim and other procedural documents submitted to court since their use as the source of law has already been introduced into the current practice of justice administration.

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[34] Fuley T. I. Application of the Practice of the European Court of Human Rights in Administrative Judicial Procedure: Research and Methodological Manual for Judges. 2nd ed. cor., add. — K., 2015. — 128 p.

[35] "Precedent UA – 2015" / Arkadiy Bushchenko, Olena Sapozhnikova, Oleh Shynkarenko. — K. : KVITs, 2015. — 412 p.: il.

CHAPTER 2

HUMAN RIGHTS AND ENVIRONMENT IN THE ECHR'S CASE-LAW

2.1. GENERAL OVERVIEW OF ENVIRONMENTAL ASPECTS IN CASES OF THE ECHR

Even though the European Convention on Human Rights does not directly establishes the right to a safe environment, the jurisprudence of the European Court of Human Rights could not avoid issues relating to the environment, because the realization of the rights under the Convention can be undermined due to environmental damage and presence of environmental risks.

The issue of the environment and the impact of environmental factors on humans is increasingly becoming the subject of review by the ECHR, thus, currently ECHR decisions touch upon many environmental issues. It is worth mentioning that in recent years, there were three cases against Ukraine, which are directly related to environmental pollution and environmental safety. In particular, these are the following cases: *Dubetska and others v. Ukraine (2011)*[36], *Grimkovska against Ukraine*[37] *(2011) and Dzemyuk against Ukraine*[38].

Among others, the ECHR reviewed cases[39], related to the folowing environmental aspects:

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[36] Case Dubetska and others v. Ukraine, 10.02.2011 http://zakon5.rada.gov.ua/laws/show/974_689

[37] Case Grimkovska v. Ukraine, 21.07.2011. http://www.epl.org.ua/law/mizhnarodni-dohovory/yevropeiskyi-sud-z-prav-liudyny/412-sprava-hrimkovska-proty-ukrainy-povnyi-tekst-rishennia-ukrainskoiu-movoiu

[38] Dzemyuk v. Ukraine, 4.09.2014, http://zakon5.rada.gov.ua/laws/show/974_a51

[39] For more details see Factsheet — Environment and the ECHR : http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf

Right to life (Article 2 of the Convention)

- Hazardous industrial activities

– *Case of Öneryıldız v. Turkey*[40] — methane explosion at a rubbish tip.

- Industrial emissions and health

– *Case of Smaltini v. Italy*[41] — impact of emissions of steel production factory and leukemia;
– *Case of Locascia and Others v. Italy (no. 35648/10)*[42] — impact of waste disposal plants.

- Natural disasters

– *Case of Budayeva and Others v. Russia*[43] — mudslide;
– *Case of Özel and Others v. Turkey*[44] — earthquake.

Right to a fair trial (Articel 6 of the Convention)

- Access to court in the context of challenging permits for environmentally hazardous activities

– *Case of L'Erablière A. S. B. L. v. Belgium*[45] — challenging by a non-profit-making association of the planning permission to expand a waste collection site;
– *Case of Athanassoglou and Others v. Switzerland*[46] — challenging the decision on extension of operating license for the nuclear power plant.

- Failure to implement final court decisions on termination of environmentally hazardous activities

– *Case of Apanasewicz v. Poland*[47] — failure to implement the decision on closing the illegally constructed plant.

Right to respect for private and family life (Article 8 of the Convention)

- Environmental risks and access to information

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[40] Case of Öneryıldız v. Turkey, 30.11.2004, http://hudoc.echr.coe.int/eng?i=001-67614

[41] Smaltini v. Italy, 24.03.2015 (decision on the admissibility) http://hudoc.echr.coe.int/eng-press?i=003-5063136-6229604

[42] Locascia and Others v. Italy, в процесі розгляду, http://hudoc.echr.coe.int/eng?i=001-118326

[43] Case of Budayeva and Others v. Russia, 20.03.2008, http://hudoc.echr.coe.int/eng? i=001-117225

[44] Case of Özel and Others v. Turkey, 17.11.2015, http://hudoc.echr.coe.int/eng-press? i=003-5224921-6478918

[45] Case of L'Erablière asbl v. Belgium, 24.02.2009, http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2643683-2889423

[46] Athanassoglou and Others v. Switzerland, 6.02.2000 (Grand Chamber), http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-68467-68935

[47] Case of Apanasewicz v. Poland, 3.05.2011. http://hudoc.echr.coe.int/eng?i=001-124654

– *Case of Guerra and Others v. Italy*[48] — damage caused by a chemical facility producing mineral fertilizers and failure to release information for assessment of the risk;
– *Case of Brincat and Others v. Malta*[49] — exposure to asbestos in the course of ships repairing at a ship producing facility.

• Industrial pollution

– *Case of Lopez Ostra v. Spain*[50] — emissions of the liquid and solid waste treatment facility at tanneries;
– *Case of Bacila v. Romania*[51] — emissions of the lead and zinc producing plant;
– *Case of Taşkın and Others v. Turkey*[52] — granting the mine an operating permit for use of cyanidation process;
– *Case of Ockan and others v. Turkey*[53] — operating permits for gold mining;
– *Case of Fadeyeva v. Russia*[54], *Case of Ledyayeva and others v. Russia*[55] — residing in a sanitary-protective zone of a metallurgic plant;
– *Case of Giacomelli v. Italy*[56] — residing in the vicinity of the plant for the storage and treatment of "special waste" classified as either hazardous or non-hazardous;
– *Case of Tătar v. Romania*[57] — use of cyanide in gold mining;
– Dubetska and others v. Ukraine[58] — water and air pollution as a result of operation of mining enterprises.

• Mobile communication towers

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[48] Case of Guerra and others v. Italy, 19.02.1998. http://hudoc.echr.coe.int/eng?i=001-58135, unofficial translation of the decision: http://medialaw.org.ua/userimages/book_files/Book_WEB_European_Court_Coe_MLI.pdf

[49] Case of Brincat and Others v. Malta, 24.07.2014, http://hudoc.echr.coe.int/eng?i=001-145790

[50] Case of Lopez Ostra v. Spain, 09.12.1994. http://hudoc.echr.coe.int/eng?i=001-57905, Ukrainian version of the decision: http://zakon0.rada.gov.ua/laws/show/980_348

[51] Case of Bacila v. Romania, 30.03.2010. http://hudoc.echr.coe.int/eng-press?i=003-3084920-3417430

[52] Case of Taşkın and Others v. Turkey, 10.11.2004. http://hudoc.echr.coe.int/eng?i=001-67401

[53] Case of Ockan and others v. Turkey, 28.03.2006. http://hudoc.echr.coe.int/eng?i=001-125726

[54] Case of Fadeyeva v. Russia, 09.06.2005. http://hudoc.echr.coe.int/eng?i=001-69315

[55] Case of Ledyayeva and others v. Russia, 26.10.2006. http://hudoc.echr.coe.int/eng?i=001-77688

[56] Case of Giacomelli v. Italy, 2.11.2006. http://hudoc.echr.coe.int/eng?i=001-126090

[57] Case of Tătar v. Romania, 27.01.2009. http://hudoc.echr.coe.int/eng?i=001-117147

[58] Case Dubetska and others v. Ukraine, 10.02.2011. http://zakon5.rada.gov.ua/laws/show/974_689

– *Case of Luginbühl v. Switzerland*[59] — potential impact of installation of mobile communication towers.

• Noise pollution

– *Case of Powell and Rayner v. the United Kingdom*[60], *Case of Hatton and others v. the United Kingdom*[61], *Case of Flamenbaum et Autres c. France*[62] — air movement and noise disturbance caused by planes;
– *Case of Moreno Gomez v. Spain*[63], *Case of Mileva and Others v. Bulgaria*[64] — noise caused by night and computer clubs located in the vicinity;
– *Case of Dees v. Hungary*[65], *Grimkovska v. Ukraine*[66] — noise and other adverse impact caused by roads and transportation;
– *Case of Fägerskiöld v. Sweden*[67], *Case of Vecbaštika and Others v. Latvia (no. 52499/11)*[68] — noise and vibration caused by wind turbines and wind parks;
– *Case of Martinez Martinez and Pino Manzano v. Spain*[69] — noise and other impact caused by a stone quarry;
– *Case of Bor v. Hungary*[70] — railway noise.

• Impact of municipal construction

– *Case of Kyrtatos v. Greece*[71] — house construction and impact on protected species and their habitats.

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59 Case of Luginbühl v. Switzerland, 17.01.2006 (decision on the admissibility). http://hudoc.echr.coe.int/eng?i=001-72459

60 Case of Powell and Rayner v. the United Kingdom, 21.02.1990. http://hudoc.echr.coe.int/eng?i=001-57622

61 Case of Hatton and others v. the United Kingdom, 8.07.2003. http://hudoc.echr.coe.int/eng?i=001-61188

62 Case of Flamenbaum et Autres c. France, 13.12.2013. http://hudoc.echr.coe.int/eng?i=001-115143

63 Case of Moreno Gomez v. Spain, 16.11.2004. http://hudoc.echr.coe.int/eng?i=001-67478, Ukrainian version of the decision http://zakon3.rada.gov.ua/laws/show/980_232

64 Case of Mileva and Others v. Bulgaria, 25.11.2010. http://hudoc.echr.coe.int/eng-press?i=003-3348485-3747598

65 Case of Dees v.Hungary, 9.11.2010, http://hudoc.echr.coe.int/eng?i=001-101647

66 Справа Гримковська проти України, 21.07.2011р. http://www.epl.org.ua/law/mizhnarodni-dohovory/yevropeiskyi-sud-z-prav-liudyny/412-sprava-hrimkovska-proty-ukrainy-povnyi-tekst-rishennia-ukrainskoiu-movoiu

67 Case of Fägerskiöld v. Sweden, 26.02.2008, http://hudoc.echr.coe.int/eng?i=001-85411

68 Case of Vecbaštika and Others v. Latvia (applicaiton no. 52499/11), pending. http://hudoc.echr.coe.int/eng?i=001-116293

69 Case of Martinez Martinez and Pino Manzano v. Spain, 3.07.2012. http://hudoc.echr.coe.int/eng?i=001-112455

70 Case of Bor v. Hungary, 18.06.2013. http://hudoc.echr.coe.int/eng?i=001-120959

71 Case of Kyrtatos v. Greece, 22.05.2003. http://hudoc.echr.coe.int/eng?i=001-61099

- Waste management

– *Case of Brânduse v. Romania*[72] — offensive smells coming from a refuse tip;
– *Case of Di Sarno and Others v. Italy*[73] — improper system of household waste collection, processing and disposal;
– *Case of Locascia and Others v. Italy (no. 35648/10)*[74] — impact of a private waste disposal plant.

- Contamination of drinking water

– *Dzemyuk v. Ukraine*[75] — contamination of water in a well as a result of a cemetery operation, and noise caused by burial ceremonies.

Freedom of expression (Article 10 of the Convention)

- Pressure on environmental non-governmental organizations

– *Case of Steel and Morris v. the United Kingdom*[76] — award of damages for dissemination of the fact sheet about McDonald's;
– *Affaire Vides Aizsardzības Klubs c. Lettonie*[77] — accusation of slander for protests against illegal construction works in a coastal area.

Right to an effective remedy (Article 13 of the Convention)

- Warning on emergencies

– *Case of Kolyadenko and others v. Russia*[78] — release of water from reservoir dam without a warning because of negligence regarding river bed maintenance;

Protection of property (Article 1 of Protocol № 1 of the Convention)

- Revocation of construction licences and permits, illegal construction

– *Case of Fredin v. Sweden*[79] — the revocation of the permit to exploit gravel pit on the land parcel of the applicant on the basis of the law on environmental protection;

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[72] Case of Brânduse v. Romania, 7.04.2009. http://hudoc.echr.coe.int/eng-press?i=003-2698080-2947397

[73] Case of Di Sarno and Others v. Italy, 10.01.2012. http://hudoc.echr.coe.int/eng?i=001-108480

[74] Case of Locascia and Others v. Italy (application no. 35648/10) pending. http://hudoc.echr.coe.int/eng?i=001-118326

[75] Case Dzemyuk v. Ukraine, 4.09.2014p. http://zakon5.rada.gov.ua/laws/show/974_a51

[76] Case of Steel and Morris v. the United Kingdom, 15.02.2005, http://hudoc.echr.coe.int/eng?i=001-68224

[77] Affaire Vides Aizsardzības Klubs c. Lettonie, 27.05.2004, http://hudoc.echr.coe.int/eng?i=001-66349

[78] Case of Kolyadenko and others v. Russia, 28.02.2012, http://hudoc.echr.coe.int/eng?i=001-109283

[79] Case of Fredin v. Sweden, 18.02.1991, http://hudoc.echr.coe.int/eng?i=001-57651

– *Case of Pine Valley Developments Ltd and Others v. Ireland*[80] — prohibition of construction works on the land parcel purchased to be used for construction;
– *Case of Valico S. R. L. v. Italy*[81] — fine for construction works performed with violations of norms on landscape and environment protection;
– *Case of Hamer v. Belgium*[82] — returning a forest lot used for construction of a house to the previous state, including by demolition of the house at the expense of the applicant;
– *Case of Depalle v. France*[83] — demolition of houses built on lands of coastal zone and lands belonging to the community.

• Property right to a land lot
– *Case of Papastavrou and Others v. Greece*[84] — forestation of private land lots without compensation;
– *Case of Turgut and Others v. Turkey*[85] — deprivation of property right to legally acquired lands covered with forests without proper compensation.

Later in this chapter, these and other cases will be discussed in detail in the context of the application of specific articles of the European Convention on Human Rights.

Besides the cases mentioned above, the motives of environmental protection and caused environmental damage were taken into account and applied by the ECHR in other cases that were not directly related to "environmental" disputes. An interesting and indicative in this context can be the *Case of Mangouras v. Spain*[86] focused on protection of liberty and security of person (Article 5 of the Convention). Mangouras was a captain of the ship *Prestige,* which in November 2002 produced a leak of 70 tonnes of fuel oil into the Atlantic ocean. The spillage caused an environmental disaster, effects of which on marine flora and fauna lasted for several months and spread as far as the French coast. Following results of this incident, a criminal proceeding was started and the applicant was taken in custody with set bail at 3,000,000 EUR. Mr. Mangouras

[80] Case of Pine Valley Developments Ltd and Others v. Ireland, 29.11.1991, http://hudoc.echr.coe.int/eng?i=001-57711

[81] Case of Valico S. R. L. v. Italy 21.03.2006 (decision on the admissibility). http://hudoc.echr.coe.int/fre?i=002-3432

[82] Case of Hamer v. Belgium, 27.11.2007, http://hudoc.echr.coe.int/eng?i=001-83537

[83] Case of Depalle v. France, 29.03.2010, http://hudoc.echr.coe.int/eng?i=001-97978

[84] Case of Papastavrou and Others v. Greece, 10.04.2003, http://hudoc.echr.coe.int/eng?i=001-61019

[85] Case of Turgut and Others v. Turkey, 8.07.2008, http://hudoc.echr.coe.int/eng?i=001-87441

[86] Case of Mangouras v. Spain, 28.09.2010 (Grand Chamber). http://hudoc.echr.coe.int/eng?i=001-100686

remained in custody for 83 days and was provisionally released after his insurance company paid the bail. Referring to p. 3 Article 5 of the Convention the applicant stated that the amount of bail in his case was unreasonably high and did not take into account specific circumstances and conditions of his personal life. In the decision made on 28 September 2010 in the case *Mangouras v. Spain* the European Court of Human Rights ruled that there had been no violation of p. 3 Article 5 of the Convention.

The Court confirmed that according to p. 3 Article 5 of the Convention, bail may be requested only if there exist legal grounds for detention of a person and that the authorities must give to determination of the amount of bail as much attention as to deciding on the need for further detention of the accused person in custody. Moreover, even if the amount of bail is determined based on the individual characteristics of the accused person and his financial situation, in certain circumstances it is reasonable to take into account also the amount of damages of causing which the person is accused.

Mr. Mangouras was deprived of his liberty for 83 days and was released after providing a bank guarantee for the amount of three million EUR. In determining the amount of bail, Spanish courts took into account the risk that the applicant may avoid punishment. In addition to the circumstances of Mr. Mangouras' private life, the account was also taken of seriousness of the crime of which he was accused, impact of the catastrophe on the public and "professional surrounding" of the applicant, in particular on the sphere of oil products transportation by water transport.

In interpreting the provisions of p. 3 Article 5 of the Convention, account should be taken of new realities, including growing and justified both in Europe and internationally concerns about environmental crimes and a tendency to use criminal law as a means of enforcement of environmental obligations laid by European and international law. The Court considers that providing a higher standard of protection of human rights requires more rigor assessment of violations of the fundamental values of a democratic society. Thus, professional environment, which creates conditions for activities in the field of transportation of oil by water, should be also taken into account in determining the amount of bail to ensure its effectiveness as a means of preventing evasion of legal responsibility.

Due to the special nature of Mr. Mangouras' case and enormous damage caused to the environment by pollution of marine waters in the scale, which until now rarely occurred, it is not surprising that the national courts in determining the amount of bail that would provide confidence that a guilty person will not escape justice, mainly referred to the responsibility of the accused person, the severity of the offense and the amount of the damage caused. In addition, there was no certainty that the bail, amount of which will be determined only in proportion to the property situation of Mr. Mangouras', will ensure the presence of the

applicant at the trial proceedings against him. Moreover, the payment of the bail by the insurer of the shipowner serves as confirmation that Spanish courts were right, when determining the amount of the bail they took into account "professional environment" of the applicant. This payment allows you to assess the links between Mr. Mangouras and persons who were required to ensure the safety of transportation.

When making a decision in the analyzed case, the Spanish courts also took into account the applicant's personal situation, including the fact that he was an employee of the ship owner, his purely professional relationship with those who had to ensure the safety of transportation, citizenship and place of residence, and lack of ties with Spain and his age. Taking into account the specific circumstances of the case and the disastrous environmental and economic consequences caused by this act, the authorities — in the Court's opinion — appointed justified bail in the amount of 3 million EUR. Moreover, they made a correct thing when in the course of adopting the court decision they took into consideration the severity of the crime and the amount of damage, of causing which Mr. Mangouras was accused[87].

2.2. ARTICLE 2. RIGHT TO LIFE

The right to life is the first material right provided by the Convention for the Protection of Human Rights and Fundamental Freedoms. At first sight, its text is not related to the environment or environmental rights.

Article 2. Right to Life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

a) in defence of any person from unlawful violence;

b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c) in action lawfully taken for the purpose of quelling a riot or insurrection.

[87] Used materials of the communication of the Secretary of the European Court of Human Right regarding the decision in the case "Mangouras v. Spain".

At first sight, the aim of Article 2 of the Convention is to grant everyone the right not to be deprived of one's life involuntarily.

Indeed, in its case-law within the context of Article 2, ECHR established the duty of the State, represented by its agents, to refrain from deprivation of life, that is the duty to regulate on the basis of the national legislation acceptable use of mortal force by the State agents[88]. In particular, it includes 1) an obligation to refrain from illegitimate deprivation of life, in other words, "obligation of subordination, control and training of staff", that ensures that those who deprive of life (for instance, police), are always well-trained and controlled; 2) doing full, open and transparent investigation of the deprivation of life by the state bodies.

At the same time, there is also one fundamental element in the first sentence of Article 2 — general duty of the state to protect right to life "by law", that means that the State should have laws that would, in different contexts, protect this right to such an extent and in such a way that actually reflect the standards of Article 2 of the Convention[89]. In its judgments the Court found that **Article 2 does not solely concern deaths resulting directly from the actions of the agents of the State, but also lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction[90]**.

This is the way "positive obligation doctrine" emerged, which says that in some situations Article 2 may impose on state bodies the obligation to take measures to guarantee the right to life when it is threatened by persons or activities not directly connected with the State[91]. Thus, the right to life, according to the Convention, evolved from a negative obligation not to deprive a person of life intentionally to a positive obligation of the state to take due measures to protect life of people whithin their jurisdiction under conditions of risk caused by environmental pollution[92].

In the judgment in the case *Öneryıldız v. Turkey* — the first judgment where the Court found violation of Article 2 in the context of environmental factors — the ECHR Great Chamber interpreted Article 2 as a "the right to the protection of life". This interpretation is a bold and unequivocal clarification of the scope of protection provided by Article 2 which follows, therefore, that the corresponding

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88 Case of McCann and Others v. the United Kingdom, 05.09.1995, http://hudoc.echr.coe.int/eng?i=001-57943, in a case based on application of relatives of three people shot by SAS (special unit of the British Army) in Gibraltar.

89 Case of McCann and Others v. the United Kingdom, 05.09.1995, http://hudoc.echr.coe.int/eng?i=001-57943, p. 151–155.

90 Case of L. C. B. v. the United Kingdom, 09.06.1998, http://hudoc.echr.coe.int/eng? i=001-58176, p. 36.

91 Manual on human rights and the environment. Principles emerging from the case-law of the European Court of Human Rights. Council of Europe, 2006.

92 Case of Öneryıldız v. Turkey, 30.11.2004, http://hudoc.echr.coe.int/eng?i=001-67614, п. 65.

scope of the state's liability encompasses, at least in certain contexts, negligent failures to protect human life[93]. Practically in all the applacations where applicants claimed violation of Article 2 within the context of environmental factors, they referred to violation of a positive obligation of a state to protect their life. In its practice the Court established that

positive obligation of the state can be used within the context of dangerous activities, such as nuclear tests (L. C. B. v. United Kingdom), landfills (Öneryıldız v. Turkey), or operation of chemical factories with toxic emissions (Guerra and Others v. Italy), asbestos operations (Brincat and others v. Malta), directly carried out by the state or private companies. In general, the scope of state obligations depends on such factors as the degree of activity-related danger and predictability of risks for life.

The issue of violation of right to life due to negative environmental factors was raised for the first time in the case *Guerra and Others v. Italy*[94] *(*application № 14967/89, judgement of 19.02.1998). The applicants in the case lived at one-kilometer distance from the factory producing mineral fertilizers. For the time of factory operation there were a number of accidents, the largest of which caused serious emission of pollutants into the atmosphere and because of this one hundred and fifty people were hospitalized with serious arsenic poisoning. The applicants claimed that lack of practical actions on reducing the pollution level and high accident risk, related to factory operations violated their right to life and physical integrity (Articles 2 and 8). They also complained that the corresponding public authorities did not inform the public on the risks and action procedure in case of serious accident that violated their right to freedom of expression (Article 10). Considering the facts in this case the Court did not find violations of Articles 2 and 10, but concluded on violation of Article 8 (for more details see the corresponding sections of the manual).

It should be noted that in this case several judges expressed their dissenting opinions stating that there was a violation of Article 2. In his dissenting opinion[95] Judge Jambrek is quoting Article 2 in the following part: "*Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save for...*" In his opinion, protection of health and physical integrity is in the same way closely related to the "right to life" as to the "respect to private and family life". It is possible to make an analogy with Court practice regarding Article 3

[93] Dimitris Xenos**,** *Asserting the Right to Life (Article 2, ECHR) in the Context of Industry,* German Law Journal, Vol. 08, No. 03, *http://www.germanlawjournal.com/pdf/Vol08No03/PDF_Vol_08_No_03_231-254_Articles_Xenos.pdf at 235.*

[94] Case of Guerra and Others v. Italy, 19.02.1998, http://hudoc.echr.coe.int/eng?i=001-58135

[95] Concurring opinion of Judge Jambrek, http://hudoc.echr.coe.int/eng?i=001-58135

on "predicted consequences"; i.e. if there are serious grounds to consider that there exists a real risk that a person will be exposed to circumstances threatening his/her life and physical integrity, one can talk about serious threat to the person's right to life protected by law. If the information on the circumstances that presuppose a real risk of danger for health and physical integrity is withheld by the State, such a situation can be protected by Article 2 of the Convention: "*No one shall be deprived of his life*".

In 1998, the Court resolved one more case where the applicant raised an issue of applying Article 2 within the context of unfavorable environmental factors. In the case *L. C. B v. the United Kingdom*[96] (application № 23413/94, judgement of 09.06.1998) the applicant claimed that radiation exposure of her father during the nuclear arms tests in 1957 and 1958 in Christmas Island in the Pacific region became a probable cause of her being diagnosed with leukemia in her childhood. She stated that lack of information given to her parents by the Government regarding potential risks for her health that might have appeared due to her father's exposure to radiation during the nuclear tests together with previous inactivity on the part of the State regarding the level of radiation doses her father was exposed to constitute violation of Article 2 of the Convention.

Resolving the case in question the Court did not come to conclusion that there was a violation of Article 2, as there were no causal relationships between the fact that her father was exposed to radiation and leukemia in a child who was conceived after this exposure. The Court stressed that radiation measurements done at the island directly after the nuclear tests showed that radiation did not reach dangerous level in places where common military men, to whom applicant's father belonged, were located. This circumstance became the ground for the Court to consider that as of before 1970, when the applicant was diagnosed with leukemia, the state bodies were confident that applicant's father was not exposed to dangerous radiation doses. Moreover, the Court studied expert conclusions, including the judgement of the British Supreme Court from 1993 in a case on the relationship between the increased level of child leukemia and parents' exposure to radiation before the conception, who did not establish causal relationship between these factors.

At the same time, the Court did not find it established that, given the information available to the State at the end of 1960s concerning the likelihood of the applicant's father having been exposed to dangerous levels of radiation and of this having created a risk to her health, it could have been expected to act of its own motion to notify her parents of these matters or to take any other special action in relation to her.

[96] Case of L.C.B v. the United Kingdom, 09.06.1998, http://hudoc.echr.coe.int/eng?i=001-58176

The first "environmental" case where the court found violation of the right to life was the case of *Öneryıldız v. Turkey*[97] (application № 48939/99, judgment of the Great Chamber of 30.11.2004). Having considered this case, the Court for the first time came to a conclusion that positive obligations of the State in relation to Article 2 extend to public and non-public activities and, in particular, to industrial activity which is dangerous in its nature. The judgment lays down general principles related to the obligation of the state to take efforts to prevent death caused by dangerous activity.

In the case *Öneryıldız v. Turkey* the applicant's house was built without corresponding permission near a landfill. Due to a methane explosion occurred at the rubbish tip on 28 April 1993, the refuse erupting from the pile of waste engulfed several houses situated below it, including the one belonging to the applicant, who lost nine close relatives. The applicant complained that there were no measures taken to prevent the explosion irrespective of the fact that the Government knew about the necessity of such measures.

In this case ECHR ruled that there was violation of Article 2 of the Convention due to lack of corresponding measures to prevent the death of applicant's nine relatives. The Court also ruled that there was a violation of Article 2 of the Convention due to the lack of adequate protection "by law" safeguarding the right to life. The Court stated that Turkish government had not provided the residents of the slums with the information on the risks related to living in such a place. And even if it were the case, the Government would be held responsible anyway as it failed to take necessary practical means to prevent danger. The Court came to conclusion that the regulatory framework had proved defective as the tip had been allowed to open and operate without a coherent supervisory system. Also, in its opinion the Court held, urban planning policy of the State was erroneous that also played its role in the sequence of the events that resulted in the disaster.

In the case *Brincat and Others v. Malta*[98] (application № 60908/11, 62110/11, 62129/11 etc., judgment of 24.7.2014) the Court considered the complaint of the applicants (and their relatives), who had been working at the state shipyard since 1968 to 2003. The applicants claimed that they (or their relatives) continuously and intensively were exposed to asbestos in the process of repairing ship mechanisms isolated with asbestos, that was highly detrimental to their health, and in case of one of the applicants this detrimental effect resulted in his death from asbestos-related cancer.

In this case the Court confirmed that the state has positive obligation to take all reasonable measures necessary to ensure applicants' right with respect to Articles 2 and 8 of the Convention. In the contexts of dangerous activities, the fields of positive obligations with respect to Articles 2 and 8 significantly overlap. Indeed,

[97] Case of Öneryıldız v. Turkey, 30.11.2004, http://hudoc.echr.coe.int/eng?i=001-67614

[98] Case of Brincat and Others v. Malta, 24.07.2014, http://hudoc.echr.coe.int/eng?i=001-145790

positive obligation with respect to Article 8 requires the national authorities to take the same practical measures that are expected from them within the context of their positive obligations regarding Article 2.

The Court came to conclusion that Maltian government was aware of the danger related to asbestos impact since early 1970s, and nevertheless the applicants were left without due protection means and were not provided the information on the potential risks up till the beginning of the 2000s. Legislation adopted in 1987 provided undue regulation of asbestos-related activity not envisaging any practical measures to protect the workers. In fact, there was no due information provided or made available for applicants throughout the corresponding period of their working in the shipyard. Having considered the facts, the Court came to conclusion that there was violation on the part of the State of the right to life regarding the worker who died, and the right to respect for private and family life in relation to the other applicants.

> Article 2 of the Convention imposed on States an obligation to take the necessary measures for the protection of the lives of individuals within their jurisdiction, even in the event of natural catastrophes that requires from the state having corresponding mechanisms of notification and protection at hand.

To the category of "environmental" cases also belong cases related to death of people from the consequences of natural disasters. Despite the fact that natural phenomena are not controlled by the state, in similar situations the Court repeatedly found the states guilty in violating its citizens' right to life.

In the case *Budayeva and Others v. Russia*[99] (application № 15339/02, judgement of 20.03.2008) mudslide in the mountainous town Tyrnauz not far from Mount Elbrus in Cabardine and Balkarian Republic (Russia) caused death of one of the applicants' husband. Because of natural disaster, the applicant got bodily injuries, psychological trauma and suffered the loss of their property. The applicants claimed that the Russian authorities failed to mitigate the disaster consequences and conduct due investigation of the accident.

Resolving the case the Court stated that the scope of the State's positive obligations in the sphere of emergency relief depended on the origin of the threat and the extent to which the risk was susceptible to mitigation. A relevant factor here was whether the circumstances of the case pointed to the imminence of clearly identifiable natural hazards, such as a recurring calamity affecting a distinct area developed for human habitation or use.

[99] Case of Budayeva and Others v. Russia, 20.03.2008, http://hudoc.echr.coe.int/eng?i=001-117225

The authorities had received a number of warnings in 1999 that should have alerted them to the increasing risks of a large-scale mudslide. Indeed, they were aware that any mudslide, regardless of its scale, was liable to have devastating consequences because of the damage to the defence infrastructure. Although the need for urgent repairs had been made quite clear, no funds had been allocated. Essential practical measures to ensure the safety of the local population were not taken: no warning had been given and no evacuation order issued, publicized or enforced; the mountain institute's persistent requests for temporary observation posts to be set up were ignored; there was no evidence of any regulatory framework, land-planning policies or specific safety measures having been put in place; and the mud-retention equipment had not been adequately maintained. In sum, the authorities had not taken any measures before the disaster.

The Court ruled that there had been no justification for their failure to implement land-planning and emergency-relief policies in view of the foreseeable risk of loss of life. The serious administrative flaws which had prevented the implementation of these policies had caused the death of people. The authorities had therefore failed in their duty to establish a legislative and administrative framework to provide effective protection of the right to life.

The Court also established violation of Article 2 in relation with the fact that the issue on the responsibility of the state for the disaster has never been researched and investigated by any court or administrative bodies either for their own initiative or on the basis of applicants appeals.

Another similar case *Özel and Others v. Turkey*[100] (applications № 14350/05, 15245/05 and 16051/05, judgment of 17.11.2015) was related to the death of the applicant's family members who were buried alive under the buildings destroyed in the town of Çınarcık by the earthquake on August 17, 1999, which was one of the most destructive and mortal earthquakes that had ever been registered in Turkey. In this case the Court found in particular that the national authorities had not acted promptly in determining the responsibilities and circumstances of the collapse of the buildings which had caused the deaths.

As regards the obligation for States to prevent disasters and protect their citizens, the Court explained that this obligation consisted mainly in the adoption of measures to strengthen the authorities' capacity to respond to lethal and unexpected natural phenomena such as earthquakes. Such preventive measures include land use planning and control over municipal construction.

The Court noted that the national authorities had been fully aware of the risks to which the disaster zone was subject. The local authorities, with their responsibility to issue building permits, thus had a role and responsibility of primary importance in the prevention of risks related to the effects of an earthquake. However, the

[100] Case of Özel and Others v. Turkey, 17.11.2015, http://hudoc.echr.coe.int/eng-press?i=003-5224921-6478918

Court found that this part of the complaint was out of time and rejected it pursuant to Article 35 paragraph 1 (admissibility criteria) of the Convention.

In the light of the case file, the Court notes that the criminal proceedings had lasted for more than 12 years. Even though the case was a complex one, only five individuals were prosecuted and the experts' reports were ready at an early stage. Two of the defendants were convicted, while the proceedings were time-barred in the case of the three others. The Court concluded that the length of the proceedings did not satisfy the requirement of promptness. It took the view that the importance of the investigation should have made the authorities deal with it promptly in order to determine the responsibilities and the circumstances in which the buildings collapsed, and thus to avoid any appearance of tolerance of illegal acts or of collusion in such acts.

As the Court practice shows, nowadays violation of the right to life in "environmental" cases was established in cases related to activities dangerous in their nature and in cases on natural disasters. However, as for now, these violations were established only in those cases, which involved death of people. If there are circumstances of negative environmental factors that did not result in lethal accidents, the Court tends to apply Article 8 (right to respect to private and family life).

Nevertheless, there are Court judgments related to Article 2 that found violations without the fact of loss of life, for instance, in situations when potentially lethal arms was used in an unjustified way[101]. Thus, taking into account dissenting opinion of the judges, in particular in a case *Guerra and Others v. Italy,* one can assume that theoretically in a situation of state tolerance to environmental factors that present a real and imminent threat to human life though without a fact of actual loss of life the Court may establish that there is a violation of Article 2 of the Convention.

Analysis of ECHR judgments in this category of cases enables us to conclude that to safeguard the right to life the state bodies are obliged to take measures on preventing violation of the right to life arising from dangerous activity or natural disaster. Primarily this obligation means the duty of the state to implement legislative and administrative frameworks that include[102]:

– adoption of by-laws that cover peculiarities of a situation or activity and the level of potential risk for life. In cases of dangerous activity it is related to the rules regulating licensing, design, operation, safety and control over such an activity[103];

[101] Case of Makaratzis v. Greece, 20.12.2004, http://hudoc.echr.coe.int/eng?i=001-67820, п. 49.

[102] Case of Öneryıldız v. Turkey, 30.11.2004, http://hudoc.echr.coe.int/eng?i=001-67614, п. 89; Case of Budayeva and others v. Russia, http://hudoc.echr.coe.int/eng?i=001-145790, п. 129.

[103] Case of Öneryıldız v. Turkey, 30.11.2004. http://hudoc.echr.coe.int/eng?i=001-67614, п. 90; Case of Budayeva and others v. Russia, http://hudoc.echr.coe.int/eng?i=001-145790, пп. 129 та 132.

– special emphasis on the right of public access to information related to such an activity. In cases of natural disasters it includes technical maintenance of due safety and notification infrastructure[104];
– envisage due procedures to identify flaws in the corresponding technical processes and errors made by people in charge[105].

2.3. ARTICLE 6. RIGHT TO A FAIR TRIAL AND ARTICLE 13. RIGHT TO AN EFFECTIVE REMEDY

Article 6 paragraph 1

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal that will resolve the case regarding his civil rights and obligations.

Applicability of paragraph 1 Article 6 to environmental disputes

In determination of the applicability of Article 6 paragraph 1 to civil disputes there should be a dispute on civil rights that at least should be recognized by the national legislation. The dispute should be genuine and serious. It may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question: poor relation or remote consequences are insufficient for Article 6 application[106].

Thus, in the case *Athanassoglou and Others v. Switzerland*[107] there were 12 applicants residing in zone 1 near unit II of a nuclear power plant in Beznau. They complained about lack of access to court on the basis of paragraph 1 of Article 6 to appeal the decision of the Federal Council from 1994 regarding an extension of nuclear power plant Beznau II operating licence and unjust

[104] Case of Öneryıldız v. Turkey, 30.11.2004. http://hudoc.echr.coe.int/eng?i=001-67614, п. 90; Case of Budayeva and others v. Russia, http://hudoc.echr.coe.int/eng?i=001-145790, пп. 129 та 132.

[105] Ibid.

[106] Case of Taşkın and Others v. Turkey, 10.11.2004. http://hudoc.echr.coe.int/eng?i=001-67401. п.130–134.

[107] Case of Athanassoglou and Others v. Switzerland, 6.06.2000, http://hudoc.echr.coe.int/eng?i=001-58560

procedures of the Federal Council. Referring to Article 13 of the Convention, the applicants also complained about lack of effective legal remedy to appeal violation of their right to life, respect of physical integrity as guaranteed by Articles 2 and 8 of the Convention. Para 1 of Article 6 states that persons have access to court in cases when they have a grounded dispute that there was an illegal interference with one of their civil rights recognized by the national legislation. In its judgment the Court found that in this case Article 6 was not applicable, the connection between the Federal Council's decision and the rights envisaged by the national legislation, invoked by the applicants (right to life, physical integrity, right to property) was too tenuous and remote. Moreover, the result of review procedure by the Federal Council was decisive for the general issue regarding an extension of nuclear power plant operating license, but not for identification of any civil rights such as right to life, physical integrity, right to property granted individually to applicants by the Swiss laws. That is why Article 6 para1 was not applicable. Indeed, the applicants in their pleadings before the Court appear to accept that they were alleging not so much a specific and imminent danger in their personal regard as a general danger in relation to all nuclear power plants; and many of the grounds they relied on related to safety, environmental and technical features inherent in the use of nuclear energy. Regarding the fact that the applicants were seeking to derive from Article 6 § 1 of the Convention a tool to contest the very principle of the use of nuclear energy, or at the least a means for transferring from the government to the courts the responsibility for taking, on the basis of the technical evidence, the ultimate decision on the operation of individual nuclear power plants, the Court found that decision on finding the better way to regulate the use of nuclear power is a policy decision for each Contracting State to take according to its democratic processes. The Court also found that Article 13 is not applicable in this case either as, in the opinion of the Court, the connection between the decision of the Federal Council and the domestic-law rights to protection of life, physical integrity and property invoked by the applicants was too tenuous and remote to attract the application of Article 6 § 1. Therefore, in relation to the Federal Council's decision no arguable claim of violation of Article 2 or Article 8 of the Convention and, consequently, no entitlement to a remedy under Article 13 have been made out by the applicant.

The Court came to similar conclusions in the case *Balmer-Schafroth and Others v. Switzerland*[108], recognizing that the proceedings on review of the legitimaticy of nuclear power plant operating license extension as such are not part of Article 6 para1, as the link between the operating license extension and their right to life, protection of their physical integrity and right to

[108] Case of Balmer-Schafroth and Others v. Switzerland, 13.09.2001. http://hudoc.echr.coe.int/eng?i=001-58084

property was too «*insignificant and unrelated*», and the applicants failed to prove imminent danger to their life.

In the case *Sdruzeni Jihoceske Matky v. the Czech Republic*[109] the Court noted that the results of administrative proceedings against a Construction Department, where an applicant organization failed to participate, were not directly decisive for "civil rights" — which are right to life, to health, to healthy environment and respect to property — which were granted to an applicant organization and its members by the Czech law. Correspondingly, paragraph 1 of Article 6 cannot be applied in this case[110].

Applicability of Article 6 to environmental disputes was recognized by the Court in the following environmental cases: in the case on dam construction that could flood the applicants' settlement (*Case of Gorraiz Lizarraga and Others v. Spain*[111]*)* and in the case on a license to operate a gold extracting mine using cyaniding near the settlements of the applicants (*Case of Taskın and Others v. Turkey*[112]*)*; as well as in the case on extending license to operate a waste management facility (case *Zander v. Sweden*[113]).

In the case *Gorraiz Lizarraga and Others v. Spain*[114] the Court was addressed by 5 individuals and a non-governmental organization (NGO) that referred to violation of paragraph 1 of Article 6, as they alleged that in the judicial proceedings brought by them to halt construction of the dam, they had not had a fair trial that they had been prevented from taking part in the proceedings concerning the preliminary ruling on the constitutionality of the Autonomous Community law of 1996, while Counsel for the State and State Counsel's Office had been able to submit their observations to the Constitutional Court. They also complained that the enactment of the Autonomous Community law had been intended to prevent the execution of a Supreme Court judgment that had become final that means violation of their right to a fair trail as guaranteed by Article 6 § 1 of the Convention and, for the applicants who are individuals — violation of their right to a respect for their private and family lives and their homes as guaranteed by Article 8, as well as their right to the peaceful enjoyment of their possessions, guaranteed by Article 1 of Protocol No. 1. Regarding applicability of Article 6 to this case, the court noted that in

[109] Case of Sdruzeni Jihoceske Matky v. the Czech Republic, 10.07.2006. http://hudoc.echr.coe.int/eng?i=001-76707

[110] http://medialaw.org.ua/userimages/book_files/Book_WEB_European_Court_Coe_MLI.pdf

[111] Case of Gorraiz Lizarraga and Others v. Spain, 27.04.2004. http://hudoc.echr.coe.int/eng?i=001-61731

[112] Case of Taşkın and Others v. Turkey, 10.11.2004. http://hudoc.echr.coe.int/eng?i=001-67401

[113] Case of Zander v. Sweden, 25.11.93. http://hudoc.echr.coe.int/eng?i=001-57862

[114] Case of Gorraiz Lizarraga and Others v. Spain, 27.04.2004. http://hudoc.echr.coe.int/eng?i=001-61731

addition to defence of the public interest, the proceedings before the Supreme Court were intended to defend certain specific interests of the association's members, namely their lifestyle and properties in the valley that was due to be flooded. As to the proceedings before the Constitutional Court concerning the request for a preliminary ruling on constitutionality, the applicants emphasized that only the decision of the Constitutional Court on unconstitutionality could have had the result of protecting both the environment and their homes and other immovable property. Admittedly, the aspect of the dispute relating to defence of the public interest did not concern a civil right, which the first five applicants could have claimed on their own behalf. However, that was not true with regard to the second aspect, namely the consequences of the dam's construction on their lifestyles and properties. Without a doubt, this aspect of the appeals had an "economic" and civil dimension. While the proceedings before the Constitutional Court ostensibly bore the hallmark of public-law proceedings, they were nonetheless decisive for the final outcome of the proceedings brought by the applicants to have the dam project set aside. In the instant case, the administrative and constitutional proceedings even appeared so interrelated that to have dealt with them separately would have been artificial and would have considerably weakened the protection afforded in respect of the applicants' rights. The Court therefore finds that the proceedings as a whole may be considered to concern the civil rights of the applicants as members of the association, accordingly, Article 6 § 1 of the Convention is applicable. However, taking into account peculiarities of the preliminary ruling on the constitutionality, the Court did not establish violation of equality of arms principle, guaranteed by paragraph 1Article 6 of the Convention, as such a process do not provide for either an exchange of memorials or for a public hearing for the participants. The Court also did not establish violation of Article 6, as the interference by the legislature in the outcome of the dispute did not make the proceedings unfair. In this case adoption of a disputable law was not intended to remove jurisdiction from the Spanish courts which had to establish whether the dam project was legal. Moreover, the disputed law concerned all of Navarre's protected areas reserves and natural sites, and not only the area affected by construction of the dam, and it did not have retrospective effect, therefore it could not influence the courts' judgments in the applicant's case. Thus, there was no violation of Article 6.

In the case *Taşkın and Others v. Turkey*[115] (more information on the case is provided in Chapter 2.3.), the applicants lived near a gold mine in the vicinity of Bergama and complained about the operating permit with the use of cyaniding procedure issued by the authorities. In the administrative courts the applicants referred to violations of their right to having adequate protection of their physical

[115] Case of Taşkın and Others v. Turkey, 10.11.2004. http://hudoc.echr.coe.int/eng?i=001-67401

integrity from the risks that will arise in the process of the gold mine operation. This right is recognized in the Turkish legislation and is different from the right to life in healthy and balanced environment. Regarding "civil" character of such right, in the opinion of the Court, the risks from cyaniding process at the gold mine are quite serious, therefore, the disputed right of the applicants is under threat. The decisions of the administrative courts can be considered as related to the "civil" rights of the applicants, that is why Article 6 can be applicable. There was a decision of the Supreme Administrative Court to annul the mine operation permit issued by the Ministry of the Environment, which was not enforced in due time, while resuming of the gold mine operation by the Ministerial decision without any legal grounds was aimed at avoiding the decision of the court. It resulted in the violation of the principle of law-bound state based on the rule of law and the principle of legal certainty and violation of paragraph 1 of Article 6 of the Convention.

In the case *Zander v. Sweden*[116], a couple of applicants got a land plot that was adjacent to the land on which a company treated household and industrial wastes. In 1986, the applicant addressed the National Licensing Board for Protection of the Environment that was in charge of considering the request of the company for permit renewal, with a request to grant the permit only under condition of free drinking water supply to the land owners concerned, as the activity in question entailed a risk of polluting their ground water. The Licensing Board granted company's request and dismissed the applicants' claim on the ground that there was no likely water connection between the dump and the wells of the applicants. The applicant appealed this decision to the Government challenging the conditions for the permit; however, the Government, as the final instance of appeal, upheld it and dismissed the appeal. While evaluating whether the applicants' rights are "civil", the Court indicated that the applicants' ability to use the water in their wells for drinking purposes was one of the aspects of their right as landowners, and the property right is clearly a "civil right" within the meaning of Article 6. As the Government's decision, upholding the Licensing Board's decision on granting permit, cannot be reviewed in court, there has been a violation of Article 6 paragraph 1 of the Convention.

A new step was made by the Court in the case *Collectif national d'information et d'opposition à l'usine Melox-Collectif Stop Melox et Mox v. France*[117], where the Court supported, that Article 6 paragraph 1 should be applied to the procedures, initiated by the Associations for Environmental Protection, which do not identify itself as association of local community that intend to protect the

[116] Case of Zander v. Sweden, 25.11.1993. http://hudoc.echr.coe.int/eng?i=001-57862

[117] Case of *Collectif national d'information et d'opposition à l'usine Melox-Collectif Stop Melox et Mox v. France. 12.06.2007. http://hudoc.echr.coe.int/eng?i=001-81006*

rights and interests of its members. The Court established that the aim of such contested procedures is protection of public interests, and the process initiated by the applicant-association had sufficient relation to the right it had as a legal person (for instance, the right to information, the right to participation and decision-making) to apply Article 6.

In the case *L'Erabliere A. S. B. L. v. Belgium*[118] the applicant-organization contested a court decision on inadmissibility of the appeal due to the lack of the statement of the facts by the plaintiff. The applicant was a non-profit organization that protected the environment in the region Marche-Nassogne. The applicant-association lodged an application for judicial review of the planning permission for landfill site extension and requested the *Conseil d'Etat (the highest body of administrative justice)* to cancel the decision. The latter dismissed the request for the impugned decision to be cancelled on the ground that the request did not include thorough and accurate statement of the facts regarding factual circumstances of the dispute , and later recognized the applicant's request on judicial review as inadmissible, as it did not contain statement of the facts that would provide any additional information but just provided reference to the contested decision. The court did not find in the organization's claim the process *actio popularis* from the viewpoint of the circumstances of the case and, in particular, the nature of the impugned measure, the status of the applicant-association and its founders and the fact that the aim of its activity was limited in space and in substance. Thus, Article 6 could be applied. The Court found that there was violation of the applicant's right to justice, as limitation of the applicant's right to access to justice was disproportionate to the requirements of legal certainty and due administration of justice, therefore, there was violation of the para 1 Article 6.

Thus, guarantees of Article 6 para1 are extended to the organizations-associations in cases when they claim recognition of right or interest of their members or even rights granted to them as legal persons (such as the right of «*citizens*» to information and participation in the decision-making on environment), or when the association's suit is not considered as *actio popularis*. As it is seen from the aforementioned court judgments, the court position focuses on inapplicability of Article 6 of the Convention to cases of *actio popularis.* The reason why the Convention does not allow any *actio popularis* is because it wants to escape Court cases brought by individuals who complaint about the very existence of the law that is applicable to any citizen of the country, or about the decision of the court they were not a party to[119].

[118] Case of L'Erablière A. S. B. L. v. Belgium, 24.02.2009. http://hudoc.echr.coe.int/eng?i=001-91492

[119] Ibid.

Access to a fair trial: limitation period

In a case *Howald Moor and Others v. Switzerland*[120] a widow and her two daughters continued the case of the father, who was a mechanic and died in 2005 from the disease caused by asbestos impact. The relatives of the diseased continued a lawsuit against the employer and claimed non-pecuniary damages in the court. The subject of the case in ECHR was the beginning of the limitation of action period for the victims of asbestos impact established by the Swiss law. Taking into account the fact that latency for the asbestos-caused diseases can last for decades, establishment of a limitation period of 10 years with the beginning of the period when the person was influenced by asbestos dust, means fast expiration of the period. Thus, initiation of the proceedings regarding damages can be unsuccessful from the very beginning, as the limitation period will expire at the time the potential claimant knows about the right to sue. The Court indicated that applicability of limitation period limited the applicants' right to justice and even weakened the very substance of their right.

Guarantee of providing legal aid and equality of arms

Article 6 para1 does not state that the State has to provide free legal aid in every dispute regarding "*civil" rights*. The fact whether Article 6 provides for legal aid depends on different factors namely: importance of what was at stake for the applicant in the proceedings; the complexity of the relevant law and procedure; the applicant's capacity to represent him or herself effectively; existence of the obligatory requirement to have a representative in court. The state is allowed to put requirements on the conditions of provision of legal aid, apart from the aforementioned, on such conditions as financial condition of a party in a case, expectations of a party regarding winning the case[121].

An exemplary case regarding application of para 1 of Article 6 with respect to absence of legal aid was the case of *Steel and Morris v. the United Kingdom*[122], where the applicants — two representatives of non-governmental organization Greenpeace London were deprived of the right to free legal aid. They were defendants in a libel case brought by McDonald's claiming damages for libel caused by a leaflet distributed by the organization Greenpeace

[120] Case of *Howald Moor and Others v. Switzerland, 11.03.2014.* http://hudoc.echr.coe.int/eng?i=002-9395

[121] Handbook on Article 6. Right to a fair trial. Civil part. Council of Europe/ European Court for Human Court, 2013. p. 19. http://www.echr.coe.int/Documents/Guide_Art_6_UKR.pdf

[122] Case of *Steel and Morris v. the United Kingdom, 15.02.2005.* http://hudoc.echr.coe.int/eng?i=001-68224

London with participation of Steel and Morris. The trial on on refuting all the information mentioned in the leaflet lasted 313 court days and the applicants were refused free legal aid, therefore, they represented themselves in a very complicated and long trial with 100 000 pounds being at stake as damages claim. After the national courts ruling against the applicants they submitted an application to the court on violation of Article 6 and Article 10 by the United Kingdom (more details about the case are presented in Chapter 2.4.). The applicants contested refusal of access to a fair trial due to lack of free legal aid and violations on the part of the judge during the trial. Having evaluated all the circumstances of the case the Court established that the denial of legal aid to the applicants had deprived them of the opportunity to present their case effectively before the courts and contributed to an unacceptable inequality of arms with McDonald's. There had, therefore, been a violation of Article 6 § 1.

Trial within a reasonable time frame

In Case of *Dees v. Hungary*[123] the applicant complained about heavy traffic on his street adjacent to toll motorway. The applicant states that due to noise, emissions and bad smell, caused by heavy traffic on his street, his home became unsuitable for living. He also complained about excessive duration of court proceedings initiated by him in this matter. Indeed, the trial commenced on February 23, 1999 and was over on November 15, 2005, lasting for 6 years 9 months on two levels of courts of the same jurisdiction. The ECHR acknowledged that the duration of proceedings exceeded reasonable limits, thus violating Article 6 paragraph 1.

In case of *Bor v. Hungary*[124] the applicant lived across the railway station and complained about intense noise pollution by trains and inaction of the authorities as to timely and efficient bringing of the railways to responsibility for exceeding noise levels. The applicant complained about violation of Article 6 of the Convention (trial within a reasonable time) and Article 8 of the Convention (see more on Article 8 in Chapter 2.3.) The applicant first initiated court proceedings in 1992 and the trial was over in 2008. Thus, the case remained in courts of the same jurisdiction on two levels for 15 years and 7 months. The ECHR took into account behaviour of the applicant who at certain stages of proceedings initiated their termination. And still the ECHR acknowledged that the duration of the proceedings exceeded reasonable time which constitutes a violation of para 1 Article 6.

[123] Case of Dees v. Hungary, 9.11.2010, http://hudoc.echr.coe.int/eng?i=001-101647

[124] Case of Bor v. Hungary, 18.06.2013. http://hudoc.echr.coe.int/eng?i=001-120959

Failure to enforce court decision

The Court's case-law shows that the right to a fair trial, which includes the right of access to the courts, i.e. the right to initiate trial before the court on civil matters, will be illusionary if national laws allow for the final, binding decision of the court not to be enforced. Enforcement of any court decision must be considered an integral part of the notion of "court proceedings" for the purposes of Article 6 of the Convention. If administrative bodies refuse to enforce, fail to enforce or postpone enforcement of court decision, the guarantees of Article 6 given to the parties in court, loose any purpose[125].

Efficient defence of the party to a case and thus restoration of justice foresees the duty of administrative bodies to enforce court decisions. Thus, in the case of *Kyrtatos v. Greece*[126] the applicants accused authorities of failure to enforce the decisions of Supreme administrative court on cancellation of construction permits. The government not only allowed for the houses, built on the ground of cancelled permits, not to be demolished, but also continued issuing construction permits for territory included into settlement as a result of illegal establishment of its boundaries. The applicants who received legal aid complained of the duration of trial. Greek authorities who refrained from enforcing two court decisions, deprived the provision of para 1 Article 6 of its useful effect which resulted in violaton of the Article 6.

In case of *Apanasewicz v. Poland*[127] the applicant, who had a land plot next to which a plant was built without a construction permit, filed a motion with the court for closing down the plant in 1989 and complained about damage caused to her by such illegal action (pollution, health problems, non-edible crops). In 2001, civil court made a decision on closing the plant, yet no enforcement measures resulted in close-down of the plant that was operating even at the time when the ECHR passed its judgement. The applicant complained of non-enforcement of the courts decision to close the plant, the duration of court proceedings. The ECHR acknowledged violation of Article 6 of the Convention, taking into account the general duration of court proceedings, lack of due attention on the part of authorities and insufficient use of enforcement measures to ensure efficient protection of applicant's rights. The Court also confirmed violation of Article 8 of the Convention due to the fact that actions taken by the authorities turned out to be inefficient for protection of the applicant's right to respect of private and family life.

In case of *Dzemyuk v. Ukraine*[128] the applicant appealed the decision of the court and actions of Tatariv village council as to location of a cemetery 38 m

[125] Case of Kyrtatos v. Greece, 22.05.2003, http://hudoc.echr.coe.int/eng?i=001-61099, paragraph 30.

[126] Case of Kyrtatos v. Greece, 22.05.2003, http://hudoc.echr.coe.int/eng?i=001-61099

[127] Case of Kyrtatos v. Poland, 3.05.2011. http://hudoc.echr.coe.int/eng?i=001-124654

[128] Case of Dzemyuk v. Ukraine 4.09.2014, http://zakon5.rada.gov.ua/laws/show/974_a51/page

away from his land plot and house. Decisions of the court to close the cemetery were not enforced by Tatariv village council over a significant period of time. Enforcement proceedings lasting for 2 years were unsuccessful. Yet, the ECHR decided not to consider the matter of compliance of government with provisions of Article 6 of the Convention since violation of Article 8 had already been established by the court.

In view of the said decisions of the ECHR as to construing of Article 6 of the Convention, the following conclusions as to rights covered and guaranteed by this article can be made. This article guarantees:

1. The right of a person to have a final decision made, which will be enforced and respected by all public bodies.
2. The rights of environmental organizations, which according to the law have the right to file motions for protection of rights of their members, have the right to access the courts for protection of economic interests of their members and in case of seeking court action for protection of public interest — access to the courts pursuant to Article 6, cannot always be guaranteed.
3. Citizens who believe their interests were not taken into account in the process of decision-making concerning environment, which may limit the right to life or the right to respect for private and family life, have the right to access the courts.

Article 13. Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority not withstanding that the violation has been committed by persons acting in an official capacity

Article 13 of the Convention guarantees "an effective remedy available in the domestic system" to everyone whose rights and freedoms, as set forth in the Convention, have been violated. Article 13 applies to all motivated claims on violation of rights and freedoms guaranteed by the Convention. A person, who files a motion with the court on violation of rights and freedoms guaranteed by the Convention, presenting their arguments, is at the same time supposed to have remedies before a national authority for the matter to be settled and for reimbursement to be received if such is awarded. According to Article 13, a national authority, responsible for providing obligatory effective remedy, must not necessarily be court. A petition filed with an administrative body may suffice. The notion of "effective remedy" includes, apart from payment of reimbursement where it is due, a detailed and efficient investigation which is called to reinstate the actual state of affairs as well as punish those respon-

sible. A remedy also includes an effective opportunity to contest investigation procedures[129].

In the case of *Hatton and others v. the United Kingdom*[130] the applicants, residents of London, complained of government policy with respect to night flights at Heathrow Airport, which resulted in violation of their rights foreseen by Article 8 of the Convention (for more details see the next subchapter) and also complained that they were denied an effective remedy for their case, which is a violation of Article 13. The Court usually interprets Article 13 as requiring availability of remedies with respect to violations that may be deemed as ones requiring proof. In this case the ECHR did not establish violation of Article 8 of the Convention, yet the ECHR established its admissibility under Article 8 of the Convention. Thus, the petition filed under Article 8 is subject to proof. Consequently, it is necessary to consider the issue of Article 13 violation as well. This article does not guarantee a possibility to contest the laws of member-states of the Convention before national authorities as to their compliance with the requirements of the Convention. Nor does it guarantee a possibility to appeal policy as such. In case an applicant has a disputable claim on violation of rights foreseen by the Convention, which can be proven, a national legal system should give access to effective remedies. In this case the Court acknowledged that in the course of appeal it could have been established that the 1993 night flight scheme, approved by the government, was illegal due to a significant gap between government policy and practice. At the same time the scope of review by domestic courts was limited to the classic English public-law concepts, such as irrationality, unlawfulness and patent unreasonableness, and did not at the time allow consideration of whether the claimed increase in night flights under the 1993 Scheme represented a justifiable limitation on the right to respect for the private and family lives or the homes of those who live in the vicinity of Heathrow Airport. In these circumstances, the Court considers that the scope of review by the domestic courts in the present case was not sufficient to comply with Article 13 and thus this Article was violated in this case.

In case of *Di Sarno and Others v. Italy*[131] the applicants complained about violation of their rights during the state of emergency when household wastes were not taken away (5 months) and were piling up in the streets of Campania polluting the environment and creating a serious threat to life and health of the

[129] Methodic recommendations for central executive bodies as to implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms in their law-making activities as approved by the Decree of the panel of the Ministry of Justice of Ukraine No. 40 dated November 21, 2000

[130] Case of Hatton and others v. the United Kingdom, 8.07.2003. http://hudoc.echr.coe.int/eng?i=001-61188

[131] Case of *Di Sarno and Others v. Italy, 10.01.2012.* http://hudoc.echr.coe.int/eng?i=001-108480

applicants. They referred to violation of Article 8 of the Convention (for more details see subchapter 2.3) and Article 13 of the Convention in connection with absence in the national legislation of effective remedies for reimbursement of damages suffered by the applicants as a result of problems with wastes.

In case of *Kolyadenko and others v. Russia*[132] the applicants who lived near the river and reservoir of Pionersk suffered damage from sudden flood in 2001 in Vladovistok. All the applicants complained that authorities put their lives under threat when they drained the water without warning, and also complained about improper maintenance of the river bed and absence of proper court procedures in response. They also complained about serious damage to their property and houses and absence of effective court remedies to address their complaints. The applicants claimed violations of Articles 2, 8, 13 of the Convention and Article 1 Protocol 1. The Court acknowledged violation of Article 8 of the Convention and Article 1 Protocol 1. Concerning Article 13 of the Convention, in connection with Article 8 of the Convention and Article 1 Protocol 1, there was no violation since Russian laws grant applicants a possibility to initiate civil proceedings to receive reimbursement and the courts are given all the instruments for considering matters on liability of the state for incurring damages in civil proceedings. The issue of liability for the events may become a subject of criminal proceedings. The very fact that the trial was not successful for the applicants, since in the end their claims were dismissed, cannot be considered an indication of absence of effective remedies required by Article 13 of the Convention.

In case of *Öneryıldız v. Turkey*[133] the applicant who lost 9 relatives and his dwelling due to methane explosion near rubbish tips close to his barrack and the barracks of his relatives, claimed violation of Article 2 of the Convention (see more about the case in subchapter 2.1), Article 1 Protocol 1 and Article 13 of the Convention. The ECHR acknowledged violation of Article 2 (violation of procedural and material obligations by Turkey). As to violation of Article 13, the Court established that in case of violation of rights foreseen by Article 2, reimbursement of pecuniary and non-pecuniary damage must be available on the national level. On the other hand, neither Article 13 of the Convention nor other provisions guarantee an applicant the right to criminal persecution and sentencing of a third party or the "right to a private action in response". The ECHR established that with respect to fatalities caused by dangerous activities, which should be regulated by the state, Article 2 demands that public bodies themselves conduct investigation to determine causes of death, which has to comply with minimum requirements. Without investigation the victim will not be able to use all the remedies to receive reimbursement since knowledge

[132] Case of Kolyadenko and others v. Russia, 28.02.2012, http://hudoc.echr.coe.int/eng?i=001-109283

[133] Case of Öneryıldız v. Turkey, 30.11.2004, http://hudoc.echr.coe.int/eng?i=001-67614

of facts pertaining to the case is usually available to public servants or public authorities. In connection with these conclusions, the task of ECHR within the limits of Article 13 of the Convention in this case lies in determining whether the applicant's possibility to use the right to effective remedy was destroyed by the form in which public bodies performed their procedural duties according to the requirements of Article 2 of the Convention. In this case the Court established that the applicant had an opportunity to use remedies offered by the law in order to receive satisfaction. The applicant used the remedies and filed a motion with administrative court for reimbursement of pecuniary and non-pecuniary damage caused by death of his close relatives and loss of dwelling and property. Efficiency of this process did not depend on the results of ongoing criminal investigation. Administrative courts hearing this case had authority as to assessment of facts and bringing the guilty party to responsibility for events which had happened to the applicant and had the authority necessary to pass a mandatory decision. It remains to be established to what extent this remedy was efficient in practice. Non-pecuniary damage reimbursements awarded to the applicant for the loss of close relatives was never paid out to the applicant. Timely payment of compensation for the suffered negative emotions must become an integral element of remedy foreseen by Article 13 of the Convention. Court proceedings lasted for 4 years 11 months, which is improper realization of justice by national courts. This is why the ECHR came to a conclusion that administrative procedures did not provide the applicant with effective remedies for appealing inaction of the state as to protection of the lives of applicant's close relatives. Thus, the court established violation of the Article 13 of the Convention with respect to petition in the part on violation of Article 2 of the Convention. Also, as a result of court proceedings the applicant was granted a judgment on reimbursement of damage for destroying of household goods, which was never paid out. Consequently, the ECHR confirmed that the applicant was deprived of effective remedies as foreseen by Article 1 Protocol 1.

As it appears from the ECHR' case-law, Article 13 of the Convention foresees the duty of state to create effective and efficient mechanisms for reviewing actions or inactions which resulted in violation of rights foreseen by the Convention, damage to property or health of citizens. These can be judicial or executive bodies having the authority to determine the guilty party and award reimbursement for damage caused to citizens by action or inaction of public bodies as to regulation, limitation or prevention of harmful environmental factors. Absence of positive results in national or administrative courts is not always indicative of violations of Article 13 of the Convention. Article 13 of the Convention demands that countries ensure a possibility to contest results of investigation, decisions of court and other bodies as to reimbursements of damage etc.

2.4. ARTICLE 8. RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In today's world, according to the ECHR, environmental protection is an increasingly important factor. However, Article 8 of the Convention does not apply to every case of deterioration of the environment. The Convention and its Protocols do not contain the right to protect the environment. Therefore, in 1999 the Standing Committee on behalf of the Parliamentary Assembly of the Council of Europe adopted the Recommendation # 1431 (1999) entitled "Future action to be taken by the Council of Europe in the field of environment protection." Provision 8 of this recommendation states: "In the light of changing living conditions and growing recognition of the importance of environmental issues, it considers that the Convention could include the right to a healthy and viable environment as a basic human right." On 27 June 2003, the Parliamentary Assembly adopted the Recommendation # 1614 (2003) entitled "Environment and human rights", Provision 3 of which states: "The Assembly believes that in view of developments in international law on both the environment and human rights as well as in European case-law, especially that of the European Court of Human Rights, the time has now come to consider legal ways in which the human rights protection system can contribute to the protection of the environment. It wishes to encourage this process by adding provisions concerning the recognition of individual procedural rights, intended to enhance environmental protection, to the rights set out in the European Convention on Human Rights. Provision 8 stated the desire to add provisions on the recognition of individual procedural rights, intended to help protect the environment, the rights set out in the Convention." Therefore, the Committee of Ministers has to form an additional protocol to the Convention on the recognition of individual procedural rights with the intention to strengthen the protection of the environment as required by Aarhus Convention[134].

Article 8 Para 1

Everyone has the right to respect for his private and family life, his home and his correspondence.

[134] Case of Ivan Atanasov v. Bulgaria, 2.12.2010. http://hudoc.echr.coe.int/eng?i=001-101958.

The ECHR under this right "in the light of environmental issues" understands the following:

1. In case of violation of this article environmental factors must directly and seriously affect private and family life, applicants' home. The seriousness of the impact is determined by the level and duration of exposure, physical and psychological consequences for people and the general environmental condition;

In the light of Article 8 of the Convention home is a place, physically designated area for the family and private life. A person has the right to respect for his home, which means not just the right to the actual physical space, but also to the quiet use of this space within reasonable limits. Violation of the right to respect home is not only limited by specific violations such as illegal entry into a person's house, but can include the actions that are scattered, like noise, emissions, odors and other similar forms of intervention. The right of a person to respect for his home could be seriously affected if he is prevented from using the parts of his home[135]. Although the Convention does not provide the right to a clean and quiet environment, in the event of negative impact of noise and pollution on a person Article 8 can be applicable[136].

The ECHR noted in several of its decisions, complaints under Article 8 of the Convention were filed in different occasions when concerns about the environment were expressed. However, in order to raise the issue under Article 8 of the Convention the interference, in respect of which the applicant complains, should have a direct impact on its home, private or family life and should reach a minimum level for the complaint to come within the purview of Article 8 of the Convention. Therefore, the primary decision is whether the pollution an applicant complains of is considered to have a sufficiently negative impact on the use of his home amenities and the quality of his private and family life, even without creating serious health hazards[137].

The assessment of this minimum level is relative and depends on all the circumstances of the case, such as the intensity and duration of exposure and adverse physical or psychological effects. The overall context of the environment should also be taken into account. The ECHR has recently reminded that there can not be a substantiated complaint under Article 8 of the Convention if the

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135 Case of Moreno Gomez v. Spain, 16.11.2004, http://hudoc.echr.coe.int/eng?i=001-67478, Case of Dees v.Hungary, 9.11.2010, http://hudoc.echr.coe.int/eng?i=001-101647, Case of Ivan Atanasov v. Bulgaria, 2.12.2010. http://hudoc.echr.coe.int/eng?i=001-101958.

136 Case of Hatton and others v. the United Kingdom, 8.07.2003. http://hudoc.echr.coe.int/eng?i=001-61188

137 Case of Taşkın and Others v. Turkey, 10.11.2004. http://hudoc.echr.coe.int/eng?i=001-67401.

damage, with reference to which the complaint is filed, is insignificant as compared to the environmental risks inherent to life in every modern city[138].

With regard to health deterioration, it is difficult to distinguish the impact of environmental risks from the effects of other relevant factors, such as age, profession or personal life. Regarding the overall context of the environment, there is no doubt that the severe pollution of water and soil can affect public health in general and worsen the quality of a person's life, but its actual impact in each case is impossible to define in quantitative terms. "Quality of life" actually is a subjective characteristic that cannot be defined precisely[139].

Considering the difficulty of proof, the ECHR will mainly consider the findings of national courts and other competent authorities to establish factual circumstances. As a basis for analysis the ECHR can use, for instance, provisions of national legislation, which determine dangerous levels of pollution, and environmental studies undertaken by the competent authorities. The ECHR will pay special attention to individual decision of the authorities on the specific situation of the applicant, such as the obligation to revoke polluters' permit for industrial activities or to resettle the inhabitants from the contaminated area. However, the ECHR can not blindly rely on decisions of national authorities, especially when they are clearly inconsistent or contradictory. In this situation, the Court must assess the evidence in their entirety. Other sources of evidence, besides the course of events outlined by the applicant, will be, for instance, his medical certificates and relevant reports, statements or research undertaken by private institutions[140].

For instance, in the case *Dzemyuk v. Ukraine*[141] the applicant complained about a breach of his right to respect for his home and private life on account of the construction of a cemetery near his home, and of the authorities' failure to enforce a judgment by which the construction of the cemetery in the vicinity of his house had been prohibited. The ECHR agreed that the applicant and his family could experience the negative impact of the water pollution. However, in the absence of direct evidence of actual impact on the applicant's health the ECHR must determine whether the potential threats to the environment caused by the location of the cemetery were related to the applicant's private life and home to the extent that adversely affect the quality of his life and bring into force the application of the provisions of Article 8 of the Convention.

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[138] Case of Hardy and Maile v. the United Kingdom, 14.02.2012. http://hudoc.echr.coe.int/eng?i=001-109072.

[139] Case of Ledyayeva and Others v. Russia, 26.10.2006. http://hudoc.echr.coe.int/eng?i=001-77688. p. 90.

[140] Case of Dubetska and others v. Ukraine, 10.02.2011, http://zakon2.rada.gov.ua/laws/show/974_689, p. 107.

[141] Case of Dzemyuk v. Ukraine, 4 September 2014, http://zakon3.rada.gov.ua/laws/show/974_a51?nreg=974_a51&find=1&text= %EC %B3 %F1 %F2 %B3&x=0&y=0#w11

In its decision on the eligibility of application of *Zbigniew Koceniak v. Poland*[142] which concerned the construction of a midden, a slaughterhouse and a meat-processing plant on the land adjacent to the applicant's plot by the applicant's neighbors, the ECHR pointed out that the non-compliance of these buildings to building norms was not sufficient for the affirmation that there was interference with the applicant's right under Article 8. The ECHR must assess the materials of the case and determine whether the alleged interference was serious enough to have a negative impact on the use of facilities of the applicant's home and the quality of his private and family life. The ECHR found that the applicant could be affected by unpleasant odor and emissions from meat processing enterprise, however, it must be determined whether such interference has reached the minimum level required to constitute a breach of Article 8 of the Convention. The ECHR noted that the applicant did not provide public authorities with such evidence as medical or environmental reports and other evidence of damage or interference of the enterprise in the vicinity of his property, and therefore it was not reliably established that the operation of the business caused environmental hazard, or the pollution level exceeded acceptable safe levels as defined by law. The applicant also did not provide the ECHR with evidence of health injury that was caused or may have been caused by the noise and pollution. It was not proved that the pollution which the applicant complained of reached the level or characteristics that caused any harmful effects on the health of the applicant or his family. Therefore, the ECHR declared the application ungrounded.

This position was supported by the court in its decision on admissibility of the application of *Fägerskiöld v. Sweden*[143], where the applicant complained of the noise from the wind turbines erected 400 meters from the applicant's house. The ECHR declared the application inadmissible for lack of evidence from physicians regarding the confirmation of negative health effects of noise from wind turbines. The applicants unreasonably criticized noise tests conducted by the government, as their results showed a small level of excess. The noise level in this case was not so serious to reach the threshold which is set in environmental cases considered by the ECHR.

In the case *Martinez Martinez and Pino Manzano v. Spain*[144], the ECHR found no violation of Article 8 of the Convention in respect of applicants living in an industrial area near the stone quarry despite the applicants' arguments about psychological disorders because of the noise of the facility. The ECHR came to

[142] Case of Zbigniew Koceniak v. Poland, 17.06.2014. http://hudoc.echr.coe.int/eng?i= 001-145668, p. 60–61.

[143] Case of Fägerskiöld v.Sweden, 26.02.2008, http://hudoc.echr.coe.int/eng?i=001-85411

[144] Case of Martinez Martinez and Pino Manzano v. Spain, 3.07.2012. http://hudoc.echr.coe.int/eng?i=001-112455

that conclusion because of the available evidence of noise measurement that showed the normal range or a small excess of the norm, and also because of the fact that the applicants lived in the area that was not intended for residence.

In the case *Kyrtatos v. Greece*[145] the ECHR found no violation of Article 8 of the Convention with regard to the applicants complaining that urban development plans destroyed their physical environment and negatively influenced their private life. The ECHR explained that on the one hand, the intervention in the living conditions of the animals in the swamp, which belonged to the applicants, was an encroachment on private or family life of the applicants. Even presuming that environmental damage was caused by urban development plans, the applicants did not prove that the alleged harm to birds and other protected species that lived in the swamp was of such a nature that directly affected their own rights under Article 8 of the Convention. On the other hand, the ECHR pointed out that the impact of urban facilities in the vicinity of the applicant's property (noise, light) did not reached the limits of sufficient seriousness to be decisive for the purposes of Article 8 of the Convention.

The Court reached the same conclusion in the Case of *Ivan Atanasov v. Bulgaria*[146]. The applicant stated that recultivation scheme of tailings pond for the flotation plant of a former copper-ore mine had a negative impact on his private and family life and home, as well as violated the peaceful possession of his property. In this case the ECHR had no doubt that placing sludge in the pond for the waste created unpleasant situation in the neighborhood, however, it was not convinced that the pollution adversely affected the private sphere of the applicant to such an extend that was necessary for the application of Article 8 for these reasons. Firstly, the applicant's house and land are located far from the sources of pollution (1 km from the house and 4 km from the land for cultivation). Secondly, the pollution caused by the pond is not the result of active production process which could result in a sudden release of large amounts of toxic gases or substances (unlike the Case of Lopez Ostra, Guerra and others, Fadeyeva). This means that in this situation there is less risk for sudden deterioration of the situation (unlike the Case of Tatar). Thirdly, there was no evidence of accidents with negative consequences for the health of people living in Elshitsa. The Case files lack data proving that the pollution around the pond caused the increase in mortality of Elshitsa residents or had a negative impact on the applicant's possession of the amenities of his homes, the quality of private or family life. In fact, the applicant admitted that he cannot prove any actual damage to his health or the availability of short-term health risks, but he is afraid of negative consequences in the long term. The applicant did not provide evidence that the degree of interference around his

[145] Case of Kyrtatos v. Greece, 22.05.2003. http://hudoc.echr.coe.int/eng?i=001-61099

[146] Case of Ivan Atanasov v. Bulgaria, 2.12.2010. http://hudoc.echr.coe.int/eng?i=001-101958

home was one that significantly adversely affects his private and family life. The applicant did not suffer obvious harm, and therefore the ECHR had doubts that Article 8 of the Convention was applicable.

2. The state has a positive obligation to take measures to guarantee respect concerning the right to respect for private and family life and to prevent interference from both public and private entities.

In order to determine whether the State is responsible under Article 8 of the Convention, the ECHR must determine whether the situation is the result of a sudden and unexpected turn of events, or, conversely , it existed for a long time and was well-known to public authorities; whether the state was or had to be aware of the hazards or harmful effects affecting the private life of the applicant, and the extent to which the applicant had helped to create this situation for himself/herself and was able to remedy the situation without incurring excessive costs[147]. Besides, the court must assess whether the authorities conducted sufficient prior research to assess the risk of potentially dangerous activities planned and whether they developed adequate policy regarding the polluters on the basis of available information, and whether this policy was implemented on time. The ECHR also examines whether the State is aware or whether it had to be aware of the danger or adverse impact made on applicants' private lives[148].

The principles that apply to the assessment of the State responsibility under Article 8 of the Convention in environmental matters are generally similar regardless of whether the case is considered in terms of direct intervention or positive obligation to regulate private activity[149].

The positive obligation of the state can manifest itself in the development of legislation which presupposes the responsibility for the resettlement of persons living in sanitary protection zones of large industrial enterprises. But this is one of the possible measures that can be taken by the State. Setting the general right to free new accommodation provided by the State (or industrial enterprise) would be an exaggeration. The State itself has the right to choose activities that would provide an effective solution to the situation of the applicant. For example, the State may help the applicant to move from the area of pollution or to take measures to reduce pollution in this area to acceptable levels[150].

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147 Case of Dubetska and others v. Ukraine, 10.02.2011, paragraph 108. http://zakon5.rada.gov.ua/laws/show/974_689/page2

148 Presentation: Article 8 of the Convention: Environmental rights. Ihor Karaman. unba.org.ua/assets/uploads/news/post.../2015.03.23-04.03.18-mat5.pdf

149 Case of Hatton and others v. the United Kingdom, 8.07.2003. http://hudoc.echr.coe.int/eng?i=001-61188, p. 98.

150 Case of Fadeyeva v. Russia, Case of Dubetska and others v. Ukraine.

In the case *Moreno Gomez v. Spain*[151] the applicant complained of excessive noise at night from a night club working near her home and failure of public authorities to limit this negative impact on her private and family life. The ECHR, taking into account the duration of exposure and the noise levels, indicated that there had been a violation of the rights of the applicant. Inaction on the part of the City Council about the night club's exceeding the noise and vibration levels caused serious violation of the applicant's right; thus, Spain has failed to fulfill its positive obligation to guarantee the applicant's right to respect for her home and private life.

In the case *Bor v.Hungary*[152] the applicant, who lived opposite the railway station, complained about the high noise pollution caused by trains and the authorities' failure to bring the railway to responsibility on time and effectively for exceeding noise levels. The ECHR found a violation of Article 8 by Hungary because of the failure of its positive obligation to guarantee the applicant's right to respect for his home. The existence of a system of sanctions is not enough if sanctions are not applied effectively and on time.

In the case *Di Sarno and Others v. Italy*[153] the Court found a violation by the State of its positive obligation to introduce a system of collection of solid household wastes and implement the appropriate legislative and administrative policy on wastes. The applicants complained of a violation of their rights during the period of emergency when wastes were not collected for 5 months and accumulated in the streets of Campania, polluting the environment and creating a serious threat to life and health of the applicants. The latter also complained that the State had not informed all affected citizens about the risks of living in the waste-contaminated area. The ECHR pointed out that the collection, treatment and disposal of wastes is a dangerous activity, and the state has the obligation to adopt reasonable and appropriate measures that would be sufficient to protect the right of persons affected to a healthy and secure environment. These government actions can be qualified as a violation of the applicants' right to respect for their private life and home. Regarding the violation of Article 8 in the light of the procedural obligations of the State, the ECHR did not establish this fact because the State informed the public about the research of the potential risk of living in Campania.

3. The obligation of public bodies is to inform the public about environmental risks and give access to information and possibilities for participation.

[151] Case of Moreno Gomez v. Spain, 16.11.2004, http://hudoc.echr.coe.int/eng?i=001-67478, Ukrainian version of the decision http://zakon3.rada.gov.ua/laws/show/980_232

[152] Case of Bor v.Hungary, 18.06.2013. http://hudoc.echr.coe.int/eng?i=001-120959

[153] Case of Di Sarno and Others v. Italy, 10.01.2012. http://hudoc.echr.coe.int/eng?i=001-108480

When the complaints relate to the state policy on industrial polluters, the role of the ECHR is primarily subsidiary. First of all, it must determine whether the process of making the decision was fair. Only in exceptional circumstances it can cross this limit and review the substantive conclusions of national authorities. The ECHR also examines the extent to which the person affected by this policy could influence the decision, including access to relevant information and the possibility to effectively challenge the decisions of the authorities[154].

Where the public authorities have to determine complex questions of economic and social policy, the decision-making process should involve appropriate investigation and research to predict and assess the impact for the future, which will allow achieving a fair balance between different conflicting interests. The ECHR stressed the importance of public access to the findings of such studies and to information that will enable individuals to assess the risks they are exposed to[155]. However, this does not mean that decisions can be made only if comprehensive and statistical data are available on every aspect of the decision[156].

In the case *Guerra and v. Italy*[157] the ECHR analyzed Italy's violation of Article 8 of the Convention due to the damage to the applicants who lived at a distance of 1 km away from the chemical plant producing mineral fertilizers and were exposed to harmful emissions from several accidents at the plant. The most serious accident was in 1976, which resulted in the release of several tonnes of potassium carbonate into the air, and the spill of bicarbonate solution, containing arsenic trioxide. 150 residents were hospitalized due to acute arsenic poisoning. The applicants complained about the lack of practical steps to reduce emissions and risk of accidents in the operation of the plant that violated their right to respect for their lives and physical integrity. Also the corresponding authorities have not informed the public about the risks and the steps to be taken in the event of serious accidents at the plant, which violated their right to freedom of information guaranteed by Art. 10 of the Convention (for details of the case see Section 2.1., 2.4.) The ECHR, recognizing the violation of Art. 8 of the Convention, established that Italy failed to fulfill its obligation to ensure the right to respect for private and family life. Serious environmental pollution,

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154 Case of Guerra and Others v. Italy, Hatton and Others v. the United Kingdom, Taskin and Others v. Turkey.

155 Case of Taşkın and Others v. Turkey, 10.11.2004. http://hudoc.ECHR.coe.int/eng?i=001-67401, p. 119.

156 Case of Hatton and others v. the United Kingdom, 8.07.2003. http://hudoc.ECHR.coe.int/eng?i=001-61188. p. 104, 128.

157 Case of Guerra and others v. Italy, 19.02.1998. http://hudoc.ECHR.coe.int/eng?i=001-58135, unofficial Ukrainian translation of the decision: http://medialaw.org.ua/userimages/book_files/Book_WEB_European_Court_Coe_MLI.pdf

according to the ECHR, may adversely affect the welfare of citizens and prevent the use of their homes, thereby adversely affecting their private and family life. In this case, until the end of production of fertilizers in 1994, the applicants were waiting for important information that would allow them to assess the risks, which they themselves and their families could experience if they continued to live in Manfredonia, in the city, which would be in particular danger in case of an accident at the plant. Thus, the ECHR established the violation of Article 8 of the Convention, and made the conclusion that there is no need to examine the case in light of Article 2[158].

In the case *McGinley and Egan v. the United Kingdom*[159] the applicants who were soldiers and took part in nuclear tests in the Pacific ocean on Easter Island complained that the government retained information that would allow them to assess the possibility of causal connection between their health problems and radiation exposure, which they suffered during the service. The ECHR pointed out the obligation of the governments that involve citizens in dangerous activity that can have hidden negative impact on their health, to respect their private and family life, and in order to comply with the abovementioned law, to establish effective available procedures for such citizens to enable them to access all necessary and appropriate information. In this case, the UK government has provided evidence of the procedure, which would allow the applicants to request documents on the basis of which the Minister of Defence concluded that they were not exposed to dangerous radiation, and provided evidence of the effectiveness of this procedure. However, none of the applicants took advantage of this procedure, and therefore the ECHR made the conclusion that the defendant did not violate his positive obligation in respect to the applicants under Article 8 of the Convention.

In a similar case *Roche v. the United Kingdom*[160] the ECHR found a violation of Article 8 due to the defendant's failure of his positive duty to implement an effective and accessible procedure that would allow the applicant to have access to relevant information that would allow him to assess the risks to which he was

[158] However, there are individual opinions of ECHR judges about the violation of Article 2 in the present case. For example, Judge Walsh said: Although in its judgment, the Court briefly touched on Article 2, but did not make a decision concerning it, I believe that its provisions have also been violated. In my view, Article 2 also guarantees the protection of the physical integrity of applicants. In the wording of Article 3 it is also clearly stated that the Convention applies to the protection of physical integrity. In my opinion, there has been a violation of Article 2 of the Convention in this case, and in view of the circumstances it does not seem necessary to go beyond this provision in order to find a violation. http://medialaw.org.ua/userimages/book_files/Book_WEB_European_Court_Coe_MLI.pdf, p. 90.

[159] Case of McGinley and Egan v. the United Kingdom, 09.06.1998. http://hudoc.ECHR.coe.int/eng?i=001-58175

[160] Case of Roche v. the United Kingdom, 19.10.2005. http://hudoc.ECHR.coe.int/eng?i=001-70662

subjected while participating in tests of mustard and nerve gas in the 1960s. The ECHR stated that a person who is trying to get information by extrajudicial means shall not apply to the courts for information. Information services and study of the impact on health in this sphere began 10 years after the applicant had started to search for relevant information and appealed to the ECHR. Violations of Art. 10 of the Convention have not been established.

Article 8 Para 2

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In the case *Dzemyuk v. Ukraine*[161] state intervention, according to the court, took place not in accordance with the law, because such interference was contrary to the law, position of environmental authorities, the court, and as a result the applicant continued to live in a small distance from the operating cemetery. The applicant complained about water contamination in the well as a result of the operation of the cemetery, and the noise of the funeral ceremonies. Since the applicant had not provided direct evidence of actual harm to his health, the ECHR had to determine whether potential risks to the environment were related to the accommodation and private life of the applicant to the extent that they could adversely affect the quality of his life. According to the law, the cemetery should be placed at a distance of at least 300 meters away from houses and water sources. The applicant lived at a distance of 38 meters from the boundary of the cemetery. The bodies of sanitary-epidemiological service and court decisions confirmed the violation of law. The applicant has provided water contamination data that indicate serious bacteriological contamination that could be caused by the existence of the cemetery. Under these conditions, the ECHR has come to the conclusion that the cemetery arrangement so close to the applicant's house reached the minimum level required by Art. 8 of the Convention, and constituted interference with the applicant's right to respect for his home and family life.

"If government interference in private and family life, and accommodation of applicants is confirmed, the court estimates the balance when deciding between public interest and individual rights and interests of applicants."

In cases involving environmental issues the country must be given a wide discretion and choice between different ways and means of compliance with

[161] Case of Dzemyuk v. Ukraine, 4.09.2014, http://zakon5.rada.gov.ua/laws/show/974_a51

their obligations. The main issue of the ECHR is whether the state managed to keep the fair balance between the competing interests of affected individuals and society as a whole[162]. In carrying out this assessment in the context of a particular case all factors must be analyzed, including national legal issues[163].

In matters relating to state decisions that can affect the environment, the ECHR can conduct research in two directions. Firstly, the ECHR can assess the material aspects of the decision of the national authority, if it is coherent with Article 8 of the Convention. Secondly, the ECHR can assess the decision-making process to be sure that adequate attention was paid to the interests of the individual. According to the established practice of the ECHR, despite the fact that Article 8 of the Convention contains no explicit procedural requirements, the decision making process that leads to intervention must be fair and give due consideration to the interests of the people as guaranteed by Article 8 of the Convention. The ECHR should consider all procedural aspects, including the type of decision or policy and the level of consideration of the interests of people in the decision-making process as well as the availability of procedural safeguards. Where the state has to decide on complex issues of economic and environmental policy, the decision-making process should include appropriate research and investigation to anticipate and assess the future consequences of these actions that could have an impact on the environment and violate the rights of citizens so that the state could observe fair balance between conflicting interests. The importance of public access to the results of such studies and to information that will enable the members of the public to assess the danger to which they may be exposed, is indisputable. And lastly, the interested members of the public should have the right to appeal against any decision, action or inaction, if they believe that in the process of decision-making their interests or comments were not given proper consideration[164].

Since the Convention is designed to protect real, not illusory human rights, a fair balance between different interests in question may be violated not only when there are no provisions for the protection of the guaranteed rights, but if they are not duly observed[165]. Procedural safeguards available to the applicant may be deemed ineffective and the state may be deemed responsible in accordance with the Convention, if the decision-making procedure is unduly

[162] Case of Hatton and others v. the United Kingdom, 8.07.2003. http://hudoc.ECHR.coe.int/eng?i=001-61188, p. 100, 119 and 123.

[163] Ibid. p. 120, Case of Fadeyeva v. Russia, 09.06.2005. http://hudoc.ECHR.coe.int/eng?i=001-69315, p. 96–97.

[164] Case of Taşkın and Others v. Turkey, 10.11.2004. http://hudoc.ECHR.coe.int/eng?i=001-67401, p. 115–117, 119.

[165] Case of case of Moreno Gómez v. Spain, 16.11.2004. http://hudoc.ECHR.coe.int/eng?i=001-67478, p. 56 and 61.

prolonged or if as a result the adopted decision remains unfulfilled over a considerable period[166].

In the case *Lopez Ostra v. Spain,*[167] the applicant lived in Lorca, where there is a large number of tanneries. Several existing tanning workshops there built a plant for treatment of liquid and solid waste, located 12 meters away from the applicant's home. The start-up of the facility caused the release of gas fumes, pestilential smells and contamination (owing to a malfunction), which immediately caused health problems and nuisance to many residents of Lorca, particularly those living in the applicant's district. The town council evacuated the local residents and rehoused them free of charge in the town centre for the months of July, August and September 1988. In October the applicant and her family returned to their flat. On 9 September 1988, following numerous complaints the town council ordered cessation of one of the plant's activities — the settling of chemical and organic residues in water tanks — while permitting the treatment of waste water contaminated with chromium to continue. The applicant complained of municipality of Lorca inaction concerning inconveniences caused by the sewage treatment plant, located a few meters from her place of residence under Article 8 and Article 3 of the Convention, she expressed the opinion that her right to respect for her home was violated that prevents her private and family life and also means inhuman treatment. The ECHR noted, however, that the family had to bear the nuisance caused by the plant for over three years before her resettlement. They moved only when it became apparent that the situation could continue indefinitely and when Mrs López Ostra's daughter's paediatrician recommended that they do so. Having regard to the foregoing, and despite the margin of appreciation left to the respondent State, the ECHR considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being — that of having a waste-treatment plant — and the applicant's effective enjoyment of her right to respect for her home and her private and family life. There has accordingly been a violation of Article 8. The ECHR stated that the conditions in which the applicant and her family lived for a few years, of course, were very difficult, but they do not constitute inhuman treatment under Article 3 of the Convention.

In the case *Bacila v. Romania,*[168] the applicant lived near a plant which was one of Europe's biggest producers of lead and zinc and at the time the biggest

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[166] Case of Taşkın and Others v. Turkey, 10.11.2004. http://hudoc.ECHR.coe.int/eng?i=001-67401, p. 124–125.

[167] Case of Lopez Ostra v. Spain, 09.12.1994. http://hudoc.ECHR.coe.int/eng?i=001-57905, Ukrainian version of the decision: http://zakon0.rada.gov.ua/laws/show/980_348

[168] Case of Bacila v. Romania, 30.03.2010 p., http://hudoc.ECHR.coe.int/eng-press?i=003-3084920-3417430

employer in the town. Despite numerous complaints from the applicant, the plant continued emitting into the atmosphere significant amounts of sulphur dioxide and dust containing heavy metals, mainly lead and cadmium. Analysis showed that heavy metals could be found in the town's waterways, in the air, in the soil and in vegetation, up to 20 times exceeding the maximum levels permitted. The rate of illness, particularly respiratory conditions, was seven times higher in the applicant's town than in other cities of Romania. In the applicant's blood the concentration of lead exceeded the permissible limit, she was often admitted to hospital. The ECHR reiterated that severe environmental pollution could affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. States have a duty to regulate the authorisation, operation, safety and monitoring of hazardous activities and to guarantee the effective protection of citizens whose lives could be endangered by such activities. Whilst the ECHR took into account the interest in maintaining the economic activity of the biggest employer of a town that had already suffered from the closure of other plants, it found that this argument should not have prevailed over the inhabitants' right to enjoy a healthy environment. Therefore, the authorities had failed to strike a fair balance between the interest in ensuring the town's economic stability and the applicant's effective enjoyment of the right to respect for her home and for her private and family life. There had been a violation of Article 8 of the Convention.

In a famous case of *Taşkın and others v. Turkey,*[169] the ECHR also supported the applicants who claimed a violation of their right to respect for private and family life and the right to a hearing of their case in court within a reasonable time. The applicants lived near a golden mine near Bergama and complained about the authorities' permission to allow the mine to work using cyanidation process, and the decision-making process violated their rights under Art. 8 of the Convention. The ECHR found a violation of Article 8 of the Convention because Turkey has not taken steps to guarantee the right to respect for private and family life. First of all, the authorities' decision to grant permission for the operation of the mines was declared invalid by Supreme Administrative Court in May 1997. However, the mine was not closed down until February 1998. By the decision of the Council of Ministers in March 2002, which was not made public, the mine resumed its operation, but it actually resumed its work earlier in April 2001. Such actions of the government violated the applicants' rights under Art. 8 of the Convention, depriving them of any procedural guarantees of their rights. The ECHR found a violation of the applicants' right to a fair trial within a reasonable timing under Article 6 of the Convention.

[169] Case of Taşkın and Others v. Turkey, 10.11.2004. http://hudoc.ECHR.coe.int/eng?i=001-67401

In a similar case *Ockan and others v. Turkey,*[170] the ECHR was addressed by 315 Turkish nationals living in Bergama areas where the conflict arose in connection with granting permits for gold exploration in the vicinity of Izmir. The ECHR concluded that the administrative authorities deprived the applicants of actually taking advantage of the procedural guarantees to which they were entitled under the law. Thus, the ECHR ruled that Turkey was unable to fulfil its obligation to ensure the applicants' right to respect for private and family life. It was therefore a violation of Art. 8 of the Convention.

The case *Fadeyeva v. Russia*[171] is about the applicant who lives in the town of Cherepovets, Vologda region, in the sanitary protection zone of Cherepovets Steel Plant JSC "Severstal". The level of air pollution at the place of her residence considerably exceeded maximum permissible concentrations of harmful substances set by the Russian legislation. In 1996 and 1999 she addressed Cherepovets city court twice with claims to the JSC "Severstal" about immediate relocation from the sanitary protection zone. As a result of processes in the Russian courts, she was placed in a public queue to obtain housing. In several years she was not even number 5000 in this queue. The ECHR found a violation of Art. 8 of the Convention, as Russia has not followed a fair balance between the interests of the community and the effective implementation of the applicant's right to respect for private life and home. The State authorised the operation of a polluting plant in the middle of a densely populated town. Strong indirect evidence makes it possible to conclude that the applicant's health deteriorated as a result of harmful emissions into the air. The ECHR further observes that the Severstal steel plant was and remains responsible for almost 95 % of overall air pollution in the city. The ECHR noted the lack of measures taken by the state: the goals to reduce emissions have not been achieved, the research and sanctions did not have any effect, and any meaningful environmental policy was absent. The ECHR pointed out that the state or the polluting enterprise had to provide the applicant with free housing. But the state did not offer the applicant any effective solution to the problem to help her move from the dangerous area. The European Court of Human Rights, finding a violation of Art. 8 of the Convention, awarded the applicant EUR 6,000 for non-pecuniary damage suffered. In the decision in a similar case of *Ledyayeva and others v. Russia,*[172] the applicants also lived where Fadeyeva did, and based on the same arguments, the ECHR found a violation of their rights under Art. 8 of the Convention.

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[170] Case of Ockan and others v. Turkey, 28.03.2006. http://hudoc.ECHR.coe.int/eng?i=001-125726

[171] Case of Fadeyeva v. Russia, 09.06.2005. http://hudoc.ECHR.coe.int/eng?i=001-69315

[172] Case of Ledyayeva and others v. Russia, 26.10.2006. http://hudoc.ECHR.coe.int/eng?i=001-77688

In the case *Giacomelli v. Italy*,[173] since 1950 the applicant has lived in a private house on the outskirts of the city, 30 metres away from a plant for the storage and treatment of "special waste", a part of which was classified as hazardous. The plant began operating in 1982. The applicant brought three sets of proceedings for judicial review of the decisions by the Regional Council to grant the company operating licences for waste recycling activity. Her applications in the first set of proceedings were dismissed. The second set resulted in a decision ordering the suspension of the plant's operation, which was not implemented. The Ministry of the Environment issued three decisions on the environmental impact of plant and obliged it to fulfil the requirements to improve the conditions for operating and monitoring the plant. The applicant complained under Article 8 that the persistent noise and harmful emissions from the plant entailed severe disturbance to her environment and a permanent risk to her health and home.

The Court observed that neither the decision to grant the company an operating licence for the plant nor the decision to authorise it to treat industrial waste by means of detoxification had been preceded by an appropriate investigation or study. The ECHR further noted that during the inspection under the Ministry, it was discovered on two occasions that the plant's operation was incompatible with legal requirements. Namely, the unsuitable geographical location of the plant was mentioned and that there was a specific risk to the health of the local residents. The ECHR also reviewed the progress of the applicant's complaints by the relevant national authorities. The ECHR noted that the decision about the immediate suspension of the plant on the grounds that its activities do not meet the legal requirements was not implemented and the plant did not stop working. For many years, the applicant suffered from violations of the right to housing because of the dangerous production process, which was carried out at the plant near her home. The ECHR also concluded that the state had not succeeded in striking a fair balance between the interest of the community in having a plant for the treatment of toxic industrial waste and the applicant's effective enjoyment of her right to respect for her home and her private and family life. The ECHR held that there had been a violation of Article 8 of the Convention.

A judgment in the case *Tătar v. Romania* is interesting in terms of the position of the court and the application of the international principle of precaution[174]. The applicants, father and son declared that the use of cyanide in the gold mining puts their lives at risk. The applicants lived near the vicinity where gold is extracted using cyanide. As a consequence, the son began to show asthmatic attacks, and numerous complaints about environmental pollution on behalf of the father failed. In 2000 an accident occurred: a dam breached, causing the release of 100,000 m^3 of cyanide contaminated water into the

[173] Case of Giacomelli v. Italy, 2.11.2006. http://hudoc.ECHR.coe.int/eng?i=001-126090

[174] Case of Tătar v. Romania, 27.01.2009. http://hudoc.ECHR.coe.int/eng?i=001-117147

environment. The court found violation of Article 8 of the Convention since Romania had failed in its obligation to assess the risks from such activities and to take appropriate measures to protect the rights of the persons concerned to respect for their private life and home, and more generally — for the right to a healthy and secure environment. The ECHR pointed out that pollution can interfere with private and family life through damaging human welfare and the state has the duty to protect its citizens by regulation in the form of the provision of permits for construction and operation, controlling and monitoring industry, which is dangerous for the environment and human health. However, the applicants have not proven causality between the impact of sodium cyanide and asthma. The ECHR pointed to the violation of the principle of precaution by the state, which allowed the company to resume its work after the accident in 2000. This principle means that the lack of certainty in today's scientific and technical research cannot justify any delay by the state in implementing effective and proportionate preventive measures. The ECHR pointed out that the government should provide public access to the findings of investigations and research, and has the responsibility to ensure that members of the public participate in decisions concerning the environment.

In the case *Dubetska and others v. Ukraine,*[175] the applicants residing in the hamlet of Vilshyna complained about a 60-metre spoil heap formed as a result of coal processing factory "Chervonohradska" located 430 metres from the Dubetska-Nayda family house and 420 metres from the Gavrylyuk-Vakiv family house. In 1960 the Velykomostivska No. 8 coal mine was put into operation, whose spoil heap is located 100 metres from the Dubetska-Nayda family house. The applicants' houses were within 500 meters of sanitary protection zone of the factory's spoil heap. Samples of water in the wells of Vilshyna hamlet showed that water does not meet safe standards. In particular, the maximum permissible concentration of nitrates was exceeded by 3–5 times, the concentration of iron — by 5–10 times, and the concentration of manganese — by 9–11 times. The concentration of soot in air samples taken in Vilshyna hamlet was 1.5 times higher than the maximum concentration permitted by national standards. The water in the well had been contaminated by mercury and cadmium, the concentration of which exceeded national safety standards by 25 and 4 times respectively. According to the report, the hamlet residents were exposed to a high risk of cancer and diseases of the respiratory tract and kidneys. The applicants alleged that their houses were damaged due to soil subsidence caused by coal mining activities, and they always suffered from a shortage of drinking water. Using water from local wells and the stream for washing and cooking caused itching and intestinal infections. Some of the applicants have acquired chronic

[175] Case of Dubetska and others v. Ukraine, 10.02.2011. http://zakon5.rada.gov.ua/laws/show/974_689

illnesses in connection with the activities of the factory, especially air pollution. The applicants alleged that their suffering due to environmental factors affected communication between family members. In this case, according to the ECHR, there is a rather strong link between polluting emissions and the state to raise the question of state responsibility under Article 8 of the Convention. The ECHR finds that when it comes to the broad discretion granted to the states in the context of their environmental obligations under Article 8 of the Convention, establishing the applicant's general right to free new housing by the state would be an exaggeration. The applicants' complaints under Article 8 could also be addressed adequately by solving environmental problems. At the same time, the government's approach to solving the problem of pollution in this case was also characterised by delays and improper performance, the applicants were not properly protected from environmental risks arising from the production activity of the factory. Overall, it appears that during the period under review, both the mine and the factory performed activities not in accordance with the applicable provisions of national environmental legislation and the government failed to facilitate the relocation of the applicants and secure a functioning policy to protect them from environmental risks connected with permanent residence in close proximity to these industrial enterprises. Such actions constitute a violation of Art. 8 of the Convention.

In the case *Hatton and others v. the United Kingdom,*[176] the applicants, residents of London, complained about government policies concerning regulation of night flights at Heathrow Airport, which resulted in the violation of their rights under Art. 8 of the Convention, and they were denied an effective means of solving their claims on violation of Art. 13 of the Convention. The applicants are all members of the Heathrow Association for the Control of Aircraft Noise (HACAN, now HACAN-ClearSkies), which itself is a member of the Heathrow Airport Consultative Committee. The applicants lived at a distance of 4 to 12 km away from the airport and pointed to the constant disturbance of their sleep and their relatives' sleep through the night flights. The ECHR noted that the main issue, which should be solved, was to ascertain whether the introduction of the government schemes in 1993 regulating night flights at Heathrow ensured a fair balance between the interests of individuals and the interests of society as a whole. Under these circumstances the ECHR does not believe that the authorities have exceeded the limit of their discretion and failed to comply with a fair balance between the rights of the applicants and the conflicting interests of others and society as a whole, also the court does not see serious procedural violations when preparing the scheme of night flights in 1993. According to part 2 of Art. 8 of the Convention, restriction of the right to respect for private

[176] Case of Hatton and others v. the United Kingdom, 8.07.2003. http://hudoc.ECHR.coe.int/eng?i=001-61188

life is allowed, among other cases, in the interest of economic wellbeing of the country and to protect the rights and freedoms of others. Thus, the government acted quite legitimately, in this case taking into account the interests of airport operators, interested companies and economic interests of the country in general. Therefore, the ECHR does not see violation of Article 8 of the Convention in the actions of the government.

Regarding the violation of Article 13 of the Convention, the Court found its violation due to the fact that the applicants could not appeal the government's decision of 1993 about night flights schemes in terms of violation of their rights under Art. 8 of the Convention. The courts could consider such a case and hold the scheme unlawful in the light of the classic British conception of public law: irrational, illegal and clearly unreasonable, but could not give an opinion whether the night flights scheme represented a reasonable restriction of the right to respect for private and family life of those who lived near Heathrow airport. Therefore, the limits of the courts' review of the government's decision in 1993 are not sufficient to meet the requirements of Article 13 of the Convention.

In a similar case *Flamenbaum and others v. France*[177], the applicants lived at a distance of 500–2500 meters away from the runway of Deauville airport in Normandy and complained about the noise disturbance caused by the extension of the airport's main runway and of shortcomings in the related decision-making process. They also complained of the decline in market value of their properties as a result of the runway extension, and about the insulation costs that they had had to bear. The ECHR stated that local courts paid attention to the public interest of building and legitimate purpose of the government — to improve the economic well-being of the region. The ECHR found no violation of Art. 8 of the Convention, as local authorities have taken sufficient measures to limit the impact of noise on local residents, and thus the authorities had struck a fair balance between the competing interests. The ECHR found no violations in the decision-making process. As for the violation of Article 1 of Protocol No. 1, the applicants had failed to establish the existence of an infringement of their right to peaceful enjoyment of their possessions.

There were cases in the court connected with the negative impact of roads and transport that uses these roads on private and family life and housing. The cases of *Dees v.Hungary*[178] and *Grimkovska v. Ukraine*[179] are the most important.

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[177] Case of Flamenbaum et Autres c. France, 13.12.2013. http://hudoc.ECHR.coe.int/eng?i=001-115143

[178] Case of Dees v.Hungary, 9.11.2010, http://hudoc.ECHR.coe.int/eng?i=001-101647

[179] Case of Grimkovska v. Ukraine, 21.07.2011 p. http://www.epl.org.ua/law/mizhnarodni-dohovory/yevropeiskyi-sud-z-prav-liudyny/412-sprava-hrimkovska-proty-ukrainy-povnyi-tekst-rishennia-ukrainskoiu-movoiu

In the case *Dees v. Hungary* the applicant complained about the heavy traffic on the streets, which served as the entrance to the toll motorway. According to the applicant's claims as a result of noise, emissions and bad smell caused by heavy traffic on the streets, his home was unfit for living. He also complained about the excessive length of judicial proceedings, which were initiated by him on this topic. The government had to keep a fair balance between the interests of the residents of this street and roads users. The actions of the authorities, according to the ECHR, were insufficient because the noise level in the applicant's house exceeded permitted levels by 12–15 % over a long period of time. The ECHR decided that there was a violation of Article 8 of the Convention because the government failed to fulfil its positive obligation to guarantee the applicant's right to respect for his private life and home.

Ms. Grimkovska from Ukraine complained to the ECHR about redirecting the motorway with heavy traffic through her street in 1998, which is only 6 m wide, located in a residential area and completely unsuitable for heavy traffic. In addition, the local authorities have not conducted regular monitoring of pollution and other impacts of the operation of the road. The ECHR noted that in making this decision the government of Ukraine did not conduct environmental impact assessment, and did not take sufficient measures to reduce the negative impact on the functioning of the motorway. The ECHR decided that there had been a violation of Article 8 of the Convention.

In the court decision on the admissibility of the case *Greenpeace E. V. and others v. Germany,*[180] the ECHR stated that the applicants, who had office and accommodation nearby busy intersections and roads in Hamburg, have not proven the inactivity of the state to limit emissions from diesel vehicles, therefore their complaint was considered inadmissible. The German government has proven that it has taken some measures to reduce emissions of diesel vehicles and the choice of the ways to solve environmental problems is within the discretion of each state. The applicants have not proven that, by refusing to take the measures the applicants asked about, the state exceeded its discretion and has not achieved a fair balance between individual interests and the interests of society as a whole.

From the ECHR's case-law on the application of Article 8 in environmental matters it follows that this article can be applied in the cases where environmental factors directly and seriously affect private and family life, housing of citizens. The seriousness of the impact is determined by the level and duration of exposure, physical and psychological consequences for people in general. This article imposes obligations on the state to take measures to guarantee the respect for this right and the prevention of interference on behalf of both public and private

[180] Case of Greenpeace E. V. and Others against Germany, 12.05.2009. http://hudoc.ECHR.coe.int/eng?i=001-92809

entities; information from state authorities about environmental risks, especially to inform those persons whose right to respect for private and family life is under threat; the decisions of public authorities that may affect the environment in a way that there would be interference in private life, or the housing of citizens must meet the following requirements: be in the form of law, pursue a legitimate aim and be proportionate to the aim pursued. The ECHR stressed the obligation to take into consideration the opinion of potentially affected citizens in the final decision of the public body.

2.5. ARTICLE 10. FREEDOM OF EXPRESSION

Article 10 Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

The purpose of this article is to ensure freedom of opinion and expression as one of the main pillars of democracy. In its practice the ECHR under this Article has repeatedly stated that freedom of expression is crucial for effective public debate and free exchange of ideas, and thus it is necessary in a democratic society. The Court has frequently found violations of freedom of expression in cases of censorship, bans of publications, punishment for implementation of this right (criminal responsibility for expression or remedy of damages in civil proceedings), requests from journalists to reveal their sources, disciplinary measures or confiscation of materials.

Analysis of "environmental" cases of the ECHR makes it evident that applicants often refer to violation of Article 10 of the Convention because of omissions of

the state in providing information about environmental factors that may have adverse impact on health and life. Nevertheless, the ECHR states that

> the freedom to receive information under Article 10 cannot be interpreted as the imposing on public authorities of general obligation to collect and disseminate information on the environment at their own initiative.

However, the freedom to receive information under Article 10 in the interpretation of the Court prohibits public authorities to restrict a person in receiving information from another person who wants to share it.

In the case of *Guerra and Others v. Italy* (more information on the case can be found in sections 2.1. and 2.3.) the applicants complained that the relevant authorities had not informed the public about the risks and about the procedure in the event of a serious accident, which violated their right to freedom of information (Article 10). However, the court did not establish in the present case a violation of Article 10, since in its opinion the Article does not imply a duty of the state to collect, process and disseminate information on its own initiative.

> On the contrary, Articles 2 and 8 of the Convention can impose specific positive obligation on public authorities to ensure access to information on environmental matters under certain circumstances[181].

The obligation to ensure access to information is usually combined with the positive obligation of the state to provide information to persons whose right to life under Article 2 or their right to respect for private and family life and home under Article 8 are threatened. The court found that in particular in the context of dangerous activities, responsibility for which bears the state, emphasis should be placed on the public right to information[182]. Moreover, the court declared that under Article 2, states are obliged to "adequately inform the public about any dangerous for life situations, including natural disasters" [183].

For example, in the case of *Guerra and Others v Italy*, the Court found a violation of Article 8 because the state failed to make available the information that would give opportunity to the applicants to assess the risks they and their families bore due to living near the factory. Violation of Articles 2 and 8 in

[181] Case of Öneryildiz v. Turkey, http://hudoc.echr.coe.int/eng?i=001-67614, п. 90; Case of Guerra and others v. Italy, http://hudoc.echr.coe.int/eng?i=001-58135, п. 60.

[182] Case of Öneryildiz v. Turkey, http://hudoc.echr.coe.int/eng?i=001-67614, п. 90.

[183] Case of Budayeva and Others v. Russia, http://hudoc.echr.coe.int/eng?i=001-117225, п. 131.

connection with a violation of the state obligation to provide access to such information for applicants has been established in the cases *Oneryildiz v. Turkey* (violation of Article 2 — failure to provide information to the poor on the risk of an explosion at the landfill), and *Budayeva and others v. Russia* (violation of Article 2 — failure to provide information about the risk of powerful mudslides), *Brinket and others v. Malta* (violation of articles 2 and 8 — failure to provide to workers of the shipyard the information about the dangers of working with asbestos), *Roche v United Kingdom* (violation of Article 8 — the lack of effective procedures for access to information about the risks of participation in tests of mustard and nerve gases) and many others.

In our opinion, by binding obligation of the state to provide access to such environmental information to the right to life and the right to respect for private and family life this obligation becomes still more important. Despite the absence in the Convention of the right to safe and healthy environment, the procedural component of this right — the right to access to environmental information — in some circumstances is a positive obligation of the state to protect life, physical integrity and privacy.

"Environmental" cases, in which the Court found a violation of Article 10 of the Convention, are related to the protection of individuals from state censorship and also from lawsuits from individuals, designed to stop the spread of information.

> The right to receive and disseminate information and ideas is guaranteed by Article 10 of the Convention. In the specific context of environmental protection, the Court found that there was significant public interest to enable individuals and groups to contribute to the public debate by disseminating information and ideas on matters of general public interest[184].

The issue of the right of environmental activists to disseminate information was touched upon in the case *of Steel and Morris v. the United Kingdom*[185]. Applicants in the case were associated with London Greenpeace, a small group, unconnected to Greenpeace International. In the mid-1980s the organization conducted an anti-McDonald's campaign, part of which was dissemination of a leaflet entitled "What's wrong with McDonald's?"

[184] Case of Steel and Morris v. the United Kingdom, 15.02.2005, http://hudoc.echr.coe.int/eng?i=001-68224, п. 89; Affaire Vides Aizsardzības Klubs c. Lettonie, 27.05.2004, http://hudoc.echr.coe.int/eng?i=001-66349, п. 40.

[185] Case of Steel and Morris v. the United Kingdom, 15.02.2005, http://hudoc.echr.coe.int/eng?i=001-68224

The leaflet contained accusations against McDonald's, in particular that the company is responsible for starvation in the "third world" countries, for forcing off small farmers from their lands and tribal peoples from rainforests. A number of allegations concerned the absence of nutritional qualities of food at McDonald's, as well as health risks associated with its consumption. The leaflet also accused the corporation of excessive targeting of advertising on children, the cruel practice of animal husbandry and poor working conditions. McDonald's initiated a lawsuit against the applicants and claimed damages for libel. The applicants were prosecuted for publishing the leaflet that according to the court contained ungrounded and false statements. The judge ruled for damages for McDonald's. After the appellate review of the case the total amount to be paid by the applicants was 76,000 pounds.

The first issue that the court considered in the context of Article 10 was whether the interference with the applicants' right to freedom of expression was "necessary in a democratic society". The government claimed that since the applicants were not journalists, they are not eligible to a high level of protection provided by Article 10 for the press. The court also noted that in a democratic society even small and informal groups such as London Greenpeace, must be able to effectively carry out their activities. There is considerable public interest to enable individuals and groups outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public concern, such as health and the environment.

Nevertheless, the court noted that despite the admissibility of hyperbole in the leaflet, in this case there have been very serious charges presented in the form of facts, not value judgments. In response to the applicants' allegations, the Court ruled that imposing the burden of proof in a defamation lawsuit[186] on the defendant is not a violation of Article 10 of the Convention, and the fact that the plaintiff is a large international corporation should not deprive him of the right to defend his reputation, though it's true that large companies inevitably and intentionally make themselves the object of general criticism, and the limits of permissible criticism of such companies are wider.

The court noted that in the case of competing interests of the public discussion of business practices and protecting the commercial success and viability of companies, the state enjoys discretion on remedies in the domestic law that allow companies to challenge inaccurate information and limit damage to reputation. The court said that if the state provides such a remedy as a defamation lawsuit, it must guarantee procedural fairness and equality of the parties, otherwise there will be a "chilling effect" on free exchange of ideas and information. The fact of the failure to provide such guarantees in this case was established by the Court

[186] Defamation lawsuit is as a rule a civil suit to claim the damage caused to honor, dignity and business reputation as a result of dissemination of false or negative information.

in the context of a violation of Article 6, which gives grounds to speak about the violation of Article 10. Furthermore, according to the Court case-law under Article 10, compensation for defamation must be proportionate to the damage that was caused to reputation. In this case, the Court concluded that significant amount of compensation awarded to the company was disproportionate to the legitimate aim it served.

> Imposed by the state restrictions on the right to receive and disseminate information and ideas, including on environmental protection, shall be provided by law and pursue a legitimate goal. Means that restrict this right should be proportionate to the legitimate goal and a fair balance must be achieved between the interests of the individual and society[187].

In the context of Article 10, the court also considered two cases about dissemination of information by environmental NGOs. In the case *Vides Aizsardzības Klubs v. Latvia* [188] (application 57829/00, judgement of 27.05.2004) the applicant was an environmental NGO, which in November 1997 adopted a resolution addressed to the competent authorities expressing its concern about the preservation of coastal dunes of the Gulf of Riga. The resolution, which was published in the local newspaper, contained a statement that the local mayor facilitated the illegal construction in the coastal zone. The mayor sued the applicant for damages, claiming that the information in the resolution against him was unreliable. Latvian courts have concluded that the applicant had not proved the truth of his allegations and ordered it to publish an official apology and compensate the damage to the mayor for publishing defamatory statements.

The ECHR noted that the disputed resolution was intended to draw attention of the authorities to the sensitive issue of common interest, namely the violations in the important sector belonging to the competence of local authorities. According to the Court, as a non-governmental organization specialized in the relevant area, the applicant organization carried out its role of a "watchdog". This organization's activities are essential in a democratic society. Thus, in order to perform its task effectively, the organization had to be able to highlight facts that represent the public interest, give them its assessment and thus contribute to the transparency of public bodies. Furthermore, the

[187] Affaire Vides Aizsardzības Klubs c. Lettonie, 27.05.2004, http://hudoc.echr.coe.int/eng?i=001-66349, п. 40.

[188] Affaire Vides Aizsardzības Klubs c. Lettonie, 27.05.2004, http://hudoc.echr.coe.int/eng?i=001-66349

Court noted that the limits of criticism of public figures are much narrower than for ordinary citizens. According to these facts, the court ruled that there was a violation of Article 10 of the Convention, since the right to freedom of expression of the applicant was not proportionate to the legitimate goal (protection of reputation and rights of others).

In the *case of Verein gegen Tierfabriken v. Switzerland*[189] (application 24699/94, judgement of 28 June 2001) the applicant was a non-governmental organization "VgT Verein gegen Tierfabriken" working to protect animals. For broadcasting on state television the applicant produced a commercial that promoted the welfare of animals and was a kind of response to advertising of meat industry products. The commercial demonstrated a noisy hall full of pigs in small pens, which resembled concentration camps. The film concluded with the exhortation: "Eat less meat, for the sake of your health, the animals and the environment!" TV company refused to broadcast the applicant's commercial in view of its clear political character. Swiss law "On the Federal Radio and Television" prohibits political advertising in order to prevent powerful financial groups from getting advantages of the political situation by demonstrating their political advertising.

Solving this case, the court examined whether restriction of the applicant's right was required by law, motivated by a legitimate goal and was necessary in a democratic society. The court emphasized that the phrase "necessary in a democratic society" requires "the existence of a pressing social need". Although the state is endowed with discretion when deciding on the existence of pressing social needs, the limits of such discretion are much narrower when it comes to advertising, serving rather interests of society than only the commercial interests.

Given that the law establishes a ban on broadcasting political advertising only for electronic media and allowed to do it in the press, the court has concluded that there was no pressing social need to ban political advertising. Moreover, it was not proven that the applicant is a powerful financial group that wants to achieve certain benefits, but instead it just tried to take part in the general public debate on animal welfare issues. The court found a violation of Article 10, as the Swiss Government insufficiently justified interference with the applicant's exercising of its freedom of expression.

Having analyzed the jurisprudence of the ECHR on access to and dissemination of environmental information, we can conclude the following:

1. In matters of the state's omissions regarding provision to applicants of information that could help them assess the risks to life and health, the court is inclined to find violations of Articles 2 or 8 of the Convention, as it

[189] Case of Verein gegen Tierfabriken v. Switzerland, 28.06.2001, http://hudoc.echr.coe.int/eng?i=001-59535

considers the state's duty to disseminate such information in the event of a real and imminent danger to be part of the positive obligation of the state to protect physical integrity or private life of individuals within its jurisdiction.

2. Imposed by the state restrictions on the right to receive and disseminate information and ideas, including on environmental protection, shall be provided by law, pursue a legitimate goal and be necessary in a democratic society.
3. Effective functioning of non-governmental organizations performing the role of a "watchdog" is very important in a democratic society.
4. In a democratic society even small and informal groups should be able to effectively carry out their activities. There is considerable public interest in order to enable individuals and groups to contribute to the public debate by disseminating information and ideas about health and the environment.
5. To fulfill its tasks effectively, the organization should be able to share the facts that represent the public interest, give them its assessment and thus contribute to the transparency of public authorities.
6. The scope of a state's discretion in determining "the existence of a pressing social need" for restriction of the right to freedom of expression is much narrower, when it comes to information dissemination of which serves the public interest.
7. If the state chooses to provide in its legislation such a remedy of reputation protection as defamation lawsuit, it must provide guarantees of procedural fairness and equality for parties of the litigation.
8. Means of restricting the right to expression should be proportionate to the legitimate goal, i. e., compensation for spreading false information should be proportionate to the damage caused to the reputation and should not be too large.

2.6 ARTICLE 1 PROTOCOL 1. PROTECTION OF PROPERTY

Article 1 Protection of property

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in

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

The jurisprudence of the ECHR on Article 1 of Protocol 1 on the issues relating to the environment, can be divided into two groups:

1. Cases where due to adverse environmental factors applicants' rights were violated under Article 2 or 8 of the Convention, and the same factors resulted in total or partial loss of property peacefully possessed by the applicants;
2. The cases where the court decided on the validity of government's interference in the right to peaceful enjoyment of property in general public interests, in particular in the interests of environmental protection.

In the case *Oneryildiz v. Turkey*[190] (application 48939/99) — further on the case, see sections on Articles 2 and 6 — the applicant's home was built illegally on the land that he did not own and it did not meet technical standards. As a result of the explosion at the landfill, the house was littered with debris and destroyed. The applicant appealed to the court with a civil suit for damages caused by death of his relatives and the destruction of his property. In 1995, the government awarded the applicant approximately 2077 EUR compensation for non-pecuniary damage and 208 EUR for pecuniary damage. As of the day of the case proceedings at the ECHR, these amounts were not paid to the applicant.

In the context of Article 1 of Protocol 1, the court decided that although the house was built illegally, the authorities deliberately did not take any action to demolish it, although it had the right to do so; such tolerance pointed to de facto recognition by the authorities that the applicant and his family had a proprietary interest in their home and movable goods. In addition, the uncertainty caused by the government's attitude to application of legislation on termination of illegal settlements, did not give the applicant an idea that his situation could change overnight. Thus, proprietary right of the applicant regarding his home was of sufficient nature and was sufficiently recognized by the state to be of great interest and mean "possession".

The court also established a causal link between the gross negligence of the state and distruction of the applicant's house, to the extent sufficient to establish a violation of the positive obligation of the state under Article 1 of Protocol 1 to do everything in its power to protect the property interests of the applicant. This positive obligation required from the national authorities to take the same practical measures as in respect of Article 2, to avoid the destruction of the applicant's house. However, no such measures were taken.

The court also pointed out that provision by the state to the applicant the right to buy housing on favorable terms does not deprive the applicant of victim

[190] Case of Öneryıldız v. Turkey, 30.11.2004, http://hudoc.echr.coe.int/eng?i=001-67614

status. Having assessed facts of the case, the court concluded that there was the violation of the applicant's right to peaceful enjoyment of property.

In the case *Dubetska and Others v. Ukraine*[191] (application № 30499/03, judgement of 10.02.2011) — for more details about the facts of the case, see the section on the right to respect for private and family life — applicants claimed 28,000 EUR of pecuniary damage. They argued that this amount corresponded to the purchase price of two similar houses (one house for each family of the applicants) in unpolluted areas nearby. They argued that they are entitled to these amounts of compensation because their homes have lost market value (due to location in the vicinity of several mining facilities that had been the source of significant pollution) and could not be sold because of their unattractive location. Regarding these claims the Court explained that this application was submitted and examined by the Court under Article 8 of the Convention and not by Article 1 of Protocol 1 to the Convention, which protects property rights. Since the Court did not consider the violation of Article 1 of Protocol 1, the Court found these claims unreasonable because of the lack of a causal link between the violation of Article 8 and the alleged loss of market value of the housing. Nevertheless, due to the violation of Article 8, the court awarded the applicants jointly just satisfaction in the amount of 65 000 EUR.

However, in another case *Taskin and Others v. Turkey*[192] — for further information please see chapters on Articles 6 and 8 — in the context of application of Article 1 of Protocol 1 the Court reminded previous practice of the Commission and repeated that some types of activities that may have adverse impact on the environment can also substantially decrease the value of property to the extent that would make it impossible to sell it, and therefore, constitutes partial expropriation or limits its use creating the situation of de facto expropriation.

The Court also considered the violation of the right to peaceful enjoyment of property due to the loss caused by natural disasters. In the case *Budayeva v. Russia*[193] — for details of the case see section on Article 2 — applicants lost their property due to exceptionally powerful mudslides. The Court noted that it was unclear to what extent proper maintenance of protective infrastructure could alleviate the exceptional strength of mudslides. Nor was it established that damage to homes and property of the applicants could be prevented by

[191] Case Dubetska and Others v. Ukraine, 10.02.2011 p., http://zakon5.rada.gov.ua/laws/show/974_689/page

[192] Affaire Taşkın et autres c. la Turquie, decision sur la recevabilite, 29.01.2004, http://hudoc.echr.coe.int/eng?i=001-44756

[193] Case of Budayeva and Others v. Russia, 20.03.2008. http://hudoc.echr.coe.int/eng?i=001-117225

existence of a protective system, and thus the damage could not be unequivocally attributed to the negligence of the state. Moreover, the obligation of the state to protect private property could not be considered as identical to the obligation to reimburse the full market value of the destroyed property. The proposed by the state compensation must be assessed taking into account all other measures taken by authorities, the complexity of the situation, the number of owners, and economic, social and humanitarian issues that arise when providing assistance in case of natural disasters. Provided to the applicant compensation for the property was not clearly inadequate. Given the large number of victims and the scale of operations to provide emergency assistance, the upper limit (13 200 rubles, about 530 EUR) of compensation for household goods seems justified. Access to compensation payments was direct and automatic and did not provide for participation in a competitive process or the need to prove actual loss incurred. That is the terms of compensation did not impose disproportionate burden on the applicants. Thus, in this case the Court found no violation of Article 1 of Protocol 1.

According to Article 1 Protocol 1 of the Convention, natural persons are entitled to the peaceful enjoyment of their possessions and to protection against unlawful deprivation of their possessions. However, this right is not absolute and some limitations are acceptable. Under some circumstances, the authorities may expropriate property. However, any deprivation of an individual of its property must be reasonable, be based on the law and in the public interest, and a fair balance must be established between interests of the individual and public interests[194]. This provision does not guarantee the right to continuous possession of the property in favorable natural environment[195]. Article 1 of Protocol 1 recognizes that authorities have the right to control the use of the property in compliance with general interest. In this context, the Court recognized that in today's society the protection of the environment was an increasingly important consideration[196].

The *case of Fredin v. Sweden*[197] (application № 12033/86, judgement of 18 February 1991) is focused on termination of the permit for exploitation of a gravel pit located on the lands of the applicant on the basis of the Law on Nature Protection.

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[194] Case of Brosset-Triboulet and Others v. France, http://hudoc.echr.coe.int/eng?i=001-98036, paragraph 80.

[195] Affaire Taşkın et autres c. la Turquie, decision sur la recevabilite, 29.01.2004, http://hudoc.echr.coe.int/eng?i=001-44756

[196] Case of Fredin v. Sweden, 18.02.1991, http://hudoc.echr.coe.int/eng?i=001-57651, paragraph 41.

[197] Case of Fredin v. Sweden, 18.02.1991, http://hudoc.echr.coe.int/eng?i=001-57651

In this case, the court ruled that in modern society environmental protection is becoming increasingly important. The court concluded that termination of the permit was interference with the peaceful use of property. Nevertheless, it had a legitimate reason and served the general interest of environmental protection. The court emphasized that the applicants were aware of the authorities' ability to terminate their permits. Although the authorities were obliged to take account of their interests when considering the renewal of the permit every ten years, this commitment did not constitute legal grounds for the applicants to expect that they would be able to continue to operate for a long time. In addition, the applicants received a three-year closing-down period, which later at their request was extended for another eleven months. The Court concluded that the termination of the permit in this case was not disproportionate to the legitimate goal of protecting the environment, and therefore Article 1 of Protocol 1 was not violated.

In the *case of Pine Valley Developments Ltd and Others v. Ireland*[198] (application 12742/87, judgement of 29 November 1991) applicants were several companies the main business of which was purchase and development of land. They complained about judgement of the Supreme Court of Ireland that found invalid the permit issued to them for construction of an industrial warehouse and office center. The applicants complained of interference with their right to peaceful enjoyment of property, namely the prohibition without any compensation to perform construction works on the land lot they owned.

The court did not find in this case a violation of Article 1 of Protocol 1 of the Convention, since termination of the construction permit was proportionate to the legitimate goal of preserving the environment. The court noted that such interference with property rights served the purpose of ensuring correct application of legislation in the process of planning and environmental protection not only regarding the applicants, but all others as well. The court stated that prevention of construction in an area planned for the development of agriculture was a proper way, if not the only way that served the legitimate goal, which was to preserve the green belt. In addition, the applicants were engaged in business activities that inherently bear an element of risk, and they were aware not only of the zoning plan, but also of the opposition of the local authorities against any deviation from it.

In a similar case *Kapsalis and Nima-Kapsali v. Greece*[199] (application 20937/03, decision on admissibility of 23 September 2004) the court decided that in such areas as spatial planning and environment the assessment of national authorities

[198] Case of Pine Valley Developments Ltd and Others v. Ireland, 29.11.1991, http://hudoc.echr.coe.int/eng?i=001-57711

[199] Affaire Kapsalis and Nima-Kapsali c. la Grèce, decision sur la recevabilite, 23.09.2004, http://hudoc.echr.coe.int/eng?i=001-66878

should prevail unless it is clearly unreasonable. In this case termination of the construction permit was supported by the Supreme Administrative Court after a thorough study of all aspects of the issue and there is no indication that its decision was arbitrary or unpredictable. Two other permits for construction on plots located in the same area as the land of the applicants were terminated by the court even before termination of the applicants' permits. In addition, the procedure of making a decision regarding the permit for construction in the area of the applicants' land lot had not been completed when they purchased it; authorities cannot be held responsible for negligence of the applicants regarding checking the status of the land lot that they bought. Having assessed the facts of the case, the Court held that termination of the construction permit was proportional to the aim of protecting the environment, and therefore the application must be rejected as obviously ungrounded.

In the *case of Hamer v. Belgium*[200] (application 21861/03, judgement of 27 November 2007), in 1967 the applicant's parents illegally built and used a holiday home on the lands of forest fund. In 1994, the police drew up two reports, one about the breach of forest legislation because of tree cutting near the house, the other one for building the house without a planning permission in the forested area for which a permission could not be issued. National authorities ordered the applicant to restore the site to its former condition and to demolish the building at her own expense without any compensation.

The ECHR in this case confirmed that the authorities made interference with the applicants' right to respect for their property, but noted that such interference was justified. As regards the proportionality of measures taken, the Court noted that the environment is an asset, the protection of which is subject to significant and constant concern of the public and, therefore, of the government as well. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard. The public authorities therefore assume a responsibility, which should in practice result in their intervention at the appropriate time in order to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective. Thus, restrictions on property rights may be allowed on condition, naturally, that a fair balance is maintained between the individual and collective interests concerned.

In this case, the court found that the challenged measures pursued the legitimate aim of protecting the forest where construction was prohibited, and focused on the question whether the benefits of the use of forests for other purposes is proportional to inconveniences caused to the applicants. In this regard, the court noted that the owners had peaceful and uninterrupted

[200] Case of Hamer v. Belgium, 27.11.2007, http://hudoc.echr.coe.int/eng?i=001-83537

enjoyment of the holiday home for thirty-seven years, and the government, which knew or should have known about the existence of the house for a long time, failed to perform any action and thus contributed to the situation which only undermines efforts to protect the forest. The Court also noted that no measure except for full restoration of the site is sufficient, given the undeniable damage to the forest area where construction was prohibited. In addition, unlike other cases in which it was established that the authorities gave their consent, the house in the instant case was built without a permit. The Court concluded that the applicant has not suffered disproportionate interference with her property rights. Accordingly, there has been no violation of Article 1 of Protocol No.1.

In two other cases *Turgut and Others v. Turkey*[201] (application 1411/03, judgement of 8 July 2008) and *Satir v. Turkey*[202] (application 36192/03, judgement of 20 May 2010) the ECHR found a violation of Article 1 of Protocol 1 in connection with the seizure of legally acquired land without adequate compensation. In the case of *Turgut and Others v Turkey*, three generations of the applicant's family had owned over one hundred thousand square meters of forest area. The applicant appealed against the decisions of the domestic courts that canceled their ownership title, and the land plot was registered in the name of the Treasury because affiliation of the plot to the public forest estate. The court noted that the seizure of property without payment of compensation, constituted disproportionate interference, and full lack of compensation can be justified only in exceptional cases. The Court noted that the applicants did not receive any compensation for the transfer of property to the Treasury and the Turkish government did not rely on any exceptional circumstances that could justify it. The Court concluded that the failure to award the applicants any compensation upset, to their detriment, the fair balance that should be struck between the demands of the general interest of the community and the requirement for the protection of individual rights.

The ECHR also concluded about violation of a fair balance between competing social and individual interests in the case *of Papastavrou and Others v. Greece*[203] (application 46372/99, judgement of 10 April 2003) focused on the decision of Athens prefect about afforestation of land lots belonging to 25 applicants that was adopted to implement the ordinance of the Ministry of Agriculture of 1934. In this case, the Court, given the fact that the decision of the prefect was made solely on the basis of data that were sixty years old and were not in

[201] Case of Turgut and Others v. Turkey, 8.07.2008, http://hudoc.echr.coe.int/eng?i=001-87441

[202] Case of Satir v. Turkey, 20.05.2010, http://hudoc.echr.coe.int/eng?i=001-98764

[203] Case of Papastavrou and Others v. Greece, 10.04.2003, http://hudoc.echr.coe.int/eng?i=001-61019

any way updated, geological studies that had established the unsuitability of the sites for afforestation and absence in Greek law the possibility of compensation, established breach of Article 1 of Protocol No. 1.

In the cases versus France *Depalle v. France*[204] (application 34044/02, judgement of 29 March 2010) and *Brosset-Triboulet and Others v. France*[205] (application 34078/02, judgement of 29 March 2010) the ECHR emphasized that even massive interference with property rights can be justified by interest of environmental protection. In both cases, the Court found no violation of Article 1 of Protocol No. 1 in a situation where public authorities ordered the applicants to restore the coast to previous state at their own expenses and without compensation. Houses that were to be demolished, were built on community lands on the basis of permission issued half a century before, which formally did not prove the ownership right or the right of temporary residence of the applicants on lands belonging to community property.

Having analyzed the case-law of the ECHR on Article 1 of Protocol No. 1 the following conclusions can be drown:

- Similar to the right to life and respect for private and family life, the Convention protects the right to property in the context of dangerous activities and natural disasters, in case of failure of the state to exercise its positive duty to protect this right.
- However, in the context of natural disasters, the obligation of the state to protect private property cannot be regarded as identical to the obligation to reimburse the full market value of the destroyed property. Proposed by the State compensation is assessed by the Court with account taken of all the other activities carried out by the authorities, the complexity of the situation, the number of owners, and economic, social and humanitarian issues that arise when providing assistance during natural disasters.
- The right to peaceful enjoyment of their property is not absolute and certain restrictions are permissible. Any deprivation of an individual of its property must be grounded, based on the law and performed in the public interest, and a fair balance must be struck between individual and public interests[206].
- Authorities have the right to control the use of property in compliance with general interest[207]. In this context, the court gives to the environment an increasingly significant attention. The state enjoys wide discretion when

[204] Case of Depalle v. France, 29.03.2010, http://hudoc.echr.coe.int/eng?i=001-97978

[205] Case of Brosset-Triboulet and Others v. France, 29.03.2010, http://hudoc.echr.coe.int/eng?i=001-98036

[206] Case of Brosset-Triboulet and Others v. France, http://hudoc.echr.coe.int/eng?i=001-98036, п. 80.

[207] Case of Fredin v. Sweden, 18.02.1991, http://hudoc.echr.coe.int/eng?i=001-57651, п. 41.

making decisions on regional planning and policy on environmental protection where common interests of a community prevail[208].

- The court gives direct importance to the fact of paying compensation to the person concerned in assessing the achievement of a fair balance between the competing public and individual interests.

[208] Case of Depalle v. France, http://hudoc.echr.coe.int/eng?i=001-97978, пп. 83–84; Case of Brosset-Triboulet and Others v. France, http://hudoc.echr.coe.int/eng?i=001-98036, пп. 84 та п. 86–87.

CONCLUSIONS

At the time of adoption of the Convention in 1950, environmental rights did not attract as much attention as fundamental human rights because the Convention does not provide direct protection of environmental human rights. However, such protection can be reached through the use of other rights enshrined in the Convention such as the right to life, respect for private and family life and other rights. Scarce ECHR's case-law covering the cases that can be considered environmental ones or related to the protection of environmental rights of people suggests that the ECHR is not ready to give to environmental rights the same protection as to those rights that are explicitly set forth in the Convention without making corresponding changes in the Convention or the adoption of a separate protocol on environmental rights. Therefore, in order to submit to the ECHR a case related to violation of environmental rights, the application should be carefully prepared and substantiated with evidence and proof of violations committed by the state.

When speaking about environmental protection, the Court provides such protection only indirectly after damage or pollution are committed, and the court decision has no impact on limitation or stoppage of pollution. The only category of cases where the ECHR protected environmental interests were the cases related to limitation by the state of some citizens' rights through environmental protection interests. However, such cases are scarce and the role of the ECHR in them comes to recognizing the absence of violation of articles of the Convention by the state that gave priority to environmental protection.

Analysis of the ECHR's case-law in environmental cases highlights the following tendencies and possibilities accessible for potential applicants — citizens and NGOs: the Convention can be used for protection of environmental rights of citizens and protection of citizens' rights from adverse environmental factors but such adverse impact should reach certain level of seriousness and cause significant damage to the applicant. Despite subsidiary role of the ECHR, the latter will rely on decisions of national courts and public authorities in assessing the degree of seriousness of damage and impact on humans. One should not expect an active role of the court in finding and obtaining evidence but potential applicants should first prepare utmost accessible and relevant evidence when submitting a lawsuit in the national court. Moreover, in order to get protection of environmental rights in court, a lawyer needs creativity and competence in

the ECHR' case-law for stipulating all aspects of violations of rights enshrined in the Convention.

Special attention should be paid to the position of the ECHR in environmental cases that emphasized positive obligation of the state to organize release and dissemination of information on environmental risks, and also involvement of the public concerned to the process of decision-making with a possibility to challenge such a decision. Such a position complies with provisions of international agreements in the sphere of environmental protection, in particular of the Aarhus Convention.

The court proves the right of non-governmental organizations, environmental civil associations to represent interests of their members and protect rights of their members as well as their rights on the national level and on the level of the ECHR. Moreover, the court has long ago recognized the important role of such subjects in controlling over the state functioning, in disseminating socially important information implying the obligation of the state to promote their realization of their functions and rights.

The ECHR's case-law becomes increasingly popular among the public and judges, and increased number of cases versus Ukraine means that the tendency will develop. Interpretation by the ECHR of norms of the Convention in view of modern conditions indicates to the opening of new potential possibilities for protection of environmental rights of citizens in this court. This publication with the analysis and translation of the most important judgements (or summaries) of the ECHR in environmental cases will promote the use of the ECHR' case-law in everyday activities related to appeals of the public to courts or authorities as well as in preparing an application to the ECHR.

When planning an application to the ECHR, one should remember about all procedural requirements and criteria of admissibility, and the web-site of the ECHR and numerous publications prepared under its auspice in Ukrainian can serve as important guides for potential applicants. Our organization is ready to provide legal advisory to all potential applicants — victims of violations of norms of the Convention by adverse environmental factors or by authorities in the course of environmental protection.

ANNEXES

Summaries and press-releases of certain decisions of the ECHR in environmental cases (non-official translation)

ANNEX 1

Information Note on the Court's case-law No.
June 1998

L. C. B. v. the United Kingdom – 23413/94

Judgment 9.6.1998

Article 2. Positive obligations

Article 2–1. Life

Failure to take measures in respect of child of serviceman present during Christmas Island nuclear tests: *no violation*

Facts

The applicant's father was exposed to radiation whilst serving as a catering assistant in the Royal Air Force at Christmas Island (Pacific Ocean) during nuclear tests in the 1950s.

The applicant was born in 1966. In or about 1970 she was diagnosed as having leukaemia. The applicant claimed in particular that the British authorities' failure to warn her parents of the possible risk to her health caused by her father's participation in the nuclear tests had given rise to a violation of Article 2 (right to life) of the Convention.

I. ARTICLE 2 OF THE CONVENTION

A. Scope of case under Article 2

Complaint concerning failure to monitor extent of father's exposure to radiation not raised before Commission and based on events before United Kingdom's Articles 25 and 46 declarations.

The Court held that there had been **no violation of Article 2** of the Convention concerning the applicant's complaint about the United Kingdom's failure to warn and advise her parents or monitor her health prior to her diagnosis with leukaemia. It did not find it established that, given the information available

to the British authorities at the relevant time concerning the likelihood of the applicant's father having been exposed to dangerous levels of radiation and of this having created a risk to her health, they could have been expected to act of their own motion to notify the applicant's parents of these matters or to take any other special action in relation to her.

Conclusion: no jurisdiction to consider this complaint (unanimously).

B. Failure to take measures in respect of applicant

Article 2 § 1 enjoins State to take appropriate steps to safeguard lives of those within its jurisdiction.

Cannot be known whether father dangerously irradiated — contemporaneous records indicate radiation did not reach dangerous levels in areas where ordinary servicemen stationed — State authorities between 1966 and 1970 could reasonably have been confident of this.

State required to warn applicant's parents and monitor her health only if it had appeared likely that irradiation of father engendered risk to applicant's health — causal link between irradiation of father and leukaemia in child not established — no obligation to take measures in respect of applicant.

Conclusion: no violation (unanimously).

II. ARTICLE 3 OF THE CONVENTION

No violation for reasons referred to in connection with Article 2.

Conclusion: no violation (unanimously).

III. ARTICLES 8 AND 13 OF THE CONVENTION

Complaints concerning failure to monitor father's exposure to radiation and withholding of radiation levels records not raised before Commission.

In principle open to Court to consider complaint about failure to take measures in respect of applicant from standpoint of Article 8 — unnecessary since no separate issue arises.

CONCLUSION: no jurisdiction to consider complaints concerning State's failure to measure father's exposure to radiation and withholding of radiation levels records (unanimously); not necessary to consider under Article 8 complaint concerning failure to take measures in respect of applicant (unanimously).

ANNEX 2

Information Note on the Court's case-law No.
February 1998

Guerra and Others v. Italy – 14967/89

Judgment 19.2.1998 [GC]

Article 8. Positive obligations

Article 8–1. Respect for family life. Respect for private life

Failure to provide local population with information about risk factor and how to proceed in event of an accident at nearby chemical factory: *Article 8 applicable; violation*

[This summary is extracted from the Court's official reports (Series A or *Reports of Judgments and Decisions*). Its formatting and structure may therefore differ from the Case-Law Information Note summaries.]

I. ARTICLE 10 OF THE CONVENTION

A. Government's preliminary objection (non-exhaustion of domestic remedies)

First limb — urgent application (Article 700 of the Code of Civil Procedure): would have been a practicable remedy if applicants' complaint had concerned failure to take measures designed to reduce or eliminate pollution; in instant case, however, such an application would probably have resulted in factory's operation being suspended.

Second limb — lodging a criminal complaint: would at most have secured conviction of factory's managers, but certainly not communication of any information.

Conclusion: objection dismissed (nineteen votes to one).

B. Merits of complaint

Right of public to receive information had been recognised by Court on a number of occasions in cases concerning restrictions on freedom of press, as a corollary of specific function of journalists, which was to impart information and ideas on matters of public interest — facts of present case were, however, clearly distinguishable from aforementioned cases since applicants complained of a failure in system set up pursuant to relevant legislation — although prefect had prepared emergency plan on basis of report submitted by factory and plan

had been sent to Civil Defence Department on 3 August 1993, applicants had yet to receive relevant information.

Freedom to receive information basically prohibited a government from restricting a person from receiving information that others wished or might be willing to impart to him — that freedom could not be construed as imposing on a State, in circumstances such as those of present case, positive obligations to collect and disseminate information of its own motion.

Conclusion: Article 10 not applicable (eighteen votes to two).

II. ARTICLE 8 OF THE CONVENTION

Direct effect of toxic emissions on applicants' right to respect for their private and family life meant that Article 8 was applicable.

Applicants complained not of an act by State but of its failure to act — object of Article 8 was essentially that of protecting individual against arbitrary interference by public authorities — it did not merely compel State to abstain from such interference: in addition to that primarily negative undertaking, there might be positive obligations inherent in effective respect for private or family life.

In present case all that had to be ascertained was whether national authorities had taken necessary steps to ensure effective protection of applicants' right to respect for their private and family life.

Ministry for the Environment and Ministry of Health had jointly adopted conclusions on safety report submitted by factory — they had provided prefect with instructions as to emergency plan, which he had drawn up in 1992, and measures required for informing local population — however, District Council concerned had not by 7 December 1995 received any document concerning the conclusions.

Severe environmental pollution might affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely — applicants had waited, right up until production of fertilisers had ceased in 1994, for essential information that would have enabled them to assess risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in event of an accident at factory.

Respondent State had not fulfilled its obligation to secure applicants' right to respect for their private and family life.

Conclusion: Article 8 applicable and violation (unanimously).

III. ARTICLE 2 OF THE CONVENTION

Conclusion: unnecessary to consider case under Article 2 also (unanimously).

IV. ARTICLE 50 OF THE CONVENTION

A. Damage

Pecuniary damage: not shown.

Non-pecuniary damage: each applicant awarded a specified sum.

B. Costs and expenses

Having regard to its lateness and amount already granted in legal aid, Court dismissed claim.

CONCLUSION: respondent State to pay each applicant a specified sum (unanimously).

ANNEX 3

Information Note on the Court's case-law No. 69
November 2004

Öneryıldız v. Turkey [GC] – 48939/99

Judgment 30.11.2004 [GC]

Article 2
Article 2–1. Life

Responsibility of authorities in connection with deaths resulting from an accidental explosion at a rubbish tip close to a shanty town: *violation*

Article 2. Positive obligations

Infringements of the right to life as a result of dangerous activities; effectiveness of preventive measures and criminal sanctions: *violation*

Article 13. Effective remedy

Effective remedy in respect of dangerous industrial activities resulting in death and destruction of property: *violation*

Article 1 of Protocol No. 1
Article 1 para. 1 of Protocol No. 1. Possessions

Question whether a house built without permission and occupied without title constitutes a substantial patrimonial interest

Peaceful enjoyment of possessions

Explosion at public rubbish tip resulting in loss of property: *violation*

Facts: At the material time the applicant was living with twelve close relatives in a slum quarter in Ümraniye (Istanbul). The area was part of an expanse of rudimentary dwellings built without any authorisation on land surrounding a rubbish tip, which was used for the storage of waste from four districts, under the authority and responsibility of Istanbul City Council. An expert report drawn up at the request of Ümraniye District Council drew the authorities' attention to the fact that the tip, which did not conform to the relevant technical requirements and the Environment Act, posed a number of dangers for the slum inhabitants and that no measures had been taken to prevent an explosion of the gases generated by the decomposing refuse. The relevant government body

recommended that the authorities remedy the problems thus identified and Ümraniye District Council applied for a court order prohibiting the use of the site by the other local councils. Before the proceedings had been concluded, a methane explosion occurred at the rubbish tip on 28 April 1993 and the refuse erupting from the pile of waste engulfed several houses situated below it, including the one belonging to the applicant, who lost nine close relatives. The police and administrative authorities promptly opened investigations and expert reports were ordered. The official investigations were all completed within less than three months, and criminal proceedings were instituted against the mayors of Ümraniye and Istanbul. They were subsequently found guilty of "negligence in the performance of their duties" and were given suspended fines, the minimum penalty under the relevant legislation. The applicant subsequently brought an action for damages in the Administrative Court on account of the death of his relatives and the loss of his property. The court found a direct causal link between the accident and the authorities' negligence. After proceedings lasting almost five years, the applicant and his surviving children were awarded compensation of TRL 100,000,000 for non-pecuniary damage (approximately 2,077 euros) and TRL 10,000,000 for pecuniary damage (approximately 208 euros), although those sums have not been paid. The court refused to take into account the destruction of the house on the ground that, following the accident, the applicant had been able to acquire subsidised housing on very favourable terms, and also refused to award compensation for the destruction of electrical appliances, which the applicant was not supposed to own as the house had had no water supply or electricity.

Law: Article 2 (positive obligations on the State in relation to dangerous activities): Both the operation of household-refuse tips and the rehabilitation of slum areas were governed by safety regulations in Turkey. In the present case, long before the explosion, there had been practical information available to the effect that the inhabitants were faced with a threat to their physical integrity on account of the tip's technical shortcomings. A court-ordered expert report had established that the tip had been opened and had continued to operate in breach of the regulations in force, that the site posed certain dangers and that the existing facilities were unable to prevent the risk of an explosion through the decomposition of the waste. In short, long before the fatal accident, both the reality and the immediacy of the risk in question had been highlighted and, given the site's continued operation in the same conditions, that risk could only have increased. Accordingly, since the authorities had been informed of the risks and the danger posed by the tip, they had known or ought to have known before the accident what the local inhabitants were facing. Under Article 2 they had therefore had an obligation to take such preventive operational measures as

were necessary and sufficient to protect those individuals. However, the council responsible had failed to take the necessary urgent measures and had also opposed official steps to the same effect. Furthermore, no negligence or lack of foresight could be attributed to the victims of the accident since, although the relevant legislation had prohibited them from living in the area of the tip, the State had for many years consistently pursued a general policy of tolerance towards slum areas, and the applicant had benefited from that tolerance. The administrative authorities had treated him as the lawful owner of his house, even though they had been entitled by law to demolish it; they had therefore remained passive in the face of his unlawful conduct and had created uncertainty as to their application of the relevant regulations. Regard had to be had, admittedly, from the State's point of view, to the level of investment required to take steps to deal with such problems, but the timely installation of a gas-extraction system at the tip could have been an effective means of alleviating the danger of an explosion of the gas given off from the decomposing waste, without placing an excessive burden on the State. Lastly, in the absence of more practical measures to avoid the risks to the lives of the slum inhabitants, even compliance by the State with its obligation to respect the public's right to information would not have been sufficient. In short, as the domestic investigating authorities had concluded, the State's responsibility had been engaged. The authorities' failure to do everything within their power to protect the slum inhabitants from immediate and known risks gave rise to a violation of Article 2 in its substantive aspect.

Conclusion: violation (unanimously).

The State had been required to ensure an "adequate" judicial response through criminal law to the deaths caused by the dangerous activity in question. The criminal-law procedures in place in Turkey were part of a system which, in theory, appeared sufficient to protect the right to life in the context of dangerous activities. In practice, the authorities had carried out prompt administrative and criminal investigations, had rapidly established the causes of the accident and the deaths and had identified those responsible. The question was therefore whether the judicial authorities had been determined to sanction those responsible. However, the criminal proceedings in issue had had the sole purpose of establishing whether the authorities could be held liable for negligence in the performance of their duties and had thus left in abeyance any question of their possible responsibility for the deaths. The judgment referred to the deaths as a factual element but there had not been an acknowledgment of any responsibility for failing to protect the right to life. There was no indication that the trial court had had sufficient regard to the extremely serious consequences of the accident; the persons held liable had ultimately been sentenced to the minimum penalty applicable, which had, moreover, been suspended. In short, the judicial response to the tragedy

had failed to secure the full accountability of State officials or authorities for their role in the fatal accident and the effective implementation of provisions of domestic law guaranteeing respect for the right to life, in particular the deterrent function of the criminal law. The lack, in connection with a fatal accident caused by a dangerous activity, of adequate protection "by law" safeguarding the right to life and deterring similar life-endangering conduct in future amounted to a violation of Article 2 in its procedural aspect.

Conclusion: violation (sixteen votes to one).

Article 1 of Protocol No. 1: (a) *Applicability*: The applicant's dwelling had been erected illegally on land belonging to the Treasury and had not conformed to the relevant technical standards. It was impossible to establish whether the applicant had been entitled to benefit from the regulations by which the situation could be regularised and title to the land obtained, but in any event, he had never taken any steps to that end. Accordingly, the hope he expressed before the Court of having the land transferred to him one day did not constitute a kind of "claim sufficiently established" to be enforceable in the courts, and hence a "possession". With regard to the applicant's unauthorised dwelling, the authorities had deliberately not demolished it, although they had been entitled to; such tolerance indicated a *de facto* acknowledgment on their part that the applicant and his relatives had a proprietary interest in their dwelling and movable goods. Furthermore, the uncertainty created by the authorities' attitude as to the application of laws to curb illegal settlements would not have caused the applicant to imagine that his situation was liable to change overnight. In short, the applicant's proprietary interest in his dwelling was of a sufficient nature and sufficiently recognised to constitute a substantive interest and hence a "possession".

(b) *Peaceful enjoyment of possessions:* There was a causal link between the gross negligence attributable to the State and the engulfment of the applicant's house, amounting to a breach of the State's positive obligation under this provision to do everything within its power to protect the applicant's proprietary interests. This positive obligation had required the national authorities to take the same practical steps as indicated under Article 2 to avoid the destruction of the applicant's house. However, no such steps had been taken. The advantages conferred on the applicant in terms of subsidised housing could not be regarded as proper compensation for the pecuniary damage he had sustained and there had been no acknowledgment by the authorities of a violation of his right to the peaceful enjoyment of his possessions. The applicant had therefore not lost his status as a "victim". The compensation awarded for pecuniary damage in a final judgment had still not been paid, and this amounted to interference with the right to enforcement of a claim that had been upheld.

Conclusion: violation (fifteen votes to two).

Article 13 — Effectiveness of the remedy in respect of the violation of Article 2: The criminal proceedings instituted after the fatal accident in the present case had been found inadequate to protect the right to life (see Article 2 in its procedural aspect), although the official investigations had established the facts and identified those responsible. Accordingly, the applicant had been in a position to use the remedies available to him under Turkish law in order to obtain redress. The administrative-law remedy used by the applicant had, on its face, been sufficient for him to enforce the substance of his complaint regarding the death of his relatives and had been capable of affording him adequate redress for the violation of Article 2 found above. Nevertheless, that remedy had not been effective in practice. In particular, the damages awarded to the applicant for the loss of his close relatives had never been paid to him and the proceedings had not been conducted with due diligence. Although the possibility in Turkish law of applying to join criminal proceedings as an intervening party should in principle be taken into consideration for the purposes of Article 13, in the present case the applicant could not be criticised for omitting to pursue that option since, as noted above, the administrative-law remedy he had chosen to use appeared to have been effective and capable of directly redressing the situation of which he complained, and the criminal-law remedy could not be used simultaneously.

Conclusion: violation (fifteen votes to two).

The applicant had been denied an effective remedy for the alleged breach of his right under Article 1 of Protocol No. 1 in view of the lack of diligence in delivering the decision on compensation and the failure to pay the sum awarded for the loss of his possessions. Although the applicant had secured advantages in the form of alternative accommodation, the Court considered that to be a matter for examination under Article 41. Moreover, as such advantages had not removed his status as the victim of an alleged violation of Article 1 of Protocol No. 1 (see above), they could not have deprived him of his right to an effective remedy in respect of that Article.

Conclusion: violation (fifteen votes to two).

No separate issue was raised under Article 6 § 1 and Article 8.

Article 41 — Violations of the right to peaceful enjoyment of possessions: As to the destruction of his property, the applicant did not appear to have sustained a loss greater than the profit he seemed to have made from the transactions relating to the replacement accommodation acquired at a reduced price, so that the finding of a violation constituted in itself sufficient just satisfaction under that head. As to the loss of movable property in the accident, the compensation awarded at domestic level (208 euros) had not taken electrical appliances into account and had never been paid to the applicant. The outcome of the compensation

proceedings should not therefore be taken into consideration for the purposes of Article 41, and the Court made an award of 1,500 euros.

Violation of the right to life: the compensation awarded at domestic level (2,077 euros) had not been paid and, in the very particular circumstances of the case, the applicant's decision not to initiate enforcement proceedings in order to obtain that sum could not be regarded as a waiver of his entitlement to it; the Court made an aggregate award of 135,000 euros.

The Court made an award in respect of the costs and expenses incurred before the Convention institutions, although the applicant had not substantiated his claim.

ANNEX 4

Information Note on the Court's case-law No. 106
March 2008

Budayeva and Others v. Russia – 15339/02

Judgment 20.3.2008 [Section I]

Article 2. Positive obligations

Failure by authorities to implement land-planning and emergency-relief policies in the light of foreseeable risk of a mudslide that would lead to loss of life: *violations*

Article 1 of Protocol No. 1

Article 1 para. 1 of Protocol No. 1. Peaceful enjoyment of possessions

Adequacy of measures taken by the authorities to provide alternative accommodation and emergency relief for victims of property damage caused by mudslide: *no violation*

Facts: The town of Tyrnauz (Russia) is situated in an area where mudslides have been recorded every year since 1937. In the summer of 2000 it was hit by a succession of mudslides over a seven-day period in which there were at least 8 reported deaths, including the first applicant's husband. Her younger son was also seriously injured while the second applicant and her daughter suffered severe friction burns. The applicants' homes and belongings were destroyed and, although they were granted free replacement housing and a lump-sum emergency allowance, their health has deteriorated since the disaster. The prosecutor's office decided not to launch a criminal investigation into either the disaster or the death of the first applicant's husband, which was considered accidental. A civil action subsequently brought by the applicants against the authorities was dismissed on the grounds that the local population had been informed of the risk by the media and all reasonable measures had been taken to mitigate it.

In the proceedings before the European Court, the Government maintained that the exceptional force of the mudslides meant that they could not have been predicted or stopped while any residents who had returned to their homes after the first wave had done so in breach of orders to evacuate.

For their part, the applicants accused the authorities of having failed to make essential repairs to defective equipment, to issue advance warnings or to hold an inquiry. They produced official papers showing that no funds had been

allocated for the repairs in the district budget and that well before the disaster the authorities had received a series of warnings from the mountain institute (the state agency responsible for monitoring weather hazards in high-altitude areas) urging them to carry out the repairs and to set up observation posts to facilitate the evacuation of the population if necessary. One of the last warnings had referred to possible record losses and casualties if the measures were not carried out as a matter of urgency.

Law: Article 2 — (a) *Inadequate maintenance and failure to set up a warning system*: The scope of the State's positive obligations in the sphere of emergency relief depended on the origin of the threat and the extent to which the risk was susceptible to mitigation. A relevant factor here was whether the circumstances of the case pointed to the imminence of clearly identifiable natural hazards, such as a recurring calamity affecting a distinct area developed for human habitation or use. The authorities had received a number of warnings in 1999 that should have alerted them to the increasing risks of a large-scale mudslide. Indeed, they were aware that any mudslide, regardless of its scale, was liable to have devastating consequences because of the damage to the defence infrastructure. Although the need for urgent repairs had been made quite clear, no funds had been allocated. Essential practical measures to ensure the safety of the local population were not taken: no warning had been given and no evacuation order issued, publicised or enforced; the mountain institute's persistent requests for temporary observation posts to be set up were ignored; there was no evidence of any regulatory framework, land-planning policies or specific safety measures having been put in place; and the mud-retention equipment had not been adequately maintained. In sum, the authorities had not taken any measures before the disaster. There had been no justification for their failure to implement land-planning and emergency-relief policies in view of the foreseeable risk of loss of life. The serious administrative flaws which had prevented the implementation of these policies had caused the death of the first applicant's husband and injuries to her and other members of their family. The authorities had therefore failed in their duty to establish a legislative and administrative framework to provide effective protection of the right to life.

Conclusion: violation (unanimously).

(b) *The judicial response to the disaster*: Within a week of the disaster the prosecutor's office had already decided to dispense with a criminal investigation into the death of the first applicant's husband. The inquest had been limited to the immediate cause of death and had not examined questions of safety compliance or the authorities' responsibility. Nor had those questions been the subject of any criminal, administrative or technical inquiry. In particular, no action had

ever been taken to verify the numerous allegations of inadequate maintenance and a failure to set up a warning system. The applicants' claims for damages had effectively been dismissed by the domestic courts because they had failed to demonstrate to what extent State negligence had caused damage exceeding what was inevitable in a natural disaster. That question could, however, only have been answered by a complex expert investigation and the establishment of facts to which only the authorities had access. The applicants had therefore been required to provide proof which was beyond their reach. In any event, the domestic courts had not made full use of their powers to establish the facts by calling witnesses or seeking expert opinions, when the evidence produced by the applicants included reports which suggested that their concerns were shared by certain officials. Thus, the question of the State's responsibility for the accident had never been investigated or examined by any judicial or administrative authority.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1 — It was unclear to what extent proper maintenance of the defence infrastructure could have mitigated the exceptional force of the mudslides. Nor had it be shown that the damage to the applicants' homes or possessions would have been prevented by a warning system, so that it could not be unequivocally attributed to State negligence. Moreover, a State's obligation to protect private property could not be seen as synonymous with an obligation to compensate the full market value of the destroyed property. The compensation offered by the State had to be assessed in the light of all the other measures implemented by the authorities, the complexity of the situation, the number of owners, and the economic, social and humanitarian issues inherent in providing disaster relief. The housing compensation offered to the applicants was not manifestly out of proportion. Given also the large number of victims and the scale of the emergency relief operations, the upper limit (RUB 13,200, approximately EUR 530) on compensation for household belongings appeared justified. Access to the benefits had been direct and automatic and had not involved a contentious procedure or the need to prove the actual losses. The conditions under which compensation was granted had not, therefore, imposed a disproportionate burden on the applicants.

CONCLUSION: no violation (unanimously).

Article 41 — Awards in respect of non-pecuniary damage of EUR 30,000 to the first applicant, EUR 15,000 to the second applicant and EUR 10,000 to each of the remaining applicants.

ANNEX 5

Issued by the Registrar of the Court

ECHR 364 (2015)
17.11.2015

Proceedings failed to establish responsibilities for death of earthquake victims

In today's Chamber judgment[1] in the case of Özel and Others v. Turkey (applications nos. 14350/05, 15245/05 and 16051/05) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 2 (right to life) of the European Convention on Human Rights under its procedural head.

The case concerned the deaths of the applicants' family members, who were buried alive under buildings that collapsed in the town of Çınarcık in an earthquake on 17 August 1999, one of the deadliest earthquakes ever recorded in Turkey.

The Court found in particular that the national authorities had not acted promptly in determining the responsibilities and circumstances of the collapse of the buildings which had caused the deaths.

Principal facts

The applicants, Mehmet Özel, Ali Kılıç, smail Erdoan, Salim Çakır, Betül Akan, Meneke Kılıç, Güher Erdoan and Sehriban Yüce (Ergüden), are Turkish nationals who were born in 1974, 1955, 1938, 1954, 1960, 1956, 1927 and 1966, respectively. The town of Çınarcık is located in a region classified as "major risk zone" on the map of seismic activity. The company V. G. Arsa Ofisi was accused of being responsible for the collapse of the buildings which killed the victims, mainly because the materials used in their construction had been deficient. Three partners in the company and its two scientific directors were prosecuted. The victims' relatives joined the proceedings as third parties. At the end of the criminal proceedings, two of the accused were convicted and the proceedings

[1] Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

against the others were discontinued as time-barred. In the absence of any administrative authorisation, it was not possible to bring criminal proceedings against the civil servants who also allegedly shared responsibility for the collapse of the buildings. In 1999 and 2000, Ms Akan, Mr Özel, Mr Çakır and his wife, and Ms Yüce (Ergüden) sought compensation by bringing proceedings in Yalova District Court. The proceedings ended between 2009 and 2011.

Complaints, procedure and composition of the Court Relying on Article 2 (right to life), the applicants complained of a breach of their relatives' right to life. Under Articles 6 (right to a fair hearing) and 13 (right to an effective remedy) they also complained of a lack of fairness in the criminal proceedings and the excessive length of the proceedings, together with a lack of effective remedies.

Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Relying on Article 1 of Protocol No. 1 (protection of property), the applicants alleged that there had been an interference with their property rights.

The applications were lodged with the European Court of Human Rights on 16, 22 and 25 April 2005.

Judgment was given by a Chamber of seven judges, composed as follows:
Paul Lemmens (Belgium), President,
Izil Karakas (Turkey),
Nebojsa Vucini (Montenegro),
Helen Keller (Switzerland),
Egidijus Kuris (Lithuania),
Robert Spano (Iceland),
Jon Fridrik Kjølbro (Denmark),
and also Stanley Naismith, Section Registrar.

Decision of the Court

Article 2 (right to life)

The Court began by pointing out that Article 2 of the Convention imposed on States an obligation to take the necessary measures for the protection of the lives of individuals within their jurisdiction, even in the event of natural catastrophes (see Budayeva and Others v. Russia).

As regards the obligation for States to prevent disasters and protect their citizens, the Court explained that this obligation consisted mainly in the adoption of measures to strengthen the authorities' capacity to respond to lethal and unexpected natural phenomena such as earthquakes.

Such prevention involved land planning and control over urban development. In the present case the Court noted that the national authorities had been fully aware of the risks to which the disaster zone was subject. The local authorities, with their responsibility to issue building permits, thus had a role and responsibility of primary importance in the prevention of risks related to the effects of an earthquake. However, the Court found that this part of the complaint was out of time and rejected it pursuant to Article 35 §§ 1 and 4 (admissibility criteria) of the Convention.

In the light of the case file, the Court notes that the criminal proceedings had lasted for more than 12 years. Even though the case was a complex one, only five individuals were prosecuted and the experts' reports were ready at an early stage. Two of the defendants were convicted, while the proceedings were time-barred in the case of the three others. The Court concluded that the length of the proceedings did not satisfy the requirement of promptness. It took the view that the importance of the investigation should have made the authorities deal with it promptly in order to determine the responsibilities and the circumstances in which the buildings collapsed, and thus to avoid any appearance of tolerance of illegal acts or of collusion in such acts.

Other articles

Having regard to the finding of a violation under Article 2 of the Convention, the Court considered that it had already examined the main legal question and that it did not need to rule separately on the other complaints.

Article 41 (just satisfaction)

The Court held that Turkey was to pay, in respect of non-pecuniary damage, 30,000 euros (EUR) jointly to Ms Akan and Mr Özel, EUR 30,000 jointly to Mr and Mrs Kılıç, EUR 30,000 jointly to Mr and Mrs Erdo.an, EUR 30,000 each to Mr Çakır and Ms Yüce (Ergüden), and for costs and expenses EUR 4,000 each to Mr Çakır and Ms Yüce (Ergüden).

ANNEX 6

Information Note on the Court's case-law
August 1997

Balmer-Schafroth and Others v. Switzerland – 22110/93

Judgment 26.8.1997 [GC]

Article 6

Article 6–1. Civil rights and obligations

Extension by Swiss Federal Council of licence to operate nuclear power station: *Article 6 not applicable*

[This summary is extracted from the Court's official reports (Series A or Reports of Judgments and Decisions). Its formatting and structure may therefore differ from the Case-Law Information Note summaries.]

I. PRELIMINARY OBJECTION (APPLICANTS NOT VICTIMS)

Fact that Federal Council had declared admissible the objection the applicants wished to raise before a tribunal justified regarding them as victims.

Conclusion: objection dismissed (unanimously).

II. ARTICLE 6 OF THE CONVENTION

A. Government's preliminary objection (failure to exhaust domestic remedies)

In view of conclusion on applicability, not necessary to decide exhaustion of remedies issue.

Conclusion: unnecessary to give a ruling (unanimously).

B. Applicability

Right on which applicants had relied in substance — to have their physical integrity adequately protected from risks entailed by use of nuclear energy — was recognised in Swiss law.

Inasmuch as it sought to review whether statutory requirements had been complied with, Federal Council's decision had been more akin to a judicial act than to a general policy decision.

No doubt that the dispute had been genuine and serious.

Applicants had not established a direct link between the operating conditions of the power station and their right to protection of their physical integrity, as

they had failed to show that they were personally exposed to a serious, specific and imminent danger — effects of measures which Federal Council could have ordered in the instant case hypothetical — neither dangers nor remedies had been established with a degree of probability that would have made outcome of proceedings directly decisive for right relied on by applicants — connection between that right and Federal Council's decision too tenuous and remote.

Conclusion: Article 6 not applicable (twelve votes to eight).

III. ARTICLE 13 OF THE CONVENTION

Same conclusion.

CONCLUSION: Article 13 not applicable (twelve votes to eight).

ANNEX 7

Registrar of the Court no. 843

09.11.2010

Measures taken by State to curb nuisance caused to resident by heavy road traffic were insufficient

In today's Chamber judgment in the case Deés v. Hungary (application no 2345/06), which is not final[2], the European Court of Human Rights held, unanimously, that there had been a:

Violation of Article 8 (right to respect for private life and home) and Article 6 § 1 (right to a fair trial within a reasonable time) of the European Convention on Human Rights.

The case concerned nuisance (noise, vibrations, pollution, smell) caused to a resident by heavy traffic in his street, situated near a motorway operating a toll.

Principal facts

The applicant, György Deés, is a Hungarian national who was born in 1950 and lives in Alsónémedi (Hungary).

Mr Deés submitted that, in order to avoid a toll introduced in early 1997 on a privatised motorway outside Alsónémedi, many trucks chose alternative routes including the street (on a section of a national road) in which he lived.

On 23 February 1999 he brought proceedings for compensation against the Pest County State Public Road Maintenance Company. He claimed that, due to the increased freight traffic in his street, the walls of his house had cracked. Ultimately, on 15 November 2005 his claims were dismissed on appeal. The domestic courts found in particular that, although the noise — measured by an expert on two occasions in May 2003 — exceeded the statutory limit of 60 dB(A) by 15 % and 12 %, the vibration or noise caused by the traffic was not substantial enough to cause damage to Mr Deés' house.

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[2] Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

In the meantime, the authorities made efforts from 1998 to slow down and reorganise the traffic in the area: notably they constructed three bypass roads, introduced a speed limit of 40 km/hr at night and provided two nearby intersections with traffic lights. In 2001 road signs prohibiting the access of vehicles over 6 tons and re-oreintating traffic were put up.

1 Under Articles 43 and 44 of the Convention, Chamber judgments are not final. During the three-month period following a judgment's delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Under Article 28 of the Convention, judgments delivered by a Committee are final.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for home) of the Convention, Mr Deés complained that, because of the noise, pollution and smell caused by the heavy traffic in his street, his home had become almost uninhabitable. He further complained under Article 6 (right to a fair hearing within a reasonable time) that the length of the court proceedings he had brought on the matter had been excessive.

The application was lodged with the European Court of Human Rights on 6 January 2006.

Judgment was given by a Chamber of seven, composed as follows:
Françoise **Tulkens** (Belgium), *President*,
Danutė **Jočienė** (Lithuania),
Dragoljub **Popović** (Serbia),
András **Sajó** (Hungary),
Nona **Tsotsoria** (Georgia),
Kristina **Pardalos** (San Marino),
Guido **Raimondi** (Italy), *Judges*,
and also Stanley **Naismith**, *Section Registrar.*

Decision of the Court

Article 8

The Court recalled that the Convention protected an individual's right not only to the actual physical area of his home (for example against such breaches

as unauthorised entry) but also to the quiet enjoyment, within reasonable limits, of that area from interferences such as noise, emissions or smells.

In particular, it acknowledged the complexity of the authorities' task in Mr Deés' case in handling infrastructure issues — involving measures which required considerable time and resources — and in striking a balance between road users' and residents' interests. However, despite the efforts to limit and reorganise the traffic, the measures had consistently proved to be insufficient, resulting in Mr Deés having been exposed to excessive noise over a substantial period of time (and at least until May 2003 when the expert had assessed the level of noise and found it in excess of the statutory limit).

In conclusion, at the relevant time a direct and serious nuisance had affected the street in which Mr Deés lived and had prevented him from enjoying his home and private life, a right which the State had an obligation to guarantee. There had therefore been a violation of Article 8.

Article 6 § 1

The Court found that the length of the proceedings, having lasted six years and nine months for two levels of jurisdiction, had been excessive, in violation of Article 6 § 1.

Article 41 (just satisfaction)

The Court held that Hungary was to pay the applicant 6,000 euros (EUR) in respect of non pecuniary damage.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.

ANNEX 8

Press-release issued by the Registrar of the Court ECHR 452 (2012)

13.12.2012

Extension of main runway at Deauville Airport does not amount to violation of right to respect for private and family life of complainants or of right to peaceful enjoyment of possessions

In today's Chamber judgment in the case of Flamenbaum and Others v. France (applications nos. 3675/04 and 23264/04), which is not final[3], the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights, and

no violation of Article 1 of Protocol No. 1 (protection of property) to the Convention.

The case concerned the extension of the main runway at Deauville Airport and the resulting disturbance affecting the properties of local residents. Noting that the domestic courts had recognised the public-interest nature of the project and that the Government had established a legitimate aim — the region's economic well-being — the Court held, having regard to the measures taken by the authorities to limit the impact of the noise disturbance on local residents, that they had struck a fair balance between the competing interests. The Court also held that the applicants had not shown that the market value of their properties had dropped as a result of the runway extension.

Principal facts

The 19 applicants are owners or joint owners of homes located in or near the Saint-Gatien forest. These homes are at a distance of between 500 and 2,500 metres from Deauville-Saint-Gatien Airport's main runway which was built in 1931 by the town of Deauville and progressively expanded.

[3] Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

A noise exposure plan, drawn up in 1978 and approved in 1982, distinguished three zones according to their degree of exposure to noise. By a decree of 24 February 1986, the airport was classified as category B (medium-haul services).

In 1987 a draft aeronautical constraints clearance plan was drawn up. The prefects of Calvados and of Eure ordered a public inquiry. A petition bearing over 500 signatures was appended to the registers circulated for observations by the public. The local residents complained, in particular, that the plan did not include an environmental impact assessment or take account of the nuisance factors that might be generated by an increase in air traffic. On 1 June 1988 the inspector appointed to conduct the inquiry recommended approval of the plan.

By a decree of 4 April 1991 the Prime Minister approved the airport's aeronautical constraints clearance plan.

Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

In June 1991 the association for the defence of local residents of Deauville-Saint Gatien Airport ("the ADRAD"), of which the applicants are all members, applied to the *Conseil d'Etat* for judicial review of the decree.

The *Conseil d'Etat* dismissed the application on grounds, among other things, that the decree classifying the airport in category B was no longer amenable to appeal and that as the decree was the subject of separate proceedings from those relating to the extension of the runway and those relating to the aeronautical constraints plan, those operations could be carried out separately according to a timetable determined by the authorities. The *Conseil d'Etat* found that there was no evidence that the disadvantages of the constraints plan were excessive having regard to the advantages that it presented for the operation of the airport.

In July 1990 the prefect of Calvados ordered a public inquiry concerning the plan to extend the runway. A firm of experts had previously carried out and completed — in June 1990 — an impact assessment study on the effects of the plans on the physical and biological environment, human activities, town planning, heritage and landscape and on noise disturbance. That impact assessment revealed that the extension of the runway would benefit not only the activity of the airport but also the local — or even regional — economy. With regard to noise disturbance, it found that the levels remained within the

limits of the noise exposure plan approved in 1982 and did not recommend compensatory measures.

The public inquiry was carried out over one month in 6 district councils. The inquiry commission submitted its report on 12 October 1990 in which it approved the plan. It considered, in particular, that the extension of the runway would not significantly increase the number of aircraft movements, that there would be no marked increase in noise disturbance and that the extension of the runway would contribute to the economic development of the region. With regard to noise disturbance, it recommended that military training flights be stopped altogether and that there be no take-offs at night.

By decree of 5 March 1991, the prefect authorised the extension of the main runway to 2,550 metres, which was considered sufficient rather than the planned 2,720 metres. An application by the ADRAD for judicial review of that decree was dismissed by the Caen Administrative Court and by the Nantes Administrative Court of Appeal.

The works to extend and reinforce the runway were completed on 5 October 1993. The runway was opened for air traffic on 10 November 1993.

On 1 July 1994 the President of the Administrative Court ordered an expert report in order to determine, among other things, whether the extension of the runway had generated an increase in air traffic and noise disturbance, and to carry out noise measurements. The expert filed his final report in October 1997 in which he recorded the acoustic measurements carried out in August 1996 and in May and June 1997 in the property belonging to the President of the ADRAD. The expert recorded a decrease in air traffic, but an increase in heavy traffic and accordingly drew up a new noise exposure plan and recommended operational measures for the airport.

In August and September 1998, on the basis of the report, the applicants lodged an application with the Administrative Court for compensation for the damage caused by the runway extension. In judgments of 4 May 1999 the Administrative Court dismissed their applications. It held, firstly, that the expert report had been improperly prepared because the expert had carried out noise measurements on a non-adversarial basis and had exceeded his remit, but that the report could be used for information purposes. On the merits, the court found that heavy-tonnage aircraft had already been using the airport before the new runway had come into service and that if, in the worst-case scenario, local residents might be exposed to high-intensity noise during take-off on some occasions, the increase in noise disturbance on account of the runway extension did not inconvenience the applicants to any greater degree than was generally experienced by inhabitants of localities situated near an airport.

An appeal by the applicants was dismissed by the Nantes Administrative Court of Appeal on similar grounds on 20 December 2000. An appeal on points

of law by Mr Flamenbaum was dismissed by the *Conseil d'Etat* on 30 July 2003 and, by a decision of 30 December 2003, it declared the other seventeen appeals inadmissible.

In May and June 2006 the town of Deauville and the regions of Haute-Normandie and Basse-Normandie decided to form a joint union (*syndicat mixte*) of Deauville-Normandie Airport, which was authorised by an order of the prefect of Calvados of 21 July 2006. An appeal by the ADRAD against that order was dismissed by a judgment of the Administrative Court on 18 December 2007 that was subsequently upheld by the Administrative Court of Appeal on 16 December 2008 on the ground, in particular, that the development, planning, management and operation of Deauville Airport, on account of its strategic position, its huge potential in terms of economic and tourist development of the territory of Normandy and the prior existence of developed airport infrastructures, was of benefit to all the participating authorities.

A new noise exposure plan was approved, following a public inquiry, by a prefectoral order of the Basse-Normandie region of 29 September 2008.

Meanwhile, since April 2009, the authorities have put in place "reduced noise" procedures under which the altitude and the approach tracks for landing and take-off have been modified in order to limit the flyover of local residences and reduce noise disturbance.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicants complained about the noise disturbance caused by the extension of the airport's main runway and of shortcomings in the related decision-making process.

Relying on Article 1 of Protocol No. 1 (protection of property), they also complained of the decline in market value of their properties as a result of the runway extension, and about the insulation costs that they had had to bear.

The application was lodged with the European Court of Human Rights on 27 January 2004 (Mr Flamenbaum) and on 21 June 2004 (the other applicants).

Judgment was given by a Chamber of seven judges, composed as follows:

Mark **Villiger** (Liechtenstein), *President*,

Boštjan M. **Zupančič** (Slovenia),

Ann **Power-Forde** (Ireland),

André **Potocki** (France),

Paul **Lemmens** (Belgium),

Helena **Jäderblom** (Sweden),

Aleš **Pejchal** (the Czech Republic),

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Article 8

The Court noted that the applicants' homes were situated at varying distances from the airport's main runway, the closest being several hundred metres away and the furthest 2.5 km away. The noise to which the applicants were exposed was of a sufficiently high level for Article 8 to be applicable, which the Government did not deny. In order to be compatible with Article 8, the interference must be prescribed by law, pursue a legitimate aim and be necessary in a democratic society. The authorities had to strike a fair balance between the interests of the individual and of the community as a whole, having regard to the wide margin of appreciation afforded to them in this area.

The Court observed first that the administrative courts dealing with the applicants' case found that the decisions taken by the authorities complied with domestic law. Accordingly, the interference in question was prescribed by law.

The Court observed next that the administrative courts had confirmed the economic interest in extending the runway, which was designed to accommodate higher-capacity aircraft. The Court thus concluded that there had been a legitimate aim: the economic well-being of the region. Contrary to the submissions of the applicants, the Court did not consider it established that the extension of the runway had generated a considerable increase in air traffic. This was confirmed by the new noise exposure plan adopted in 2008. The prefect authorised an extension of the runway to 2,550 metres, instead of the 2,720 metres initially planned, on the ground that this was sufficiently long to meet the aim sought to be achieved. Moreover, the noisiest aircraft were now no longer authorised to fly in France. There was no longer any aerobatic flying or military training flights at the airport; civil training flights were regulated or even forbidden during certain periods or time bands. Furthermore, the Court observed that since 2009 the authorities had set in place "reduced noise procedures" under which the altitude and approach tracks for landing and take-off had been modified in order to limit the flyover of local residences and reduce noise disturbance.

Accordingly, having regard to those factors, the Court considered that the authorities had struck a fair balance between the competing interests.

With regard to the decision-making process, the Court observed that the planned extension of the runway had been preceded by a detailed impact assessment detailing the effects of the project on the physical and biological environment, human activities, town planning, heritage and landscape and also noise disturbance. A public inquiry had been carried out regarding the project during which, the materials having been made available, the public had been able to make observations on the inquiry registers and meet members of the inquiry commission. The impact assessment and the public inquiry file

had been sent to the environmental advisory board at which the ADRAD had been represented. The aeronautical constraints clearance plan had also been the subject of a public inquiry in the district councils concerned during which the local residents had been able to make their observations. Lastly, a further public inquiry had preceded the adoption of the radio constraints plan. Consequently, the proper inquiries and studies had been carried out and the public had had satisfactory access to the conclusions.

Moreover, the applicants had had two types of remedy before the administrative courts: an application for judicial review and an application for compensation for damage and had used both those remedies.

With regard to the alleged "fragmentation" of the decision-making process and the fact that the applicants had not been able to have the entire plan examined by one single judge, the Court pointed out that whilst States had a duty to take into consideration individual interests — respect for which it was obliged to secure by virtue of Article 8 — they must in principle be left a choice between different ways and means of complying with that obligation. In any event the applicants had been able to participate in each stage of the decision-making process and submit their observations. Accordingly, the Court saw no flaw in the decision-making process, and there had therefore been no violation of Article 8.

Article 1 of Protocol No. 1

The Court reiterated that Article 1 of Protocol No. 1 did not in principle guarantee the right to keep property in a pleasant environment.

The applicants submitted that the noise disturbance generated by the runway extension had caused a drop in the value of their property. They relied on two expert reports, only one of which had been ordered by the Administrative Court and had subsequently been deemed by the Administrative Court, the Administrative Court of Appeal and the *Conseil d'Etat* to have been improperly prepared. The applicants also relied on another expert report that had been prepared at their request and concerned seven of the properties. The expert, who gave no indication as to the method used to calculate their current market value, concluded that there had been a drop in value of between 25 % and 60 % on account of the presence of the airport, without, however, indicating which method he had used to arrive at that conclusion and to calculate the decrease in value of the properties. The Court noted that the applicants' complaint did not concern the disturbance generated by the presence of the airport but that caused by the extension of its main runway.

The Court reiterated that the Chamber had asked the parties to specify the updated sale price of their properties, their current market value, and to indicate whether that market value corresponded to the market price of similar properties that were not affected by the noise disturbance complained of. The documents

produced by the applicants did not provide the answers requested and some of them contained conflicting information regarding the market value of one and the same property and the decrease in value related to the presence of the airport.

In these circumstances the applicants had not established whether and to what extent the extension of Deauville Airport's main runway had affected the value of their property. Nor could the Court take account of the cost of the soundproofing work, because the applicants had failed to establish a causal link between the extension of the runway and the increase in traffic and because of the measures taken by the authorities to limit the impact of the noise disturbance.

As the applicants had failed to establish the existence of an infringement of their right to peaceful enjoyment of their possessions, the Court concluded that there had been no violation of Article 1 of Protocol No. 1.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.

ANNEX 9

Press release issued by the Registrar
CHAMBER JUDGMENT IN THE CASE OF TAŞKIN AND OTHERS v. TURKEY

The European Court of Human Rights has today notified in writing a judgment in the case of Taşkın and Others v. Turkey (application no. 46117/99).

The Court held unanimously

- that there had been a **violation of Article 8** of the European Convention on Human Rights (right to respect for private and family life);
- that there had been a **violation of Article 6 § 1** of the Convention (right to a fair trial); and
- that it was not necessary to examine separately the complaints under Article 2 (right to life) and Article 13 (right to an effective remedy) of the Convention.

Under Article 41 of the Convention (just satisfaction), the Court awarded each of the applicants 3,000 euros (EUR) for non-pecuniary damage. (The judgment is available only in French.)

1. Principal facts

The applicants are 10 Turkish nationals living in Bergama or the surrounding villages. The case concerns the granting of permits to operate a goldmine in Ovacık, in the district of Bergama (Izmir).

In 1992 the limited company *E. M. Eurogold Madencilik* (which subsequently became known as *Normandy Madencilik A. Ş.*) obtained the right to prospect for gold. The permit was valid for 10 years and also authorised use of the cyanide leaching process for gold extraction. In 1994, on the basis of an environmental-impact report, the Ministry of the Environment gave the company a permit to operate the goldmine at Ovacık.

The applicants, and other inhabitants of Bergama, asked for this permit to be set aside, citing the dangers of the cyanidation process used by the operating company, the health risks and the risks of pollution of the underlying aquifers and destruction of the local ecosystem. Their application was refused at first instance, but in a judgment of 13 May 1997 the Supreme Administrative Court allowed it. Referring to the conclusions of the impact study and other reports, the Supreme Administrative Court held that in view of the goldmine's geographical position

and the geology of the region the operating permit was not in accordance with the general interest on account of the risks for the environment and human health.

In application of that judgment, the Izmir Administrative Court set aside the decision to grant the mine an operating permit on 15 October 1997. Its judgment was upheld by the Supreme Administrative Court on 1 April 1998.

On 27 February 1998 the Izmir provincial governor's office ordered the mine to be closed down.

In October 1999, at the Prime Minister's request, the Turkish Institute of Scientific And Technical Research (*TÜBİTAK*) produced a report on the impact of using cyanide for gold extraction at the mine, stating that the risks referred to by the Supreme Administrative Court had been removed or reduced to a level lower than the acceptable limits. On the basis of that report a number of ministerial decisions to issue or renew operating permits were taken, and on 13 April 2001 the operating company began its mining activities. The applicants challenged these decisions in the Turkish courts, obtaining a stay of execution. Some of the applications concerned are at present pending in the Turkish courts.

On 29 March 2002 the Cabinet decided "as a principle" that the operating company could continue its activities, but the Supreme Administrative Court ordered a stay of execution of that decision on 23 June 2004 pending a judgment on an application to set it aside. Pursuant to that judgment, the Izmir provincial governor's office ordered the mine to cease gold extraction in August 2004.

The *Normandy Madencilik* company submitted a final impact study upon which the Ministry of the Environment and Forestry expressed a favourable opinion at the end of August 2004.

2. Procedure and composition of the Court

The application was lodged with the European Commission of Human Rights on 25 September 1998 and transmitted to the Court on 1 November 1998. It was declared partly admissible on 29 January 2004. Applying Article 36 of the Convention and Rule 44 of the Rules of Court, the President of the Chamber gave the *Normandy Madencilik* company leave to intervene in the proceedings as a third party. A hearing was held in Strasbourg on 3 June 2004.

Judgment was given by a Chamber of 7 judges, composed as follows:
Georg **Ress** (German), ***President***,
Ireneu **Cabral Barreto** (Portuguese),
Lucius **Caflisch** (Swiss),
Riza **Türmen** (Turkish),
Boštjan **Zupančič** (Slovenian),
Hanne Sophie **Greve** (Norwegian),
Kristaq **Traja** (Albanian), ***judges***,
and also Vincent **Berger**, ***Section Registrar***.

3. Summary of the judgment

Complaints

The applicants alleged that both the granting by the national authorities of a permit to operate a goldmine using the cyanidation process and the related decision-making process had infringed their rights under Articles 2 and 8 of the Convention. They further alleged that the administrative authorities' refusal to comply with the decisions of the administrative courts had infringed their right to effective judicial protection. They relied on Articles 6 § 1 and 13 of the Convention.

Decision of the Court

Article 8 of the Convention

The Court noted that, after weighing the competing interests in the case against each other, the Supreme Administrative Court had based its ruling that the mine's operating permit was not consistent with the public interest on the applicants' effective enjoyment of the right to life and to a healthy environment. In the light of that decision, no further examination of the substance of the case with regard to the margin of appreciation generally left to the national authorities in such matters was necessary.

With regard to the decision-making process, the Court noted that the decision to grant an operating permit had been preceded by a series of investigations and studies conducted over a long period. A meeting to inform the population of the region had been organised. The applicants and the inhabitants of the region had had access to all the relevant documents, including the study in the issue. The Supreme Administrative Court had based its decision in its judgment of 13 May 1997 to set aside the operating permit on those studies and reports. However, although that judgment had become enforceable at the latest when it was served on the administrative authorities on 20 October 1997, the mine's closure had not been ordered until 27 February 1998, more than 10 months after delivery of the judgment and four months after it was served.

With regard to the period after 1 April 1998, the Court noted the administrative authorities' refusal to comply with the court decisions and domestic legislation, and the lack of a decision, based on a new environmental-impact report, to take the place of the one which had been set aside by the courts.

Moreover, despite the procedural safeguards laid down by Turkish legislation and the practical effect given to those safeguards by judicial decisions, on 29 March 2002, in a decision which was not made public, the Cabinet had authorised the continuation of the activities of the goldmine, which had already begun working in April 2001.

In those circumstances, the Court considered that the authorities had deprived the procedural safeguards protecting the applicants of all useful effect. Turkey had thus failed to discharge its obligation to guarantee the applicants' right to respect for their private and family life. The Court accordingly concluded unanimously that there had been a violation of Article 8 of the Convention.

Article 6 § 1 of the Convention

The Court noted that the judgment given by the Supreme Administrative Court on 13 May 1997 had had suspensive effect even before it became final on 1 April 1998, but had not been enforced within the time prescribed.

Moreover, on the basis of ministerial authorisations issued at the direct prompting of the Prime Minister, the company had resumed operating the mine on an experimental basis on 13 April 2001. That resumption had had no legal basis and amounted to circumvention of a judicial decision. Such a situation was incompatible with the rule of law and the security of legal relations.

That being so, the Court considered that the Turkish authorities had failed to comply effectively and within a reasonable time with the judgment given by the Izmir Administrative Court on 15 October 1997 and upheld by the Supreme Administrative Court on 1 April 1998, thus depriving Article 6 § 1 of all useful effect. The Court accordingly held unanimously that there had been a violation of the Convention in that regard.

Articles 2 and 13 of the Convention

As these complaints were the same as those submitted under Articles 8 and 6 § 1 of the Convention, the Court considered that it was not necessary to examine them separately under Articles 2 and 13 of the Convention.

ANNEX 10

Issued by the Registrar of the Court
ECHR 005 (2011)

10.01.2012

Italy's prolonged inability to deal with "waste crisis" in Campania breached human rights of 18 people living and working in the region. In today's Chamber judgment in the case **di Sarno and Others v. Italy** (application no. 30765/08), which is not final1, the European Court of Human Rights held, by a majority, that there had been:

A violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights;

No violation of Article 8 of the Convention concerning the Italian authorities' obligation to provide information on the potential risks facing the applicants; and,

A violation of Article 13 (right to an effective remedy). The case concerned the state of emergency (from 11 February 1994 to 31 December 2009) in relation to waste collection, treatment and disposal in the Campania region of Italy where the applicants lived and/or worked, including a period of five months in which rubbish piled up in the streets.

Principal facts

The applicants are 18 Italian nationals, 13 of whom live in — and the other five who work in — the municipality of Somma Vesuviana (Campania).

From 11 February 1994 to 31 December 2009 a state of emergency was in place in the region of Campania, declared by the then Prime Minister on account of serious problems with the disposal of urban waste. The management of the state of emergency was initially entrusted to "deputy commissioners".

On 9 June 1997 the President of the Region, acting as deputy commissioner, drew up a regional waste disposal plan which provided for the construction of five incinerators, five principal landfill sites and six secondary landfill sites. He issued an invitation to tender for a ten-year concession to operate the waste treatment and disposal service in the province of Naples. According to the specifications, the successful bidder would be required to ensure the proper reception of the collected waste, its sorting, conversion into refuse-derived fuel (RDF) and incineration. To that end, it was to construct and manage three waste sorting and fuel production facilities and set up an electric power plant using RDF, by 31 December 2000.

The concession was awarded to a consortium of five companies which undertook to build a total of three RDF production facilities and one incinerator.

Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

On 22 April 1999 the same deputy commissioner launched an invitation to tender for a concession to operate the waste disposal service in Campania. The successful bidder was a consortium which set up the company FIBE Campania S.p.A. The company undertook to build and manage seven RDF production facilities and two incinerators. It was required to ensure the reception, sorting and treatment of waste in the Campania region.

In January 2001 the closure of the Tufino landfill site resulted in the temporary suspension of waste disposal services in the province of Naples. The mayors of the other municipalities in the province authorised the storage of the waste in their respective landfill sites on a temporary basis.

On 22 May 2001 the collection and transport of waste in the municipality of Somma Vesuviana was entrusted to a consortium of several companies. Subsequently, on 26 October 2004, management of the service was handed over to a publicly-owned company.

In 2003 the Naples public prosecutor's office opened a criminal investigation into the management of the waste disposal service in Campania. On 31 July 2007 the public prosecutor requested the committal for trial of the directors and certain employees of the companies operating the concession and of the deputy commissioner who had held office between 2000 and 2004 and several officials from his office, on charges of fraud, failure to perform public contracts, deception, interruption of a public service, abuse of office, misrepresentation of the facts in the performance of public duties and conducting unauthorised waste management operations.

A further crisis erupted at the end of 2007, during which tonnes of waste piled up in the streets of Naples and several other towns and cities in the province. On 11 January 2008 the Prime Minister appointed a senior police official as deputy commissioner, with responsibility for opening landfill sites and identifying new waste storage and disposal sites.

In the meantime, in 2006, another criminal investigation was opened, this time concerning the waste disposal operations carried out during the transitional phase following the termination of the first concession agreements. On 22 May 2008 the judge made compulsory residence orders in respect of the accused, who included directors, managers and employees of the waste disposal and treatment companies, persons in charge of waste recycling centres, managers of landfill sites, representatives of waste transport companies and officials from the office of the deputy commissioner. Those concerned were charged with conspiracy to conduct trafficking in waste, forging official documents, deception, misrepresentation of the facts in the performance of public duties and organised trafficking of waste.

Complaints, procedure and composition of the Court

Relying on Articles 2 (right to life) and 8 (right to respect for private and family life), the applicants complained that, by omitting to take the necessary measures to ensure the proper functioning of the public waste collection service and by implementing inappropriate legislative and administrative policies, the State had caused serious damage to the environment in their region and placed their lives and health in jeopardy. They criticised the authorities for not informing those concerned of the risks entailed in living in a polluted area.

Relying on Articles 6 (right to a fair hearing) and 13 (right to an effective remedy), the applicants complained that the Italian authorities had taken no initiatives aimed at safeguarding the rights of members of the public, and criticised the Italian courts for delays in prosecuting those responsible.

The application was lodged with the European Court of Human Rights on 9 January 2008.

Judgment was given by a Chamber of seven, composed as follows:
Françoise **Tulkens** (Belgium), *President*,
Danutė **Jočienė** (Lithuania),
Dragoljub **Popović** (Serbia),
Isabelle **Berro-Lefèvre** (Monaco),
András **Sajó** (Hungary),
Işıl **Karakaş** (Turkey),
Guido **Raimondi** (Italy), *Judges*,
and also Stanley **Naismith**, *Section Registrar.*

Decision of the Court

The Italian Government's preliminary objections

The Italian Government argued that the applicants could not claim "victim" status. According to the Court's case-law, the crucial element in determining whether environmental pollution amounted to a violation of one of the rights

safeguarded by Article 8 was the existence of a harmful effect on a person's private or family life and not simply the general deterioration of the environment. However, in today's case the Court considered that the environmental damage complained of by the applicants had been such as to directly affect their own well-being. Accordingly, it rejected the Government's preliminary objection concerning the applicants' victim status.

The Government further alleged that the applicants had not exhausted domestic remedies, arguing that they could have brought an action for compensation against the agencies managing the collection, treatment and disposal of waste in order to seek redress for the damage sustained as a result of the malfunctioning of the service, as other inhabitants of the Campania region had done.

As to the possibility for the applicants to bring an action for damages, the Court noted that that might theoretically have resulted in compensation for those concerned but would not have led to the removal of the rubbish from the streets and other public places. The Court further observed that the Government had not produced any civil court decision awarding damages to the residents of the areas concerned, or any administrative court decision awarding compensation for damage. Likewise, the Government had not cited any court rulings establishing that the residents of the areas affected by the "waste crisis" could have been joined as civil parties to criminal proceedings concerning offences against the public service and the environment. Lastly, as to the possibility of requesting the Environment Ministry to bring an action seeking compensation for environmental damage, the Court noted that only the Environment Ministry, and not the applicants themselves, could claim compensation. The only course of action open to the applicants would have been to ask the Ministry to apply to the judicial authorities. That could not be said to constitute an effective remedy for the purposes of Article 35 § 1 of the Convention. Accordingly, the Court rejected the Government's preliminary objection of failure to exhaust domestic remedies.

Article 8

The Court pointed out that States had first and foremost a positive obligation, especially in relation to hazardous activities, to put in place regulations appropriate for the activity in question, particularly with regard to the level of the potential risk. Article 8 also required that members of the public should be able to receive information enabling them to assess the danger to which they were exposed.

The Court observed that the municipality of Somma Vesuviana, where the applicants lived or worked, had been affected by the "waste crisis". A state of emergency had been in place in Campania from 11 February 1994 to 31 December 2009 and the applicants had been forced, from the end of 2007 until May 2008, to live in an environment polluted by the piling-up of rubbish on the streets.

The Court noted that the applicants had not complained of any medical disorders linked to their exposure to the waste, and that the scientific studies produced by the parties had made conflicting findings as to the existence of a link between exposure to waste and an increased risk of cancer or congenital defects. Although the Court of Justice of the European Union, which had ruled on the issue of waste disposal in Campania, had taken the view that a significant accumulation of waste on public roads or in temporary storage sites was liable to expose the population to a health risk, the applicants' lives and health had not been in danger.

The collection, treatment and disposal of waste were hazardous activities; as such, the State had been under a duty to adopt reasonable and appropriate measures capable of safeguarding the right of those concerned to a healthy and protected environment.

It was true that the Italian State, from May 2008 onwards, had adopted several measures and launched a series of initiatives which made it possible to lift the state of emergency in Campania on 31 December 2009. However, the Court could not accept the Italian Government's argument that that state of crisis was attributable to *force majeure*. Even if one took the view, as the Government did, that the acute phase of the crisis had lasted only five months — from the end of 2007 until May 2008 — the fact remained that the Italian authorities had for a lengthy period been unable to ensure the proper functioning of the waste collection, treatment and disposal service, resulting in an infringement of the applicants' right to respect for their private lives and their homes. The Court therefore held that there had been a violation of Article 8.

On the other hand, the studies commissioned by the civil emergency planning department had been published by the Italian authorities in 2005 and 2008, in compliance with their obligation to inform the affected population. There had therefore been no violation of Article 8 concerning the provision of information to the public.

Articles 6 and 13

As to the applicants' complaint concerning the opening of criminal proceedings, the Court reiterated that neither Articles 6 and 13 nor any other provision of the Convention guaranteed an applicant a right to secure the prosecution and conviction of a third party or a right to "private revenge".

However, in so far as the complaint related to the absence of effective remedies in the Italian legal system by which to obtain redress for the damage sustained, the Court considered that that complaint fell within the scope of Article 13.

In view of its findings as to the existence of relevant and effective remedies enabling the applicants to raise their complaints with the national authorities,

the Court held that there had been a violation of Article 13. Judgment of 4 March 2010 by the Court of Justice of the European Union (Case C-297/08).

Article 41

Under Article 41 (just satisfaction) of the Convention, the Court held that its findings of violations of the Convention constituted sufficient redress for the non-pecuniary damage sustained. It held that Italy was to pay 2,500 euros (EUR) to Mr Errico di Lorenzo in respect of costs and expenses.

Separate opinion

Judge **Sajó** expressed a separate opinion which is annexed to the judgment.

The judgment is available only in French.

This press release is a document produced by the Registry. It does not bind the Court.

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.

ANNEX 11

EUROPEAN COURT OF HUMAN RIGHTS

069
15.2.2005

Press release issued by the Registrar

CHAMBER JUDGMENT
STEEL AND MORRIS v. THE UNITED KINGDOM

The European Court of Human Rights has today notified in writing a judgment[4] in the case of ***Steel and Morris v. the United Kingdom*** (application no. 68416/01).

The Court held unanimously:

- that there had been **a violation of Article 6 § 1** (right to a fair hearing) of the European Convention on Human Rights;
- that there had been **a violation of Article 10** (freedom of expression) of the Convention.

Under Article 41 (just satisfaction) of the Convention, the Court awarded 20,000 euros (EUR) to the first applicant and EUR 15,000 to the second applicant for non-pecuniary damage, and EUR 47,311.17 for costs and expenses.

(The judgment is available in English and in French.)

1. Principal facts

The case concerns an application brought by two United Kingdom nationals, Helen Steel and David Morris, who were born in 1965 and 1954 respectively and live in London. During the relevant period Mr Morris was unemployed and Ms Steel was either unemployed or on a low wage. Both were associated with London

[4] Under Article 43 of the European Convention on Human Rights, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

Greenpeace, a small group, unconnected with Greenpeace International, which campaigned principally on environmental and social issues.

In the mid-1980s London Greenpeace began an anti-McDonald's campaign. In 1986 a six-page leaflet entitled "What's wrong with McDonald's?" was produced and distributed as part of that campaign.

On 20 September 1990 McDonald's Corporation ("US McDonald's") and McDonald's Restaurants Limited ("UK McDonald's") issued a writ against the applicants claiming damages for libel allegedly caused by the alleged publication by the defendants of the leaflet.

The applicants denied publication, denied that the words complained of had the meanings attributed to them by McDonald's and denied that all or some of the meanings were capable of being defamatory. Further, they contended, in the alternative, that the words were substantially true or else were fair comment on matters of fact.

The applicants were refused legal aid and so represented themselves throughout the trial and appeal, with only some help from volunteer lawyers. They submit that they were severely hampered by lack of resources, not just in the way of legal advice and representation, but also when it came to administration, photocopying, note-taking, and the tracing, preparation and payment of the costs and expenses of expert and factual witnesses. Throughout the proceedings McDonald's were represented by leading and junior counsel, experienced in defamation law and by a one or, at times, two solicitors and other assistants.

The trial took place before a judge sitting alone between 28 June 1994 and 13 December 1996. It lasted for 313 court days and was the longest trial in English legal history. On appeal the Court of Appeal rejected the majority of the applicants' submissions as to general grounds of law and unfairness, but accepted some of the challenges to the trial judge's findings as to the content of the leaflet. The damages awarded by the trial judge were reduced from a total of GBP 60,000 to a total of GBP 40,000. Leave to appeal to the House of Lords was refused. McDonald's, who had not applied for costs, have not sought to enforce the award.

2. Procedure and composition of the Court

The application was lodged on 20 September 2000 and declared partly admissible on 6 April 2004. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 September 2004.

Judgment was given by a Chamber of 7 judges, composed as follows:
Matti **Pellonpää** (Finnish), ***President***,
Nicolas **Bratza** (British),
Viera **Strážnická** (Slovakian),
Josep **Casadevall** (Andorran),
Rait **Maruste** (Estonian),

Stanislav **Pavlovschi** (Moldovan),
Lech **Garlicki** (Polish), ***judges***,
and also Michael **O'Boyle**, ***Section Registrar***.

3. Summary of the judgment[5]

Complaints

The applicants complained, under Article 6 § 1 of the Convention, that the proceedings were unfair, principally because they were denied legal aid, and, under Article 10, that the proceedings and their outcome constituted a disproportionate interference with their right to freedom of expression.

DECISION OF THE COURT

Article 6 § 1 of the Convention

The applicants' principal complaint under this provision was that they were denied a fair trial because of the lack of legal aid.

The question whether the provision of legal aid was necessary for a fair hearing had to be determined on the basis of the particular facts and circumstances of each case and depended *inter alia* upon the importance of what was at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.

The Court examined the facts of the case with reference to these criteria.

In terms of what had been at stake for the applicants, although defamation proceedings were not, in this context, comparable to, for instance, proceedings raising important family-law issues, the financial consequences had been potentially severe.

As regards the complexity of the proceedings, the trial at first instance had lasted 313 court days, preceded by 28 interlocutory applications. The appeal hearing had lasted 23 days. The factual case which the applicants had had to prove had been highly complex, involving 40,000 pages of documentary evidence and 130 oral witnesses.

Nor was the case straightforward legally. Extensive legal and procedural issues had to be resolved before the trial judge was in a position to decide the main issue.

Against this background, it was necessary to assess the extent to which the applicants were able to bring an effective defence despite the absence of legal aid. The applicants appeared to have been articulate and resourceful and they had succeeded in proving the truth of a number of the statements complained of. They had moreover received some help on the legal and procedural aspects of the case from barristers and solicitors acting *pro bono*: their initial pleadings were drafted by lawyers. For the bulk of the proceedings, however, including

5 This summary drafted by the Registry is not binding on the Court.

all the hearings to determine the truth of the statements in the leaflet, they had acted alone.

In an action of this complexity, neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person, was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel. The very length of the proceedings was, to a certain extent, a testament to the applicants' lack of skill and experience.

In conclusion, the denial of legal aid to the applicants had deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald's. There had, therefore, been a violation of Article 6 § 1.

In view of its finding of a violation of Article 6 § 1 based on the lack of legal aid, the Court did not consider it necessary to examine separately additional complaints under that provision directed at a number of specific rulings made by the judges in the proceedings.

Article 10 of the Convention

The central issue which fell to be determined was whether the interference with the applicants' freedom of expression had been "necessary in a democratic society".

The Government had contended that, as the applicants were not journalists, they should not attract the high level of protection afforded to the press under Article 10. However, in a democratic society even small and informal campaign groups, such as London Greenpeace, had to be able to carry on their activities effectively. There existed a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.

The safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest was subject to the proviso that they acted in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism, and the same principle applied to others who engaged in public debate. In a campaigning leaflet a certain degree of hyperbole and exaggeration could be tolerated, and even expected, but in the case under review the allegations had been of a very serious nature and had been presented as statements of fact rather than value judgments.

The applicants, who, despite the High Court's finding to the contrary, had denied that they had been involved in producing the leaflet, had claimed that it placed an intolerable burden on campaigners such as themselves, and thus stifled public debate, to require those who merely distributed a leaflet to bear the burden of establishing the truth of every statement contained in it. They had

also argued that large multinational companies should not be entitled to sue in defamation, at least without proof of actual financial damage. Complaint was further made of the fact that under the law McDonald's were able to bring and succeed in a claim for defamation when much of the material included in the leaflet was already in the public domain.

Like the Court of Appeal, the Court was not persuaded by the argument that the material was in the public domain since either the material relied on did not support the allegations in the leaflet or the other material was itself lacking in justification.

As to the complaint about the burden of proof, it was not in principle incompatible with Article 10 to place on a defendant in libel proceedings the onus of proving to the civil standard the truth of defamatory statements.

Nor should in principle the fact that the plaintiff in the present case was a large multinational company deprive it of a right to defend itself against defamatory allegations or entail that the applicants should not have been required to prove the truth of the statements made. It was true that large public companies inevitably and knowingly laid themselves open to close scrutiny of their acts and the limits of acceptable criticism are wider in the case of such companies. However, in addition to the public interest in open debate about business practices, there was a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good. The State therefore enjoyed a margin of appreciation as to the means it provided under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation.

If, however, a State decided to provide such a remedy to a corporate body, it was essential, in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms was provided for. The more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible "chilling" effect on others were also important factors to be considered in this context. The lack of procedural fairness and equality which the Court had already found therefore also gave rise to a breach of Article 10.

Moreover, under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered. While it was true that no steps had so far been taken to enforce the damages award against either applicant, the fact remained that the substantial sums awarded against them had remained enforceable since the decision of the Court of Appeal. In those circumstances, the award of damages in the present case was disproportionate to the legitimate aim served.

In conclusion, given the lack of procedural fairness and the disproportionate award of damages, the Court found that there has been a violation of Article 10.

ANNEX 12

Information Note on the Court's case-law No. 64
May 2004

Vides Aizsardzības Klubs v. Latvia – 57829/00

Judgment 27.5.2004 [Section I]

Article 10

Article 10–1. Freedom of expression

Award of damages against an association for the protection of the environment following its criticism of a mayor and its denunciation of administrative malpractice: *violation*

Facts: The applicant association is a Latvian association for environmental protection. It adopted a resolution addressed to the relevant authorities expressing its concerns about the conservation of an area of dunes along a stretch of coastline. The resolution, which was published in a regional newspaper, contained, *inter alia*, allegations that the chair of the district council, I. B., had signed illegal decisions and certificates, thus facilitating illegal construction work in the area of the dunes, and had deliberately failed to comply with instructions to halt the work. The resolution asked the relevant authorities to carry out checks. The Environmental Protection Act authorised non-governmental organisations to give their views on this subject and to issue requests to the relevant authorities. Checks were carried out and several instances of illegal activity were detected in the municipality in question. I. B. had provided a statement with "erroneous details" of the distance to the sea, which had enabled a building to be constructed inside the protected area. I. B. claimed that the statements in the resolution were incorrect and brought an action for compensation against the applicant organisation, requesting the publication of an official retraction. The relevant court found in favour of I. B. The court of appeal, to which the applicant association appealed, found that there was no proof that I. B. had illegally signed documents facilitating illegal building work in the dunes. Even if I. B. had provided a document containing incorrect references to distance, the municipality had nonetheless itself undertaken to put an end to the violation; as the impugned document was considered a collective decision of the district council, it could not engage I. B.'s personal responsibility. Consequently, the court of appeal gave judgment against the applicant association. The Senate of the Supreme Court dismissed an appeal on points of law by the applicant association.

Law: Article 10 — The order to pay damages, made against the applicant association in a civil action, constituted interference with the exercise of its right to freedom of expression. This interference, prescribed by law, had been grounded on the protection of "the reputation and rights of others". The Court had therefore to determine whether it had been necessary in a democratic society. The resolution had been intended to draw the relevant authorities' attention to a sensitive matter of public interest, namely malpractice in an important sector managed by local government. As a non-governmental organisation specialising in this field, the applicant association had thus fulfilled the role of "watchdog" conferred on it by the Environmental Protection Act. Like the role of the press, such participation by a voluntary association was essential in a democratic society. In order to fulfil its mandate, an association had to be able to report facts that were likely to interest the public and thus contribute to transparency in the public authorities' actions. The applicant association had further complied with its obligation to demonstrate the truth of the factual allegations for which it had been criticised. Bearing in mind the relatively wide powers conferred on mayors by Latvian legislation, and the particular scope of the limits of acceptable criticism of a political figure, the fact of criticising the mayor for the policy of the local authority as a whole could not be described as abuse of freedom of expression. In addition, the description of I. B.'s behaviour as "illegal" was a value judgment and its truthfulness could not be proven. Finally, the Government could not seriously argue that the applicant association had in substance accused I. B. of having committed a criminal offence, and it would be completely contrary to the purpose and spirit of Article 10 of the Convention to grant the national authorities a right to interpret the applicant association's spoken or written statements improperly, thereby giving them a meaning that had clearly never been intended. In short, the reasons put forward by the Government did not suffice to demonstrate that the interference complained of was "necessary in a democratic society".

CONCLUSION: violation (unanimously).

Article 41 — The Court made an award in respect of non-pecuniary damage. It also made an award in respect of costs and expenses.

ANNEX 13

EUROPEAN COURT OF HUMAN RIGHTS

484
28.6.2001

Press release issued by the Registrar

JUDGMENT IN THE CASE OF VGT VEREIN GEGEN TIERFABRIKEN v. SWITZERLAND

The European Court of Human Rights has today notified in writing judgment in the case ***VgT Verein gegen Tierfabriken v. Switzerland*** (24699/94)[6]. The Court held, unanimously, that there had been:

- a **violation of Article 10** (freedom of expression) of the European Convention on Human Rights,
- **no violation of Article 13** (right to an effective remedy) of the Convention,
- **no violation of Article 14** (prohibition of discrimination).

Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicant association 20,000 Swiss francs for costs and expenses.

1. Principal facts

VgT Verein gegen Tierfabriken is a Swiss-registered association dedicated to the protection of animals. It produced a television commercial concerning animal welfare, in response to the adverts produced by the meat industry, which it intended to have broadcast by the Swiss Radio and Television Company. One scene showed a noisy hall with pigs in small pens and compared the conditions to those in concentration camps. The commercial ended with the words "eat less meat, for the sake of your health, the animals, and the environment".

[6] Under Article 43 of the European Convention on Human Rights, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its Protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

On 10 January 1994 the Commercial Television Company, responsible for television advertising, informed the association that it would not broadcast the commercial in view of its "clear political character".

The applicant association filed a complaint, which was transmitted to the Federal Office of Communication, which informed the association on 25 April 1994 that the Commercial Television Company was free to purchase commercials and choose their contractual partners as they wished. A further complaint to the Federal Department for Transport and Energy was also dismissed. The association filed an administrative law appeal, which was dismissed by the Federal Court on 20 August 1997.

2. Procedure and composition of the Court

The application was transmitted to the European Court of Human Rights on 1 November 1998.

Judgment was given by a Chamber of seven judges, composed as follows:
Christos **Rozakis** (Greek),***President***,
András **Baka** (Hungarian),
Luzius **Wildhaber** (Swiss),
Giovanni **Bonello** (Maltese),
Peer **Lorenzen** (Danish),
Margarita **Tsatsa-Nikolovska** (FYROMacedonia),
Egils **Levits** (Latvian) ***judges***,
and also Erik **Fribergh**, ***Section Registrar***.

3. Summary of the judgment[7]

Complaints

The applicant association complained that the refusal to broadcast its commercial was in violation of Article 10, that it had no effective remedy, relying on Article 13, and that it suffered discrimination, relying on Article 14, as the meat industry was permitted to broadcast commercials.

Decision of the Court

Article 10

The Court observed that the commercial could be regarded as "political" within the meaning of S. 18 § 5 of the Federal Radio and Television Act as, rather than inciting the public to purchase a particular product, it reflected controversial opinions pertaining to modern society in general, lying at the heart of various political debates. It was, therefore, "foreseeable" for the applicant association that its commercial would not be broadcast and the interference with the applicant

[7] This summary by the Registry does not bind the Court.

association's freedom of expression was, therefore, "prescribed by law" within the meaning of Article 10 § 2.

The Court also noted both the view of the Federal Council, that S. 18 § 5 served to prevent financially powerful groups from obtaining a competitive advantage in politics, and the Federal Court's judgment of 20 August 1997, which considered that the prohibition served to ensure the independence of the broadcaster, to spare the political process from undue commercial influence, to provide for a certain equality of opportunity between the different forces of society, and to support the press, which remained free to publish political advertisements. The Court was, therefore, satisfied that the measure was aimed at the "protection of the... rights of others" within the meaning of Article 10 § 2.

It followed that the Swiss authorities had a certain margin of appreciation to decide whether there was a "pressing social need" to refuse to broadcast the commercial. Such a margin of appreciation was particularly essential in commercial matters, especially in an area as complex and fluctuating as that of advertising. However, the extent of the margin of appreciation was reduced, since what was at stake were not purely commercial interests, but participation in a debate affecting the general interest. The Court therefore considered whether the right balance had been struck between the applicant association's freedom of expression and the reasons adduced by the Swiss authorities for the prohibition of political advertising.

The Court observed that powerful financial groups could obtain competitive advantages through commercial advertising and might thereby exercise pressure on, and eventually curtail the freedom of, the radio and television stations broadcasting the commercials. Such situations undermined the fundamental role of freedom of expression in a democratic society, as enshrined in Article 10 of the Convention, particularly concerning information and ideas of general interest which the public were entitled to receive. This was especially important in relation to audio-visual media, whose programmes were often broadcast very widely.

However, noting that S. 18 § 5 was applied only to radio and television broadcasts, and not to other media such as the press, the Court found that a prohibition of political advertising, which applied only to certain media, did not appear to be a particularly pressing need. Moreover, it had not been argued that the applicant association itself constituted a powerful financial group which, with its proposed commercial, sought to endanger the independence of the broadcaster, to unduly influence public opinion, or to endanger the equality of opportunity between the different forces of society. Indeed, rather than abusing a competitive advantage, the applicant association intended only to participate in an ongoing general debate on animal protection and the rearing of animals. In the Court's opinion, the domestic authorities had not justified the interference in the applicant association's freedom of expression in a "relevant and sufficient" manner.

The domestic authorities did not adduce the disturbing nature of any particular sequence, or of any particular words, of the commercial as a ground for refusing to broadcast it. It therefore mattered little that the pictures and words employed in the commercial at issue may have appeared provocative or even disagreeable.

The Court further observed that the applicant association's only means of reaching the entire Swiss public was through the national television programmes of the Swiss Radio and Television Company, which were the only programmes broadcast throughout Switzerland. Regional private television channels and foreign television stations could not be received throughout Switzerland.

Finding that the measure in issue could not be considered "necessary in a democratic society", the Court held that there had been a violation of Article 10.

Article 13

The Court noted that the Federal Court in its decision of 20 August 1997 dealt extensively and in substance with the applicant association's complaints and there was therefore no breach of Article 13.

Article 14

Noting the Federal Court's decision that the commercials produced by the meat industry and the applicant association were not comparable because they differed in their goals — the first aiming to increasing turnover and the second opposing industrial animal production — the Court found no violation of Article 14.

* * *

The Court's judgments are accessible on its Internet site (http://www.echr.coe.int).

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The European Court of Human Rights was set up in Strasbourg in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights. On 1 November 1998 a full-time Court was established, replacing the original two-tier system of a part-time Commission and Court.

ANNEX 14

Information Note on the Court's case-law No.
February 1991

Fredin v. Sweden (no. 1) – 12033/86

Judgment 18.2.1991

Article 1 of Protocol No. 1

Article 1 para. 1 of Protocol No. 1. Deprivation of property

Revocation of a permit granted in 1963 to exploit gravel: *no violation*

Article 6

Article 6–1. Access to court

Absence of judicial review of this decision: *violation*

[This summary is extracted from the Court's official reports (Series A or Reports of Judgments and Decisions). Its formatting and structure may therefore differ from the Case-Law Information Note summaries.]

I. ARTICLE 1 OF PROTOCOL No. 1

A. Article 1 rule applicable to the case

No formal expropriation of applicants' property. Furthermore, consequences of revocation not sufficiently serious for it to amount to a *de facto* expropriation: land not left without any meaningful use; applicants still owners of gravel resources; their possibilities of continuing to exploit them had already been made uncertain by the changes in the law in 1973. Measure therefore a control of use falling within the scope of second paragraph of the Article.

B. Lawfulness and purpose

Legislation had legitimate aim of protecting nature, an increasingly important consideration in today's society. Not established that interference contrary to Swedish law or pursued some other aim. 1964 Act indicated scope and manner of exercise of discretion conferred on authorities with sufficient precision. Absence of judicial review not in itself a violation of Article 1.

C. Proportionality

Effects of revocation to be assessed in light not only of substantial losses suffered by applicants having regard to potential of gravel pit if exploited in

accordance with original permit, but also of lawful restrictions on its use. When they initiated investments and exploitation in 1980, applicants could not, *inter alia*, as 1973 amendment authorised the revocation of permits such as theirs after ten years, have had legitimate expectations of being able to continue working the pit for a long time.

Having regard also to closing-down period granted (almost four years), revocation not disproportionate to legitimate aim pursued.

Conclusion: no violation (unanimously).

II. ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 1 OF PROTOCOL No. 1

"Discrimination" means, *inter alia*, treating differently persons in similar situations — applicants had not tried to refute view of European Commission of Human Rights that their situation not shown to be similar to that of companies whose permits not revoked, and it was not for the Government to demonstrate that cases were dissimilar — Court found no reason to assess evidence otherwise than did Commission — accordingly no issue of discrimination arose.

Conclusion: no violation (unanimously).

III. ARTICLE 6 § 1 OF THE CONVENTION

Applicants' right to develop their property in accordance with applicable laws and regulations: a "civil" right. Also existence of a "genuine and serious" dispute over lawfulness of the impugned decisions: could be determined only by the Government as the final instance.

Conclusion: violation (unanimously).

IV. ARTICLE 50 OF THE CONVENTION

A. Pecuniary damage: no causal link with violation of Article 6 § 1 — no award of compensation.

B. Non-pecuniary damage: amount awarded on an equitable basis

C. Costs and expenses: claim relating to domestic and Strasbourg proceedings — partial reimbursement.

CONCLUSION: defendant State to pay specified sums to the applicants (unanimously).

ANNEX 15

Press-release

COURT (CHAMBER)
Case of Pine Valley Developments Ltd and Other v. Ireland (article 50)

(Application no. 12742/87)

JUDGMENT
STRASBOURG

9 February 1993

In the case of Pine Valley Developments Ltd and Others v. Ireland[8],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[9] and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mrs D. Bindschedler-Robert, *President,*
Mr L.-E. Pettiti,
Mr C. Russo,
Mr J. De Meyer,
Mr S. K. Martens,
Mrs E. Palm,
Mr I. Foighel,
Mr R. Pekkanen,
Mr J. Blayney, *ad hoc judge,*
and also of Mr M.-A. Eissen, *Registrar,*

Having deliberated in private on 23 September 1992 and 1 February 1993,

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

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[8] The case is numbered 43/1990/234/300. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[9] As amended by Article 11 of Protocol No. 8 (P 8–11), which came into force on 1 January 1990.

PROCEDURE AND FACTS

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of Ireland ("the Government") on 11 July and 11 September 1990, respectively. It originated in an application (no. 12742/87) against Ireland lodged with the Commission in 1987 by two companies registered in that State, Pine Valley Developments Ltd ("Pine Valley") and Healy Holdings Ltd ("Healy Holdings"), and an Irish national, Mr Daniel Healy.

2. By judgment of 29 November 1991 ("the principal judgment"), the Court held, inter alia, that Healy Holdings and Mr Healy (hereinafter together referred to as "the applicants") had been victims of discrimination contrary to Article 14 of the Convention, taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1–1), in that section 6 of the Local Government (Planning and Development) Act 1982 ("the 1982 Act") had retrospectively validated all planning permissions in the relevant category other than theirs (Series A no. 222, paragraphs 61–64 of the reasons and point 6 of the operative provisions, pp. 26–27 and 29).

The only outstanding matter to be settled is the question of the application of Article 50 (art. 50). As regards the facts, reference should be made to paragraphs 8–34 of the principal judgment (ibid., pp. 8–17).

3. At the Court's hearing on 21 May 1991, counsel for the Government and the Delegate of the Commission both reserved their position on the claims for just satisfaction advanced by the applicants.

In the principal judgment, the Court therefore reserved the whole of this question and invited the Government and the applicants to submit, within the next three months, their written comments thereon and, in particular, to notify the Court of any agreement reached between them (paragraphs 67–68 of the reasons and point 8 of the operative provisions, pp. 28–29).

4. Following the failure of settlement negotiations and in accordance with the foregoing invitation and the President's directions, submissions and observations relating to the claims under Article 50 (art. 50) were filed by the applicants on 28 February, 19 March, 20 and 22 April and 30 June 1992, by the Government on 27 March, 10 April and 15 June 1992 and by the Delegate of the Commission on 10 April 1992. The materials furnished to the Court included valuations by chartered surveyors of the land owned by Healy Holdings, to which outline planning permission had initially been attached ("the Clondalkin site").

5. On 23 September 1992 the Court decided that there was no need to hold a hearing.

6. At the deliberations on 1 February 1993 Mr R. Ryssdal and Mr J. Pinheiro Farinha, who had sat to consider the merits of the case but were unable to be present on that date, were replaced by Mrs D. Bindschedler-Robert, who sat as President of the Chamber, and Mr S. K. Martens, substitute judge, respectively;

Mrs Bindschedler-Robert in her turn was replaced by Mr R. Pekkanen, also a substitute judge (Rules 21 para. 5, 22 para. 1, 24 para. 1 and 54 para. 2).

AS TO THE LAW

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

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

The applicants claimed under this provision compensation for pecuniary damage and reimbursement of costs and expenses, together with interest. Mr Healy also sought compensation for non-pecuniary damage.

A. Pecuniary damage

8. The applicants claimed compensation for the pecuniary damage they had sustained by reason of the fact that the 1982 Act had not retrospectively validated the outline planning permission which had been granted in 1977 in respect of the Clondalkin site and had been declared by the Supreme Court in 1982 to be a nullity.

9. It was common ground between the applicants, the Government and the Delegate of the Commission that this was a proper case for an award of compensation for pecuniary damage. The applicants stated that they were not seeking to recoup the profits which they would have earned had they been able to develop the site; their claim was formulated on the basis that the loss to be made good to them was the difference between the values, on the relevant date, of the site with and without the outline planning permission. It was also common ground between the applicants and the Government that the relevant date in this connection was 28 July 1982, being the date on which the 1982 Act had entered into force. Whilst the Delegate of the Commission expressed reservations about the use of that date, the Court considers that it is not an inappropriate one for the present purposes.

10. The principal point of contention on this part of the case was the value which the Clondalkin site would have had in July 1982 if the outline planning permission granted in 1977 had still been in force. Relying on valuation reports by chartered surveyors, the applicants and the Government advanced in this connection figures of IR£ 2,200,000 and IR£ 550,000, respectively.

11. Faced with a difference of this magnitude, the Court has sought in the first place to extract from the material before it elements in respect of which there is no, or a lesser degree of, dispute. In doing so, it has noted the following.

(a) Pine Valley purchased the 22-acre — or, according to the Government, 21.5-acre — Clondalkin site in November 1978, in an arms-length transaction, for IR£ 550,000, that is to say at a price of approximately IR£ 25,000 per acre.

(b) A site of 4.5 acres, considered by the Government to be comparable to that of the applicants, was sold at public auction in June 1981 for IR£ 200,000, that is IR£ 44,444 per acre. Whilst a calculation cannot be made on a simple per acre basis, this example demonstrates that the period from 1978 to 1981 witnessed an increase in the value of properties for development. Since it was not disputed that the applicants' land was a prime development site, there is no reason to suppose that by July 1982 its market value, with outline planning permission, would not have increased beyond the IR£ 550,000 obtaining in 1978. Indeed, the Government themselves estimated that if it had been capable of immediate development and if no abnormal costs had been involved (as to which points, see the next two sub-paragraphs), it would have been worth IR£ 1,600,000 in July 1982, that is approximately IR£ 73,000 per acre.

(c) The Government laid great stress on what they described as the "inherent defects" of the Clondalkin site, namely that it had an awkward shape, that access to it was by a narrow road over which the applicants had only a right of way and that it was not equipped with public water and sewage services. The applicants did not maintain that these points were factually incorrect, nor did they contest the quantum of the deductions which the Government suggested had to be made in order to arrive at an open-market value which took these drawbacks into account (IR£ 535,000); they pointed out rather, as regards the second and third of the defects, that the outline planning permission attaching to the land was not subject to any conditions as to the improvement of the access or the installation of public services. The Court, however, considers that these are matters which are relevant to an assessment of the open-market value of the site: a prospective purchaser would doubtless have taken into account any abnormal costs which he would have to incur in order to provide the development with appropriate facilities, such as access and services, even if the outline permission imposed no conditions to that effect.

(d) Although this was questioned by the applicants, the Government also relied on the fact that there would have been considerable delay in obtaining the requisite full planning approval and bye-law approval for the development of the site. The Court does not consider that those approvals could have been secured as rapidly as the applicants appear to suggest, since a purchaser would have had to decide on the precise type of development he wanted, have detailed plans prepared giving effect to such decision and finally have those plans approved by the planning authority. Furthermore, neither the Government nor the applicants referred in this context to the fact that the applicants' outline planning permission, had it been retrospectively validated by the 1982 Act, would have expired on

10 March 1984 and could not have been extended unless substantial works had already been carried out before that date (see the principal judgment, p. 10, para. 16). The resultant need for speedy action on the part of a developer was likely, in the Court's opinion, to have limited the circle of potential purchasers and, in consequence, the market value of the land.

(e) The applicants initially asserted that the July 1982 value of their site without the outline planning permission was IR£ 50,000, being the sum for which it was sold on the open market in 1988. However, they subsequently accepted the Government's proposition that its value in July 1982 for agricultural or amenity purposes was IR£ 65,000.

(f) The applicants themselves admitted that, in assessing compensation on the basis suggested by them, a deduction of IR£ 13,500 should be made to cover the potential rental income from the property in the period from 1982 to 1988.

12. The Court finds itself unable to accept the arguments advanced by the Government on the following points.

(a) It does not consider that, in quantifying the damage sustained by the applicants, allowance should be made for the capital gains tax to which they would have been liable on a sale of the site or for the stamp duty which such a transaction would have attracted. This is because what has to be assessed, having regard to the manner in which the applicants' claim was formulated, is the value of the land in their hands, rather than the net proceeds which they would have received had they disposed of it.

(b) The Court is not satisfied that the Government have established grounds for the making of the deduction referred to in their final submission as "Defer for 4 years at 15 % per annum: IR£ 590,000".

(c) The Court agrees with the Delegate of the Commission that no reduction should be made to reflect the fact that, in the principal judgment, it held that there had been no breach of Article 1 of Protocol No. 1 (P 1-1) to the Convention: that is a matter that had no influence on the quantum of the damage flowing from the discrimination of which the Court found that the applicants had been victims.

13. The applicants submitted that the Court's award should include interest from the date of the violation of the Convention, namely 28 July 1982, on the ground that if compensation had been paid to them on that date, it would have earned interest since then.

14. The Court agrees with the Delegate of the Commission that interest should be paid. Since the applicants' claim is not based on loss of development profits, it is not persuaded by the Government's argument that to award interest would amount to providing compensation for property speculators. Nor does it share the Government's view that the applicants are estopped from claiming interest by reason of their failure to do so in the domestic proceedings, since it would have been open to the court of its own motion to award interest in those proceedings.

In connection with the claim for interest, the Court considers that it should have regard to the rates applicable to Irish court judgments; the commercial rates cited by the applicants appear to be more appropriate to a claim based on lost development profits.

15. Having regard to the foregoing and making an assessment on an equitable basis, the Court concludes that the applicants should be awarded a global sum, including interest, of IR£ 1,200,000 under this head.

B. Non-pecuniary damage

16. Mr Healy claimed a "very substantial", but unquantified, sum for non-pecuniary damage, to compensate him for the effects which the violation found by the Court had had on his personal circumstances, namely loss of status, prospects and enjoyment of life, inability to obtain employment, and bankruptcy. He left the assessment of the award to the Court's discretion.

The Delegate of the Commission considered that Mr Healy should receive some compensation under this head. The Government took the contrary view, on the ground that he had not established a clear causal connection between the violation and the deterioration in his circumstances. In the alternative, they maintained that an award of compensation for pecuniary damage, coupled with the declaratory relief afforded by the principal judgment, would suffice to meet the justice of the case.

17. The Court is unable to accept the Government's submissions. Even assuming that, as they suggested, Mr Healy's personal difficulties originated in problems encountered with other development projects with which he was involved, there is no reason to suppose that the inability to proceed with the Clondalkin development did not compound and aggravate those difficulties. The violation of the Convention therefore caused him non-pecuniary damage and, in the Court's view, the finding in the principal judgment does not of itself constitute sufficient just satisfaction therefor.

Making an assessment on an equitable basis, the Court awards Mr Healy IR£50,000 under this head.

C. Costs and expenses

18. The applicants sought reimbursement of legal costs and expenses totalling IR£ 449,415.11, this amount being made up as follows:

(a) costs incurred in Ireland after 28 July 1982, in proceedings in the High Court and the Supreme Court, together with interest: IR£ 42,655.11;

(b) costs referable to the proceedings in Strasbourg, including those relating to the application of Article 50 (art. 50): IR£ 406,760.

The Government disputed this claim, which they saw as "greatly inflated": in their view, a reasonable sum (inclusive of value-added tax) for both the domestic and the Strasbourg proceedings would be IR£ 80,455.97.

The Delegate of the Commission too found that the amount claimed was high, but he left it to the Court to assess a reasonable figure.

19. The Court has examined the matter in the light of the principles that emerge from its case-law.

It notes, in the first place, that it is not contested that the costs claimed were actually and necessarily incurred. The amount sought in respect of the domestic proceedings should, it finds, be reimbursed in full: the quantum of fees and expenses cannot be regarded as unreasonable and the addition of interest is warranted (see, on the latter point, the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, p. 38, para. 81).

On the other hand, the Court agrees that the claim in respect of the Strasbourg proceedings is excessive. Taking into account the amount paid to Mr Healy by the Council of Europe by way of legal aid in respect of fees and making an assessment on an equitable basis, the Court awards for this item IR£ 70,000, together with any value-added tax that may be due.

D. Interest on the Court's award

20. The applicants also sought interest on the sums awarded (at least, those for pecuniary damage and for costs) for the period between the date of the present judgment and the date of payment.

21. Neither the Government nor the Commission adverted to this claim. The Court does not consider it appropriate to accede to it in this instance.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that Ireland is to pay, within three months:

(a) to Healy Holdings Ltd and Mr Healy jointly the sum of IR£ 1,200,000 (one million two hundred thousand Irish pounds) for pecuniary damage, the sum of IR£ 42,655.11 (forty-two thousand six hundred and fifty-five Irish pounds and eleven pence) for domestic costs and expenses and the sum of IR£ 70,000 (seventy thousand Irish pounds), together with any value-added tax that may be due, for Strasbourg costs and expenses;

(b) to Mr Healy the sum of IR£ 50,000 (fifty thousand Irish pounds) for non-pecuniary damage;

2. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and notified in writing under Rule 55 para. 2, second sub-paragraph, of the Rules of Court on 9 February 1993.

Denise BINDSCHEDLER-ROBERT — *President*
Marc-André EISSEN — *Registrar*

ANNEX 16

Information Note on the Court's case-law No. 102
November 2007

Hamer v. Belgium – 21861/03

Judgment 27.11.2007 [Section II]

Article 6. Criminal proceedings

Article 6–1. Criminal charge

Proceedings resulting in the demolition of a house built without planning permission: *article 6 applicable*

Article 1 of Protocol No. 1

Article 1 para. 1 of Protocol No. 1. Possessions

Holiday home whose destruction was only ordered several decades later after it was discovered that it had been built without planning permission: *article 1 of Protocol No. 1 applicable*

Article 1 para. 2 of Protocol No. 1. Control of the use of property

Order for the demolition of a holiday home built in woodlands to which a ban on building applied: *no violation*

Facts: In 1967 the applicant's parents built a holiday home on a piece of land without planning permission. When the applicant's mother died, the deed concerning the partition of the estate with her father expressly mentioned the existence of the building and was registered by the authorities, who charged a registration fee. When the applicant's father died the notarial deed of partition expressly mentioned the house as a holiday home and the applicant paid the corresponding inheritance tax. Every year she paid an advance on tax payable on immovable property and the property tax payable on a second home. The partly government-controlled water supply company connected the house to the mains without any reaction from the authorities. Not until 1994 did the police draw up two reports, one concerning the felling of trees on the property in violation of forestry regulations, and one for building a house without planning permission in a woodland area where no planning permission could be granted. In 1999 the applicant was summoned by the public prosecutor for having a weekend home that had been built without permission, and for felling about fifty pine trees in violation of the Forestry Decree. The Criminal Court acquitted the

applicant. The prosecuting authorities appealed and the Court of Appeal upheld the judgment in so far as it acquitted the applicant on the tree-felling count. However, it found her guilty of keeping a house built without authorisation, by virtue of a decree on the organisation of regional development. Noting that the proceedings had taken longer than was reasonable, the Court of Appeal simply declared the applicant guilty and ordered her to restore the site to its original state, which meant demolishing the house. The applicant lodged an appeal on points of law, but to no avail. The Court of Cassation did not consider having to restore the site to its original state as a penalty but as a civil measure. The house was demolished pursuant to an enforcement order.

Law: Article 6 § 1 (reasonable time) — The fact that the Court of Appeal had pronounced a simple declaration of guilt against the applicant in view of the excessive length of the proceedings did not make her any less a "victim" in so far as that court had ordered her at the same time to restore the site to its original state.

Article 6 was applicable under its criminal limb as the demolition measure could be considered a "penalty" for the purposes of the Convention.

While the length of the proceedings on the merits did not appear unreasonable (they had taken a little over three and a half years for three levels of jurisdiction), the police report noting the unlawful nature of the construction marked the time from which the applicant had been "accused" within the meaning of the case-law and from which the reasonable time ran. The proceedings had therefore taken between 8 and 9 years for three levels of jurisdiction, including 5 years at the investigation stage, although the case had not been a particularly complex one.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1 — The construction at issue had existed for twenty-seven years before the domestic authorities had reported the offence. Reporting infringements of spatial planning legislation was irrefutably the responsibility of the authorities, as was making the requisite resources available to do so. The Court was even able to consider that the authorities had been aware of the existence of the construction at issue as the corresponding taxes had been paid. In short, the authorities had tolerated the situation for twenty-seven years and there had been no change for another ten years after the offence had been reported. After such a long period of time, the applicant's proprietary interest in using her holiday home had been sufficiently great and established to constitute a substantive interest and, therefore, a "possession", and she had had a "legitimate expectation" that she could go on using her property. The interference with the applicant's right to the peaceful enjoyment of her property that resulted from the demolition of her house by order of the authorities had been provided for

by law and pursued the aim of controlling the use of property in accordance with the general interest, by bringing the property concerned into conformity with a land-use plan establishing a woodland area on which no building could be authorised.

Concerning the proportionality of the interference, the Court pointed out that the environment had a value, and that economic imperatives and even certain fundamental rights, such as property rights, should not take precedence over environmental considerations, particularly when the State had passed laws on the subject. The public authorities then had a responsibility to take the necessary steps at the proper time to ensure that the environmental protection measures they had decided to implement were not rendered ineffectual. Restrictions on property rights were therefore permissible, provided, of course, that a reasonable balance was struck between the individual and collective interests involved.

The disputed measure had pursued the legitimate aim of protecting a woodland area where no building was permitted. The owners of the holiday home had been able to enjoy it in peace for a total uninterrupted period of thirty-seven years. The official documents, the taxes paid and the work done indicated that the authorities knew or should have known about the existence of the house for a long time, and once the offence had been reported, they had let another five years go by before prosecuting, thereby helping to perpetuate a situation which could only be prejudicial to the protection of the woodland area the law was meant to protect.

However, there was no provision in Belgian law for regularising a building erected in such a woodland area. The offence was not subject to limitation under Belgian law and the authorities were free to decide at any time to enforce the law. No measure other than restoring the site to its original state had seemed appropriate because of the undeniable interference with the integrity of a woodland area where no building was permitted. Furthermore, unlike the position in cases where there was implicit consent on the part of the authorities, this house had been built without any official authorisation. For those reasons the interference had not been disproportionate.

CONCLUSION: no violation (unanimously).
Article 41 — EUR 5,000 in respect of non-pecuniary damage.

ANNEX 17

Information Note on the Court's case-law No. 110
July 2008

Turgut and Others v. Turkey – 1411/03

Judgment 8.7.2008 [Section II]

Article 1 of Protocol No. 1

Article 1 para. 1 of Protocol No. 1. Deprivation of property

Registration of land belonging to the applicants in the name of the Treasury for nature-conservation purposes without payment of compensation: *violation*

Facts: The applicants claimed that a piece of land measuring more than 100,000 square metres had been owned by their families for more than three generations. In 1962 the Ministry of Forestry and the Treasury brought court proceedings to have the title to the land in question annulled. In its judgment the court found that the land was part of the State forest and that it could not be privately owned. In 1974, following an amendment of Turkish legislation on the delimitation of State forests, the case was referred back to the court for new expert opinions concerning the disputed land. Based on expert reports it had commissioned, the court ordered the land to be registered in the land register under the applicants' names. In 1978 the Court of Cassation, considering the expert reports insufficient, remitted the case to the court. New expert reports concluded that the land was located within the perimeter of the State forest. In a judgment delivered in 2001 the court ruled that the land was part of the State forest and ordered its registration in the land register as property belonging to the Treasury. The court based its decision on experts' reports, on the principle emerging from the case-law of the Court of Cassation to the effect that title to property forming part of the national forestry domain had no legal value and on the constitutional principle of the inalienability of ownership of State forests. That judgment was upheld by the Court of Cassation, which subsequently dismissed a revision request lodged by the applicants. Yet 50-odd private housing units and a military holiday camp for officers in the armed forces had since been built on the disputed land.

Law: There had been an interference with the applicants' right to the peaceful enjoyment of their possessions, as they had been deprived of their property. The applicants' good faith was not in dispute. Until the annulment of their title

and its re-registration in the name of the Treasury, the applicants had been the rightful owners of the property, with all the consequences arising from their title, and they had further benefitted from "legal certainty" as to the validity of the title recorded on the land register, which provided undisputable evidence of ownership. The applicants had been deprived of their property by a judicial decision. In spite of their protests as to the nature of the land, the domestic courts had finally annulled their ownership title in application of the provisions of the Constitution and on the strength of expert reports according to which the land was part of the national forestry domain. Having regard to the reasons given by the domestic courts, the purpose of the deprivation imposed on the applicants, namely the protection of nature and forests, fell within the public interest. The Court had often dealt with questions linked to environmental protection, and stressed the importance of the subject. The protection of nature and forests, and of the environment in general, was a matter of considerable and constant concern to public opinion and consequently to the public authorities. Economic imperatives and even certain fundamental rights, including the right of property, should not be placed before considerations relating to environmental protection, in particular when there was legislation on the subject.However, where there was deprivation of property, consideration had to be given to the means of compensation provided for in domestic legislation. The applicants had not received any compensation for the transfer of their property to the Treasury, in conformity with the Constitution. No exceptional circumstance had been raised in order to justify the lack of compensation. Consequently, the failure to award the applicants any compensation had upset, to their detriment, the fair balance that had to be struck between the demands of the general interest of the community and the requirements of the protection of individual rights.

CONCLUSION: violation (unanimously).

ANNEX 18

Information Note on the Court's case-law No. 128
March 2010

Brosset-Triboulet and Others v. France [GC] – 34078/02

Judgment 29.3.2010 [GC]

Article 1 of Protocol No. 1

Article 1 para. 2 of Protocol No. 1. Control of the use of property

Obligation on owners to demolish, at their own expense and without compensation, house they had lawfully purchased on maritime public land: *no violation*

[This summary also covers the judgment in the case of *Depalle v. France*, no. 34044/02, 29 March 2011]

Facts — In the *Depalle* case the applicant and his wife had purchased a dwelling house in 1960 that had been partly built on land on the coast falling within the category of maritime public property. A series of decisions authorising temporary occupancy of maritime public property subject to certain conditions, which were regularly renewed up until December 1992, gave the applicants legal access to the property. The *Brosset-Triboulet* case concerns similar facts. In 1945 the applicants' mother had acquired a dwelling house falling within the category of maritime public property. The successive occupants of the land had had the benefit of a prefectoral decision authorising occupancy that had been systematically renewed between September 1909 and December 1990. In September 1993 the prefect informed the parties in both cases that the entry into force of the Coastal Areas (Development, Protection and Enhancement) Act ("the Coastal Areas Act") no longer allowed him to renew authorisation on the same terms and conditions because the Act ruled out any private use of maritime public property, including as a dwelling house. However, he proposed to enter into an agreement with them that would authorise limited and strictly personal use and prohibit them from transferring or selling the land and houses and from carrying out any work on the property other than maintenance and would include an option for the State, on the expiry of the authorisation, to have the property restored to its original condition or to reuse the buildings. The parties rejected the offer and, in May 1994, applied to the Administrative Court for the prefect's decision to be set aside. In December 1995 the prefect lodged an application with the

Administrative Court citing the parties as defendants in respect of an offence of unlawful interference with the highway as they continued to unlawfully occupy public property. He also sought an order against them to restore the foreshore to its original state prior to construction of the dwelling houses, at their expense and without compensation. As a final court of appeal, the *Conseil d'Etat* held in March 2002 that the property in question was part of maritime public property, that the parties could not rely on any right *in rem* over the land in question or over the buildings and that the obligation to restore the land to its original state without any prior compensation was not a measure prohibited by Article 1 of Protocol No. 1 to the European Convention on Human Rights.

Law — Article 1 of Protocol No. 1: *a) Applicability* — In strictly applying the principles governing public property — which authorised only precarious and revocable private occupancy — the domestic courts had ruled out any recognition of a right *in rem* over the houses in favour of the applicants. The fact that the applicants had occupied them for a very long time had not had any effect on the classification of the property as inalienable and imprescriptible maritime public property. In the circumstances, and notwithstanding the fact that the houses had been acquired in good faith, as the decisions authorising occupancy had not constituted rights *in rem* over public property the Court doubted that they could reasonably have expected to continue having peaceful enjoyment of the property solely on the basis of the decisions authorising occupancy. All the prefectoral decisions had referred to the obligation, in the event of revocation of the decision authorising occupancy, to restore the site to its original state if so required by the authorities. However, the fact that the domestic laws of a State did not recognise a particular interest as a property right did not necessarily prevent the interest in question, in some circumstances, from being regarded as a possession within the meaning of Article 1 of Protocol No. 1. In the present case the time that had elapsed had had the effect of vesting in the applicants a proprietary interest in peaceful enjoyment of their houses that was sufficiently established and weighty to amount to a possession.

Conclusion: Article 1 of Protocol No. 1 applicable.

b) Merits — Having regard to the principles governing this category of property, and to the fact that the demolition measure had not been implemented to date, there had not been a deprivation of possessions. The non-renewal of the decisions authorising private occupancy of the public property, which the applicants must have anticipated would one day affect them, and the resulting order to demolish the houses could be analysed as control of the use of property in accordance with the general interest. Furthermore, the reasons given by the Prefect for refusing to renew authorisation had been based on the provisions of the Coastal Areas Act.

The interference had pursued a legitimate aim that was in the general interest: to promote unrestricted access to the shore. It therefore remained to be determined whether, having regard to the applicants' interest in keeping their houses, the order to restore the site to its original state was a means proportionate to the aim pursued. Regional planning and environmental conservation policies, where the community's general interest was pre-eminent, conferred on the State a wide margin of appreciation. Since the acquisition by the applicants of the possessions, or possibly even since the houses had been built, the authorities had been aware of the existence of the houses because they had been occupied on the basis of a decision specifying that the dyke had to be accessible to the public at all times. Each prefectoral decision authorising occupancy had specified the length of the authorisation and the authorities' right to modify or withdraw the authorisation should they deem it necessary, on any ground whatsoever, without the permittee thereby acquiring a right to claim any compensation. Furthermore, it had been specified that the permittee must, if required, restore the site to its original state by demolishing the constructions built on public land, including those existing on the date on which the decision had been signed. Accordingly, the applicants had always known that the decisions authorising occupancy were precarious and revocable and, therefore the authorities could not be deemed to have contributed to maintaining uncertainty regarding the legal status of the property. Admittedly, the applicants had had peaceful enjoyment of the possession for a long time. The Court did not, however, see any negligence on the part of the authorities, but rather tolerance of the ongoing occupancy, which had, moreover, been subject to certain rules. Accordingly, there was no evidence to support the applicants' suggestion that the authorities' responsibility for the uncertainty regarding the status of the houses had increased with the passage of time. It was not until 1986 that the applicants' situation had changed, following the enactment of the Coastal Areas Act which had put an end to a policy of protecting coastal areas merely by applying the rules governing public property at a time when development and environmental concerns had not reached the degree witnessed today. In any event, the aforementioned tolerance could not result in a legalisation *ex post facto* of the status quo. Regarding the appropriateness of the measure in terms of the general interest in protecting coastal areas, it was first and foremost for the national authorities to decide which type of measures should be imposed. The refusal to renew authorisation of occupancy and the measure ordering the applicants to restore the site to its condition prior to the construction of the houses corresponded to a concern to apply the law consistently and more strictly. Having regard to the appeal of the coast and the degree to which it was coveted, the need for planning control and unrestricted public access to the coast made it necessary to adopt a firmer policy of management of this part of the country. The same was true of all European coastal areas. Allowing an exemption from

the law in the case of the applicants, who could not rely on acquired rights, would go against the aims of the Coastal Areas Act and undermine efforts to achieve a better organisation of the relations between private use and public use. Moreover, the applicants had refused the compromise solution and the Prefect's proposal to continue enjoyment of the houses subject to conditions, which could have provided a solution reconciling the competing interests and did not appear unreasonable. Lastly, having regard to the rules governing public property, and considering that the applicants could not have been unaware of the principle that no compensation was payable, which had been clearly stated in every decision issued since 1961 and 1951 respectively, the lack of compensation could not, in the Court's view, be regarded as a measure disproportionate to control of the use of the applicants' property, carried out in pursuit of the general interest. The applicants would not bear an individual and excessive burden in the event of demolition of their houses with no compensation. Accordingly, the balance between the interests of the community and those of the applicants would not be upset.

CONCLUSION: no violation (thirteen votes to four).

Decisions of the ECHR versus Ukraine (official translation)

ANNEX 19

FIFTH SECTION
CASE OF DUBETSKA AND OTHERS v. UKRAINE

(Application no. 30499/03)

JUDGMENT

This version was rectified on 2 May and 18 October 2011 under Rule 81 of the Rules of Court

STRASBOURG 10 February 2011
FINAL 10/05/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Dubetska and Others v. Ukraine

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:
Peer Lorenzen, *President,*
Karel Jungwiert,
Mark Villiger,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska,
Angelika Nußberger, *judges,*
and Claudia Westerdiek, *Section Registrar,*
Having deliberated in private on 18 January 2011,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 30499/03) against Ukraine lodged with the Court on 4 September 2003 under Article 34 of the Convention for the

Protection of Human Rights and Fundamental Freedoms ("the Convention") by eleven Ukrainian nationals: Ms Ganna Pavlivna Dubetska, born in 1927; Ms Olga Grygorivna Dubetska, born in 1958; Mr Yaroslav Vasylyovych Dubetskyy, born in 1957; Mr Igor Volodymyrovych Nayda, born in 1958; Ms Myroslava Vasylivna Nayda[10], born in 1960; Mr Arkadiy Vasylyovych Gavrylyuk, born in 1932; Ms Ganna Petrivna Gavrylyuk, born in 1939; Ms Alla Arkadiyivna Vakiv, born in 1957; Ms Mariya Yaroslavivna Vakiv, born in 1982; Mr Yaroslav Yosypovych Vakiv, born in 1955; and Mr Yuriy Yaroslavovych Vakiv, born in 1979.

2. The applicants were represented by Ms Y. Ostapyk, a lawyer practising in Lviv. The Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev.

3. The applicants alleged that the State authorities had failed to protect their home, private and family life from excessive pollution generated by two State-owned industrial facilities.

4. On 15 October 2008 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. On an unspecified date after the case was communicated the applicant Mr Arkadiy Gavrylyuk died. On 18 September 2009 the applicants' representative requested that his claims be excluded from consideration.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants are Ukrainian nationals residing in the hamlet of Vilshyna in the Lviv region.

A. Preliminary information

7. The first to fifth applicants are members of an extended family residing in a house owned by the first applicant (the Dubetska-Nayda family house). This house was built by the family in 1933.

8. The remaining applicants are members of an extended family residing in a house constructed by the sixth applicant (the Gavrylyuk-Vakiv family house). This house was built by him in 1959. It is unclear whether a permit for construction of this house was obtained in 1959. Subsequently the house was officially registered, to which a property certificate of 1988 is witness.

9. The applicants' houses are located in Vilshyna hamlet, administratively a part of Silets village, Sokalskyy district, Lviv Region. The village is located in the Chervonograd coal-mining basin.

10. In 1955 the State began building, and in 1960 put into operation, the Velykomostivska No. 8 coal mine, whose spoil heap is located 100 metres from

[10] Rectified on 18 October 2011: the text was "Myroslava Yaroslavivna Nayda".

the Dubetska-Vakiv family house. In 2001 this mine was renamed the Vizeyska mine of the Lvivvugillya State Holding Company ("the mine"; *Шахта «Візейська» ДХК «Львіввугілля»*). In July 2005 a decision was taken to close the mine as unprofitable. The closure project is currently under way.

11. In 1979 the State opened the Chervonogradska coal processing factory ("the factory"; *Центрально-збагачувальна фабрика «Червоноградська»*) in the vicinity of the hamlet, initially managed by the Ukrzakhidvugillya State Company. In 2001 the factory was leased out to the Lvivsystemenergo Closed Joint Stock Company (*ЗАТ «Львівсистеменерго»*). Subsequently the Lvivsystemenergo CJSC was succeeded by the Lviv Coal Company Open Joint Stock Company. In 2007 a decision was taken to allow the factory to be privatised. It is not clear whether the factory has already been privatised.

12. In the course of its operation the factory has piled up a 60-metre spoil heap 430 metres from the Dubetska-Nayda family house and 420 metres from the Gavrylyuk-Vakiv family house. This spoil heap was not subject to privatisation and remained State property.

B. The environmental situation in Vilshyna hamlet

1. General data concerning pollution emitted by the factory and the mine

13. According to a number of studies by governmental and non-governmental entities, the operation of the factory and the mine has had adverse environmental effects.

14. In particular, in 1989 the Sokalskyy District Council Executive Committee ("the Sokalskyy Executive Committee"; *Виконавчий комітет Сокальської районної ради*) noted that the mine's and the factory's spoil heaps caused continuous infiltration of ground water, resulting in flooding of certain areas.

15. According to an assessment commissioned by the State Committee for Geology and Mineral Resource Utilisation, jointly with the Zakhidukrgeologiya State geological company (*Державний комітет України по геології та використанню надр; Державне геологічне підприємство «Західукргеологія»)* in 1998, the factory was a major contributor to pollution of the ground water, in particular on account of infiltration of water from its spoil heap. The authors of the assessment contended, in particular, that:

"All the coal-mining industry operational in the region for over forty years has been negatively affecting the environment: spoil heaps from the mines and the coal-processing factory have been created, from which dust with a high concentration of toxic components spreads into the atmosphere and the soil... systems of water drainage of the mines... and cesspools... of the coal-processing factory are sources of pollution of surface and underground waters...

Rocks from the spoil heaps contain a variety of toxic heavy metals, leaching of which results in pollution of soils, surface and underground waters...

Very serious polluters... are cesspools of mining waters and factory tailing ponds..., which in the event of the slightest disturbance of the hydro-insulation cause pollution of surface and ground waters ...

The general area of soil subsidence is about 70 square kilometres[11]... the deepest subsidence (up to 3.5 metres) corresponds to areas with the most mining activity...

During construction of the water inlets... deep wells were drilled which reached those [mineralised] waters. All this inevitably affected the health of people living in the area, first of all the children...

Extremely high pollution levels... were found in the hamlet of Vilshyna, not far from the coal-processing factory and mine no. 8 spoil heaps, in the wells of Mr T. and Mr Dubetskyy. We can testify that even the appearance of this water does not give grounds to consider it fit for any use. People from this community should be supplied with drinking-quality water or resettled..."

16. In 2001 similar conclusions were proposed in a white paper published by Lviv State University.

17. On 20 April 2000 the Chervonograd Sanitary Epidemiological Service ("the Sanitary Service"; *Червоноградська міська санітарно-епідеміологічна служба*) recorded a 5.2-fold excess of dust concentration and a 1.2-fold excess of soot concentration in ambient air samples taken 500 metres from the factory's chimney.

18. On 1 August 2000 the Sanitary Service sampled water in the Vilshyna hamlet wells and found it did not meet safety standards. In particular, the concentration of nitrates exceeded the safety limits by three- to five-fold, the concentration of iron by five- to ten-fold and that of manganese by nine- to eleven-fold.

19. On 16 August 2002 the Ministry of Ecology and Natural Resources (*Міністерство екології та природних ресурсів*) acknowledged in a letter to the applicants that mining activities were of major environmental concern for the entire Chervonograd region. They caused soil subsidence and flooding. Heavy metals from mining waste penetrated the soil and ground waters. The level of pollution of the soil by heavy metals was up to ten times the permissible concentration, in particular in Silets village, especially on account of the operation of the factory and the mine.

20. On 28 May 2003 factory officials and the Chervonograd Coal Industry Inspectorate (*Червоноградська гірничо-технічна інспекція з нагляду у вугільній промисловості*) recorded infiltration of water from the foot of the factory's spoil heap on the side facing Vilshyna hamlet. They noted that water flowing from the heap had accumulated into one hectare of brownish salty lake.

21. In 2004 the Zakhidukrgeologiya company published a study entitled "Hydrogeological Conclusion concerning the Condition of Underground Waters in the Area of Mezhyriccha Village and Vilshyna Hamlet", according to which in

[11] Rectified on 2 May 2011: the text was "70 square meters".

the geological composition of the area there were water-bearing layers of sand. The study also indicated that even before the beginning of the mining works the upper water-bearing layers were contaminated with sodium and compounds thereof as well as iron in the river valleys. However, exploitation of the mines added pollution to underground waters, especially their upper layers.

22. On 14 June 2004 the Lviv Chief Medical Officer for Health (*Головний державний санітарний лікар Львівської області*) noted that air samples had revealed dust and soot exceeding the maximum permissible concentrations 350 metres from the factory, and imposed administrative sanctions on the person in charge of the factory's boiler.

23. In September 2005 Dr Mark Chernaik of the Environmental Law Alliance Worldwide reported that the concentration of soot in ambient air samples taken in Vilshyna hamlet was 1.5 times higher than the maximum permissible concentration under domestic standards. The well water was contaminated with mercury and cadmium, exceeding domestic safety standards twenty-five-fold and fourfold respectively. According to the report, the hamlet inhabitants were exposed to higher risks of cancer and respiratory and kidney diseases.

2. The applicants' accounts of damage sustained by them on account of the mine and factory operation

24. The applicants first submitted that their houses had sustained damage as a result of soil subsidence caused by mining activities and presented an acknowledgement of this signed by the mine's director on 1 January 1999. According to the applicants, the mine promised to pay for the repair of their houses but never did so.

25. Secondly, the applicants alleged that they were continuing to suffer from a lack of drinkable water. They contended that until 2009 the hamlet had no access to a mains water supply. Using the local well and stream water for washing and cooking purposes caused itching and intestinal infections. The applicants presented three photographs reportedly of the water available to them near their home. One photo entitled "water in a well in Vilshyna hamlet" pictured a bucket full of yellow-orange water near a well. The second photo entitled "a stream near the house" pictured a small stream of a bright orange colour. The third photo entitled "destruction of plant life by water from the coal-processing factory waste heap" depicted a brownish lake with many stumps and several dead bushes in the middle of it.

26. The applicants further contended that from 2003 the Lvivsystemenergo CJSC had been bringing, at its own expense, drinkable water into the hamlet by truck and tractor. However, this water was not provided in sufficient quantity. In evidence of this statement, the applicants presented a photograph picturing five large buckets of water and entitled "weekly water supply".

27. The applicants further alleged that the water supply was not always regular. In support of this argument they produced letters from the Sokalskyy District Administration dated 9 July 2002 and 7 March 2006, acknowledging recent irregularities in supply of drinking water.

28. Thirdly, some of the applicants were alleged to have developed chronic health conditions associated with the factory operation, especially with air pollution. They presented medical certificates which stated that Olga Dubetska and Alla Vakiv were suffering from chronic bronchitis and emphysema and that Ganna Gavrylyuk had been diagnosed with carcinoma.

29. Fourthly, the applicants contended that their frustration with environmental factors affected communication between family members. In particular, lack of clean water for washing reportedly caused difficulties in relations between spouses. Younger family members sought to break away from the older ones in search of better conditions for their growing children.

30. The applicants, however, did not relocate. They alleged that they would not be able to sell houses located in a contaminated area or to find other sources of funding for relocation to a safer community without State support. In evidence, the applicants presented a letter from a private real estate agency, S., dated September 2009, stating the following:

"since in Vilshyna hamlet .. there has been no demand for residential housing for the past ten years because of the situation of this hamlet in technogenically polluted territory and subsidence of soil on its territory... it is not possible to determine the market value of the house."

C. Administrative decisions addressing the harmful effects of the factory and mine operation

1. Decisions aimed at improving the environmental situation in the region

31. In November 1995 the Sanitary Service ordered the factory to develop a plan for management of the buffer zone.

32. On 5 June 1996 the Sanitary Service found that the factory had failed to comply with its order and ordered suspension of its operation. In spite of this measure, the factory reportedly continued to operate, with no further sanctions being imposed on its management.

33. On 7 April 2000 and 12 June 2002 the State Commission for Technogenic and Ecological Safety and Emergencies ("The Ecological Safety Commission"; *Державна комісія з питань техногенно-екологічної безпеки та надзвичайних ситуацій*) ordered a number of measures to improve water management and tackle soil pollution in the vicinity of the factory.

34. On 14 April 2003 the Lviv Regional Administration (*Львівська обласна державна адміністрація*) noted that the overall environmental situation had not improved since the Ecological Safety Commission's decision of 7 April 2000,

as no funds had been allocated by the State Budget for implementation of the relevant measures.

35. On 27 January 2004 the Sanitary Service found that the mine had failed to comply with its instruction of 4 December 2003 as to the development of a plan for management of the buffer zone, and ordered suspension of its operation. However, the mine reportedly continued to operate.

36. On 13 July 2005 the Marzeyev State Institute for Hygiene and Medical Ecology (*Інститут гігієни та медичної екології ім. О.М. Марзеєва АМН України*) developed a management plan for the factory buffer zone. The authors of the report acknowledged that the factory was polluting the air with nitrogen dioxide, carbon oxide, sulphuric anhydride and dust. They noted, however, that according to their studies ambient air samples taken more than 300 metres from the factory did not contain excessive pollution. The plan provided for implementation of a number of measures aimed at improvement of the hydro-insulation of the spoil heap, as well as reduction of its height to 50 metres. The authors concluded that in view of such measures it was possible to establish a general buffer zone at 300 metres for the entire factory site.

37. Later in the year the Ministry of Health (*Міністерство охорони здоров'я*) approved the Marzeyev Institute's plan, on an assumption that the height of the spoil heap would be reduced by August 2008.

38. On 29 April 2009 the Sanitary Service fined the factory director for failing to implement the measures in the factory buffer zone management plan.

2. Decisions concerning the applicants' resettlement

39. On 20 December 1994 the Sokalskyy Executive Committee noted that eighteen houses, including those of the applicants, were located within the factory spoil heap 500-metre buffer zone, in violation of applicable sanitary norms. It further allowed the Ukrzakhidvugillya company to resettle the inhabitants and to have these houses demolished. The Committee further obliged the company director to provide the applicants with housing by December 1996. This decision was not enforced.

40. In 1995 the Sokalskyy Executive Committee amended its decision and allowed the residents to keep their former houses following resettlement for recreational and gardening use.

41. On 7 April 2000 the Ecological Safety Commission noted that eighteen families lived within the limits of the factory buffer zone and commissioned the Ministry of Fuel and Energy and local executive authorities to ensure their resettlement in 2000–2001. The names of the families appear not to have been listed.

42. In December 2000 and 2001 the applicants enquired of the Ministry of Fuel and Energy when they would be resettled and received no answer.

43. In 2001 the Lviv Regional Administration included resettlement of eighteen families (names not listed) from the factory sanitary security zone in their annual activity plan, indicating the State budget as the funding source and referring to the Ecological Safety Commission's decision of 7 April 2000.

44. On 12 June 2002 the Ecological Safety Commission noted that its decision of 7 April 2000 remained unenforced and ordered the Sokalskyy District Administration, the Silets Village Council and the factory to work together to ensure the resettlement of families from the factory spoil heap buffer zone by the end of 2003.

45. In June 2002 the applicants, along with other village residents, complained to the President of Ukraine about the non-enforcement of the decisions concerning their resettlement. The President's Administration redirected their complaint to the Lviv Regional Administration and the Ministry of Ecology and Natural Resources for consideration.

46. On 16 August 2002 the Ministry of Ecology and Natural Resources informed the Vilshyna inhabitants in response to their complaint that it had proposed that the Cabinet of Ministers ensure prompt resettlement of the inhabitants from the factory buffer zone in accordance with the decision of the Ecological Safety Commission of 7 April 2000.

47. On 14 April 2003 the Lviv Regional Administration informed the applicants that it had repeatedly requested the Prime Minister and the Ministry of Fuel and Energy to provide funding for the enforcement of the decision of 7 April 2000.

D. Civil actions concerning the applicants' resettlement

1. Proceeding brought by the Dubetska-Nayda family

48. On 23 July 2002 the Dubetska-Nayda family instituted civil proceedings in the Chervonograd Court (*Місцевий суд м. Червонограда*) seeking to oblige the factory to resettle them from its buffer zone. Subsequently the Lvivvugillya State Company was summoned as a co-defendant.

49. The first hearing was scheduled for 28 October 2003. Subsequent hearings were scheduled for 12 November and 18 December 2003, 26 and 30 April, 18 May, 18 and 30 June, 19 July and 22 December 2004, and 25 November, 6, 20 and 26 December 2005. On some four occasions hearings were adjourned on account of a defendant's absence or following a defendant's request for an adjournment.

50. On 26 December 2005 the Chervonograd Court found that the plaintiffs resided in the mine's buffer zone and ordered the Lvivvugillya State Company holding it to resettle them. It further dismissed the applicants' claims against the factory, finding that their house was outside its 300-metre buffer zone.

51. This judgment was not appealed against and became final.

52. On 3 May 2006 the Chervonograd Bailiffs' Service initiated enforcement proceedings.

53. On 19 June 2006 the Bailiffs fined the mine's director for failing to ensure the enforcement of the judgment. The latter appealed against this decision.

54. On 26 June 2006 the director informed the Bailiffs that the mine could not comply with the judgment. It neither had available residential housing at its disposal nor was it engaged in constructing housing, as it had received no appropriate allocations from the State budget.

55. The judgment remains unenforced to the present date.

2. Proceedings brought by the Gavrylyuk-Vakiv family

56. On 23 July 2002 the Gavrylyuk-Vakiv family, similarly to the Dubetska-Nayda family, instituted civil proceedings at Chervonograd Court seeking to be resettled outside the factory buffer zone.

57. Subsequently the factory was replaced by the Lvivsystemenergo CJSC as a defendant in the proceedings.

58. The first hearing was scheduled for 29 September 2003. Subsequent hearings were scheduled for 6, 17 and 30 October 2003, and 15 and 30 April, 18 May, 18 and 21 June 2004.

59. On 21 June 2004 Chervonograd Court dismissed the applicants' claims. The court found, in particular that, although the plan for management of the factory buffer zone was still under way, there were sufficient studies to justify the 300-metre zone. As the plaintiffs' house was located outside it, the defendant could not be obliged to resettle them. Moreover, the defendant had no funds to provide the applicants with new housing. The court found the decision of 1994 concerning the applicants' resettlement irrelevant and did not comment on subsequent decisions concerning the matter.

60. On 20 July 2004 the applicants appealed. They maintained, in particular, that the law provided that the actual concentration of pollutants on the outside boundaries of the zone should meet applicable safety standards. In their case, the actual level of pollution outside the zone exceeded such standards, as evidenced by a number of studies, referring to the factory operation as the major source of pollution. Furthermore, the decision of the Sokalskyy Executive Committee of 1994 could not have been irrelevant, as it remained formally in force.

61. On 28 March 2005 the Lviv Regional Court of Appeal *(Апеляційний суд Львівської області)* upheld the previous judgment and agreed with the trial court's reasoning. In response to the applicants' arguments concerning the actual pollution level at their place of residence, the court noted that the hamlet was supplied with imported water and that in any event, while the applicable law included penalties against polluters, it did not impose a general obligation on them to resettle individuals.

62. On 23 April 2005 the applicants appealed on points of law, relying on essentially the same arguments as in their previous appeal.

63. On 17 September 2007 the Khmelnytskyy Regional Court of Appeal *(Апеляційний суд Хмельницької області)* dismissed the applicants' request for leave to appeal on points of law.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine

64. Relevant provisions of the Constitution read as follows:

Article 16

"To ensure ecological safety and to maintain the ecological balance on the territory of Ukraine, to overcome the consequences of the Chernobyl catastrophe — a catastrophe of global scale, and to preserve the gene pool of the Ukrainian people, is the duty of the State."

Article 50

"Everyone has the right to an environment that is safe for life and health, and to compensation for damages inflicted through the violation of this right..."

B. Law of Ukraine "On Local Councils of People's Deputies and Local and Regional Self-Government" of 7 December 1990 (repealed with effect from 21 May 1997)

65. According to Article 57 of the Law, private and public entities and individuals could be held liable under the law for failure to comply with lawful decisions of bodies of regional self-government (which included executive committees of district councils).

66. Subsequent legislation concerning local self-government did not envisage the existence of such a body as an executive committee of a district council.

C. Law of Ukraine "On Waste" of 5 March 1998

67. Relevant provisions of the Law "On Waste" read as follows:

Section 9. Property rights to waste

"The State is the owner of waste produced on State property ... On behalf of the State the management of waste owned by the State shall be carried out by the Cabinet of Ministers."

D. Law of Ukraine "On Measures to Ensure the Stable Operation of Fuel and Energy Sector Enterprises" of 23 June 2005

68. The above Law introduced a new mechanism for payment and amortisation of companies' debts for energy resources. It also introduced a special register of companies involved in debt payment and amortisation under its provisions. A company's presence on that register suspends any enforcement proceedings against it; domestic courts shall also dismiss any request to initiate insolvency or liquidation proceedings against the company.

E. Order of the Ministry of Health No. 173 of 19 June 1996 "On Approval of the State Sanitary Rules concerning Planning and Construction of Populated Communities"

69. Relevant provisions of the Order of the Ministry of Health read as follows:

"5.4. Industrial, agricultural and other objects, which are sources of environmental pollution with chemical, physical and biological factors, in the event that it is impossible to create wasteless technologies, should be separated from residential areas by sanitary security zones.

...

On the exterior boundary of a sanitary security zone which faces a residential area, concentrations and levels of harmful substances should not be greater than those set down in the relevant hygiene standards (maximum permissible concentrations, maximum permissible levels)...

5.5. ...

In the event the studies do not confirm the statutory sanitary security zone or its establishment is not possible under particular circumstances, it is necessary to take a decision concerning a change of production technology, which would provide for decrease in emission of harmful substances into the atmosphere, its re-profiling or closure.

Supplement No. 4, Sanitary classification of enterprises, production facilities and buildings and their required sanitary security zones:

...

A sanitary security zone of 500 metres [shall surround the following facilities]:

...

5. Spoil heaps of mines which are being exploited, inactive spoil heaps exceeding 30 metres in height which are susceptible to combustion; inactive spoil heaps exceeding 50 metres in height which are not susceptible to combustion.

A sanitary security zone of 300 metres [shall surround the following facilities]:

...

5. ... coal-processing factories using wet treatment technology

6. ... inactive spoil heaps of mines, less than 50 metres in height and not susceptible to combustion."

THE LAW

I. SCOPE OF THE CASE

70. On 18 September 2009 the applicants' representative informed the Court that applicant Mr Arkadiy Gavrylyuk had died. She further requested that his claims be excluded from consideration.

71. The Court considers that, in the absence of any heir expressing the wish to take over and continue the application on behalf of Mr Arkadiy Gavrylyuk, there are no special circumstances in the case affecting respect for human rights as defined in the Convention and requiring further examination of the application under Article 37 § 1 *in fine* of the Convention (see, for example, *Pukhigova v. Russia*, no. 15440/05, §§ 106–107, 2 July 2009 and *Goranda v. Romania* (dec.), no. 38090/03, 25 May 2010).

72. In view of the above, it is appropriate to strike the complaints lodged by Mr Arkadiy Gavrylyuk out of the list.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

73. The applicants complained that the State authorities had failed to protect their home, private and family life from excessive pollution generated by two State-owned industrial facilities. They relied on Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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

A. Admissibility

1. Submissions by the parties

(a) The Government

74. The Government submitted that the application was inadmissible *ratione temporis* in so far as it related to the facts predating 11 September 1997, the date of entry of the Convention into force with respect to Ukraine.

75. They further submitted that the Gavrylyuk-Vakiv family could not claim to be victims of any violations of Article 8 as in 1959 they had unlawfully constructed their house on the land, which was formally allocated to them only a year later. Moreover, in breach of the law in force at the material time, this family had never requested authorisation of the mining authorities to construct their house on the land above the mine. As the Gavrylyuk-Vakiv family had deliberately constructed their house on land under industrial development and in

so doing acted in violation of applicable law, they could not claim that the State had any obligations relating to respect for their Article 8 rights while they lived in this house. Their complaints were therefore inadmissible *ratione personae*.

76. The Government also submitted as an alternative that the Gavrylyuk-Vakiv family's complaints were manifestly ill-founded, as their family lived outside the statutory buffer zones of both the mine and the factory, and their resettlement claim was rejected by a competent court at the close of adversary proceedings. These applicants had therefore not made out an arguable Convention claim.

77. Finally, the Government contended that none of the applicants had exhausted available domestic remedies. In particular, they had never claimed compensation from either the mine or the factory for any damage allegedly sustained on account of their industrial activity.

(b) The applicants

78. The applicants disagreed. They noted that while the situation complained about had started before the entry of the Convention into force with respect to Ukraine, it continued afterwards and up to the present day. In particular, the Sokalskyy Executive Committee's decision to resettle them had not been formally quashed and was in force by the date of the Convention's entry into effect. So the competent authorities were responsible for its non-enforcement, as well as for the non-enforcement of the subsequent decision of the Ecological Safety Commission concerning the applicants' resettlement and the Chervonograd Court's judgment in the Dubetska-Nayda family's favour. Likewise, the State bore responsibility for failure to enforce the buffer zone management plans for the mine and the factory leading to environmental deterioration in the area, where the applicants lived.

79. The applicants further submitted that the Gavrylyuk-Vakiv family had constructed their house lawfully, on land duly allocated for this purpose, while in 1960 they had been given extra land for gardening. The Government's submission that they had to seek the mining authorities' permission to build a house was not based on law. Also, by the time the Convention entered into force in respect of Ukraine, their house had been properly registered with the authorities, as evidenced by the property certificate provided by them to the Court.

80. The applicants further contended that the fact that the Chervonograd Court had dismissed the Gavrylyuk-Vakiv family's resettlement claim did not render their application manifestly ill-founded, regard being had to the actual excessive levels of pollution in the vicinity of their home. In rejecting their claim for resettlement the courts had relied on the prospective improvements anticipated following implementation of the buffer zone management plan for the factory. As the plan remained unimplemented, this group of applicants continued to suffer from excessive pollution and their claim was therefore not manifestly ill-founded.

81. Finally, the applicants alleged that they had properly exhausted domestic remedies, as they aired their complaints through domestic courts and referred to environmental pollution as the reason to claim resettlement.

2. The Court's assessment

82. In so far as the Government alleged partial inadmissibility of the application as falling outside the scope of the Court's temporal jurisdiction, the Court considers itself not competent *ratione temporis* to examine the State actions or omissions in addressing the applicants' situation prior to the date of the entry of the Convention into force with respect to Ukraine (11 September 1997). It is however competent to examine the applicants' complaints, which relate to the period after this date (see, *mutatis mutandis, Fadeyeva v. Russia*, no. 55723/00, § 82, ECHR 2005-IV).

83. As regards the Government's allegation that the complaints lodged by the Gavrylyuk-Vakiv family are incompatible with the Convention *ratione personae*, the Court notes, firstly, that Article 8 of the Convention applies regardless of whether an applicant's home has been built or occupied lawfully (see, among other authorities, *Prokopovich v. Russia*, no. 58255/00, § 36, ECHR 2004-XI (extracts)). Moreover, it notes that irrespective of whether the house at issue was lawfully constructed or regularised after the family had settled in it, by 11 September 1997, when the Convention entered into force with respect to Ukraine, the Gavrylyuk-Vakiv family was occupying it lawfully. This fact is not disputed between the parties. In light of the above the Government's objection should be dismissed.

84. As regards the Government's allegation that the Gavrylyuk-Vakiv family's claims were manifestly ill-founded as their resettlement claim had been rejected in domestic proceedings, the Court agrees that it is not in a position to substitute its own judgment for that of the national courts and its power to review compliance with domestic law is limited (see, among other authorities, *Slivenko v. Latvia* [GC], no. 48321/99, § 105, ECHR 2003-X and *Paulić v. Croatia*, no. 3572/06, § 39, 22 October 2009). It is the Court's function, however, to review the reasoning adduced by domestic judicial authorities from the point of view of the Convention (see *Slivenko*, cited above, ibid.). Furthermore, the Court notes that the Gavrylyuk-Vakiv family's complaint is not limited to the alleged unfairness of the judgments dismissing their resettlement claim. It concerns a general failure of the State to remedy their suffering from adverse environmental effect of pollution in their area. The Government's objection must therefore be dismissed.

85. Finally, as regards the non-exhaustion objection, the Court notes that the Government have not presented any examples of domestic court practice whereby an individual's claim for compensation against an industrial pollutant would be allowed in a situation similar to that of the applicants. Furthermore,

both applicant families in the present case chose to exhaust domestic remedies with respect to their claim to be resettled from the area, permanently affected by pollution. One family obtained a resettlement order, which however remains unenforced as the debtor mine lacks budgetary allocations for it, and the other's claim was dismissed on the grounds that it lived outside the pollutants' statutory buffer zone. In view of all the above the Court has doubts concerning the applicants' prospects of success in compensation proceedings.

86. Even assuming, however, that such compensation could be awarded to them for past pollution and paid in good time, the Court notes that the applicants complain about continuing pollution, curtailing which for the future appears to necessitate some structural solutions. It is not obvious how the compensatory measure proposed by the Government would address this matter. In light of the above, the Court dismisses the non-exhaustion objection.

87. In conclusion, the Court notes that the application raises serious issues of fact and law under the Convention, the determination of which must be reserved to an examination of the merits. The application cannot therefore be declared manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established. The Court, therefore, declares the application admissible.

B. Merits

1. Applicability of Article 8 of the Convention

(a) Submissions by the parties

(i) The applicants

88. The applicants submitted that they were suffering from serious State interference with their rights guaranteed by Article 8 of the Convention, on account of environmental pollution emanating from the State-owned mine and factory (in particular their spoil heaps), as well as from the State's failure to cope with its positive obligation to regulate hazardous industrial activity.

89. The applicants further noted that they had set up their present homes lawfully, before they could possibly have known that the area would fall within the legislative industrial buffer zone and would be environmentally unsafe.

90. The applicants next alleged that the Government's plan approving the 300-metre buffer zone around the factory was controversial, as operation of the spoil heap required a 500-metre buffer zone. The plan at issue had not been approved by the State Medical Officer for Health until it had previewed the measures for decreasing the height of the waste heap to 50 metres and hydro-insulating it, which has not been done so far. They considered, therefore, that they continued to live within the scientifically justifiable buffer zone of the waste heap.

91. The applicants further contended that not only their houses were located within the zone formally designated by the law as inappropriate for habitation,

but there was considerable evidence that the actual air, water and soil pollution levels in the vicinity of their homes were unsafe and were such as could increase the applicants' vulnerability to pollution-associated diseases. In this regard they referred to various Governmental and non-governmental reports and surveys discussed in paragraphs 13–23 above.

92. The applicants additionally noted that other hazards included flooding of the nearby areas and soil subsidence caused by mining activities. They alleged that regard being had to the existence of numerous underground caverns dug out in the course of mining operations these hazards would exist even if no new mining activities took place.

93. In the meantime, the applicants were unable to relocate without the State's assistance, as on account of industrial pollution there was no demand for real estate in their hamlet and they were not capable of finding other sources of funding for relocation.

94. Finally, the applicants noted that the State being the owner of the factory for numerous years and remaining at present the owner of its spoil heap as well as the owner of the mine, was fully aware of and responsible for the damage caused by their everyday operations, which had been going on for a long time. It therefore had responsibility under Article 8 of the Convention to take appropriate measures to alleviate the applicants' burden.

(ii) The Government

95. The Government did not dispute that they had Convention responsibility for addressing environmental concerns associated with the mine and the factory operation.

96. On the other hand, they contested the applicants' submissions as regards the damage suffered by them on account of alleged pollution. In particular, the Government submitted that, as regards the pollution emitted by the factory, its levels were generally safe outside the 300-metre zone around it, as confirmed by numerous studies. It is in view of these studies that the 300-metre buffer zone around the factory was approved by the relevant authorities in 2005. The applicants' houses, located 430 and 420 metres from the factory, should accordingly have been safe, regardless of whether the buffer zone plans had formally been put in place. Although occasional incidents of increased emissions might have taken place, they were promptly monitored and appropriate measures to decrease them were applied in good time, as evidenced, for instance, by the sanctions imposed on the factory management (see paragraphs 32 and 35 above).

97. The Government further submitted that although the Dubetska-Nayda family lived within the boundaries of the mine spoil heap's buffer zone, they, like the Gavrylyuk-Vakiv family, which lived outside the buffer zones of either the mine or the factory, had failed to substantiate any actual damage sustained on account of their proximity to both industrial facilities.

98. As regards the applicants' reference to several chronic diseases suffered by some of them, these could well be associated with their occupational activities and other factors.

99. As regards soil subsidence and flooding, the Government referred to geological studies which determined that the mountainous area in which the applicants lived had layers of water-bearing sands underneath the surface, susceptible to flotation. Based on these studies, the Government alleged that it could not be proved beyond reasonable doubt that the soil had subsided as a result of mining activities, rather than of a natural geological process.

100. The Government next alleged that in so far as the applicants complained about the water quality, various studies, including the one done by the Zakhidukrgeologiya (see paragraph 15 above) scientifically proved that the chemical composition and purity of the underground water in the area was naturally unfavourable for household consumption, except when drilled for at a much deeper level than was done for the applicants' households. In addition, the applicants' wells were not equipped with the necessary filters and pipes. Moreover, the applicants were supplied with imported water. Finally, it was not in 2009, as suggested by the applicants (see paragraph 25 above), but in 2007 that a centralised aqueduct for the hamlet was put into operation.

101. As regards the authorities' decisions on the applicants' resettlement, they were based on preventive rather than remedial considerations. The decision taken by the Sokalskyy Executive Committee had expired by 1997 in view of the change in economic circumstances. The decision at issue had been taken when enlargement of the factory was being contemplated, which called for the establishment of a 500-metre buffer zone around it. If such a zone had been approved the applicants' houses would have been located within its boundaries, setting in motion the legal provisions calling for their resettlement regardless of the actual level of pollution. However, by 1997 it had become clear that the enlarged zone would not be necessary and the 1994 decision automatically became invalid.

102. Moreover, in 1995 the Sokalskyy Executive Committee had made amendments to its resettlement decision. Following requests from residents subject to resettlement, the Committee decided that there was no need to demolish their former houses, which could be used by them for recreational and gardening purposes. Several families who had been provided with alternative housing in 2000–03 as they lived within the 300-metre buffer zone, did in fact continue to use their previous houses, including for long periods, and refused to give them up.

103. In the Government's view, this fact was evidence that the applicants' resettlement claims were in fact not based on the actual levels of pollution. The conclusion that the Gavrylyuk-Vakiv family's[12] resettlement was not necessary

[12] Rectified on 2 May 2011: the text was "Gavrylyuk-Nayda family's".

was likewise reasonably made by the national judicial authorities. As regards the Dubetska-Nayda family, their resettlement was ordered on the basis of formal statutory provisions and did not involve any assessment of the actual or potential damage involved. In any event, both families were free to apply to the authorities for placement on a waiting list for social housing, which they had never done.

104. In sum, the applicants did not show that the operation of either the mine or the factory had infringed on their rights to an extent which would attract State responsibility under Article 8 of the Convention.

(b) The Court's assessment

(i) The Court's jurisprudence

105. The Court refers to its well-established case-law that neither Article 8 nor any other provision of the Convention guarantees the right to preservation of the natural environment as such (see *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI). Likewise, no issue will arise if the detriment complained of is negligible in comparison to the environmental hazards inherent in life in every modern city. However, an arguable claim under Article 8 may arise where an environmental hazard attains a level of severity resulting in significant impairment of the applicant's ability to enjoy his home, private or family life. The assessment of that minimum level is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life (see, among other authorities, *Fadeyeva*, cited above, §§ 68–69).

106. While there is no doubt that industrial pollution may negatively affect public health in general and worsen the quality of an individual's life, it is often impossible to quantify its effects in each individual case. As regards health impairment for instance, it is hard to distinguish the effect of environmental hazards from the influence of other relevant factors, such as age, profession or personal lifestyle. "Quality of life" in its turn is a subjective characteristic which hardly lends itself to a precise definition (see *Ledyayeva and Others v. Russia*, nos. 53157/99, 53247/99, 53695/00 and 56850/00, § 90, 26 October 2006).

107. Taking into consideration the evidentiary difficulties involved, the Court will primarily give regard to the findings of the domestic courts and other competent authorities in establishing the factual circumstances of the case (see *Buckley v. the United Kingdom*, judgment of 25 September 1996, *Reports of Judgments and Decisions* 1996-IV, pp. 1291–93, §§ 74–77). As a basis for the analysis it may use, for instance, domestic legal provisions determining unsafe levels of pollution (see *Fadeyeva,* cited above, § 87) and environmental studies commissioned by the authorities (see *Taşkın and Others v. Turkey*, no. 46117/99, §§ 113 and 120, ECHR 2004-X). Special attention will be paid by the Court to individual decisions taken by the authorities with respect to an applicant's par-

ticular situation, such as an undertaking to revoke a polluter's operating licence (see *Taşkın and Others,* cited above, § 112) or to resettle a resident away from a polluted area (see *Fadeyeva,* cited above, § 86). However, the Court cannot rely blindly on the decisions of the domestic authorities, especially when they are obviously inconsistent or contradict each other. In such a situation it has to assess the evidence in its entirety (see *Ledyayeva and Others,* cited above, § 90). Further sources of evidence for consideration in addition to the applicant's personal accounts of events, will include, for instance, his medical certificates (see *Lars and Astrid Fägerskiöld v. Sweden* (dec.), no. 37664/04, 26 February 2008) as well as relevant reports, statements or studies made by private entities (see *Fadeyeva,* cited above, § 85).

108. In addition, in order to determine whether or not the State could be held responsible under Article 8 of the Convention, the Court must examine whether a situation was a result of a sudden and unexpected turn of events or, on the contrary, was long-standing and well known to the State authorities *(see Fadeyeva*, cited above, §§ 90–91); whether the State was or should have been aware that the hazard or the nuisance was affecting the applicant's private life (see *López Ostra v. Spain*, 9 December 1994, §§ 52-53, Series A no. 303-C) and to what extent the applicant contributed to creating this situation for himself and was in a position to remedy it without a prohibitive outlay (see *Ledyayeva*, cited above, § 97).

(ii) Assessment of the facts in the present case

109. The Court reiterates that the present case concerns an allegation of adverse effects on the applicants' Article 8 rights on account of industrial pollution emanating from two State-owned facilities — the Vizeyska coal mine and the Chervonogradska coal-processing factory (in particular, its waste heap, which is 60 metres high).

110. The applicants' submissions relate firstly to deterioration of their health on account of water, air and soil pollution by toxic substances in excess of permissible concentrations. In addition, these submissions likewise concern the worsening of the quality of life in view of the damage to the houses by soil subsidence and persistent difficulties in accessing non-contaminated water, which have adversely affected the applicants' daily routine and interactions between family members.

111. In assessing to what extent the applicants' health was affected by the pollution complained about, the Court agrees with the Government that there is no evidence making it possible to establish quantifiable harm in the present case. It considers, however, that living in the area marked by pollution in clear excess of applicable safety standards exposed the applicants to an elevated risk to health.

112. As regards the quality of the applicants' life, the Court notes the applicants' photographs of water and their accounts of their daily routine and communi-

cations (see paragraphs 24–30 above), which appear to be palpably affected by environmental considerations.

113. It notes that, as suggested by the Government, there may be different natural factors affecting the quality of water and causing soil subsidence in the applicants' case (see, for instance, paragraph 21 above). Moreover, at the present time the issue of accessing fresh water appears to have been resolved by the recent opening of a centralised aqueduct. At the same time, the case file contains sufficient evidence that the operation of the mine and the factory (in particular their spoil heaps) have contributed to the above problems for a number of years, at least to a certain extent.

114. This extent appears to be not at all negligible, in particular as according to domestic legislation residential houses may not be located within the buffer zones of the mines and the spoil heaps are designated as *a priori* environmentally hazardous. It appears that according to the State Sanitary Rules, a "safe distance" from a house to a spoil heap exceeding 50 metres in height is estimated at 500 metres (see paragraph 69 above). The Dubetska-Nayda family's house is situated 100 metres from the mine spoil heap and 430 metres from the factory one. The Gavrylyuk-Vakiv family's house in its turn is situated 420 metres from the factory spoil heap.

115. While agreeing with the Government that the statutory definitions do not necessarily reflect the actual levels of pollution to which the applicants were exposed, the Court notes that the applicants in the present case have presented a substantial amount of data in evidence that the actual excess of polluting substances within these distances from the facilities at issue has been recorded on a number of occasions (see paragraphs 17–18 and 22–23 above).

116. In deciding on whether the damage (or risk of damage) suffered by the applicants in the present case was such as to attract guarantees of Article 8, the Court also has regard to the fact that at various times the authorities considered resettling the applicants. The need to resettle the Dubetska-Nayda family was ultimately confirmed in a final judgment given by the Chervonograd Court on 26 December 2005.

117. As regards the Gavrylyuk-Vakiv family, on 21 June 2004 the same court found their resettlement unnecessary. However, in its findings the judicial authorities relied on anticipation that the factory would promptly enforce the measures envisioned in its prospective buffer zone management plan. These measures included hydro-insulation of the spoil heap and decreasing its height to 50 metres (in which case, as noted by the applicants, a 300-metre buffer zone around the spoil heap would become permissible under domestic law). According to the case file materials, these measures have not yet been carried out.

118. Consequently, it appears that for a period exceeding twelve years since the entry of the Convention into force in respect of Ukraine, the applicants were

living permanently in an area which, according to both the legislative framework and empirical studies, was unsafe for residential use on account of air and water pollution and soil subsidence resulting from the operation of two State-owned industrial facilities.

119. In these circumstances the Court considers that the environmental nuisance complained about attained the level of severity necessary to bring the complaint within the ambit of Article 8 of the Convention.

120. In examining to what extent the State owed a duty to the applicants under this provision, the Court reiterates that the present case concerns pollution emanating from the daily operation of the State-owned Vizeyska coal mine and the Chervonogradska coal-processing factory, which was State-owned at least until 2007; its spoil heap has remained in State ownership to the present day. The State should have been, and in fact was, well aware of the environmental effects of the operation of these facilities, as these were the only large industries in the vicinity of the applicant families' households.

121. The Court further notes that the applicants set up their present homes before the facilities were in operation and long before the actual effect of their operation on the environment could be determined.

122. The Court also observes that, as the Government suggests, in principle the applicants remain free to move elsewhere. However, regard being had to the applicants' substantiated arguments concerning lack of demand for their houses located in the close proximity to major industrial pollutants, the Court is prepared to conclude that remedying their situation without State support may be a difficult task. Moreover, the Court considers that the applicants were not unreasonable in relying on the State, which owned both the polluters, to support their resettlement, especially since a promise to that effect was given to them as early as in 1994. As regards the Government's argument that the applicants could have applied for social housing, in the Court's view they presented no valid evidence that a general request of this sort would have been more effective than other efforts made by the applicants to obtain State housing, especially in view of the fact that the only formal reason for them to seek relocation was environmental pollution.

123. In the Court's opinion the combination of all these factors shows a strong enough link between the pollutant emissions and the State to raise an issue of the State's responsibility under Article 8 of the Convention.

124. It remains to be determined whether the State, in securing the applicants' rights, has struck a fair balance between the competing interests of the applicants and the community as a whole, as required by paragraph 2 of Article 8.

2. Justification under Article 8 § 2 of the Convention

(a) Submissions by the parties

(i) The applicants

125. The applicants asserted that in addressing their environmental concerns the State had failed to strike a fair balance between their interests and those of the community.

126. In particular, for the period of more than twelve years since the entry of the Convention into force with respect to Ukraine, the State authorities have failed either to bring the pollution levels under control or to resettle the applicants into a safer area.

127. While some measures in respect of mitigating the applicants' hardship were taken at various times, they were inconsistent and insufficient to change the applicants' overall situation as well as marked by prohibitive delays.

128. In particular, it was only in 2009 that the hamlet was provided with a centralised aqueduct. Until then drinking water, which was not available at all before 2003, was brought in small quantities by trucks and tractors at irregular intervals, sometimes as long as several months in winter. On several occasions the State authorities attempted to penalise the mine and the factory management for their failures to ensure safer pollution levels, but these punishments were negligible or remained unenforced (such as the decision to suspend operation of the mine) and did not bring about any subsequent improvements.

129. The applicants further submitted that, as regards their resettlement, the 1994 decision to this end was never officially revoked, remained in force and was confirmed in 2000 by the Ecological Safety Commission. The subsequent court decisions disregarding it were therefore unlawful. Moreover, in deciding that the applicants no longer lived in the factory buffer zone, the judicial authorities relied on its prospective plan for buffer zone management, envisioning a number of measures to ensure that living outside the 300-metre zone actually would become safe, including downsizing of the spoil heap to 50 metres and hydro-insulating it. However, as the zone management measures had remained unenforced, the applicants continued to live in an environmentally unsafe area.

130. Moreover, the Dubetska-Nayda family's house was also located within the mine's buffer zone, which was confirmed by the judicial authorities in a final and binding decision of 26 December 2005 ordering this family's resettlement.

131. Further, significant delays marked consideration of the applicants' claims by domestic judicial authorities. On many occasions the trial court failed to inform the applicants of hearing dates or unreasonably postponed hearings on account of defendants' absences.

132. Finally, even though the Dubetska-Nayda family succeeded in obtaining a resettlement judgment, its effect was set at naught, as for some five years now it has remained unenforced. The prospects for its enforcement within foreseeable future were unpromising, regard being had, in particular, to the entry into force of the Law of Ukraine "On Measures to Ensure the Stable Operation of Fuel and

Energy Sector Enterprises", which stalled the possibility of recovering debt from the Vizeyska mine.

133. In sum, the applicants submitted that the State authorities had failed to act diligently and in good time in addressing their problems caused by pollution from the mine and the factory.

(ii) The Government

134. The Government disagreed. They submitted that they had done everything in their power to ensure that people living near the mine and the factory, whose operation was admittedly connected with some environmental risks, were least affected by them.

135. In particular, the State put in place a legislative framework to regulate the operation of industrial polluters, including the establishment of safe emission levels and buffer zones. It has kept a constant watch on compliance with pollution safety standards by the mine and the factory and, in the event of occasional failures, the management was promptly penalised and the problems addressed. As a result, within 300 metres of the factory the levels of pollution were actually usually within the limits statutorily recognised as safe. This fact, confirmed by rigorous empirical monitoring, enabled scientific substantiation of the 300-metre buffer zone plan around the factory. A plan for the mine was likewise developed, however, in view of the mine's eventual closure there was no need to approve it or put it in place.

136. The Government further submitted that, as regards the applicants' resettlement claims, neither family had actually suffered damage or risk of damage from pollution such as to warrant their resettlement. As the 1994 decision, which had expired by 1997 in view of the economic challenges downsizing the factory's production levels instead of their anticipated increase, at no point in time from the entry of the Convention into force with respect to Ukraine to the present was the State responsible for the Gavrylyuk-Vakiv family's resettlement, as that family lived outside both buffer zones.

137. As regards the Dubetska-Nayda family, the State was obliged to resettle them on statutory grounds by the Chervonograd Court's decision of 26 December 2005. While the State's obligation to enforce this judgment was not in dispute, delays were caused by the severe financial problems of the debtor mine as well as the mining sector nationwide. The mine was unprofitable and owed substantial amounts to various creditors, including salary arrears to its employees. It was therefore unable to pay its debts and was subject to liquidation. Attempting to tackle the nationwide critical situation in the fuel and energy sector, the State was forced to enact the Law "On Measures to Ensure the Stable Operation of Fuel and Energy Sector Enterprises", suspending or restructuring debts of the enterprises in the industry. Although it was not clear when the judgment would be

enforced, funds were being sought and provision of the family with housing had been included in the list of measures previewed in the course of the liquidation.

138. In any event, both applicant families were given a judicial forum to handle their resettlement complaints. In so far as they complained that their court proceedings were lengthy, the delays were caused by the complexity of the subject and the search for the comprehensive evidence necessary to substantiate a reasoned and fair decision. In addition, some adjournments were on account of the applicants' failures to appear.

139. Overall, the State, which was facing a complex task of balancing between environmental and economic concerns relating to the mine and the factory operation, had duly considered the applicants' interests against those of the community in addressing them.

(b) The Court's assessment

(i) The Court's jurisprudence

140. The Court reiterates that the principles applicable to an assessment of the State's responsibility under Article 8 of the Convention in environmental cases are broadly similar regardless of whether the case is analysed in terms of a direct interference or a positive duty to regulate private activities (see Hatton and Others v. the United Kingdom [GC], no. 36022/97, § 98, ECHR 2003-VIII, and Fadeyeva, cited above, §§ 89 and 94).

141. In cases involving environmental issues, the State must be allowed a wide margin of appreciation and be left a choice between different ways and means of meeting its obligations. The ultimate question before the Court is, however, whether a State has succeeded in striking a fair balance between the competing interests of the individuals affected and the community as a whole (see Hatton and Others, cited above, §§ 100, 119 and 123). In making such an assessment all the factors, including domestic legality, must be analysed in the context of a particular case (see ibid., § 120, and Fadeyeva, cited above, §§ 96–97).

142. Where the complaints relate to State policy with respect to industrial polluters, as in the present case, it remains open to the Court to review the merits of the respective decisions and conclude that there has been a manifest error. However, the complexity of the issues involved with regard to environmental policymaking renders the Court's role primarily a subsidiary one. It must first examine whether the decision-making process was fair, and only in exceptional circumstances may it go beyond this line and revise the material conclusions of the domestic authorities (see Fadeyeva, cited above, § 105).

143. In scrutinising the procedures at issue, the Court will examine whether the authorities conducted sufficient studies to evaluate the risks of a potentially hazardous activity (see Hatton and Others, cited above, § 128, and Giacomelli v. Italy, no. 59909/00, § 86, ECHR 2006-XII), whether, on the basis of the information

available, they have developed an adequate policy vis-à-vis polluters and whether all necessary measures have been taken to enforce this policy in good time (see Ledyayeva and Others, cited above, § 104, and Giacomelli, cited above, §§ 92–93, ECHR 2006-...). The Court will likewise examine to what extent the individuals affected by the policy at issue were able to contribute to the decision-making, including access to the relevant information and ability to challenge the authorities' decisions in an effective way (see, mutatis mutandis, Guerra and Others v. Italy, judgment of 19 February 1998, Reports 1998-I, p. 228, § 60; Hatton and Others, cited above, § 127; and Taşkın and Others, cited above, § 119).

144. As the Convention is intended to protect effective rights, not illusory ones, a fair balance between the various interests at stake may be upset not only where the regulations to protect the guaranteed rights are lacking, but also where they are not duly complied with (see Moreno Gómez v. Spain, no. 4143/02, §§ 56 and 61, ECHR 2004-X). The procedural safeguards available to the applicant may be rendered inoperative and the State may be found liable under the Convention where a decision-making procedure is unjustifiably lengthy or where a decision taken as a result remains for an important period unenforced (see Taşkın and Others, cited above, §§ 124–25).

145. Overall, the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community (see Fadeyeva, cited above, § 128).

(ii) Assessment of the facts in the present case

146. The Court remarks that the authorities contemplated and conceived a number of measures aimed at minimising the harmful effects of the mine and the factory operation on the applicants' households. It should be noted, for instance, that the quality of the legislative framework concerning industrial pollution is not in dispute between the parties in the present case. Further, as suggested by the Government, the authorities regularly monitored the levels of actual pollution and designed various measures to minimise them, including imposing penalties on the mine and factory management for breaches and eventual development of a plan for maintenance of the factory buffer zone. In addition, the applicants were promised compensation for damage caused by soil subsidence and water was brought in at State expense. No later than 2009 a centralised aqueduct was built, which should relieve the applicants of the burdens associated with accessing drinking-quality water, a major issue raised in their application. Finally, as mentioned above, on numerous occasions the authorities considered resettling the applicants as a way of providing an effective solution to their environmental hardship.

147. Notwithstanding the effort, for more than twelve years the State authorities have not been able to put in place an effective solution for the applicants' personal situation, which throughout this period has remained virtually the same.

148. It is noted that on the date of the Convention's entry into force (11 September 1997) the applicants were living in close proximity to two major industrial polluters, which adversely and substantially affected their daily life. It appears that in order to fulfil their Convention obligations, the State authorities, who owned these polluters, contemplated two major policy choices *vis-à-vis* the applicants' situation — either to facilitate their relocation to a safer area or to mitigate the pollution effects in some way.

149. Yet in 1994, before the Convention's entry into force, the Sokalskyy Executive Committee made the choice in favour of relocation. In the following period, however, the Government did not act promptly and consistently and did not back up this decision with the necessary resources to have it enforced. While according to the Government's observations the 1994 decision automatically lost its legal power by 1997 in view of the factory downsizing, the applicants were never officially informed of this, much less given a reference to the legal provision on the basis of which the decision at issue could have automatically lost its effect, in particular, in the absence of a new factory buffer zone management plan. Moreover, it appears that in April 2000 the 1994 decision was backed up by that of the Ecological Safety Commission, resolving to solicit State funding for the resettlement of eighteen families from the factory buffer zone. While the names of the families apparently remained unlisted, their number — eighteen — was the same as that mentioned in the 1994 decision. The Court therefore finds that the applicants could have reasonably expected to be among them. It was not until 21 June 2004 for the Gavrylyuk-Vakiv family and 26 December 2005 for the Dubetska-Nayda family that the applicants were formally declared to be living outside the prospective factory buffer zone and not entitled to relocation at State expense. It was also only on 26 December 2005 that the State authorities acknowledged their obligation under domestic law to resettle the Dubetska-Nayda family from the mine spoil heap buffer zone. The judicial proceedings, which lasted some three and a half years at one level of jurisdiction for the Dubetska-Nayda family and a little over five years at three levels of jurisdiction for the Gavrylyuk-Vakiv family, were marked by certain delays, in particular, on account of some significant intervals between hearings. Next, the decision given in the Dubetska-Nayda family's favour did not change the family's situation, as throughout the next five years and until now it has not been funded. Consequently, the Court remarks that for more than twelve years from the Convention's entry into force and up to now little or nothing has been done to help the applicants to move to a safer area.

150. The Court considers that when it comes to the wide margin of appreciation available to the States in context of their environmental obligations under Article 8 of the Convention, it would be going too far to establish an applicant's general right to free new housing at the State's expense (see *Fadeyeva*, cited

above, § 133). The applicants' Article 8 complaints could also be remedied by duly addressing the environmental hazards.

151. In the meantime, the Government's approach to tackling pollution in the present case has also been marked by numerous delays and inconsistent enforcement. A major measure contemplated by the Government in this regard during the period in question concerned the development of scientifically justified buffer zone management plans for the mine and the factory. This measure appears to have been mandatory under the applicable law, as at various times the public health authorities imposed sanctions on the facilities' management for failures to implement it, going as far as the suspension of their operating licences (see paragraphs 32 and 35 above). However, these suspensions apparently remained unenforced and neither the mine nor the factory has put in place a valid functioning buffer zone management plan as yet.

152. Eight years since the entry of the Convention into force, in 2005, the factory had such plan developed. When dismissing the applicants' claims against the factory for resettlement, the judicial authorities pointed out that the applicants' rights should be duly protected by this plan, in particular, in view of the anticipated downsizing of the spoil heap and its hydro-insulation. However, these measures, envisioned by the plan as necessary in order to render the factory's operation harmless to the area outside the buffer zone, have still not been enforced more than five years later (see paragraph 38 above). There also appear to have been, at least until the launch of the aqueduct no later than in 2009, delays in supplying potable water to the hamlet, which resulted in considerable difficulties for the applicants. The applicants cannot therefore be said to have been duly protected from the environmental risks emanating from the factory operation.

153. As regards the mine, in 2005 it went into liquidation without the zone management plan ever being finalised. It is unclear whether the mine has in fact ceased to operate at the present time. It appears, however, that the applicants in any event continue to be affected by its presence, in particular as they have not been compensated for damage caused by soil subsidence. In addition, the Dubetska-Nayda family lives within 100 metres of the mine's spoil heap, which needs environmental management regardless of whether it is still in use.

154. In sum, it appears that during the entire period taken into consideration both the mine and the factory have functioned not in compliance with the applicable domestic environmental regulations and the Government have failed either to facilitate the applicants' relocation or to put in place a functioning policy to protect them from environmental risks associated with continuing to live within their immediate proximity.

155. The Court appreciates that tackling environmental concerns associated with the operation of two major industrial polluters, which had apparently been malfunctioning from the start and piling up waste for over fifty years, was

a complex task which required time and considerable resources, the more so in the context of these facilities' low profitability and nationwide economic difficulties, to which the Government have referred. At the same time, the Court notes that these industrial facilities were located in a rural area and the applicants belonged to a very small group of people (apparently not more than two dozen families) who lived nearby and were most seriously affected by pollution. In these circumstances the Government has failed to adduce sufficient explanation for their failure to either resettle the applicants or find some other kind of effective solution for their individual burden for more than twelve years.

156. There has therefore been a breach of Article 8 of the Convention in the present case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

157. Article 41 of the Convention provides:

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

A. Damage

1. Pecuniary damage

158. The applicants claimed 28,000 euros (EUR) in respect of pecuniary damage. They alleged that this sum represented the purchase price of two comparable houses (one for each of the two applicant families) in the neighbouring area, not affected by pollution. They argued that they were entitled to this amount in damages, as their houses had lost market value and could not be sold on account of their unfavourable location.

159. The Government submitted that these claims were exorbitant and unsubstantiated.

160. In considering the applicants' claim for pecuniary damage, the Court would state that the violation complained of by the applicants is of a continuing nature. Throughout the period under consideration the applicants have been living in their houses and have never been deprived of them. Although during this time their private life was adversely affected by operation of two industrial facilities, nothing indicates that they incurred any expenses in this connection. Therefore, the applicants failed to substantiate any material loss.

161. In so far as they allege that their houses have lost market value, the Court reiterates that the present application was lodged and examined under Article 8 of the Convention and not under Article 1 of Protocol no. 1, which protects property rights. There is therefore no causal link between the violation found and the loss of market value alleged.

162. As regards future measures to be adopted by the Government in order to comply with the Court's finding of a violation of Article 8 of the Convention in the present case, the Court reiterates that the State obligation to enforce the final judgment in respect of the Dubetska-Nayda family is not in dispute. As regards the Gavrylyuk-Vakiv family, their resettlement to an ecologically safe area would be only one of many possible solutions. In any event, according to Article 41 of the Convention, by finding a violation of Article 8 in the present case the Court has established the Government's obligation to take appropriate measures to remedy the applicants' individual situation.

2. Non-pecuniary damage

163. In addition, the Dubetska-Nayda family claimed EUR 32,000 in non-pecuniary damage and the Gavrylyuk-Vakiv family claimed EUR 33,000 in this respect. The applicants alleged that these amounts represented compensation for their physical suffering in connection with living in an unsafe environment, as well as psychological distress on account of disruption of their daily routine, complications in interpersonal communication and frustration with making prolonged unsuccessful efforts to obtain redress from the public authorities.

164. The Government submitted that the applicants should not be awarded any compensation.

165. The Court is prepared to accept that the applicants' prolonged exposure to industrial pollution caused them much inconvenience, psychological distress and even a degree of physical suffering, and that they might well feel frustration on account of the authorities' response to their hardship — this is clear from the grounds on which the Court found a violation of Article 8. Taking into account various relevant factors, including the duration of the situation complained of, and making an assessment on an equitable basis, the Court awards the applicants the amounts claimed in respect of non-pecuniary damage in full.

B. Costs and expenses

166. The applicants did not submit any claim under this head. The Court therefore makes no award.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to strike the application out of its list of cases, in so far as Mr Arkadiy Gavrylyuk's complaint is concerned;

2. *Declares* the application admissible in respect of all other applicants;

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

4. *Holds*

(a) that the respondent State is to pay, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention,

(i) the first, the second, the third, the fourth and the fifth applicant jointly EUR 32,000 (thirty-two thousand euros);

(ii) the seventh, the eighth, the ninth, the tenth and the eleventh applicant jointly EUR 33,000 (thirty-three thousand euros)

plus any tax that may be chargeable in respect of the above amounts, to be converted into the national currency of Ukraine at the rate applicable on the date of settlement;

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

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 10 February 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek — Registrar
Peer Lorenzen — President

ANNEX 20

FIFTH SECTION

CASE OF DZEMYUK v. UKRAINE

(Application no. 42488/02)

JUDGMENT

STRASBOURG 4 September 2014

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Dzemyuk v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Helena Jäderblom,
Aleš Pejchal, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 1 July 2014,

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

PROCEDURE

1. The case originated in an application (no. 42488/02) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Sergiy Mykhaylovych Dzemyuk ("the applicant"), on 16 October 2002.

2. The Ukrainian Government ("the Government") were represented by their then Agent, Mr N. Kulchytskyy.

3. The applicant complained under Articles 6 and 8 of the Convention of a breach of his right to respect for his home and private life on account of the construction of a cemetery near his home, and of the authorities' failure to enforce a judgment by which the construction of the cemetery in the vicinity of his house had been prohibited.

4. On 24 March 2005 the President of the Second Section decided to give notice of the application to the Government.

5. On 1 April 2006 the case was assigned to the newly composed Fifth Section (Rule 25 § 1 and Rule 52 § 1 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1961 and lives in the village of Tatariv, which forms part of Yaremche, a resort town in the Ivano-Frankivsk Region of Ukraine.

A. Background to the case

7. The applicant owns a house and an adjacent plot of land in Tatariv. The village of Tatariv is situated in a mountainous region and because of its location holds the status of mountainous residential area. It is also known as a resort for "green tourism" in Carpathy region. It is situated on the banks of Prut river.

8. On 10 February 2000 Tatariv Village Council ("Tatariv Council"), having considered four sites on which to construct a new cemetery, chose the land previously occupied by garages belonging to a company called Vorokhtya Lisokombinat ("the VL plot") as it was not occupied, it was located in the village and the cemetery could be constructed at low cost.

9. The VL plot is located near the applicant's house (for further details see paragraphs 14 and 33 below), in which he was residing with his family at the time. Two rivers flow at a distance of 30 and 70 metres from the VL plot. Drinking water for Tatariv comes from wells fed by groundwater; there is no centralised water supply system and the wells are not protected.

10. On 24 May 2000 the All-Ukrainian Bureau of Environmental Investigations informed the Chairman of Yaremche Town Council ("Yaremche Council") that the construction of the cemetery on the VL plot might cause contamination of the river and the wells situated on adjacent plots of land by ptomaine carried by the groundwater flow.

11. The cemetery was opened for use by the Yaremche Council in August 2000. It is being administered by the Yaremche Council.

12. On 6 February 2001 the Yaremche Environmental Health Inspectorate (*санітарно-епідеміологічна станція*) concluded that the cemetery should not have been constructed on the VL plot in view of its proximity to residential buildings and the risk of contamination of the surrounding environment by ptomaine.

13. On 20 August 2002 the Regional Environmental Health Inspectorate of the Ministry of Health refused to approve the construction plan. In particular, it stated that the cemetery should not be situated in the proposed area as its distance from private housing did not comply with the norms and standards of a health protection zone (*санітарно-захисна зона*).

14. On 30 August 2002 and 20 January 2003 the Marzeyev Institute of Hygiene and Medical Ecology, part of the Academy of Medical Sciences, informed the applicant and Yaremche Council that another location would have to be found for the cemetery. It was of the view that constructing the cemetery on the VL plot would breach environmental health laws and regulations and would worsen the living conditions of the residents of adjacent houses. In particular, it would be located less than 300 metres from the nearest residential buildings, which are 38 metres away from the edge of the cemetery (which would not allow for the establishment of the necessary health protection zone). It could lead to contamination of the groundwater reservoir used by the residents of adjacent households for drinking water and of the nearby rivers with by-products of human decomposition. It further stated that a health protection zone was also intended to reduce psychological pressure on the residents of adjacent houses.

15. The applicant alleges that from 2002 to the present moment he has been receiving treatment for hypertension and various cardio-related diseases. He supplied in this respect sick leave certificates and medical certificates from 2002 and 2006, relating to him and his wife. He has also provided the Court with death certificates for two of his neighbours Mr R. G. and Mr D. B., who also resided in the vicinity of the prohibited cemetery and died at the age of 68 and 43, respectively.

16. On 17 September 2002 the Ivano-Frankivsk Regional Prosecutor's Office informed the applicant that it could not intervene in respect of unauthorised burials taking place on the VL plot: the issue was in the competence of local authorities, including the Yaremche Council, which was responsible for management and maintenance of the cemetery.

17. On 22 April 2003 the Executive Board of Yaremche Council informed the Regional State Administration that Tatariv Council was considering resettling the applicant. He had twice been invited to discuss a proposal for resettlement of his family to another part of the village but no response had been received.

18. On 5 May 2003 the Regional Urban Development and Architecture Department ("the Urban Development Department") informed Yaremche and Tatariv Councils that the area near the applicant's house was not suitable for construction of the cemetery as it did not respect a 300-metre wide health protection zone that would protect the residential buildings and a 50-metre wide water protection zone to protect the Prutets river.

19. On 18 May 2003 the Tatariv Council resolved *inter alia* that the relevant local authorities were prepared to consider the purchase of a house or apartment for the applicant, or to pay him compensation if he refused to reside in the cemetery's vicinity.

20. On 21 April 2004 the issue of the site of the cemetery was examined by officials from the Urban Development Department, the Municipal Housing

Department, the environmental health inspectorate and the Land Management Department. They recommended to the Chairman of Tatariv Council that another plot on the outskirts of the village of "Ventarivka" be used as a cemetery.

21. On 22 June 2005 the Regional State Administration informed the applicant that the only way to resolve the issue was to resettle him. They asked him to agree to such a resettlement. They also confirmed that Yaremche Council was willing either to buy a house for the applicant or to provide him with an equivalent plot of land and the funds necessary to construct another house

22. On 18 July 2005 the Chairman of Yaremche Council invited the applicant to inform the authorities whether his family was willing to resettle and, if so, on what conditions.

23. In reply, the applicant sought more information on the proposal, such as, details of the specific land plot, house and facilities to be provided.

24. By letter of 27 July 2005 the Chairman of Yaremche Council, in reply to the applicant's request for specific proposals, invited the applicant to discuss the proposal in person with a view to a possible compromise.

25. On 15 August 2005 the Chairman of Tatariv Council asked the Ukrainian State Urban Planning Institute (*Дніпромісто* — "the Institute") to develop proposals for the site of a cemetery in the village.

26. On 21 December 2005 the Institute informed the applicant that it was not within its competence to decide matters such as the question of where to situate the cemetery. It also mentioned that the local development plan for Tatariv proposed a plot in the Chertizh area for the cemetery. However, this was subject to approval by the local council and environmental health inspectorate. It also informed the applicant that no letter of 15 August 2005 with proposals to investigate possible site of the cemetery (see paragraph 25 above) had been received from Tatariv Council.

27. By letter of 6 March 2006 addressed to the applicant and the Chairman of Tatariv Council, the Urban Development Department stated that it had repeatedly proposed to Tatariv Council that it use an area called Venterivka for the site of the cemetery. However, the council had not taken up that suggestion for unspecified reasons. It also informed the applicant that it was within Tatariv Council's competence to decide on the allocation of a plot of land for a cemetery.

28. On several occasions between August 2006 and June 2008 the applicant and members of his family, who resided together, asked Tatariv Council to grant each of them a plot of land on which to construct a house because they felt that living in the cemetery's vicinity was intolerable. Tatariv Council rejected the requests because of a lack of available plots of land.

29. According to the results of examinations of drinking water from the applicant's well conducted by the Yaremche Environmental Health Inspectorate dated 21 August 2008 and 7 July 2009, the toxicological, chemical and organo-

leptic indices of the water complied with national standards (no *E. coli* index examination had been made). A conclusion was reached that water could be used for household needs.

30. On 23 August 2008 and 6 July 2009 the Yaremche Environmental Health Inspectorate carried out a bacteriological analysis of the water from the same well. It established, contrary to the results of the examinations held on 21 August 2008 and 7 July 2009 (see paragraph 29 above) that the *E. coli* bacteria index in the water gave a reading of 2,380, whereas the normal reading was 10 (see paragraph 72 below), and concluded that the water could not be used for household needs. It also recommended disinfecting the water supply. The cause of water pollution was not established and would require an additional expert report.

31. On 14 December 2009 in response to a request from the Government, the Yaremche Environmental Health Inspectorate concluded that the reading obtained from the bacteriological analysis which had indicated water contamination did not have any connection to the location of the cemetery, but could also have been caused by other sources.

32. On 15 December 2009 the Regional Environmental Health Inspectorate informed the applicant that the reasons for the bacterial contamination of the water supply could be established on the basis of a hydrogeological assessment as to whether there were any connections between the drinking water reservoirs and possible sources of contamination. It further stated that according to an analysis of water taken from different parts of the village, the *E. coli* index exceeded the allowed reading established by law, which provided that drinking water should not contain any index of *E. coli* or be less than 1 in that index per 100 cm^3 (see paragraph 72 in relation to the domestic drinking water standards), nevertheless the *E. coli* index ranged from 23 to 2,380.

33. The applicant's house and well are some 38 metres from the nearest boundary of the cemetery.

34. By letters of 10, 15 and 16 December 2009 from the Tarariv Council, Yaremche Executive Committee and the Ivano-Frankivsk Regional State Administration, the authorities informed the Government's agent that the applicant had failed to manifest any interest in being resettled.

B. Proceedings against Tatariv Council

35. On 10 August 2000 the Verkhovyna Court, following the applicant's claim in proceedings against the Tatariv Council, held that the Council's decision to situate the cemetery on the VL plot had been unlawful.

36. At the end of August 2000 residents of Tatariv carried out the first burial at the cemetery.

37. On 1 December 2000 the Yaremche Court, in another set of new proceedings, found that Tatariv Council had failed to follow the proper procedure for

the allocation of a plot of land for a cemetery, namely obtaining an environmental health assessment, and ordered it to prohibit burials on the VL plot.

38. On 24 December 2000 the residents of Tatariv were informed of the court's decision to stop the use of the VL plot as a cemetery. Nevertheless, burials continued at the site.

39. On 29 December 2000 Tatariv Council prohibited burials on the VL plot. On 2 February 2001 the State Bailiffs' Service terminated enforcement proceedings in the case, considering that the judgment had been fully complied with by the Tatariv Council.

40. On 2 March 2001 Tatariv Council again decided that the VL plot could be used for the new village cemetery. On 26 March 2001 the applicant lodged a new claim against that decision with the Yaremche Court.

41. In the meantime, on 22 August 2001 the Regional Environmental Health Inspectorate informed the relevant judge of the Yaremche Court, which assumed jurisdiction over the claims lodged on 26 March 2001 (see paragraph 40 above), that the site of the cemetery did not comply with national environmental health laws and regulations on the planning and construction of urban areas. In particular, the location did not comply with the requirement of a health protection zone between the cemetery and the nearest residential buildings.

42. On 16 October 2001 the Yaremche Court declared Tatariv Council's decision of 2 March 2001 unlawful. On 17 April 2002 the Supreme Court upheld that judgment.

43. On 25 December 2001 Tatariv Council cancelled its decision of 2 March 2001 in pursuance of the judgment of 16 October 2001.

44. On 3 July 2003 Tatariv Council approved a new development plan for the village. The plan again authorised the use of the VL plot as a cemetery.

45. On 22 July 2003 the applicant again instituted proceedings against Tatariv Council, seeking to have the approval of the new development plan for the village, insofar as it concerned the location of the cemetery, declared unlawful. He also sought compensation for non-pecuniary damage, court fees and legal expenses.

46. On 22 August 2003 the Verkhovyna Court ordered Tatariv Council to inform the residents of the village that burials at the unauthorised cemetery near the applicant's house were prohibited.

47. By that time, up to seventy burials had been carried out on the VL plot. The distance between the applicant's house and some of the graves was less than 120 metres.

48. The Chairman of Tatariv Council argued before the court that there was no other suitable area for a cemetery in the village. She further submitted that the applicant's allegation of possible contamination of the water supply was unfounded, as the groundwater flowed away from his property.

49. On 26 December 2003 the Verkhovyna Court allowed the applicant's claims and held that the new construction plan was unlawful as regards the location of the cemetery. It found that the VL plot was not suitable for use as a cemetery. In particular, constructing the cemetery on the VL plot had breached the environmental health laws and regulations requiring the establishment of: (a) a health protection zone 300 metres wide separating residential areas from a risk factor; and (b) a water protection zone 50 metres wide separating water supply sources from a risk factor. It observed that those distances could not be reduced. It ordered Tatariv Council to close the cemetery and to pay the applicant 25,000 hryvnias (UAH)[13] in compensation for non-pecuniary damage and UAH 609.45[14] for costs and expenses.

50. On 28 May 2004 the Ivano-Frankivsk Regional Court of Appeal ("Court of Appeal") upheld the judgment of 26 December 2003 in part. In particular, it decided that no award of non-pecuniary damage should be made to the applicant, and it reduced the award for costs and expenses to UAH 151[15].

51. On 9 October 2006 the Supreme Court upheld the ruling of 28 May 2004.

C. Enforcement proceedings

52. On 18 June 2004 the Verkhovyna Court issued two writs of execution ordering Tatariv Council to adopt a decision declaring the new development plan unlawful and to close the cemetery.

53. On 7 July 2004 the State Bailiffs' Service instituted enforcement proceedings in the case.

54. Between July 2004 and February 2005 the State Bailiffs' Service imposed fines on Tatariv Council several times for its refusal to comply with the judgment of 26 December 2003.

55. On 3 March 2005 the Bailiffs terminated the enforcement proceedings, stating that it had been impossible to enforce the decision without the involvement of Tatariv Council, whose members had failed to adopt a decision in pursuance of the judgment of 26 December 2003.

56. In March 2005 the applicant requested the Verkhovyna Court to change the terms of the enforcement of the judgment of 26 December 2003. In particular, he sought to have the Chairman of Tatariv Council ordered to execute the judgment.

57. On 17 October 2005 the Verkhovyna Court rejected the applicant's request. It held that the Chairman had acted only as a representative of Tatariv Council, the respondent in the case. The Chairman had not been involved as a party to the proceedings. On 6 December 2005 the Court of Appeal upheld the ruling of 17 October 2005.

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13 EUR 3,869

14 EUR 94

15 EUR 24

58. In August 2005 the applicant challenged the alleged omissions and inactivity of the Chairman of Tatariv Council as regards the enforcement of the judgment of 26 December 2003 before the Verkhovyna Court.

59. On 8 November 2005 the Verkhovyna Court found no fault on the part of the Chairman and rejected the applicant's claim. On 12 January 2006 the Court of Appeal upheld that decision.

60. On 16 August 2006 Tatariv Council again refused to declare the new development plan unlawful and to close the cemetery.

61. On 28 August 2006 the State Bailiffs' Service informed the applicant that the enforcement proceedings were not subject to renewal.

62. The applicant also unsuccessfully sought to institute criminal proceedings against the Chairman of Tatariv Council for her alleged failure to enforce the judgment of 26 December 2003.

D. Proceedings against private individuals

63. On 7 May 2002 the Yaremche Court, acting upon the applicant's request, refused to institute criminal proceedings against a private individual, K. M., for using the VL plot for a burial. On 16 July 2002 and 21 January 2003 the Court of Appeal and the Supreme Court, respectively, upheld this decision.

64. On 3 October 2002 the Yaremche Court in two separate judgments rejected as unsubstantiated damages claims brought by the applicant and his neighbour, D. B., against K. M. and F. G. (private individuals) concerning the unlawful use of the land near their houses for burial purposes. It found no breach of applicant's rights by the respondents.

65. The judgments were upheld on 24 December 2002 (in two separate rulings) by the Court of Appeal and subsequently on 15 September 2005 and 15 February 2006 by the Supreme Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Ukraine, 26 June 1996

66. The relevant provisions of the Constitution read as follows:

Article 16

"To ensure ecological safety and to maintain the ecological balance on the territory of Ukraine, to overcome the consequences of the Chernobyl catastrophe — a catastrophe of global scale, and to preserve the gene pool of the Ukrainian people, is the duty of the State."

Article 50

"Everyone has the right to an environment that is safe for life and health, and to compensation for damages inflicted through the violation of this right..."

B. Law of Ukraine "On Ensuring the Environmental Health of the Public" of 24 February 1994

67. The relevant extracts from the Law provide as follows:

Article 15. Requirements as to urban planning and construction, development, manufacture and use of new technologies and means of production

"Enterprises, institutions, organisations and citizens shall comply with the requirements of environmental health legislation during... construction and in urban planning development...

Building and urban development... should first and foremost aim at creating the most prosperous conditions for life and maintaining and improving the health of citizens."

Article 18. Requirements concerning the domestic drinking water supply and water consumption areas

"The Government and local self-government authorities shall provide the residents of cities and other residential areas with drinking water, whose quantity and quality must comply with the requirements of environmental health legislation and [with] national standards...

...

Special health protection zones shall be established for domestic water supply systems and their sources."

C. Law of Ukraine "On Burials and Burial Service" of 10 July 2003

68. According to the relevant provisions of that law the State standards relating to planning and construction of burial vicinities shall include the State construction and environmental standards (Article 5 of the Law). Under Article 8 of the Law the local self-government bodies shall be responsible for allocation of land, construction, operation and administration of the cemeteries. Burial, pursuant to Article 12 of the Law, may be effectuated on the basis of a request lodged with the head of the village council or a relevant burial service. According to Article 23 of the Law, the executive bodies of village, town and city councils shall be responsible for planning and organisation of the territories of the burial vicinities, according to the general construction plans of the relevant residential areas and taking into account town planning, environmental and sanitary and hygiene requirements.

D. Law of Ukraine "On Drinking Water and the Drinking Water Supply" of 10 January 2002

69. The Drinking Water and Water Supply Act of 10 January 2002 (see relevant extracts from the Act below) establishes framework regulations for sanitary and hygiene standards of drinking water and water supply. In particular, Sections 27–30 of that Act establish obligatory standards for drinking water and its supply,

obligatory for compliance by the State authorities. These standards, according to Section 28 of the Act shall be established by the Cabinet of Ministers and shall be monitored by the Chief Sanitary Doctor of Ukraine, administering the State Sanitary and Epidemic Service of Ukraine. The relevant extracts from the Law provide as follows:

Article 13. Powers of local self-government bodies concerning drinking water and the drinking water supply

"Local self-government bodies shall be authorised:

to approve urban development projects and other documents relating to town planning, taking into account the requirements of [this Act];

..."

Article 22. Rights and duties of consumers of drinking water

"Consumers of drinking water shall be entitled:

to be provided with drinking water of a quality that complies with national standards..."

Article 36. Limitations on economic and other activities within health protection zones

"...

It is prohibited to place, construct, operate or reconstruct enterprises, installations and other objects for which full compliance with the requirements of the health protection zones [applicable to] projects, building and reconstruction and other projects cannot be guaranteed.

...

Within the second belt of the health protection zone:

it is prohibited to place a cemetery...or other object that [may] create a threat of microbial contamination of water..."

E. The National Environmental Health Regulations establishing "Environmental Health Requirements Concerning the Construction and Maintenance of Cemeteries in Residential Areas of Ukraine" of 1 July 1999

70. The relevant extracts from the Law provide as follows:

1. General Provisions

"...

1.2. The National Environmental Health Regulations are statutory and binding on public officials and citizens..."

3. Environmental Health Rules as to the Construction of Cemeteries

"3.2. The location of a cemetery and its size shall be envisaged by the general construction plan of a residential area; the allocation of a plot of land for a cemetery, new cemetery construction plans, and the expansion and reconstruction of operating cemeteries are subject to approval by the local offices of the State Environmental Health Inspectorate.

...

3.5. ... [A] health protection zone between a cemetery for traditional burials or a crematorium and residential or public buildings, recreational areas and allotments shall not be less than 300 metres wide...

[The following] cannot be located within a health protection zone:

– residential houses with a household plot, dormitories, hotels, guest houses."

F. The Relevant Domestic Standards Relating to Drinking Water, Construction of Cemeteries and Water Protection Zones

71. According to the Resolution of the Cabinet of Ministers No. 2024 of 18 December 1998 "On the Legal Regime of Sanitary Protection Zones for Water Objects", it is prohibited to place cemeteries and other objects which create a danger of microbic water pollution within the second belt of water protection zone.

72. According to the Appendix No. 1 to the State Sanitary Norms and Rules on Hygiene of Drinking Water for Human Consumption, approved by the Ministry of Health (*ДСанПіН 2.2.4.-171–10*) on 12 May 2010, drinking water should not contain any traces of *E. coli* to be considered safe for human consumption. These regulations replaced the State Sanitary Rules and Norms "On Placement and maintenance of wells and underground captation of water sources used for decentralised household drinking water supply", as approved by the Order No. 384 of the Ministry of Health of Ukraine on 23 December 1996. The 1996 State Sanitary Rules and Norms established that the index of *E. coli* bacteria per 1 cubic dm (*вміст бактерій групи кишкової палички в 1 куб.дм або "Індекс ВГКП"*) should not exceed 10. According to that standard a coliphage content, i. e. a bacteriophage that infects *E. coli,* should equal to "zero".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

73. The applicant complained of a violation of Article 8 of the Convention. In particular, he submitted that the construction of a cemetery near his house had led to the contamination of his supply of drinking water and water used for private gardening purposes, preventing him from making normal use of his home and its amenities, including the soil of his own plot of land, and negatively affecting his and his family's physical and mental health.

The text of Article 8 reads as follows: "1. Everyone has the right to respect for his private and family life, his home...

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

A. Admissibility

74. The Government raised no objection as to the admissibility of this complaint. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Applicability of Article 8

1. The parties' submissions

75. The Government submitted that there was no evidence of any adverse effects on the applicant's health which had resulted from the construction and use of the cemetery in issue. Nevertheless, they agreed that the applicant could have sustained some suffering as a result of the construction of the cemetery in the land plot adjacent to his house.

76. The applicant maintained his complaints, stating that the continued use of the cemetery had rendered his home virtually uninhabitable and his land unsuitable for use. He submitted that he could not use his plot of land for gardening nor the well on his land for drinking water for fear of being poisoned. The applicant further submitted that he and his family had been disturbed by the burial ceremonies carried out near their house.

2. The Court's assessment

77. As the Court has noted in a number of its judgments, Article 8 has been relied on in various cases in which environmental concerns are raised (see, among many other authorities, *Fadeyeva v. Russia*, no. 55723/00, § 68, ECHR 2005-IV). However, in order to raise an issue under Article 8 the interference about which the applicant complains must directly affect his home, family or private life and must attain a certain minimum level if the complaints are to fall within the scope of Article 8 (see *López Ostra v. Spain*, 9 December 1994, § 51, Series A no. 303-C; and *Fadeyeva*, cited above, § 69–70). Therefore, the first point for decision is whether the environmental pollution of which the applicant complains can be regarded as affecting adversely, to a sufficient extent, the enjoyment of the amenities of his home and the quality of his private and family life (see *Ivan Atanasov v. Bulgaria*, no. 12853/03, § 66, 2 December 2010). In this respect, the Court recalls that water pollution was one of the factors which was found to affect the applicants' health and hence their ability to enjoy their home, private and family life in the case of *Dubetska and Others v. Ukraine* (no. 30499/03, §§ 110 and 113, 10 February 2011).

78. The assessment of the minimum level is relative and depends on all the circumstances of the case, such as, the intensity and duration of the nuisance and its physical or mental effects. The general context of the environment should also be taken into account. The Court recently recalled that there could be no

arguable claim under Article 8 if the detriment complained of was negligible when compared to the environmental hazards inherent in life in every modern city (see *Hardy and Maile v. the United Kingdom*, no. 31965/07, § 188, 14 February 2012).

79. As regards health impairment, it is hard to distinguish the effect of environmental hazards from the effects of other relevant factors, such as, age, profession or personal lifestyle. Also, as regards the general context of the environment, there is no doubt that severe water and soil pollution may negatively affect public health in general and worsen the quality of an individual's life, but it may be impossible to quantify its actual effects in each individual case, "quality of life" itself being a subjective characteristic which does not lend itself to a precise definition (see, *mutatis mutandis*, *Ledyayeva and Others v. Russia*, nos. 53157/99, 53247/99, 53695/00 and 56850/00, § 90, 26 October 2006).

80. Taking into consideration the evidentiary difficulties involved, the Court will primarily give regard to the findings of the domestic courts and other competent authorities in establishing the factual circumstances of the case. As a basis for the analysis it may use, for instance, domestic legal provisions determining unsafe levels of pollution and environmental studies commissioned by the authorities. Special attention will be paid by the Court to individual decisions taken by the authorities with respect to an applicant's particular situation, such as an undertaking to revoke a polluter's operating licence or to resettle a resident away from a polluted area. However, the Court cannot rely blindly on the decisions of the domestic authorities, especially when they are obviously inconsistent or contradict each other. In such a situation it has to assess the evidence in its entirety. Further sources of evidence for consideration in addition to the applicant's personal accounts of events, will include, for instance, his medical certificates as well as relevant reports, statements or studies made by private entities (see *Dubetska and Others v. Ukraine*, § 107, cited above, with further references).

81. The Court recalls that Article 8 has been found to apply where the dangerous effects of an activity to which the individuals concerned were likely to be exposed established a sufficiently close link with private and family life for the purposes of Article 8 of the Convention (see *Hardy and Maile v. the United Kingdom*, § 189, cited above). In that case, the Court recognised that the potential risks to the environment caused by the construction and operation of two liquefied natural gas ("LNG") terminals established a sufficiently close link with the applicant's private live and home for the purposes of Article 8 and thereby triggered the application of that provision (see *Hardy and Maile v. the United Kingdom*, § 192, cited above).

82. As to the present case, the Court accepts that the applicant and his family may have been affected by the water pollution at issue. However, the Court must establish, in the absence of direct evidence of actual damage to the applicant's health, whether the potential risks to the environment caused by the cemetery's

location established a close link with the applicant's private life and home sufficient to affect his "quality of life" and to trigger the application of the requirements of Article 8 of the Convention (see paragraphs 78–81 above).

83. The Court notes that the domestic environmental health and sanitary regulations clearly prohibited placing the cemetery in close proximity to residential buildings and water sources (see paragraphs 67 to 72 above). It appears that the nearest boundary of the cemetery is situated 38 metres away from the applicant's house (see paragraph 33 above). This cannot be regarded as a minor irregularity but as a rather serious breach of domestic regulations given that the actual distance is just over one tenth of the minimum distance permissible by those rules. Furthermore, the cemetery is a continuous source of possible health hazards and the potential damage caused by such is not easily reversible or preventable. Such environmental dangers have been acknowledged by the authorities on numerous occasions, including, by prohibiting the use of the illegal cemetery for burials and by the offer to resettle the applicant (see paragraphs 20–25 and 49 above). It further notes that the domestic authorities established that the construction of a cemetery at the said location placed the applicant at risk of contamination of the soil and of the drinking and irrigation water sources because of emanations from decomposing bodies like ptomaine (see paragraph 10 above). The Court has particular regard to the fact that there was no centralised water supply in the Tatariv village and villagers used their own wells (see paragraph 9 above). It also appears that the high level of *E. coli* found in the drinking water of the applicant's well was far in excess of permitted levels and may have emanated from the cemetery (see paragraphs 12, 18 and 30 above), although the technical reports came to no definitive or unanimous conclusion as to the true source of *E. coli* contamination (see paragraph 31 above). In any event, the high level of *E. coli*, regardless of its origin, coupled with clear and blatant violation of environmental health safety regulations confirmed the existence of environmental risks, in particular, of serious water pollution, to which the applicant was exposed.

84. Under such circumstances, the Court concludes that the construction and use of the cemetery so close to the applicant's house with the consequent impact on the environment and the applicant's "quality of life" reached the minimum level required by Article 8 and constituted an interference with the applicant's right to respect for his home and private and family life. It also considers that the interference, being potentially harmful, attained a sufficient degree of seriousness to trigger the application of Article 8 of the Convention.

C. Compliance with Article 8

1. Submissions by the parties

85. The Government maintained that the cemetery had been built in the interests of the villagers of Tatariv, as there had been absolutely no other place in

the mountainous region near the village that could be used for a cemetery. They further stated that while it was true that the cemetery had been built in breach of environmental health laws and regulations as it had lacked the health protection zone required by law, the authorities had done all they could to prohibit burials and to provide the applicant with an opportunity to be re-housed, even though such an obligation to resettle had not existed in law. According to them, he had continuously rejected such proposals. In this respect they supplied letters of 10, 15 and 16 December 2009 from Tarariv Council and the Ivano-Frankivsk Regional State Administration, in which the municipal authorities stated that the applicant was not interested in resettlement (see paragraph 34 above). The Government accepted that the fact that the cemetery was placed on the VL plot engaged State's positive obligations under Article 8 of the Convention.

86. The applicant maintained his complaints and submitted that the decision to construct the cemetery in the vicinity of his house had been taken in breach of domestic regulations and that the Ukrainian authorities' measures to remedy the situation had been insufficient and inadequate. In particular, he stated that the authorities had done nothing to close the illegal cemetery, had failed to discontinue burials or to redress the situation by providing him with an alternative. The applicant submitted that he did not have anywhere to move to and he did not have enough money to build a new house. He mentioned that, despite his requests, no detailed and specific resettlement proposal had ever been made by the authorities.

2. The Court's assessment

87. Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it may involve the authorities' adopting measures designed to secure respect for private life and home (see, with further references, *Moreno Gómez v. Spain*, no. 4143/02, § 55, ECHR 2004-X).

88. Environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. The Court notes that the allegations of environmental harm in the instant case do not, as such, relate to the State's involvement in industrial pollution (see, in the context of serious industrial pollution, *Dubetska and Others v. Ukraine*, § 73, cited above). However, they concern allegations of health hazards arising from the local authority's decision to locate a cemetery just 38 meters from the applicant's home in breach of domestic regulations plus the State's failure to act in securing compliance with the domestic environmental standards. The allegations also concern the State's failure to regulate the activities of the municipality in line with such standards. The Court's task in such a situation is to assess whether

the State took all reasonable measures to secure the protection of the applicant's rights under Article 8 of the Convention. In making such an assessment factors, including compliance with the domestic environmental regulations and judicial decisions, must be analysed in the context of a given case (see, *mutatis mutandis*, *Dubetska and Others v. Ukraine*, cited above, § 141). In particular, where domestic environmental regulations exist, a breach of Article 8 may be established where there is a failure to comply with such regulations (see *Moreno Gómez v. Spain*, cited above, §§ 56 and 61).

89. Moreover, the principles applicable to an assessment of the State's responsibility under Article 8 of the Convention in environmental cases are broadly similar, regardless of whether the case is to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under Article 8 § 1 of the Convention or in terms of an "interference by a public authority" to be justified in accordance with Article 8 § 2. Furthermore, the procedural safeguards available to the applicant under Article 8 may be rendered inoperative and the State may be found liable under the Convention where a judicial decision, prescribing certain conduct to the authorities on environmental issues, is ignored by the authorities or remains unenforced for an important period of time (see, *mutatis mutandis*, *Taşkın and Others v. Turkey*, no. 46117/99, §§ 124–25, ECHR 2004-X).

90. Given that the applicant complains about direct Government responsibility for the placement of the cemetery in close proximity to his home and the pollution flowing therefrom, the Court will consider the case as one of direct interference with the applicant's rights under Article 8 (see paragraph 84 above).

91. As to the assessment of compliance with the requirement of lawfulness under Article 8 of the Convention, combined with the requirements of compliance with the domestic regulations, the Court notes the following:

(i) Tatariv Council's decision to situate the cemetery on the VL plot was taken in breach of the National Environmental Health Regulations and in particular the 300 metres "health protection zone" requirement (see paragraph 71 and 72 above). There was no lawfully approved construction plan, in contravention of the Laws of Ukraine "On Burials and Burial Service" (see paragraph 68 above) and "On Drinking Water and the Drinking Water Supply". In particular, the latter Act in its Sections 27–30 established obligatory sanitary and hygiene standards of drinking water and water supply, envisaging no *E. coli* content in drinking water (see paragraph 72 above);

(ii) The unlawfulness of the placement of the cemetery and the non-compliance with health and water protection zones were signalled on numerous occasions by the environmental health authorities and were acknowledged in the decisions of the domestic courts on at least six occasions (see paragraphs 12–14, 18, 35, 37, 42, 46 and 49–51 above);

(iii) The domestic authorities, responsible for the administration and maintenance of the cemetery under the law, failed to respect and to give full effect to the final and binding judgment of 26 December 2003 given by the Verkhovyna Court, confirmed by the appeal court and the Supreme Court, by which Tatariv Council was obliged to close the cemetery (see paragraph 49 above). This judgment remains unenforced to this day (see paragraph 61 above) and members of Tatariv Council, on several occasions, have refused to adopt a decision in compliance with that judgment;

(iv). The domestic authorities continued to disrespect the domestic environmental regulations as well as the final and binding judicial decisions confirming that they acted illegally and the decision of 26 December 2003 confirming that the cemetery should have been closed.

92. The Court notes that the Government have not disputed that the cemetery was built and used in breach of the domestic regulations (see paragraph 85 above). It further appreciates the difficulties and possible costs in tackling environmental concerns associated with water pollution in mountainous regions. At the same time, it notes that the siting and use of the cemetery were illegal in a number of ways: environmental regulations were breached; the conclusions of the environmental authorities were disregarded; final and binding judicial decisions were never enforced and the health and environment dangers inherent in water pollution were not acted upon (see paragraph 91 above). The Court finds that the interference with the applicant's right to respect for his home and private and family life was not "in accordance with the law" within the meaning of Article 8 of the Convention. There has consequently been a violation of that provision in the present case. The Court considers, in view of its findings of illegality of the authorities' actions, that it is unnecessary to rule on the remaining aspects of the alleged breach of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

93. The applicant complained that the failure of the domestic authorities and private individuals to comply with the final judgment prohibiting the use of the VL plot situated near his house for burial purposes had amounted to a breach of Article 6 § 1 of the Convention.

94. The Government contested that argument.

95. The Court finds that this complaint is linked to those examined above and must therefore likewise be declared admissible. Having regard to the finding relating to Article 8 (see paragraph 92 above), the Court considers that it is not necessary to examine the issue separately under Article 6 § 1 (see, *mutatis mutandis*, *W. v. the United Kingdom*, 8 July 1987, § 84, Series A no. 121, and *Mihailova v. Bulgaria*, no. 35978/02, § 107, 12 January 2006).

III. OTHER COMPLAINTS

96. The applicant complained under Article 6 § 1 that the proceedings concerning his dispute with Tatariv Council had been unfair and excessively lengthy.

97. In the light of the materials in its possession, the Court finds that the applicant's complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

98. It follows that this part of the application must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. Article 41 of the Convention provides:

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

A. Damage

100. The applicant claimed UAH 1,000,000 (EUR 163,125) in respect of non-pecuniary damage.

101. The Government contested this claim.

102. The Court notes that the applicant must have sustained non-pecuniary damage as the result of the violation found. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 6,000 in respect of non-pecuniary damage.

B. Costs and expenses

103. The applicant did not submit any claim for costs and expenses. Accordingly, the Court makes no award under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints of a violation of Article 6 § 1 on account of the lengthy non-enforcement of the judgment of 26 December 2003 and of a violation of Article 8 admissible and the remainder of the application inadmissible;

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

3. *Holds* that there is no need to examine the complaint under Article 6 § 1 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into national currency of the respondent State at the rate applicable at the date of settlement;

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

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

Done in English, and notified in writing on 4 September 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek — Registrar
Mark Villiger — President

ANNEX 21

FIFTH SECTION

CASE OF GRIMKOVSKAYA v. UKRAINE

(Application no. 38182/03)

JUDGMENT

STRASBOURG 21 July 2011

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

GRIMKOVSKAYA v. UKRAINE JUDGMENT 1

In the case of Grimkovskaya v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President,*
Elisabet Fura,
Boštjan M. Zupančič,
Isabelle Berro-Lefèvre,
Ann Power,
Ganna Yudkivska,
Angelika Nußberger, *judges,*
and Claudia Westerdiek, *Section Registrar,*
Having deliberated in private on 28 June 2011,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 38182/03) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mrs Klara Vasilyevna Grishchenko. The initial application form was executed by her on 20 and posted on 21 October 2003.

2. On 22 December 2003 Mrs Grishchenko informed the Court that she did not wish to be the applicant in the present case. She wished, on the other hand, to represent the interests of Mrs Natalya Nikolayevna Grimkovskaya, her daughter ("the applicant"). She also presented a power of attorney in her name signed by the applicant.

3. On 28 June 2004 the Court received a new undated application form, signed by the applicant, indicating Mrs Grishchenko as her representative.

4. The Ukrainian Government ("the Government") were represented by their Agent, Mrs V. Lutkovska.

5. In both application forms it was alleged that the applicant's home, private and family life were severely affected by the operation of a

motorway and that the domestic courts had arbitrarily dismissed her claims relating to the matter without responding to her main arguments.

6. On 23 November 2004 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). Subsequently the case was assigned to the newly composed Fifth Section (Rule 25 § 1 and Rule 52 § 1 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1966 and lives in Krasnodon.

A. Impact of the operation of the M04 motorway on the applicant's home, private and family life

8. The applicant is the owner of a house on K. Street in Krasnodon, where she resides with her parents and her minor son, D. G.

9. According to the Government, since 1983 K. Street had been a part of the Soviet trans-republican motorway running from Chisinau (Moldova) to Volgograd (the Russian Federation). In 1998 (after disintegration of the USSR) the Ukrainian authorities undertook a motorway stocktaking project and re-classified part of the motorway routed through the applicant's street as the "M04 Kyiv–Lugansk–Izvarine motorway".

10. According to the applicant, until the 1998 stocktaking project, the Chisinau-Volgograd motorway had never been routed through K. Street. Instead, it ran through P. Street in Krasnodon. K. Street, which is only six meters wide, is lined with private houses and gardens and is completely unsuitable for accommodating cross-town traffic. It has no drainage system, pavements or proper surfacing able to support heavy lorries and has been initially designed as an exclusively residential street. In 1998, in the course of the stocktaking project, the Department for Architecture and Urban Development of the Krasnodon City Council's Executive Committee agreed, for the first time, that the M04 motorway should pass via K. Street. In support of this allegation, the applicant provided a copy of a letter sent by the abovementioned Department on 9 October 1998 addressed to the State Roads Design Institute *(Дорпроект)*, in which it notified that agency of its consent to the M04 motorway being routed via a number of streets in Krasnodon, including K. Street.

11. According to the applicant, following this change in the routing of traffic, her house eventually became practically uninhabitable. It suffered heavily from

vibration and noise caused by up to several hundred lorries passing by every hour. In addition, air pollution increased substantially over the years and numerous potholes emerged in the inadequate surface of the road. As a result of driving across these potholes, the vehicles emitted additional fumes and stirred up clouds of dust. In trying to deal with the potholes, the road service department started filling them with cheap materials, such as waste from nearby coal-mines, which had a high heavy-metal content.

12. On 15 May 2002, responding to complaints from the street'sresidents, the Lugansk Regional Sanitary Department *(Державна санітарно-епідеміологічна служба в Луганській області)* measured the level of pollution near several K. Street houses, including the applicant's. During the test period of one hour, 129 vehicles were recorded as having passed by, 71 of which (55 %) emitted pollutants (nitrogen dioxide, carbon monoxide, saturated hydrocarbons, lead, copper, etc.) in excess of applicable safety standards. It was further established that the content of copper and lead in dust stirred up exceeded the safety standards by 23 and 7.5 times respectively. The monitoring team also noted that the road surface was damaged.

13. By way of evidence concerning the damage to the applicant's house, she presented a certificate dated 31 May 2002 signed by a group of assessors consisting of a city council deputy, the head of the local residents' association and a private individual. The group attested that it had examined the house and found that it had been damaged. In particular, the basement was cracked and the walls were covered with coal dust, which had allegedly been used during ad-hoc repairs of the road aimed at filling the potholes and subsequently disturbed by passing traffic. It also noted that the road surface near the applicant's house had been badly damaged, thus amplifying vibrations from passing vehicles and causing vibration of the furniture inside the applicant's house and pieces of plaster to occasionally fall from its ceiling and walls.

14. By way of evidence of health damage, the applicant presented medical certificates attesting that her father, mother and minor son were suffering from numerous diseases. The applicant's father, born in 1939, was diagnosed, in particular, with chronic erosive gastroduodenitis, chronic bronchitis, pneumatic fibrosis, atherosclerosis, hypertension, cardiosclerosis and other diseases, cumulatively resulting in his being assessed in April 2001 as a "second (intermediate) degree" disabled person.

15. The applicant's mother (Mrs Grishchenko), born in 1946, was found to be suffering, *inter alia*, from ulcers, chronic bronchitis, respiratory insufficiency, ischemic heart disease, deforming osteoarthritis, osteochondrosis and other diseases.

16. The applicant's minor son D. G., born in 1994, started suffering from frequent respiratory tract diseases from 1997 onwards. In 1998 he was diagnosed

as suffering from secondary immunodeficiency, non-rheumatic carditis and biliary dyskinesia. In 2000 D. G. was further diagnosed with hyperexcitability and hyperactivity disorder. During in-patient treatment of D. G. in November 2002, he was found to have excessive levels of copper and lead in his blood and urine and was diagnosed as suffering from chronic poisoning from heavy-metal salts, chronic toxic hepatitis and toxic encephalopathy.

17. On 12 July 2003 the Krasnodon Children's Hospital recommended that the applicant's son be resettled. The certificate noted, in particular: "Regard being had [to the fact] that the child has been living in an environmentally-saturated area since his birth (considerable pollution of air and soil with salts of heavy metals, sulphur dioxide, saturated and unsaturated carbohydrates), it is necessary to change his place of residence".

B. Administrative decisions addressing damage caused by the operation of the M04 motorway

18. On numerous occasions Mrs Grishchenko complained on the family's behalf to various authorities (including the President of Ukraine, the State Sanitary Department, the municipal authorities and the prosecutor's office) about intolerable levels of nuisance and pollution from the M04 motorway. According to the case file, the first complaints were lodged by her no later than 2000. On various occasions analogous complaints were also lodged individually and collectively by other K. Street residents. It is unclear from the case file what actions, if any, were taken by the authorities in response to these complaints prior to May 2002.

19. On 28 May 2002, following the assessment of pollution levels undertaken on 15 May 2002 (mentioned in paragraph 12 above), the Lugansk Regional Chief Sanitary Officer *(головний санітарний лікар Луганської області)* ordered the Krasnodon Mayor to consider stopping through traffic using K. Street and repairing K. Street's road surface. In his decision, that official mentioned that K. Street was designated as a temporary transit thoroughfare and that heavy traffic had ruined the surface of the road. He further noted that the level of air pollution on K. Street was in breach of the Law of Ukraine "On the Protection of the Air" ("the Clean Air Act") and that such pollution could have adverse effects on the residents' health.

20. On an unspecified date Mrs Grishchenko complained to the Krasnodon Prosecutors' Office about the level of pollution and demanded the initiation of a criminal investigation into the situation.

21. On 13 June 2002 the Krasnodon Prosecutors' Office rejected her demand, having found that while the fact of excessive pollution was not in dispute, there was no basis for linking this situation to any criminal wrong-doing on any authority's behalf. There was no appearance that the decision to use K. Street as

a transit road had been in and of itself unlawful. As regards repairing the road, the Prosecutors' Office had ordered the Krasnodon City Council's Executive Committee (hereafter "the Executive Committee") to redress violations of environmental law. It further notified Mrs Grishchenko that according to its information, repairs were planned for June 2002.

22. On 16 June 2002 K. Street was blocked to prevent the further passage of automobile traffic.

23. On 2 July 2002 the Lugansk Regional Prosecutors' Office further informed Mrs Grishchenko that on 18 June 2002 the Executive Committee had decided to order repairs to K. Street.

24. On 24 October 2002 the Chief of the Krasnodon Department of the Interior recommended that the municipality find funding for the repair of the surface of K. and L. Streets.

25. On 1 July 2003 the Lugansk Regional Department of the State Highways Agency (*Укравтодор* — "the Highways Agency") wrote to the Mayor of Krasnodon, acknowledging that the section of the M04 road in the region was not sufficiently equipped to accommodate the increased traffic and that there was an urgent need to build transit routes bypassing populated communities, including Krasnodon. However, regard being had to the lack of available funding, these works had not been carried out and the Lugansk Department had asked its central headquarters to deal with the situation. It further suggested that the Krasnodon municipality should renovate the in-town part of the road using funds garnered from automobile tax retained by the city treasury.

26. On 6 June 2006 the Municipal Housing and Municipal Maintenance Department informed the Executive Committee that repairing the surface of K. Street had been entered into the Urban Development Plan for 2006. However, no funding for the works had ever been received. It further noted that Krasnodon lacked any alternative roads meeting the standards of a transit thoroughfare and that the use of K. Street for this purpose — which it was unequipped for — had resulted in heavy deterioration of its surface.

27. On 27 June 2006 the Lugansk Regional Chief Sanitary Officer confirmed in his correspondence that the passage of vehicles through K. Street had been impossible, the street having been blocked by concrete blocks and other barriers.

28. On 24 November 2010 the applicant informed the Court, without providing any supporting materials, that the use of K. Street as a motorway had been recently restarted without any in-depth repairs having been carried out.

C. Civil proceedings against the Krasnodon City Council's Executive Committee

29. In 2001 Mrs Grishchenko lodged a civil claim on the applicant's behalf, seeking to oblige the Krasnodon City Council's Executive Committee to resettle

the family and to pay 5,000 hryvnias (UAH) in compensation for damage caused to their house and health by the operation of the M04 motorway.

30. In the course of the trial, the court examined written evidence presented by the applicant and questioned officials of the municipal Architecture, Housing and Road Maintenance Departments, and officers from the traffic police. The Architecture Department official stated that K. Street was seven metres wide; it had no drainage or pavements because there was no funding available for constructing these amenities. The Housing Maintenance Department official acknowledged that his department was partly responsible for K. Street's maintenance, which was to be funded by the Highways Agency and from automobile taxes. As the funding had not been forthcoming, the street had not been maintained properly. He also opined that the damage to the applicant's house had more likely been caused by construction flaws than by the operation of the motorway. The official from the Road Maintenance Department submitted that K. Street, being part of a motorway, was to be managed by it jointly with the Highways Agency. Finally, a traffic police officer submitted that for several preceding years there had been no complaints of traffic accidents on K. Street and that twice a year the traffic police examined the state of the road.

31. On 18 January 2002 the Krasnodon Court rejected Mrs Grishchenko's claim. The full text of its reasoning reads as follows:

"It has been established in court that K. Street in Krasnodon hosts the M04 Kyiv–Lugansk–Izvarine motorway.

The plaintiff did not provide the court with evidence that on account of the Executive Committee's fault the road is operated in breach of technical requirements existing for this category of roads. The plaintiff did not specify which particular provisions have been breached.

In addition, the plaintiff did not provide evidence that it is the [Executive Committee's] fault that her lawful rights have been infringed, namely, [that] her house has been destroyed, [and that] herself and her family suffer from various illnesses, resulting in mental distress.

Based on the above, the court considers it necessary to reject the claim as ill-founded..."

32. Mrs Grishchenko appealed. Referring primarily to Article 50 of the Constitution of Ukraine and the Clean Air Act, she noted, in particular, that by focusing on the issue of the road's maintenance, the first-instance court had deviated from the object of her claim. In fact, instead of seeking to oblige the plaintiff to repair the street, she had demanded resettlement, as in her opinion the street was completely unsuitable for hosting a motorway in the first place. The defendant had been at fault, not only for allowing through traffic, but also for failure to organise its regular supervision by traffic police, environmental and sanitary services to ensure safety, and antipollution measures. The claimant

asserted that the witnesses had presented inaccurate data. In particular, there had been numerous traffic accidents on K. Street, and a recent police response to one of the residents' complaints about that issue had been included in the case file. Mrs Grishchenko further complained that the court had failed to summon officials from the environmental and sanitary services to present comprehensive information about the environmental situation around the road and so had failed to ensure her and her family's right of access to environmental information.

33. On 10 June 2002 the Lugansk Regional Court of Appeal dismissed this appeal. The full text of the court's reasoning was as follows:

"Rejecting the claim of Grimkovskaya N. N., the court lawfully concluded that the M04 Kyiv-Lugansk-Izvarine motorway has been assigned on the basis of full managerial maintenance to the [Highways Agency]... and not to the Krasnodon City Council's Executive Committee.

The plaintiff did not provide the court with any evidence that the defendant had wrongly caused her non-pecuniary damage and did not specify the legal basis for compensation of the [alleged] non-pecuniary damage and [for] resettlement ..."

34. On 8 July 2002 Mrs Grishchenko appealed in cassation. She submitted that in her view the Krasnodon City Council's Executive Committee had been the proper defendant. In support of this argument, she provided a letter from the Highways Agency dated 6 June 2002 informing her that K. Street was not on its books and that it was to be managed by the municipality. She further alleged that the court had never examined whether the decision of the Krasnodon City Department for Architecture and Urban Development taken in October 1998 to route through traffic via K. Street had been lawful and reasonable. She considered that it had been unlawful to turn a six-metre-wide street into a motorway, especially in light of the subsequent failure of the municipality to organise proper environmental monitoring and management of the road. Mrs Grishchenko additionally mentioned that the first measurement of pollution levels had been carried out only in May 2002, following numerous complaints by the street's residents.

35. On 21 July 2003 the Supreme Court of Ukraine rejected Mrs Grishchenko's request for leave to appeal in cassation.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine of 28 June 1996

36. Relevant provisions of the Constitution read as follows:

Article 16

"To ensure ecological safety and to maintain the ecological balance on the territory of Ukraine, to overcome the consequences of the Chernobyl

catastrophe — a catastrophe of global scale, and to preserve the gene pool of the Ukrainian people, is the duty of the State."

Article 50

"Everyone has the right to an environment that is safe for life and health, and to ucompensation for damages inflicted through the violation of this right..."

B. Clean Air Act (Law of Ukraine no. 2707-XII "On the Protection of the Air") of 16 October 1992

37. The relevant provisions of the above law as worded at the material time read as follows:

Article 12. Restriction, suspension or discontinuation of emissions of pollutants into the air and [of levels of pollution] by physical and biological factors

"Carrying out a business or other type of activity connected to a breach of conditions and requirements concerning the emission of pollutants into the air and levels of [pollution] by physical and biological factors envisaged by permits may be restricted, suspended or discontinued according to the law."

Article 13. Regulation of levels of [pollution of the] air by physical and biological factors

"... Local bodies of executive power, bodies of local self-governance, enterprises, establishments, organisations and citizens [involved in] entrepreneurial activity shall be obliged to take necessary measures to prevent and preclude [an increase in] established levels of air [pollution] by physical and biological factors and [its effects on] human health."

Article 17. Measures concerning the prevention and mitigation of air pollution [caused] by emissions from methods of transport and by [associated] physical factors and facilities "In order to prevent and mitigate air pollution by methods of transport and by physical factors and facilities connected to them, there shall be:

- developed and implemented a system of measures concerning reductions in emissions, detoxification of pollutants and mitigation of physical impacts in the course of the development, production, exploitation and repair of methods of transport and in [associated] facilities;
- a shift of methods of transport and [associated] facilities to less toxic types of fuel;
- rational planning and development of populated communities in conformity with the distances to main roads set out by law or regulation;
- the movement of transport enterprises, cargo transit, and automobile transport [so that they take place] outside of densely populated residential areas;
- restrictions on the entrance of automotive traffic and other methods of transport and on [associated] facilities in areas zoned for residential, resort,

health, recreational and nature-reserve uses, and in places of mass recreation and tourism;

– improvement in the state of maintenance of main roads and street surfaces;
– implementation of automated systems of traffic regulation in the cities;
– improvement in technologies for the transportation and storage of fuel at petrol refineries and petrol stations;
– implementation of and improvement in monitoring activities, regulatory facilities, diagnostics facilities and comprehensive systems of control over compliance with environmental safety laws and regulations governing methods of transport and [associated] facilities;

A prohibition on the development, production and exploitation of methods of transport and [associated] facilities or physical factors [giving rise to] a level of pollutants in exhaust fumes which exceeds [applicable] standards."

Article 21. Preclusion and decrease of noise

"In order to preclude and decrease [excessive] levels of production and other noise and [in order to] achieve safe [levels of noise], there shall be:

...

Improvement in the design of methods of transport and [associated] facilities, and in the conditions for their exploitation, as well as due maintenance of train and tram tracks, roads, [and] street surfaces;

The situation, during the planning and development of populated communities, of enterprises, transport thoroughfares, aerodromes and other objects containing sources of noise in accordance with sanitary requirements and construction guidelines established by law and [in accordance with] noise maps;

...

Administrative measures concerning the preclusion and decrease of ... noise, including the implementation of regulations and schedules [governing] transport and vehicle movement, and [the operation of associated] facilities, within the boundaries of populated communities.

..."

C. The State Committee for Construction, Architecture and Housing Policy of Ukraine, State Construction Guidelines of Ukraine DBN B.2.3–4 — 2000 of 2000

38. The relevant paragraph of the Guidelines as worded at the material time reads as follows:

"In the course of developing new or reconstructing existing motorways of national importance, their routes shall be channelled, as a rule, [so as to] bypass existing populated communities."

III. RELEVANT INTERNATIONAL MATERIALS

39. The Aarhus Convention ("Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters", ECE/CEP/43) was adopted on 25 June 1998 by the United Nations Economic Commission for Europe and came into force on 30 October 2001. Ukraine ratified the Convention on 6 July 1999.

The Aarhus Convention may be broken down into the following areas:

– Developing public access to information held by the public authorities, in particular by providing for transparent and accessible dissemination of basic information.
– Promoting public participation in decision-making concerning issues with an environmental impact. In particular, provision is made for encouraging public participation from the beginning of the procedure for a proposed development, "when all options are open and effective public participation can take place". Due account is to be taken of the outcome of the public participation in reaching the final decision, which must also be made public.
– Extending conditions for access to the courts in connection with environmental legislation and access to information.

40. On 27 June 2003 the Parliamentary Assembly of the Council of Europe adopted Recommendation 1614 (2003) on environment and human rights. The relevant part of this recommendation states:

"9. The Assembly recommends that the Governments of member States:

i. ensure appropriate protection of the life, health, family and private life, physical integrity and private property of persons in accordance with Articles 2, 3 and 8 of the European Convention on Human Rights and by Article 1 of its Additional Protocol, by also taking particular account of the need for environmental protection;

ii. recognise a human right to a healthy, viable and decent environment which includes the objective obligation for states to protect the environment, in national laws, preferably at constitutional level;

iii. safeguard the individual procedural rights to access to information, public participation in decision making and access to justice in environmental matters set out in the Aarhus Convention;

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

41. The applicant complained that by routing the M04 motorway via her street, which had been unequipped for such a purpose, and by failing to organise the road's proper environmental monitoring and management, the Krasnodon

municipal authorities had breached her right to enjoyment of her home and her private and family life. She referred in this respect to Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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

A. Admissibility

42. The Government submitted that they were confused as to the applicant's identity: namely, whether Mrs Klara Grishchenko or Mrs Natalya Grimkovskaya should be considered the applicant in the present case.

43. The Government further contended that, assuming that the application had been lodged by Natalya Grimkovskaya, it should be dismissed as incompatible *ratione personae* with the provisions of the Convention. Namely, they contended that Natalya Grimkovskaya could not be considered a victim of a violation of Article 8, as she had not been a party to the relevant domestic civil proceedings. In the alternative, her complaint should be rejected for non-exhaustion grounds for the same reason. Finally, it was in any event lodged outside the six-month period provided for by the Convention, because the application form signed by Natalya Grimkovskaya had been undated and had only been received by the Court on 28 June 2004, while the final domestic decision in Mrs Grishchenko's civil proceedings had been taken on 21 July 2003.

44. The Government further submitted that, assuming that Mrs Grishchenko was the proper applicant, the complaint should be rejected for non-exhaustion. She had lodged her civil claim against the Executive Committee, which had been an improper defendant. Mrs Grishchenko had never lodged a claim against the Highways Agency, which, according to the domestic courts' findings, had been responsible for maintenance of the M04 motorway.

45. The applicant disagreed. She noted that the application concerned the interests of her entire family. However, she had wished to be considered the applicant, since she was the owner of the house. In addition, it had been expressly on her behalf that Mrs Grishchenko had instituted the domestic civil proceedings claiming compensation and resettlement. The applicant further alleged that she had not been obliged to lodge a claim against the Highways Agency, as in her opinion the Executive Committee had been responsible for K. Street's maintenance. Moreover, it had been the Executive Committee who had allowed through traffic on K. Street in the first place. Further, it had not organised regular monitoring of this part of the road by traffic police, or by environmental

and sanitary authorities, to ensure the enforcement of anti-pollution and safety measures. The substance of her complaint under Article 8 of the Convention had therefore been duly stated before the domestic courts.

46. The Court notes that the applicant lives on K. Street and has provided considerable information concerning her personal suffering on account of the street's designation as part of a motorway. Her complaint may therefore not be considered incompatible *ratione personae* with the provisions of the Convention. The Government's objection concerning the applicant's victim status must therefore be dismissed.

47. The Court further observes that the judicial authorities, and, in particular, the Lugansk Regional Court of Appeal clearly considered Mrs Grishchenko's civil claim as having been lodged on the applicant's behalf (see paragraph 33 above). The Government's first objection concerning non-exhaustion must therefore also be dismissed.

48. As regards the Government's argument that the complaint was lodged after the expiry of the six-month period, the Court notes that Mrs Grishchenko first informed the Court that she wanted to act on her daughter's behalf in the Convention proceedings and submitted the respective power of attorney from the applicant on 22 December 2003. This date falls within the six-month period following the taking of the final decision in the civil proceedings ending on 21 July 2003. The Court considers that, in these circumstances, the fact that the initial application form (executed on 20 and posted on 21 October 2003) was signed by Mrs Grishchenko and that subsequently the applicant herself signed a new application form raising the same complaints, which was received by the Court on 28 June 2004, cannot be construed against her. The Court therefore dismisses the Government's objection concerning the six-month period.

49. Finally, as regards the Government's second objection concerning non-exhaustion, namely, that a civil claim should have been lodged against the Highways Agency, in light of the materials in the case file (see paragraphs 21, 24–26 and 30 above) the Court considers that the applicant's arguments concerning the Executive Committee's responsibility for the maintenance of K. Street were not without some basis. It is more important, however, that the object of the applicant's claim before the Court concerns, primarily, not repairs to K. Street, but rather the compatibility with the Convention of: (i) the municipality's consent to designate that street as a part of a motorway; and (ii) its alleged omissions in putting in place a sound environmental management policy to ensure that the operation of the motorway complied with applicable law. The Government have not shown how these issues could be resolved in proceedings against the Highways Agency. This objection must therefore also be dismissed.

50. Overall, the Court considers that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention.

It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The applicant

51. The applicant submitted that the decision taken in 1998 to designate K. Street as part of a motorway had been unlawful and arbitrary, as national transit roads should be constructed outside of populated communities. Given that as of October 1998, when the authorities had been carrying out the motorway stocktaking project, there had been no proper transit road in place, they should have routed the M04 motorway via P. Street, which had previously served as a portion of the Chisinau–Volgograd motorway. The decision to re-route traffic via a six-metre-wide residential street with private houses situated four to five metres from the road had been arbitrary.

52. Furthermore, having taken this decision, the municipal authorities had never taken measures to ensure regular monitoring of the street by the traffic police, as well as its environmental management to curtail pollution resulting from the heavy lorry traffic. Pollution and other nuisances had remained unchecked for several years in a row, and it had only been following multiple complaints from the street's residents that in May 2002 the level of pollution had been checked and the decision to suspend the traffic had been taken. Moreover, the street's residents had had to engage in mass protests in order to have this decision eventually enforced. In any event, although the traffic had been stopped, no measures to repair the deteriorated road surface or clean up the soil had ever been implemented.

53. As a result, the applicant's house had been damaged and her family members had suffered irreparable damage to their health. They should have obtained compensation from the Executive Committee for their grievances. However, the domestic courts had arbitrarily dismissed her claim concerning the matter, having refused to properly consider her main arguments.

(b) The Government

54. The Government objected to this view.

55. They alleged, firstly, that there had been insufficient evidence that the applicant's suffering had reached the threshold necessary for bringing Article 8 of the Convention into play. The damage to the house from vibration had been confirmed by a group of assessors who had not been qualified to come to such conclusions. On the other hand, a qualified representative of the Housing Maintenance department had opined during the court hearings that the house had more likely been flawed upon its initial construction. There had likewise been no conclusive evidence concerning a correlation between the motorway's operation

and the health problems suffered by the members of the applicant's family. The Government also contested, without providing evidence, the accuracy of the medical certificates issued by the City Hospital, alleging that they were prepared by the applicant's sister. Moreover, there had been other sources of pollution in the area, such as burning spoil heaps from coal-mining activity. Overall, a considerable part of Ukraine suffers from various environmental problems and there is no indication that the environmental burden suffered by the applicant's family had been any heavier than that borne by the rest of the community.

56. The Government further contended that, even assuming that they had owed any duty vis-à-vis the applicant under Article 8 of the Convention, they had taken all reasonable actions to ensure a fair balance between her interests and those of the community. Firstly, K. Street had served as a through road since 1983. In 1998 the street's status as part of the motorway had merely been confirmed during the stocktaking project. The Government should therefore not be held responsible for the decision to route the traffic via K. Street. Secondly, following the entry of the Convention into force, the authorities had been contemplating the construction of a new through road, bypassing residential streets. However, they had had no choice but to use the existing road until the necessary funding could be found, as closing it off would have caused considerable detriment to the economic well-being of the country. Contrary to the applicant's argument, the use of the road had not been at odds with applicable law, because paragraph 1.9 of the State Construction Guidelines had recommended, but had not required, that major motorways be constructed outside populated communities.

57. The Government next argued that the pollution complained of had not been emitted by the State authorities' operation of the road, but rather by vehicles belonging to various owners. This pollution therefore could not qualify as State interference with the applicant's Article 8 rights. Assuming the State had had a positive obligation to react to this pollution, it had done so by setting up a legislative scheme establishing safe pollution levels and a system to monitor compliance with that scheme. Once the State authorities had become aware that the road was not operating as intended, they had reacted quickly by closing it off to through traffic on 16 June 2002, more than a year before the applicant had applied to the Court.

2. The Court's assessment

58. Referring to its well-established case-law (see, among other authorities, *López Ostra v. Spain*, 9 December 1994, Series A no. 303-C; *Dubetska and Others v. Ukraine*, no. 30499/03, §§ 105–108, 10 February 2011) the Court reiterates that, where, as in the present case, the case concerns an environmental hazard, an arguable claim under Article 8 may arise only where the hazard at issue attains a level of severity resulting in significant impairment of the applicant's ability to enjoy her home, private or family life. The assessment of that minimum level is

relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life.

59. In line with these principles, the Court must first consider whether the detriment suffered by the applicant on account of the operation of the M04 motorway starting from October 1998 was sufficiently serious to raise an issue under Article 8 of the Convention. The Court observes that the applicant's complaints concern, primarily, the level of noise, damage to her house from vibration and her sufferings on account of the deterioration of her parents' and her minor son's health resulting from air and soil pollution.

60. The Court considers that there is insufficient evidence to prove all the applicant's allegations 'beyond reasonable doubt'. In particular, the noise levels and their impact on the applicant's private and family life have never been measured (see *a contrario Deés v. Hungary*, no. 2345/06, § 23, 9 November 2010). The allegation that the damage to the house had been caused by vibration was disputed by the Government with reference to a competent authority's opinion and has never been confirmed by an independent expert. Insofar as the applicant's parents' health can fall within the scope of her family life under Article 8, the case file contains medical evidence that they suffer from numerous illnesses. However, based on this evidence, it is not possible to determine to what extent these illnesses have been caused or aggravated by the operation of the motorway. As regards the health of the applicant's minor son, it appears that he already suffered from immunodeficiency before October 1998 and that in his doctors' opinion he had resided in an 'environmentally saturated area' from his birth in 1994 (see paragraph 17 above).

61. At the same time, the Court notes that according to the official investigation of 15 May 2002 (see paragraph 12 above), the surface of the road near the applicant's house was severely damaged and more than one hundred vehicles drove over it during one hour. It is not implausible in these circumstances that the applicant was regularly disturbed by noise and vibration, at least to some extent. Further, more than half of the examined vehicles were found to be emitting pollutants in excess of applicable safety standards. The level of air and soil pollution was assessed by the domestic environmental health authorities as necessitating the suspension of the use of the road, on pain of risk of adverse impact on the residents' health (see paragraph 19 above). The polluting substances emitted by the vehicles included copper and lead, an excessive level of which was also found in the soil near the applicant's house. In light of these findings, the Court considers it particularly notable that the applicant's son was diagnosed in 2002 with chronic lead and copper salts poisoning. The Court notes that the Government have not provided any evidence disproving the authenticity and accuracy of this diagnosis and have not proposed any plausible alternative explanation concerning the origin of this

poisoning to counter the applicant's allegation that it was directly connected to the motorway's operation.

62. Regard being had to the above data, the Court considers that the cumulative effect of noise, vibration and air and soil pollution generated by the M04 motorway significantly deterred the applicant from enjoying her rights guaranteed by Article 8 of the Convention. Article 8 is therefore applicable in the present case.

63. In view of the above, the Court will next examine, in the light of the principles developed in its jurisprudence (see, among other authorities, *Dubetska*, cited above, §§ 140–145) whether the Government have provided sufficient evidence to justify a situation in which the applicant bore a heavy burden on behalf of the rest of the community.

64. The Court firstly notes that, as submitted by the Government, on 16 June 2002, within one month of the investigation by the environmental health authorities, K. Street was closed off to through traffic. Lacking concrete data, and, in particular, texts of relevant domestic decisions (if any) in evidence of the applicant's allegations that this decision was in fact enforced at an unspecified later date or that the traffic was eventually restarted, the Court will proceed from the assumption that through traffic was stopped on the date suggested by the Government (see, *mutatis mutandis*, *Vinokurov v. Russia and Ukraine* (dec.), no. 2937/04, 16 October 2007). Consequently, it must be noted that the issues of noise, vibration, air and soil pollution connected to its functioning were redressed. It, however, remains to be examined whether the State authorities should still be liable for the adverse effects of the motorway's operation between October 1998 and June 2002.

65. In assessing this matter, the Court recognises the complexity of the State's tasks in handling infrastructural issues, such as the present one, where measures requiring considerable time and resources may be necessary. Being mindful of its subsidiary role under the Convention, on many occasions the Court has emphasized that the States should enjoy a considerable margin of appreciation in the complex sphere of environmental policymaking (see, for example, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 100, ECHR 2003-VIII). While the authorities of the Member States are increasingly taking on responsibility for minimising or controlling pollution, Article 8 cannot be construed as requiring them to ensure that every individual enjoys housing that meets particular environmental standards (see *Ward v. the United Kingdom* (dec.), no. 31888/03, 9 November 2004). In line with these considerations, the Court considers that it would be going too far to render the Government responsible for the very fact of allowing cross-town through traffic to pass through a populated street or establish the applicant's general right to free, new housing at the State's expense. All the more so, given that the applicant in the present case has not argued that her house has decreased in value since October 1998 or that she has otherwise

been unable to sell it and relocate without the State's support (see, *a contrario*, *Fadeyeva v. Russia*, no. 55723/00, § 121, ECHR 2005-IV).

66. While the Court finds no reason to reassess the substance of the Government's decision to allow the use of K. Street as a through road, in examining the procedural aspect of relevant policymaking, the Court is not convinced that minimal safeguards to ensure a fair balance between the applicant's and the community's interests were put in place.

67. It notes, firstly, that the Government have not shown that the 1998 decision to route motorway M04 via K. Street was preceded by an adequate feasibility study, assessing the probability of compliance with applicable environmental standards and enabling interested parties, including K. Street's residents, to contribute their views (see, *a contrario*, *Hatton*, cited above, § 128). On the contrary, the nature of this decision and the adequacy of attenuating procedures appear quite ambiguous, particularly in light of the Government's disagreement with the applicant as to whether the 1998 decision re-routed the traffic from P. Street to K. Street or merely confirmed K. Street's earlier status as a through road. The Court considers, however, that even if K. Street had been used by through traffic before the 1998 stocktaking project, the State authorities were responsible for ensuring minimal procedural safeguards in this project's course. Neither the domestic court decisions, nor the Government's observations contain evidence that these safeguards, and particularly public access to relevant environmental information and decision-taking in the period of contemplating the stocktaking project, existed.

68. Secondly, the Court considers that no later than the time of the 1998 stocktaking project, the authorities likewise became responsible for putting in place a reasonable policy for mitigating the motorway's harmful effects on the Article 8 rights of K. Street's residents (see, *mutatis mutandis*, Fadeyeva, cited above, §§ 127–131). It appears that the municipal authorities did take some measures aimed at the street's environmental management (see paragraph 30 above). However, neither the assessment made by domestic courts in their judgments, nor the Government's observations contain sufficient detail enabling the Court to conclude that this management was effective and meaningful before the measurement of critical pollution levels on 15 May 2002. As transpires from the available materials, this measurement session was carried out only in response to repeated complaints by K. Street's residents, which, according to the case file, were initially lodged no later than in 2000.

69. Thirdly, emphasising the importance of public participation in environmental decision-making as a procedural safeguard for ensuring rights protected by Article 8 of the Convention, the Court underlines that an essential element of this safeguard is an individual's ability to challenge an official act or omission affecting her rights in this sphere before an independent authority (see *Dubetska*, cited above,

§ 143). It also notes that as of 30 October 2001 the Aarhus Convention, which concerns access to information, participation of the public in decision-making and access to justice in environmental matters has entered into force in respect of Ukraine (see paragraph 39 above). In the meantime, it has not been shown in the present case that the applicant was afforded a meaningful opportunity to contest the State authorities' policymaking regarding the M04 motorway during the period of October 1998 – June 2002 before the domestic courts.

70. The Court notes that the applicant formally attempted to do so by lodging through Mrs Grishchenko a civil claim against the Executive Committee. As appears from the brief reasoning adduced by the Lugansk Regional Court of Appeal for dismissing her claim (see paragraph 33 above), its analysis was mostly limited to concluding that the defendant was not at all responsible for K. Street's maintenance and repair. The Court notes that a variety of documents in the case file appear to pinpoint that such responsibility did — at least to some extent — in fact exist (see paragraphs 24–26, 30 and 34 above), while the court's reasoning does not contain any reference to the evidence which served as a basis for its contrary conclusion.

71. Regardless, however, of which authority was responsible for the maintenance of K. Street's road surface and other amenities, the Court finds it more important that the courts' reasoning does not contain a direct response to the applicant's main arguments, on the basis of which she had sought to establish the Executive Committee's liability. In particular, while the first-instance court questioned some witnesses as to some points of the municipality's environmental policy, neither its, nor the higher courts' judgments contain any express assessment as to why they considered that this policy adequately protected the applicant's rights. Likewise, no reasoning was provided for dismissing an allegation that the defendant's decision taken in October 1998 was in and of itself unlawful and arbitrary, and it is unclear from the case file whether this aspect of the applicant's complaint was at all studied during the proceedings at issue. The Court considers that the applicant's arguments concerning the unlawfulness and arbitrariness of the above decision and the adequacy of the municipality's environmental policy concerning K. Street were of paramount importance for resolving whether or not the defendant's conduct struck a fair balance between the applicant's rights guaranteed by Article 8 and the interests of the community. Lacking reasoning for the dismissal of these arguments in the texts of the domestic judgments, the Court is unable to conclude that the applicant had a meaningful opportunity to adduce her viewpoints before an independent authority.

72. Overall, the Court attaches importance to the following factors. First, the Government's failure to show that the decision to designate K. Street as part of the M04 motorway was preceded by an adequate environmental feasibility study and followed by the enactment of a reasonable environmental management policy. Second, the Government did not show that the applicant had a meaningful opportunity to contribute to the related decision-making processes, including

by challenging the municipal policies before an independent authority. Bearing those two factors and the Aarhus Convention (see paragraph 39) in mind, the Court cannot conclude that a fair balance was struck in the present case.

73. There has therefore been a breach of Article 8 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION

74. The applicant additionally complained under Articles 6 § 1 and 13 of the Convention that the civil proceedings in her case had been unfair. In particular, she complained that the courts had not stated sufficient reasons for dismissing her claims. The Court considers that this complaint falls to be examined under Article 6 § 1 of the Convention only (see *Kudła v. Poland* [GC], no. 30210/96, § 146, ECHR 2000-XI). This provision, insofar as relevant, reads as follows:

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

75. The Government contested this allegation.

76. The Court notes that this complaint is linked to the applicant's complaint under Article 8 and must therefore likewise be declared admissible.

77. It further reiterates that, notwithstanding the difference in the nature of the interests protected by Articles 6 and 8 of the Convention, which may require separate examination of claims lodged under these provisions, in the instant case, regard being had to the Court's findings under Article 8 (see paragraphs 69–71 above) concerning the lack of reasoning in the domestic court judgments, the Court considers that it is not necessary to also examine the same facts under Article 6 (see, *mutatis mutandis*, *Hunt v. Ukraine*, no. 31111/04, § 66, 7 December 2006).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. Article 41 of the Convention provides:

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

A. Damage

79. The applicant claimed 10,000 euros (EUR) in just satisfaction for damage allegedly caused to her current house and EUR 20,000 for buying a new house. She further claimed EUR 100,000 in compensation for health damage and mental distress.

80. The Government submitted that these claims were unsubstantiated.

81. Regard being had to the reasons for which the Court has found a violation of Article 8 of the Convention in the present case, it considers that the applicant

must have suffered non-pecuniary damage which cannot be redressed by the mere finding of the violation. Ruling on an equitable basis, it awards the applicant EUR 10,000 in respect of non-pecuniary damage and dismisses the remainder of her claim as unsubstantiated.

B. Costs and expenses

82. The applicant also claimed EUR 500 for costs and expenses incurred before the domestic courts. She did not provide any supporting documents.

83. The Government alleged that this claim was unsubstantiated.

84. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, lacking any supporting documents, as well as giving no explanation as to the nature of the expenses comprising the amount claimed, the Court makes no award.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

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

3. *Holds* that there is no need to examine the complaints under Articles 6 § 1 and 13 of the Convention separately;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to be converted into the national currency of Ukraine at the rate applicable at the date of settlement;

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

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

Done in English, and notified in writing on 21 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek — Registrar
Dean Spielmann — President

FOR NOTES

Навчальне видання

Є. Алексєєва
О. Мелень-Забрамна
Д. Скрильніков

ЗАСТОСУВАННЯ ЄВРОПЕЙСЬКОЇ КОНВЕНЦІЇ З ПРАВ ЛЮДИНИ ТА ЗАХИСТУ ЕКОЛОГІЧНИХ ПРАВ ТА ДОВКІЛЛЯ

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