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

The second edition

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

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А 46 Застосування Європейської конвенції з прав людини для захисту екологічних прав та довкілля (посібник, 2-ге видання) / Є. Алексєєва, О. Мелень-Забрамна. Львів : Видавництво «Компанія "Манускрипт"», 2025. 488 с.
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Посібник становить собою друге 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 тлумачить задля поширення 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 у екологічних справах, а також питанням природи і цінності 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, а також резюме чи прес-релізи, підготовлені Секретаріатом ЄСПЛ.

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

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Application of the European Convention on Human Rights for Protection of Environmental Rights and the Environment (manual, 2nd edition) / Ye. Aleksyeyeva, O. Melen-Zabramna. Lviv : Company "Manuscript" Publishing, 2025. 488 p.

The manual constitutes the second edition of the analytical review of the practice of the European Court of Human Rights in cases relating to the environment. The authors analyse court judgments under specific articles of the Convention for the Protection of Human Rights and Fundamental Freedoms, the content of which was creatively interpreted 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 value of the judgments of the ECHR for national legislation and practice in Ukraine. The second chapter directly analyses the case-law of the ECHR in the issues relating to the environment. Official texts of decisions as well as summaries or press releases prepared by the Secretariat of the ECHR are provided as annexes to 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 framework of Ukraine on the protection of the environment and a human right to a safe environment is quite a developed and detailed one. Nevertheless, in practice protection of the elements of the environment and environmental rights presents a difficult task t solved even for the national judicial system.

In such cases Environment–People–Law advises to turn to the international mechanisms and tools, including resorting to the European Convention for the Protection of Human Rights and Fundamental Freedoms and its unique mechanism — the European Court of Human Rights (hereinafter referred to as the ECHR, the Court)[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 which procedure envisages the possibility of private persons to address it, and not just Member States of the Convention. It is mandated to confirm the infringement 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 provision 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 the Parties to the Convention, in 2006 the Parliament of Ukraine recognized the jurisprudence of the ECHR 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 jurisdiction 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 (hereinafter referred to as the European Convention or Convention) was adopted in 1950 — at the times when environmental protection was not yet on the agenda for international regulation. Originally, the Convention was not meant for environmental protection, therefore its provisions do not secure the right to the environment safe for life and health. No wonder that the first environmental cases arguing the violation of rights under the Convention heard in the 60–70ies were considered to be manifestly ill-founded. Nevertheless, 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".[3] Thus, for instance, the content of the right to life has evolved from negative obligation not to deprive intentionally a human being of their life to a positive obligation of a State to take appropriate measures to safeguard the lives of those within their jurisdiction in cases of risk caused by environmental pollution.[4] 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 living in degrading or polluted environment, including in sanitary protection zones of industrial installations.[5]

Currently, protection of environmental rights and the environment has been reflected in the case-law of the ECHR, in particular, with regard to the violations 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). The scope of 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 the violation of Article 8 of the Convention and awarded the applicants the just satisfaction as well as obliged the respondent-countries 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 Court. In case of Heathrow Airport, the ECHR striking the balance between economic and environmental interests, decided in favour of a public interest in economic

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3 Tyrer v. the United Kingdom, 25.04.1978, http://hudoc.ECHR.coe.int/eng?i=001-57587

4 Öneryıldız v. Turkey, 30.11.2004, http://hudoc.ECHR.coe.int/eng?i=001-67614

5 Dubetska and others v. Ukraine, 10.02.2011p., http://zakon0.rada.gov.ua/laws/show/974_689

welfare. One of the judges in his dissenting opinion however 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, and noise; the Court should keep on developing environmental rights under the Convention[6]. Such approach of at some judges even if they do not yet constitute the majority gives hope for further expansion of the range of possibilities in protecting environmental rights under the Convention. Furthermore, even existing agreements related to the 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 practice of the ECHR as a binding source of law in Ukraine, the legislator has reshaped the legal system for the sake of inclusion of the European standards of human rights protection. To strengthen the rule of law principle, the Parliament of Ukraine has made all the judgments of the ECHR regarding any Member States of the Council of Europe binding for Ukrainian courts, that is to 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 analyses the case-law of the ECHR in specific cases grouped according to the respective articles of the Convention.

Since the first edition of 2016, the number of judgments of the ECHR in cases relating to violation of human rights due to certain environmental factors has grown. To give the reader an opportunity to get better acquainted with the judgments, the manual includes full texts of the most prominent judgments against Ukraine, as well as official legal summaries and press releases issued by the Secretariat of the ECHR in cases related to other countries. Full texts of all decisions of the ECHR are available in the HUDOC database[7], and in cases relating to Ukraine they could also be found on the online official legislative database of Ukraine in Ukrainian language[8].

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 environmental activists of Ukraine and worldwide.

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6 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

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

8 See: [Electronic resource]. — Access mode: https://zakon.rada.gov.ua/laws/main/index

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

Every year near 45 000 applications are lodged to the ECHR, in 2023 — a small decline was observed and 33 000 applications filed[9]. As of Nobember 30, 2023 — 70,000 applications were pending before judicial formations of the ECHR. Small amount of applications are resulting in judgement (6000 judgements out of 34000 applications in 2023, 3800 from 37000 applications in 2022), while the majority are decided by the decision on inadmissibility or struck out of the list of cases (28000 applications in 2023 and 32000 in 2022). As of 31/12/23, half of pending cases relate to violations made by the following 2 countries: Russia and Turkey. Currently, about 12,5 % are cases against Ukraine[10], and Ukraine stopped to be the "leader" among defending states among which is the highest figure among all the member states of the Convention.

The time from lodging application to the final decision from judicial formation of the ECHR might take several years, thus in 2009 the Court adopted a Priority policy with a view to speeding up the processing and adjudication of the most important, serious and urgent cases. It established seven categories (table below) ranging from urgent cases concerning vulnerable applicants (Category I) to clearly inadmissible cases dealt with by a Single Judge (Category VII). It has conducted a review of that policy in 2017 and has made some amendments to the priority categories for more targeted and effective case-processing with the

9 https://www.echr.coe.int/documents/d/echr/stats_month_2023_eng

10 https://www.echr.coe.int/documents/d/echr/stats_pending_2023_bil

aim of streamlining the handling of both priority and "impact" cases (i.e. non-priority Chamber cases which address core issues of relevance for the State in question and/or for the Convention system generally).[11]

I.	**Urgent** applications (in particular risk to life or health of the applicant, the applicant deprived of liberty as a direct consequence of the alleged violation of his or her Convention rights, other circumstances linked to the personal or family situation of the applicant, particularly where the well-being of a child is at issue, application of Rule 39 of the Rules of Court)
II.	Applications raising questions capable of having an **impact on the effectiveness of the Convention system** (in particular a structural or endemic situation that the Court has not yet examined, pilot-judgment procedure) or applications raising an **important question of general interest** (in particular a serious question capable of having major implications for domestic legal systems or for the European system)
III.	Applications which on their face raise as main complaints issues under **Articles 2, 3, 4 or 5 § 1** of the Convention ("core rights"), irrespective of whether they are repetitive, and which have given rise to direct threats to the physical integrity and dignity of human beings
IV.	Potentially well-founded applications based on other Articles
V.	Applications raising issues already dealt with in a pilot/leading judgment ("well-established case-law cases")
VI.	Applications identified as giving rise to a problem of admissibility
VII.	Applications which are manifestly inadmissible

Categories of priorities. Source: https://www.echr.coe.int/documents/d/echr/Priority_policy_ENG

Cases falling under categories I-III are dealt with by the Court by way of judgments or decisions mainly taken by the Grand Chamber or Chambers of seven Judges. Repetitive cases and manifestly inadmissible cases under categories V–VII are processed speedily by the Court by way of various filtering mechanisms and new working methods. In category IV a small percentage of cases may raise very important issues of relevance for the State in question and/or the Convention system as a whole and justify more expeditious

[11] https://www.echr.coe.int/documents/d/echr/Priority_policy_ENG

case-processing. These cases will be identified and marked as "impact" cases under a new category IV-High. So as a result, these new IV-High cases will be processed and adjudicated by the Court even more expeditiously. Non-impact category IV cases will be dealt with by the Court as efficiently as possible in Committees of three Judges.[12]

Case processing chart in ECHR looks as follows — see page 12.

"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,[13] 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. 14 established the Single Judge formation, meaning that a Judge sitting alone, assisted by a Non-Judicial Rapporteur, could declare applications inadmissible, whereas previously three Judges had been required. The Filtering Section has been in operation since the beginning of 2011. Its principal function is to carry out a thorough, accurate and immediate sifting of cases to ensure that all applications are placed on the appropriate procedural track, whether submitted to a Single Judge for prompt decision or sent to await examination by a Committee of three judges or Chamber in accordance with the Court's priority policy.

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. It is worth mentioning, that sending application shortly before the deadline for application to the ECHR might bring negative result in cases when your application is incomplete. For instance, on 9 September 2014, in *Malysh and Ivanin v. Ukraine* (nos. 40139/14 and 41418/14), a Chamber rejected two cases as out of time where the applicants failed to re-submit a full and complete application form within the six-month time-limit. It is therefore now established in the Court's case-law that the introduction date is that of the dispatch of the completed application form and that earlier incomplete submissions are not taken into account.

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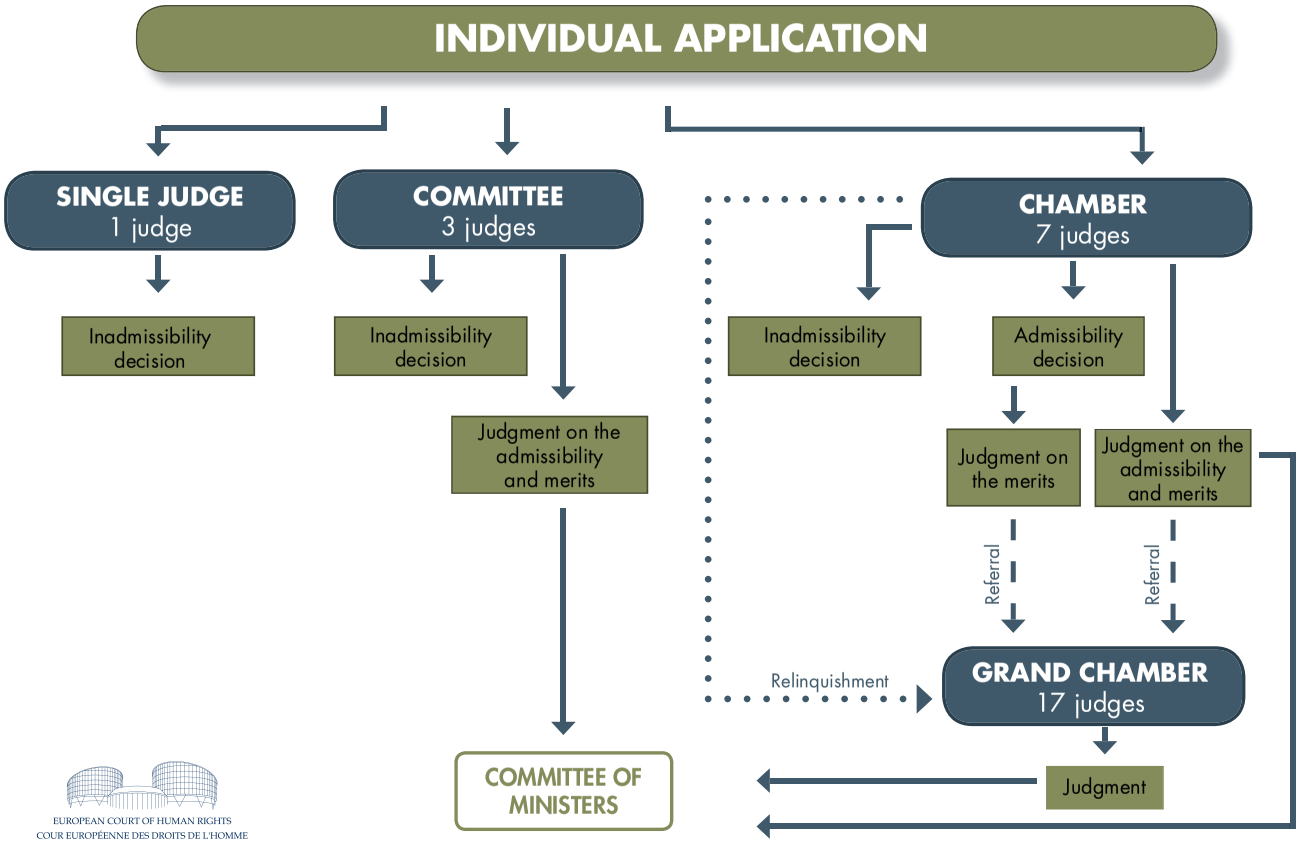
12 https://www.echr.coe.int/documents/d/echr/Court_that_matters_ENG

13 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



Source: https://www.echr.coe.int/documents/d/echr/Case_processing_Court_ENG

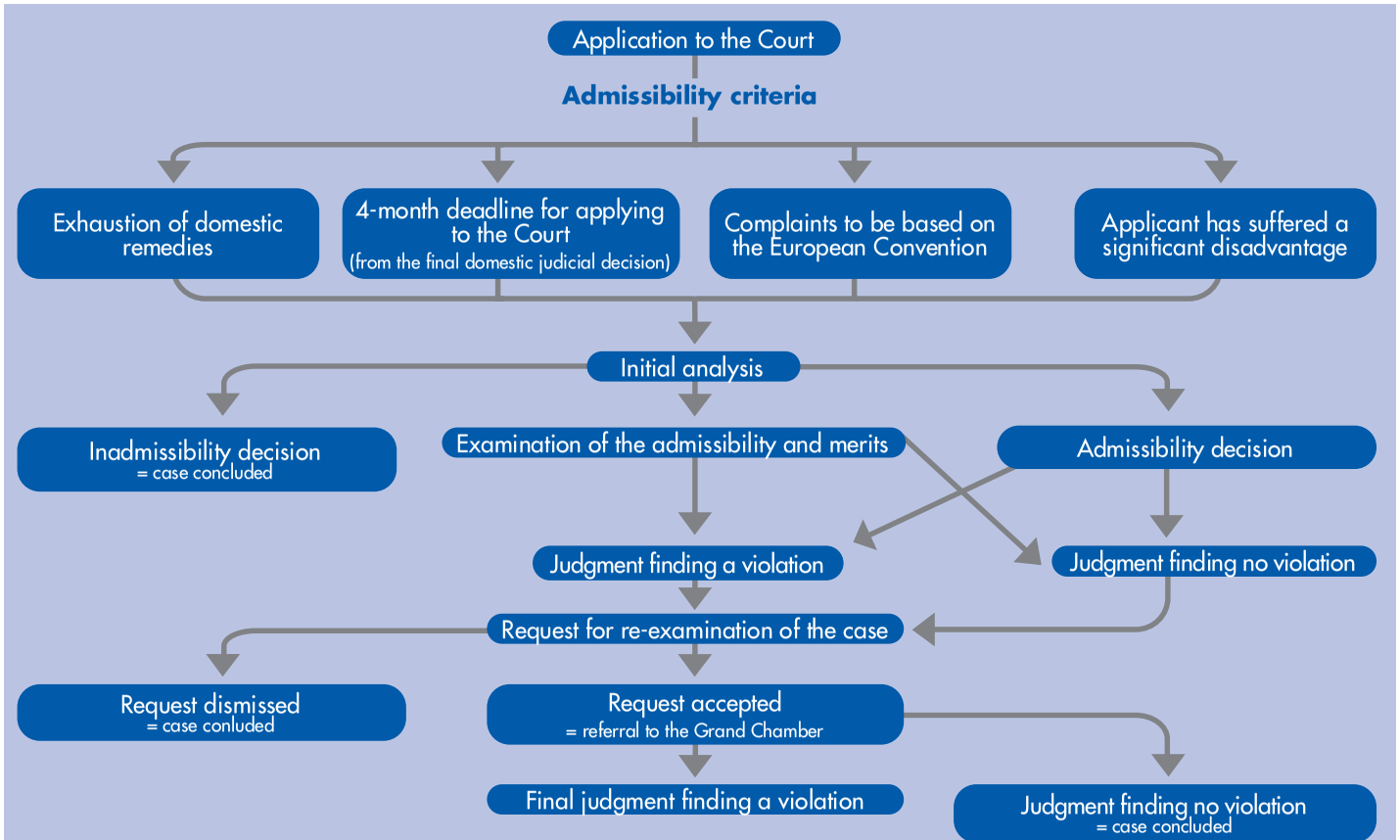
Protocol No 15 has also introduced minor changes into the Preamble of the European Convention on Human Rights by including a reference to the subsidiarity principle to it as well as the doctrine of the limits of freedom of discretion. Protocol No. 16 dated October 2, 2013 allows the parties to address 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.

On 1 January 2014, a revised version of Rule 47 of the Rules of Court[14] came into force. Under the amended Rule applicants must comply with strict requirements for their application before the Court to be valid. In brief, they must use the Court's new application form, take care to fill in all fields and append all necessary supporting documents. They also have to make sure that they provide a signed authority if they are represented and that the application form is duly signed by them. If an applicant fails to comply with Rule 47, the application will not be allocated to a Court formation for decision.[15] 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: https://www.echr.coe.int/apply-to-the-court-other-languages?filter_category_2348815=2035040&filter_category_3290069=1675246. 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 or nuisance 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. The process of assessment and consideration of the application by the ECHR is described in the chart below (see page 14):

[14] https://www.echr.coe.int/documents/d/echr/Rules_Court_ENG

[15] https://www.echr.coe.int/documents/d/echr/Report_Rule_47_ENG



Source: https://www.echr.coe.int/documents/d/echr/Case_processing_ENG

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 terms "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 possible 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.

The interpretation of the term"victim" is liable to evolve in the light of conditions in contemporary society and it must be applied without excessive formalism (ibid., §§ 30–33; *Gorraiz Lizarraga and Others v. Spain*, 2004, § 38; *Stukus and Others v. Poland*, 2008, § 35; *Ziętal v. Poland*, 2009, §§ 54–59). The Court has held that the issue of victim status may be linked to the merits of the case (*Siliadin v. France*, 2005, § 63; *Hirsi Jamaa and Others v. Italy* [GC], 2012, § 111).[16]

The victim should prove that he or she was "directly affected" by the measure complained of. For instance, a person cannot complain of a violation of his or her rights in proceedings to which he or she was not a party (*Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], 2012, § 92). However, in *Margulev v. Russia*, 2019, the Court considered the applicant to be a direct victim of defamation proceedings although he was only admitted as a third party to the proceedings. Since domestic law granted the status of third party to proceedings where "the judgment may affect the third party's rights and obligations vis-à-vis the claimant or defendant", the Court considered that the domestic courts had tacitly accepted that the applicant's rights might have been affected by the

[16] Practical guide on admissibility criteria, p. 11. https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng

outcome of the defamation proceedings (§ 36; see also *Khural and Zeynalov v. Azerbaijan (no. 2)*, 2023, §§ 31–32). In *Mukhin v. Russia*, 2021, the Court recognised that the editor-in-chief of a newspaper could claim to be a victim of the domestic courts' decisions divesting that newspaper of its media-outlet status and annulling the document certifying its registration (§§ 158–160).[17] Therefore, standing in domestic proceedings is not decisive, as the notion of "victim" is interpreted autonomously by the Court.

In cases related to the environmental pollution, the applicant should be directly and seriously affected by noise or other pollution, and in such cases an issue many arise under article 8 of the Convention.[18]

In case *Tribaut v. France* the Court took a decision on admissibility of the application on 14 June, 2022. The case concerned the opposition to a plan to replace the existing power line with a new 400 kV double-circuit line, most of it overhead, at height of 70 m over 30 km. The applicants argued that the construction of the projected extra-high-voltage power line would create the risk for persons living near it, on account of the resulting magnetic fields, and, in consequence, that it would create the risk for the health of person living near it, and in consequence, it would have an impact on their peaceful enjoyment of their homes. They criticized the fact that the company responsible for the project had rejected the option of putting the line underground, and applicants submitted that they could not escape the permanent anxiety caused by their exposure this risk by moving house since the proximity of this infrastructure would lover the value of their house or make it difficult to sell it.

The Court declared application inadmissible, finding that compliant under art. 8 was manifestly ill-founded. The Court found, that the applicants, who were living 115m away from planed lines, had not produced the evidence to show that the project would expose them to electromagnetic fields exceeding domestic or international standards. It thus appeared that applicants had not demonstrated that the completion of the power line would expose them to an environmental danger such that their capacity to enjoy their private and family life or their home would be directly and seriously affected. https://hudoc.echr.coe.int/rus?i=002-12760

[17] Practical guide on admissibility criteria, p. 12. https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng

[18] Hatton v. the United Kingdom, § 96, Kozul and others v. Bosnia and Herzegovina, § 31.

Applications can only be lodged by, or in the name of, individuals who are alive. However, particular considerations may arise in the case of victims of alleged breaches of Articles 2, 3 and 8 at the hands of the national authorities. Applications lodged by individuals or associations on behalf of the victim(s), even though no valid form of authority was presented, have thus been declared admissible.[19]

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.

The Court does not grant "victim" status to associations whose interests are not at stake, even if the interests of their members — or some of them — could be at stake. In addition, "victim" status is not granted to NGOs even if the associations have been founded for the sole purpose of defending the rights of the alleged victims (*Nencheva and Others v. Bulgaria*, 2013, § 90 and § 93 and the references cited therein; see also *Kalfagiannis and Pospert v. Greece* (dec.), 2020, §§ 49–51, concerning a federation of trade unions representing media employees; *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey* (dec.), 2021, §§ 42–44, concerning a non-governmental organisation created with a view to defending the residents of an area where a dam was being built.[20]

Also, residents who have not participated in the domestic proceedings seeking the annulment of administrative decisions or associations which have not been granted *locus standi* by the domestic courts cannot claim to be victims of an alleged violation of the right to enforcement of judicial decisions under Article 6 § 1 (*Bursa Barosu Başkanliği and Others v. Turkey*, 2018, §§ 114–116).[21]

Anapplicant who has been forced by adverse environmental conditions to abandon his home and subsequently to buy another house with his own funds does not cease to be a victim in respect of an alleged violation of his right to respect for his private life and his home under Article 8 of the Convention (*Yevgeniy Dmitriyev v. Russia*, 2020, §§ 37–38).[22]

19 https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng

20 Ibid, p. 15.

21 Ibid, p. 16.

22 Ibid, p. 19.

In the case Centre for legal resources on behalf of *Valentin Campeanu v. Romania* 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.
Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, 17.07.2014, http://hudoc.ECHR.coe.int/eng?i=001-145577

In its judgment in the case *Sdruženi Jihočeské Matky v. Czech Republic* 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 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, 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.

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

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.

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 four 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 administrative practice actions incompatible with the Convention are repetitive, and official state authorities are tolerant about it, 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 4 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).

Before the entry into force of Protocol No. 15 to the Convention (1 August 2021), Article 35 § 1 of the Convention referred to a period of six months. Article 4 of Protocol No. 15 has amended Article 35 § 1 to reduce the period from six to four months. According to the transitional provisions of the Protocol (Article 8 § 3), this amendment applies only after a period of six months following the entry into force of the Protocol (as from 1 February 2022), in order to allow potential applicants to become fully aware of the new deadline. Furthermore, the new time limit does not have a retroactive effect, since it does not apply to applications in respect of which the final decision within the meaning of Article 35 § 1 of the Convention was taken prior to the date of entry into force of the new rule. If the final decision within the meaning of Article 35 § 1 was taken before the entry into force of Protocol no. 15 but notified to the applicant after 1 August 2021, the applicable time-limit is still that of *six* months; however, it starts to run from the day following the notification of the final decision (*Orhan v. Türkiye* (dec.), 2022, §§ 23–47).[23]

Concerning the exhaustion rule, the Court have frequently underlined the need to apply the rule with some degree of flexibility and without excessive formalism, given the context of protecting human rights (*Ringeisen v. Austria*, 1971, § 89; *Lehtinen v. Finland* (dec.), 1999; *Gherghina v. Romania* (dec.) [GC], 2015, § 87). For instance, the Court accepts that the last stage of domestic remedies may be reached after the application has been lodged but before its admissibility has been determined (*Molla Sali v. Greece* [GC], § 90). The rule of exhaustion is neither absolute nor capable of being applied automatically (*Kozacıoğlu v. Turkey* [GC], 2009, § 40). Although in principle it would be conceivable to accept public interest litigation by an NGO — explicitly provided for by domestic law as a means of defending the interests of a larger group of people — as a form of exhausting domestic remedies, public interest litigation cannot exonerate an individual applicant from bringing his/her own domestic proceedings if that litigation did not correspond exactly to his or her individual situation and specific complaints (*Kósa v. Hungary* (dec.), 2017, §§ 55–63, concerning an alleged discrimination against Roma children). In *Beizaras and Levickas v. Lithuania*, 2020, §§ 78–81, the Court held that a non-governmental organization, although not an applicant before the Strasbourg Court, could have acted as a representative of the applicants' interests in the domestic criminal proceedings, because the NGO had been set up so that persons who had suffered discrimination could be defended, including in court. The Court also took into account that the NGO's representation of the applicants' interests before the prosecutors and domestic

[23] Practical guide on admissibility criteria, p. 41. https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng

courts (two instances) had never been questioned or challenged in any way (see also *Gorraiz Lizarraga and Others v. Spain*, 2004, §§ 37–39).[24]

It is not necessary for the Convention right to be explicitly raised in domestic proceedings provided that the complaint is raised "at least in substance" (*Castells v. Spain*, 1992, § 32; *Ahmet Sadik v. Greece*, 1996, § 33; *Fressoz and Roire v. France* [GC], 1999, § 38. This means that if the applicant has not relied on the provisions of the Convention, he or she must have raised arguments to the same or like effect on the basis of domestic law, in order to have given the national courts the opportunity to redress the alleged breach in the first place (*Gäfgen v. Germany* [GC], 2010, §§ 142, 144 and 146; *Radomilja and Others v. Croatia* [GC], 2018, § 117; *Karapanagiotou and Others v. Greece*, 2010, § 29. It is not sufficient that the applicant may have exercised a remedy which could have overturned the impugned measure on other grounds not connected with the complaint of a violation of a Convention right. It is the Convention complaint which must have been aired at national level for there to have been exhaustion of "effective remedies" (*Vučković and Others v. Serbia* (preliminary objection) [GC], 2014, § 75; *Nicklinson and Lamb v. the United Kingdom* (dec.), 2015, § 90).

In sum, the mere fact that an applicant has submitted his or her case to the relevant court does not of itself constitute compliance with the requirements of Article 35 § 1. Even in those jurisdictions where the domestic courts are able, or even obliged, to examine the case of their own motion (that is, to apply the principle of *jura novit curia*), applicants are not dispensed from raising before them a complaint which they may intend to subsequently make to the Court (see, among other authorities, *Kandarakis v. Greece*, 2020, § 77), it being understood that for the purposes of exhaustion of domestic remedies the Court must take into account not only the facts but also the legal arguments presented domestically (see *Radomilja and Others v. Croatia* [GC], 2018, § 117.[25]

Discretionary or extraordinary remedies need not be used, for example requesting a court to review its decision (*Çınar v. Turkey* (dec.), 2003; *Prystavska v. Ukraine* (dec.), 2002). A complaint to the Ministry amounts to a hierarchical complaint and is not considered an effective remedy (*Polyakh and Others v. Ukraine,* 2019, § 135. Where an applicant has tried a remedy which the Court considers inappropriate, the time taken to do so will not stop the four-month period from running, which may lead to the application being rejected as out of time (*Rezgui v. France* (dec.), 2000; *Prystavska v. Ukraine* (dec.), 2002).[26]

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[24] Practical guide on admissibility criteria, p. 28–29. https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng

[25] Ibid. page 30.

[26] Ibid. page 31–32.

The 4-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.[27] 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. The four-month period runs from the date on which the applicant's lawyer became aware of the decision completing the exhaustion of the domestic remedies, notwithstanding the fact that the applicant only became aware of the decision later. (*Çelik v. Turkey* (dec.), 2004).[28]

If it is understandable right from the beginning that the applicant does not have any effective remedy, the 4-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 condition 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 serious long-term consequences does not mean that it creates the "ongoing condition".

The primary purpose of the 4-month rule is to maintain legal certainty by ensuring that cases raising issues under the Convention are examined within a reasonable time, and to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time (*Mocanu and Others v. Romania* [GC], 2014, § 258; *Lopes de Sousa Fernandes v. Portugal* [GC], 2017, § 129). It also affords the prospective applicant time to consider whether

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[27] 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

[28] Ibid, page 43.

to lodge an application and, if so, to decide on the specific complaints and arguments to be raised and facilitates the establishment of facts in a case, since with the passage of time, any fair examination of the issues raised is rendered problematic (*Ramos Nunes de Carvalho e Sá v. Portugal* [GC], 2018, §§ 99–101; *Sabri Güneş v. Turkey* [GC], 2012, § 39).[29]

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, when only the filled out application form suspends the run of the 4-month-period.

Besides, the applicant should follow the rules and procedures of national laws. If complaint could not have been decided by the national courts because applicant failed to lodge it within the time-limit prescribed by national law, then such complaint 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.

Only remedies which are normal and effective can be taken into account as an applicant cannot extend the strict time-limit imposed by the Convention by seeking to make inappropriate or misconceived applications to bodies or institutions which have no power or competence to offer effective redress for the complaint in issue under the Convention (*Lopes de Sousa Fernandes v. Portugal* [GC], 2017, § 132; *Fernie v. the United Kingdom* (dec.), 2006). However, in the case of *Červenka v. the Czech Republic*, 2016, where the applicant waited for the Constitutional Court's decision even though he had doubts about the effectiveness of the remedy, the Court stated that the applicant should not be blamed for having tried to exhaust this remedy (§§ 90 and 113–121). Equally, in *Polyakh and Others v. Ukraine*, 2019, the Court held that, even though the length of the proceedings in the applicants' cases had not been "reasonable" in violation of Article 6 § 1, it did not find that the applicants ought to have been aware that the remedy in question was ineffective (because of the excessive delay), so as to trigger the running of the four-month period at any point prior to the delivery of the final judgment (§§ 213–216).

In cases where proceedings are reopened or a final decision is reviewed, the running of the four-month period in respect of the initial set of proceedings

[29] Practical guide on admissibility criteria, p. 40. https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng

or the final decision will be interrupted only in relation to those Convention issues which served as a ground for such a review or reopening and were the subject of examination before the extraordinary appeal body.[30]

Where it is clear from the outset that the applicant has no effective remedy, the four-month period runs from the date on which the act complained of took place or the date on which the applicant was directly affected by or became aware of such an act or had knowledge of its adverse effects (*Dennis and Others v. the United Kingdom* (dec.), 2002; *Varnava and Others v. Turkey* [GC], 2009, § 157; *Aydarov and Others v. Bulgaria* (dec.), 2018, § 90). Where the alleged violation constitutes a continuing situation against which no domestic remedy is available, it is only when the situation ends that the four-month period starts to run (*Sabri Güneş v. Turkey* [GC], 2012, § 54; *Varnava and Others v. Turkey* [GC], 2009, § 159; *Ülke v. Turkey* (dec.), 2004). As long as the situation continues, the four-month rule is not applicable (*Iordache v. Romania*, 2008, § 50; *Oliari and Others v. Italy*, 2015, §§ 96–97).[31]

Time starts to run on the day following the date on which the final decision has been pronounced in public, or on which the applicant or his/her representative was informed of it, and expires four calendar months later, regardless of the actual duration of those calendar months (*Otto v. Germany* (dec.), 2009; *Ataykaya v. Turkey*, 2014, § 40).

> ***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 ill-founded, 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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30 Practical guide on admissibility criteria, p. 42. https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng

31 Ibid, page 44.

The most frequent reason for application rejection by the ECHR is the fact that the application is manifestly ill-founded. 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.

Manifestly ill-founded complaints can be divided into four categories[32]:

- "fourth-instance" complaints (stem from a misapprehension on the part of the applicants as to the Court's role and the nature of the judicial machinery established by the Convention; it is not the task of ECHR to deal with errors of fact or law allegedly committed by a national court unless and in so far as such errors may have infringed rights and freedoms protected by the Convention. It may not itself assess the facts which have led a national court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of third or fourth instance, which would be to disregard the limits imposed on its action (*García Ruiz v. Spain* [GC], 1999, § 28; *De Tommaso v. Italy* [GC], 2017, § 170). Most fourth-instance complaints are made under Article 6 § 1 of the Convention concerning the right to a "fair hearing" in civil and criminal proceedings. It should be borne in mind — since this is a very common source of misunderstandings on the part of applicants — that the "fairness" required by Article 6 § 1 is not "substantive" fairness (a concept which is part-legal, part-ethical and can only be applied by the trial judge), but "procedural" fairness;
- complaints where there has clearly or apparently been no violation (Court can and should satisfy itself that the decision-making process resulting in the act complained of by the applicant was fair and was not arbitrary (the process in question may be administrative or judicial, or both, depending on the case). Consequently, the Court may declare manifestly ill-founded a complaint which was examined in substance by the competent national courts in the course of proceedings which fulfilled, *a priori*, the necessary conditions — e.g. sufficient reasons of decisions, by empowered bodies, in accordance with procedural requirements, arguments and evidence were presented, etc.);

[32] Practical guide on admissibility criteria, p. 79–80. https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng

- unsubstantiated complaints (the application can be manifestly ill-founded if the applicant failed to provide sufficient evidence to support the facts and the legal arguments which are raised);
- confused or far-fetched complaints (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.)[33]

In case Calancea and others v. the Republic of Moldova concerning the presence of a high voltage power line crossing the land of applicants, a married couple and their neighbour, the court took a decision on the admissibility on 6 February 2018. It declared the application inadmissible as being manifestly ill-founded.

Relying on Article 6 § 1 (right to a fair hearing), the applicants complained of the District Court's refusal to order an expert report, of the fact that their case had been examined by the Court of Appeal in the absence of their lawyer and of a lack of reasons for the domestic courts' decisions. Under Article 8 (right to respect for private and family life and the home), they alleged that the State authorities had failed to fulfil their positive obligations. Lastly, relying on Article 1 of Protocol No. 1 (protection of property), they contended that the presence of a high-voltage line above their land infringed their right to the peaceful enjoyment of their possessions. It considered in particular that it had not been demonstrated that they strength of the electromagnetic field created by the high-voltage line had attained a level capable of having a harmful effect on the applicants' private and family sphere. It held that in the present case the minimum threshold of severity required in order to find a violation of article 8 of the Convention had not been attained. Secondly, it found no appearance of a violation of the right to a fair hearing. Lastly, it observed that the applicants must have been aware of the presence of the high-voltage line when they had purchased the land and subsequently built their houses on it.

For instance, in case Kozul and others v. Bosnia and Herzegovina, the court stated: *It has not been established that the pollution levels complained of were so serious as to reach the high threshold established in the Court`s case-law. It follows*

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

that this compliant is manifestly ill-founded within the meaning of art. 35 § 3 of the Convention and must be rejected pursuant to art. 35 § 4.[34]

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.

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.

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[34] Case Kozul and Others v. Bosnia and Herzegovina, application 38695/13, § 38.

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.[35]

Normally, the ECHR applies a hierarchical approach to checking admissibility criteria following the sequence, but there are some exceptions. For instance, in the case of *Finger v. Bulgaria*[36], 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.

Due to the changes in court proceedings, at present, in most cases which pass the admissibility test, the admissibility and merits are examined at the same time, which simplifies and speeds up the procedure.[37]

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.

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

[36] Case of Finger v. Bulgaria, decision 10.5.2011, https://hudoc.echr.coe.int/fre?i=002-544

[37] https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng

In case: *Ahunbay and Others v. Turkey filed by citizen alleging violation of art. 8* **(**Respect for private life) due to dam construction threatening important archaeological site, the Court declared the application inadmissible. In 2006 work had begun on the construction of the Ilısu dam on the Tigris river. The project had entailed flooding dozens of sites of major cultural and historical interest (some of them contained ancient Mesopotamian remains), not all of which had been excavated. The applicants — private individuals involved in the local archaeological projects — regarded this as a violation of the right to knowledge of the cultural heritage and the right to transmit cultural values to future generations.

The Court stated that clearly, the gradual emergence of cultural heritage conservation values has been accompanied by a growing international body of legislation on the protection of access to the cultural heritage. Thus the present case might be considered as relating to an evolving field. In that regard and in the light of the international instruments and the common denominators of international legal standards, whether binding or not, the Court did not, a priori, rule out the existence of a joint European and international stance on the need to protect access to the cultural heritage.

In each case the Court decides on the start of the termination period on individual basis as there are cases when exhaustion of domestic remedies is impossible. In cases of violation of article 6 of the Convention by non-execution of the court decision, the Court considers all the legal options for challenging non-execution of the court decisions available to the applicant. For instance, in Turkey the government established Compensation Commission to deal with applications concerning, inter alia, non-execution of judgements. Thus, the issue of exhaustion of domestic remedies in Turkey will be dependent on the fact whether applicant applied to the Compensation Commission for the compensation in cases of non-execution of judgements of national courts. On the other hand, the Commission offers compensation for non-execution of judgements, but this will keep the violation of article 6 ongoing. On the contrary, in case *Erol Cicek and others v. Turkey*, in the decision on admissibility from 27/02/2020 the court stated: *In the particular circumstances of the case, the Court notes that the implementation of the Bursa Administrative Court decision is objectively impossible having regard to the fact that Plant ceased its operation in 2010 and moved elsewhere. For this reason the Court considers that the Compensation Commission can provide redress in response to the applicants' complaints and therefore the*

Government's objection on non-execution of domestic remedies must be upheld. Thus, the application should be rejected under article 35 §§ 1 and 4 of the Convention for failure to exhaust domestic remedies.[38]

In another case against Turkey concerning non-execution of court decisions the Court pronounced: *The Court notes that Turkish national Assembly enacted Law no 6384 on the resolution, by means of compensation, of applications lodged with the Court concerning length of judicial proceedings and non-enforcement or delayed enforcement of judicial decisions. Law no 6384 provided for establishment of a Compensation Commission empowered to award compensation to individuals to deal with the Convention complaints falling within its scope. The Court considers that the applicants could claim compensation from the Compensation Commission, set up by the Law no 6384. However, in the circumstances of present case, the award of compensation would no be a sufficient redress for the applicants Convention grievances since their compliant pertains to the non-enforcement of binding final judicial decisions to stop the operation of Ovacik gold mine. Besides, the Turkish Government did not submit any decision showing that resource to the Compensation Commission had led to the cessation of the activities of a gold mine or a similar mining or industrial activities in respect of which national courts had annulled operation permits. Against this background, the Court finds that applicants were not required to apply to the Compensation Commission set up by Law no 6384.*[39] Thus, the Court have not supported the position of the government of Turkey that applicants failed to exhaust the domestic remedies in case of alleged violation of art. 6 and art. 8 of the Convention by Turkey.

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

[38] Erol Cicek and others v. Turkey, application no4483/07 decision on admissibility from 27/02/2020. https://hudoc.echr.coe.int/eng?i=001-188957

[39] Genc and Demirgan v. Turkey, application 34327/06 and 45165/06, judgement dated 10/10/2017, § 41.

but 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 Convention and the Protocols thereto the ECHR 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 contains any provision that would make it binding for the parties to follow the ECHR 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 discloses the content of obligations under the Convention, which is difficult to see looking merely at the text of the Convention.[40]

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.[41] 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 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

[40] 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.

[41] 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

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."[42]

Although 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 nothing about the great number of judgments of the ECHR made in cases filed against other European countries. Nevertheless, while the ECHR case-law as such is not binding on the countries that were not parties to the case, in fact judgments relating to other countries sooner or later stimulate counties to change their legislation or practice.[43]

Interestingly, unlike countries of the Western Europe, some Eastern European countries like Ukraine and Georgia have recognized and officially enshrined universal application of the ECHR case-law. In Georgia, for example, courts must apply not just the Convention, but the ECHR case-law, that is all judgments interpreting provisions of the Convention and contributing to its correct application.[44]

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

The Parliament of Ukraine ratified the European Convention in 1997. Under the 2004 Law of Ukraine *on International Treaties of Ukraine*, current international treaties of Ukraine, the consent to the binding nature of which has been granted by the Parliament 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 procedure set determines other rules than the ones envisaged in the corresponding legislative act of Ukraine, rules of the international treaty shall apply.[45] 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

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[42] 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

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

[44] 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

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

corresponding legal relations. Still application of the Convention in isolation of the ECHR judgments that give content to its provisions is senseless from the practical point of view.

The issue of application of the ECHR 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 prevail — judgment of the ECHR or a certain law of Ukraine if there is a 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.

We keep 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 ECHR 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 case-law over the norms of national legislation. And implementation of the Convention and ECHR case-law is viewed as a long-awaited way of resolving conflicts in law in disputes dealing with the rights guaranteed by the Convention and preventing violations of the Convention by Ukraine in the future[46].

Such views do not in any way run counter to provisions of the national legislation. In particular, 1997 Law *on Ratification of the European Convention*, envisages that "Ukraine completely recognizes on its territory [...] without conclusion of a special agreement the jurisdiction of the ECHR in all the issues relating to the interpretation and application of the Convention".

In 2006 a special Law of Ukraine *on Enforcement of Judgments and Application of the Case-Law of the European Court of Human Rights* 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

[46] 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

create preconditions for reducing the number of applications submitted to the ECHR against Ukraine. Under the Law Ukraine has not just undertaken the commitment to enforce judgments made with its participation, but also additional commitments relating to the whole ECHR case-law. Under Article 17, while hearing cases, Ukrainian courts should apply the Convention and the ECHR 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 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 (Art. 6.1.).

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 the courts (Art. 6.4.). Under Article 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 — the court uses original text of the judgment (in English or French).

As it has been noted 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 proceedings in question. Following the adoption of the Law of Ukraine o*n Enforcement of Judgments and Application of the Practice of the ECHR*, the High Commercial Court of Ukraine published an information letter indicating that commercial courts must apply all the decisions and judgments of the ECHR while settling commercial cases.[47] Formally, provisions of the law have a direct effect and should be enforced. Nevertheless, such methodological indication of the high court aimed to draw attention to such provision of the law of judges of commercial courts who rather rarely face the issues of human rights in their cases.

As of today, all judicial proceedings in Ukraine — economic judicial proceedings, administrative judicial proceedings, civil proceedings and

[47] 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"".

criminal proceedings — envisage application of the practice of the ECHR while administering justice. All procedural codes of Ukraine[48] require the application of the ECHR case-law and link it to the rule of law principle, by 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 application of the ECHR 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 Business Reputation of an Individual and Legal Entity* it is indicated that taking into account provisions of Article 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, 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 a methodological manual for judges[49] also indicate that Law No. 3477-IV envisages application of the Convention and the ECHR 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 may 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[50]. The study has shown that as of 2015 judges of all instances do not just know, but also actively use the ECHR case-law in their activities. The 2019 study shows that 10 % of the Supreme Court rulings (2018

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[48] The Code of Administrative Procedure of Ukraine, the Code of Criminal Procedure of Ukraine, the Civil Procedure Code of Ukraine and the Economic Procedure Code of Ukraine.

[49] 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.

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

and 1st quarter of 2019) have a reference to the ECHR case-law. Moreover, since 2019 the Supreme Court routinely prepares and posts on its website monthly and thematical overviews of the ECHR case-law in Ukrainian language[51].

Thus, as of today it is safe to say that it is highly advised to use the ECHR case-law while preparing statements of claim and other procedural documents submitted to the domestic courts since their application as the source of law in Ukraine has firmly rooted in the contemporary practice of justice administration.

[51] https://supreme.court.gov.ua/supreme/pokazniki-diyalnosti/mign_standart/

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 the availability 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 cover 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),[52] *Grimkovska against Ukraine (2011)*[53] *and Dzemyuk against Ukraine (2014).*[54]

Among others, the ECHR reviewed cases[55], related to the folowing environmental aspects:

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

[53] Case Grimkovska v. Ukraine, decision 21.07.2011, https://zakon.rada.gov.ua/laws/show/974_729#Text

[54] Dzemyuk v. Ukraine, decision 4.09.2014, https://zakon.rada.gov.ua/laws/show/974_a51#Texthttp://zakon5.rada.gov.ua/laws/show/974_a51

[55] For more details see Factsheet — Environment and the ECHR: https://www.echr.coe.int/documents/d/echr/FS_Environment_ENG

Right to life (Article 2 of the Convention)

- Hazardous industrial activities
  - *Case of Öneryıldız v. Turkey*[56] — methane explosion at a rubbish tip
- Industrial emissions and health
  - *Case of Smaltini v. Italy*[57] — impact of emissions of steel production factory and leukemia
  - *Case of Locascia and Others v. Italy*[58] — impact of waste disposal plants
- Natural disasters
  - *Case of Budayeva and Others v. Russia*[59] — mudflow
  - *Case of Özel and Others v. Turkey*[60] — 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*[61] — challenging by a non-profit-making association of the planning permission to expand a waste collection site
  - *Case of Athanassoglou and Others v. Switzerland*[62] — challenging the decision on extension of operating license for the nuclear power plant
  - *Case of L'Erablière A. S. B. L. v. Belgique*[63] — lack of access to court for environmental NGO on procedural grounds

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

[57] Case of Smaltini v. Italy, decision 24.03.2015, https://hudoc.echr.coe.int/rus?i=001-127699

[58] Case of Locascia and Others v. Italy, decision 19.10.2023, https://hudoc.echr.coe.int/eng?i=001-228155

[59] Case of Budayeva and Others v. Russia, decision 20.03.2008, https://hudoc.echr.coe.int/fre?i=001-85436

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

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

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

[63] Case of L'Erablière A. S. B. L. v. Belgique, decision 24.02.09, https://hudoc.echr.coe.int/rus?i=002-1657

- *Case of Howald Moor and Others v. Switzerland*[64] — short limitation period for cases concerning harm to health due to asbestos impact of workers
- *Case of Karin Anderson and others v. Sweden*[65] — lack of access to court to review governmental decision concerning construction of railway
- *Case of Stichting Landgoed Steenbergen and Others v. the Netherlands*[66] — electronic means of notification about the decision of the authorities do not constitute the violation of the right of access to court

- Failure to implement final court decisions on termination of environmentally hazardous activities
- *Case of Apanasewicz v. Poland*[67] — failure to implement the decision on closing the illegally constructed plant
- *Case of Barosu Bursa Barosu Baskanligi and Others v. Turkey*[68] — failure to enforce judicial decisions authorizing factory construction

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

- Environmental risks and access to information
- *Case of Guerra and Others v. Italy*[69] — 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*[70] — exposure to asbestos in the course of ships repairing at a ship producing facility

64 Case of Howald Moor and Others v. Switzerland, decision 11.03.2014, https://hudoc.echr.coe.int/eng?i=001-141952

65 Case of Karin Anderson and others v. Sweden, decision 25.09.2014, https://hudoc.echr.coe.int/rus?i=001-146399

66 Case of Stichting Landgoed Steenbergen and Others v. the Netherlands, decision 16.02.21, https://hudoc.echr.coe.int/eng?i=002-13137

67 Case of Apanasewicz v. Poland, decision 3.05.2011, https://hudoc.echr.coe.int/eng?i=001-124654

68 Case of Barosu Bursa Barosu Baskanligi and Others v. Turkey, decision 19.06.2018, https://hudoc.echr.coe.int/eng?i=001-184293

69 Case of Guerra and Others v. Italy, decision 19.02.1998, https://hudoc.echr.coe.int/eng?i=001-58135

70 Case of Brincat and Others v. Malta, decision 24.07.2014, https://hudoc.echr.coe.int/fre?i=002-9688

- Industrial pollution
- *Case of Lopez Ostra v. Spain*[71] — emissions of the liquid and solid waste treatment facility at tanneries
- *Case of Bacila v. Romania*[72] — emissions of the lead and zinc producing plant
- *Case of Taşkın and Others v. Turkey*[73] — granting the mine an operating permit for use of cyanidation process
- *Case of Ockan and others v. Turkey*[74] — operating permits for gold mining
- *Case of Fadeyeva v. Russia*[75], *Case of Ledyayeva and others v. Russia*[76] — residing in a sanitary-protective zone of a metallurgic plant
- *Case of Giacomelli v. Italy*[77] — 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*[78] — use of cyanide in gold mining
- *Dubetska and others v. Ukraine*[79] — water and air pollution as a result of operation of mining enterprises

- High-voltage power line
- *Case of Calancea and others v. the Republic of Moldova*[80] — impact of high-voltage power line

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71 Case of Lopez Ostra v. Spain, decision 09.12.1994. http://hudoc.echr.coe.int/eng? i=001-57905

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

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

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

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

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

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

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

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

80 Case of Calancea and others v. the Republic of Moldova, decision 6.02.2018, https://hudoc.echr.coe.int/rus?i=003-6020311-7722913

- Mobile communication towers
  - *Case of Luginbühl v. Switzerland*[81] — potential impact of installation of mobile communication towers
- Noise pollution
  - *Case of Powell and Rayner v. the United Kingdom*[82], *Case of Hatton and others v. the United Kingdom*[83], *Case of Flamenbaum et Autres c. France*[84] — air movement and noise disturbance caused by planes
  - *Case of Moreno Gomez v. Spain*[85], *Case of Mileva and Others v. Bulgaria*[86] — noise caused by night and computer clubs located in the vicinity
  - *Case of Deés v. Hungary*[87], *Grimkovska v. Ukraine*[88] — noise and other adverse impact caused by roads and transportation
  - *Case of Fägerskiöld v. Sweden*[89], *Case of Vecbaštika and Others v. Latvia*[90] — noise and vibration caused by wind turbines and wind parks
  - *Case of Martinez Martinez and Pino Manzano v. Spain*[91] — noise and other impact caused by a stone quarry
  - *Case of Bor v. Hungary*[92] — railway noise

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81 Case of Luginbühl v. Switzerland, decision 17.01.2006, http://hudoc.echr.coe.int/eng?i=001-72459

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

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

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

85 Case of Moreno Gomez v. Spain, decision 16.11.2004, http://hudoc.echr.coe.int/eng?i=001-67478,

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

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

88 Case of Grimkovska v. Ukraine, decision 21.07.2011, https://hudoc.echr.coe.int/fre?i=001-105746

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

90 Case of Vecbaštika and Others v. Latvia, decision 19.11.2019, https://hudoc.echr.coe.int/eng?i=001-116293

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

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

- Impact of municipal construction
  - *Case of Kyrtatos v. Greece*[93] — house construction and impact on protected species and their habitats
- Waste management
  - *Case of Brânduse v. Romania*[94] — offensive smells coming from a refuse tip
  - *Case of Di Sarno and Others v. Italy*[95] — improper system of household waste collection, processing and disposal
  - *Case of Locascia and Others v. Italy*[96] — impact of a private waste disposal plant
- Contamination of drinking water
  - *Case of Dzemyuk v. Ukraine*[97] — 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*[98] — award of damages for dissemination of the fact sheet about McDonald's
  - *Affaire Vides Aizsardzības Klubs c. Lettonie*[99] — 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*[100] — release of water from reservoir dam without a warning because of negligence regarding river bed maintenance

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

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

95 Case of Di Sarno and Others v. Italy, decision 10.01.2012, https://hudoc.echr.coe.int/eng-press?i=003-2698080-2947397

96 Case of Locascia and Others v. Italy, decision 19.10.23, https://hudoc.echr.coe.int/eng?i=001-228155

97 Case of Dzemyuk v. Ukraine, decision 4.09.2014, https://hudoc.echr.coe.int/fre?i=002-10019

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

99 Case of Affaire Vides Aizsardzības Klubs c. Lettonie, decision 27.05.2004, http://hudoc.echr.coe.int/eng?i=001-66349

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

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

- Revocation of construction licences and permits, illegal construction
- *Case of Fredin v. Sweden*[101] — 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
- *Case of Pine Valley Developments Ltd and Others v. Ireland*[102] — prohibition of construction works on the land parcel purchased to be used for construction
- *Case of Valico S. R. L. v. Italy*[103] — fine for construction works performed with violations of norms on landscape and environment protection
- *Case of Hamer v. Belgium*[104] — 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*[105] — 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*[106] — forestation of private land lots without compensation
- *Case of Turgut and Others v. Turkey*[107] — 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 and Fundamental Freedoms.

Besides the cases mentioned above, the motives of environmental protection and caused environmental damage were taken into account and applied by the

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

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

103 Case of Valico S. R. L. v. Italy, decision 21.03.2006, https://hudoc.echr.coe.int/eng?i=001-110210

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

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

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

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

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*[108] 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 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 para 3 Article 5 of the Convention.

The Court confirmed that according to para 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 para 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

[108] Case of Mangouras v. Spain, decision 28.09.2010, http://hudoc.echr.coe.int/eng?i=001-100686

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.[109]

[109] Case of Mangouras v. Spain, decision 28.09.2010, http://hudoc.echr.coe.int/eng?i=001-100686

2.2. ARTICLE 2. RIGHT TO LIFE

The right to life is the first material right provided for by the Convention. 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.*

At first glance, 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.[110] 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 — a 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 reflect the standards of Article 2 of the Convention.[111] In its judgments the Court found that Article 2 does not solely concern deaths resulting directly from the actions of the agents of

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

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

the State, but also lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction[112].

This is how "a positive obligation doctrine" emerged, suggesting that in some situations Article 2 may impose on state bodies an obligation to take measures to guarantee the right to life when it is threatened by persons or activities not directly connected to the State.[113] 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 a state to take due measures to protect lives of people within its jurisdiction in case of risk caused by environmental pollution.[114]

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 "right to the protection of life". This interpretation is a bold and unequivocal clarification of the scope of protection provided for by Article 2 which, therefore, implies that the corresponding scope of the State's liability encompasses, at least in certain contexts, negligent failures to protect human life[115]. Practically in all the applications 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's obligations depends on such factors as the degree of activity-related danger and predictability of risks to 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*[116] (application № 14967/89, judgement from 19.02.1998). The applicants in the case lived

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

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

114 Öneryıldız v. Turkey, 30.11.2004, http://hudoc.echr.coe.int/eng?i=001-67614, para. 65.

115 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.

116 Guerra and Others v. Italy, 19.02.1998, http://hudoc.echr.coe.int/eng?i=001-58135

at one-kilometre distance from a 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 causing one hundred and fifty people being 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 indeed a violation of Article 2. In his dissenting opinion[117] Judge Jambrek is quoting this part of Article 2 "*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's practice regarding Article 3 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 considered another case where the applicant raised the issue of applying Article 2 within the context of unfavourable environmental factors. In the case *L. C. B. v. the United Kingdom*[118] (application № 23413/94, judgement from 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 leukaemia 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.

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

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

Resolving the case in question the Court did not come to conclusion that there was a violation of Article 2, as there was no causal link between the fact that her father was exposed to radiation and leukaemia 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 leukaemia, 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 leukaemia and parents' exposure to radiation before the conception, that did not establish causal link between these factors. Furthermore, 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.

The first "environmental" case where the Court found violation of the right to life was the case of *Öneryıldız v. Turkey*[119] (application № 48939/99, judgment of the Great Chamber 30.11.2004). Having considered this case the Court for the first time concluded 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 a dangerous activity.

In the case of *Öneryıldız v. Turkey* the applicant's house was built without a corresponding permit 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

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

the Convention due to 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 that 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 of *Brincat and Others v. Malta*[120] (application № 60908/11, 62110/11, 62129/11 etc., judgment from 24.7.2014) the Court considered the complaint of the applicants (and their relatives), who had been working at the state shipyard from 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, 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 protections 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 concluded that there was a 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 imposes on States an obligation to take the necessary measures for the protection of the lives of individuals within their

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

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. Even though natural phenomena are not controlled by the State, the Court repeatedly in similar situations found the states guilty in violating its citizens' right to life.

In the case of *Budayeva and Others v. Russia*[121] (application № 15339/02, judgement from 20.03.2008) a 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, one 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 depends 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 several 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, would cause devastating consequences because of the damage to the protective 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.

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

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 on their own initiative or on the basis of applicants appeals.

In the case of *Kolyadenko and others v. Russia*[122] (application № 17423/05, judgment from 28 February 2012) the applicants brought a case claiming a failure of their government to protect their lives and property from a dangerous flood.

On the 7th of August 2001, due to heavy rainstorm and the sudden release of water from the reservoir, a nearby area was immediately flooded including the applicants' homes. There was no local emergency warning in place and the water rose quickly to a level of 1.50 metres. The applicants suffered damages to their properties and possessions. It was widely known that the floodplain of the Pionerskaya river was subject to periodic flooding during heavy rains. In the years preceding the flood various authorities knew that the river channel was blocked and in need of being emptied to avoid dangerous flooding, yet no significant measures seem to be taken.

In their case, the applicants claimed that the authorities had put their lives at risk by failing to warn them of the release of water and by failing to maintain the river channel. In regard the applicants who were present at their homes when the flood occurred the Court reiterated that Article 2 confers a positive obligation on States to take appropriate measures to safeguard lives. The Court accepted that, due to the risk of the dam breaking, expelling water from the reservoir was appropriate, but given the nature and location of such activity, the authorities had a positive obligation to assess all risks in the reservoir's operation, taking measures where necessary to protect lives. The Court asserted that there was a failure in implementing town planning restrictions to prevent the area from being inhabited and to safeguard the lives of those living downstream of the reservoir.

The Court also noted that, although the authorities were aware of the blocked state of the river channel for several years prior to the flood, no recommended measures were taken, and the residents of the area had not even been warned about residing in an area at risk from heavy flooding. Furthermore, the Court found that there was a lack of communication and cooperation between relevant administrative authorities to ensure that lives were not put at risk. Even after the flood, no preventative measures had been put in place, leaving the residents of the area still at risk at the time of the judgment. The Court thus found there had been both substantive and procedural violations of Article 2 of the ECHR.

[122] Kolyadenko and others v. Russia, https://hudoc.echr.coe.int/rus#{%22itemid%22:[%22001-109283%22]}

Another similar case *Özel and Others v. Turkey*[123] (applications № 14350/05, 15245/05 and 16051/05, judgment from 17.11.2015) 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 — one of the most destructive and mortal earthquakes 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 of the 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. 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 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 caselaw shows, violations of the right to life in "environmental" cases are established in cases related to activities dangerous in their nature and in cases of natural disasters. However, these violations are established predominantly in the cases, which involved actual deaths of people. In 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

[123] Özel and others v. Turkey, decision 17.11.2015, http://hudoc.echr.coe.int/eng-press?i=003-5224921-6478918

violations without the fact of loss of life, for instance, in situations when a person has obviously been exposed to a real and imminent threat to their life[124].

The ECHR judgments in this category of cases show that to safeguard the right to life the state authorities are obliged to take measures on preventing violations of right to life arising from dangerous activity or foreseeable natural disaster. Primarily this obligation means the duty of the State to implement legislative and administrative frameworks that include:

1) putting in place a legislative and administrative framework designed to provide effective deterrence against threats to the right of life;
2) in the particular context of dangerous activities, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives;
3) such preventive regulations should govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks;
4) preventive regulations must, in particular, guarantee the public's right to information;
5) regulations geared to protecting people's lives must not only exist and be appropriate, but the authorities must also actually comply with them;
6) nevertheless, the Court allows States a wide margin of appreciation in difficult social and technical spheres as this one, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means;
7) where lives have been lost the States have to ensure, by all means at their disposal, an adequate response — judicial or otherwise — so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished.

[124] Kolyadenko and others v. Russia, https://hudoc.echr.coe.int/rus#{%22itemid%22:[%22001-109283%22]}

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.[125]

Thus, in the case *Athanassoglou and Others v. Switzerland*[126] 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 license and unjust 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

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

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

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 para 1 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 of *Balmer-Schafroth and Others v. Switzerland*[127], recognizing that the proceedings on review of the legitimaticy of nuclear power plant operating license extension as such are not part of Article 6 para 1, as the link between the operating license extension and their right to life, protection of their physical integrity and right to property was too "*insignificant and unrelated*", and the applicants failed to prove imminent danger to their life.

In the case of *Sdruzeni Jihoceske Matky v. the Czech Republic*[128] 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 the right to life, to health, to healthy environment and respect to property — which were granted to an

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

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

applicant organization and its members by the Czech law. Correspondingly, paragraph 1 of Article 6 cannot be applied in this case.[129]

Applicability of Article 6 to environmental disputes was recognized by the Court in the following environmental cases: in the case of dam construction that could flood the applicants' settlement (*Case of Gorraiz Lizarraga and Others v. Spain*[130]*)* and in the case of a license to operate a gold extracting mine using cyaniding near the settlements of the applicants (*Case of Taskın and Others v. Turkey*[131]*)*; as well as in the case on extending license to operate a waste management facility (case *Zander v. Sweden*[132]).

In the case of *Gorraiz Lizarraga and Others v. Spain*[133]*,* the Court was addressed by 5 individuals and non-government 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 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

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129 http://medialaw.org.ua/userimages/book_files/Book_WEB_European_Court_Coe_MLI.pdf

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

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

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

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

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 1 Article 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 of *Taşkın and Others v. Turkey*[134] (more information on a case is provided in Chapter 2.3.), the applicants lived near gold mine in the vicinity of Bergama and complained about the operating permit with the use of cyaniding procedure given by the authorities. In the administrative courts the applicants referred to violations of their right to having adequate protection of their physical integrity from the risks that will arise in the process of 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

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

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 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 of *Zander v. Sweden*[135], a couple of applicants got a land plot that was adjacent to the land on which a company treated household and industrial waste. 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 a case of *Collectif national d'information et d'opposition à l'usine Melox — Collectif Stop Melox et Mox v. France*[136], 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 rights and interest of its members. The Court established that the aim of such contested procedures is protection of public interests, and the process

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

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

initiated by the applicant-association has sufficient relation to the right it has as a legal person (for instance, the right to information, the right to participation and decision-making) to apply Article 6.

In the case of *L'Erablière A. S. B. L. v. Belgium*[137], the applicant-organization contested 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 para 1 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.[138]

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

[138] Ibid.

In the case of *Karin Andersson and others v. Sweden*[139], the Court found violation of art. 6 of the Convention. The applicants owned a property close to Umea in northern Sweden. In 2003 the Government took a decision permitting the construction of 10 km long railway in or close to their properties. The Government stated, inter alia, that the activity could be permitted, despite its harmful effect on the environment in a Natura 2000 area, if there were no alternative solutions and the railway had to be constructed for reasons of public interest. Judicial review before the Supreme Administrative Court of that Decsion of the Government was not successful: the Supreme court issued a decision of 1 December 2004 to dismiss the petition for judicial review. Thus, the applicants complained under Article 6 of the Convention that they had been denied a fair trial with regard to their civil rights, as they had been refused a full legal review of the Government's decision to permit the construction of the railway, which was situated on or close to their properties. The latter decision had significantly affected the applicants' property as well as the environment in the area concerned. The Court concluded that the applicants had civil rights, at least in relation to the enjoyment of their property, which they wished to invoke in the domestic proceedings. As has been mentioned above, the Government's decision of 12 June 2003 to permit construction of the railway in the specified "corridor", as soon as it was final, acquired binding force on the further examinations relating to the railway. Thus, the Supreme Administrative Court's judicial review of the Government's decision would have been the natural point in time for the rights of the local property owners to be determined. However, the court, on 1 December 2004, denied the petitioners locus standi and stated that the parties sufficiently affected by the future railway could have a judicial review of the later Government decision on the railway plan. It is true that certain details of the railway project could be determined in the subsequent proceedings and that several applicants have received some form of compensation for the effects of the railway construction. The fact remains, however, that the applicants were not able, at any time of the domestic proceedings, to obtain a full judicial review of the authorities' decisions, including the question whether the location of the railway infringed their rights as property owners. Thus, notwithstanding that the applicants were accepted as parties before the Supreme Administrative Court in 2008, they did not have access to a court for the determination of their civil rights in the case. There has therefore been a violation of Article 6 § 1 of the Convention.

[139] Case of Karin Andersson and others v. Sweden, decision 25.09.2014, https://hudoc.echr.coe.int/rus?i=001-146399

The Court is not in position to question the expert reports and declare violation of art. 6 of the Convention in cases when national courts take into account or ignore the reliable expert decisions concerning the impact on the environment, health or property of applicants. In case of *Dimitar Yordanov v. Bulgaria*[140], the applicant lived very close (160–180 m) to opencast coalmine and his property suffered damage. The applicant brought the case against mining company seeking compensation for the damage caused to his property because of the extraction of the coal by blasting. The courts heard the case and commissioned expert reports, establishing that serious damage had been caused to his property and detonations nearby had been carried out inside the 500 m buffer area, in breach of domestic law. However, the courts concluded that there was no proof of a link between the mining activities and the damage. The Court held that there have been a violation of art. 1 of Protocol 1 and there have been no violation of art. 6 of the Convention, finding that decisions of the national courts, in particular their conclusion contested by the applicant as to the existence of a casual link between the detonation works at the mine and the damage to his property, had not reached the threshold of arbitrariness and manifest unreasonableness or amounted to a denial of justice.

Access to a fair trial: limitation period

In a case of *Howald Moor and Others v. Switzerland*[141] a widow and her two daughters continued the case of the father, who was a mechanic, who 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.

[140] Case of Dimitar Yordanov v. Bulgaria, decision 6.09.2018, https://hudoc.echr.coe.int/eng?i=002-12038

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

The Court also gave its opinion on the use of electronic tools and electronic means of notification and participation during decision-making by authorities. In the case of *Stichting Landgoed Steenbergen and Others v. the Netherlands*[142] the Court considered a case of expiration of fixed time-limit for appealing of local exectutive`s decision by applicants and applicability of art. 6 to this case. The applicants` premises were located in close proximity to a motocross track. The Provincial Executive decided to extend the opening hours of this track and published the notification on the draft of its decision and decision itself on its web-site. The applicants failed to notice this notification on the web-site and as soon as they have learned about the decision to extent the working hours, they appealed the decision of Executive. Their claim was dismissed by the court due to expiration of time-limit for appealing. They complained that giving notice of the draft decision and decision itself online only, their right of access to court was impinged. The Court found that there had been no violation of art. 6 of the Convention. In the present case, the Provincial Executive's use of electronic means for publishing notifications had been sufficiently coherent and clear for the purpose of allowing third parties to become aware of decisions that could potentially directly affect them. The system of electronic publication used by the Provincial Executive had therefore constituted a coherent system that had struck a fair balance between the interests of the community as a whole in having a more modern and efficient administration. There was no indication that the applicants had not been afforded a clear, practical and effective opportunity to comment on the draft decision and to challenge the decision given by the Provincial Executive. In light of all the circumstances and the safeguards identified, the national authorities had not exceeded the margin of appreciation afforded to the State and the applicants had not suffered a disproportionate restriction of their right to access of court.

Guarantee of providing legal aid and equality of arms

Article 6 para 1 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,

[142] Stichting Landgoed Steenbergen and Others v. the Netherlands, decision 16.02.2021, https://hudoc.echr.coe.int/eng?i=002-13137

apart from the aforementioned, on such conditions as financial condition of a party in a case, expectations of a party regarding winning the case.[143]

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*[144], 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 London with participation of Steel and Morris. The trial 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

In Case of *Deés v. Hungary*[145] 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. ECHR acknowledged that the duration of proceedings exceeded reasonable limits, thus violating Article 6 paragraph 1.

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[143] 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

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

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

In case of *Bor v. Hungary*[146] the applicant lived across the railway station and complained about intense noise pollution by trains and inaction of the authorities as to timely and efficiently 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. 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 proceedings exceeded reasonable time which constituted a violation of para 1 Article 6.

Failure to enforce court decision

Court practice 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.[147]

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*[148] 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 violation of the Article 6.

In case of *Apanasewicz v. Poland*[149] the applicant, who had a land plot next to which a plant was built without a construction permit, filed a motion with

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

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

148 Ibid.

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

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 which 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. 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*[150] the applicant appealed decision of the court and actions of Tatariv village council as to location of a cemetery 38 m 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 the case of *Bursa Barosu Baskanligi and Others v. Turkey*,[151] the Court held, unanimously, that there had been a violation of Article 6 § 1 of the Convention. The case concerned the failure to enforce numerous judicial rulings setting aside administrative decisions authorising the construction and operation of a starch factory on farmland in Orhangazi (a district of Bursa) by a US company (Cargill).

The Court found in particular that, by refraining for several years from taking the necessary measures to comply with a number of final and enforceable judicial decisions, the national authorities had deprived the applicants of effective judicial protection. The applicants are Bursa Barosu Başkanlığı (Bursa Bar Association) and the Association for the Protection of Nature and the Environment (based in Bursa, Turkey), together with 21 individuals, Turkish nationals who live in Bursa.

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

[151] Case of Bursa Barosu Baskanligi and Others v. Turkey, decision 19.06.2018, https://hudoc.echr.coe.int/eng?i=003-6120029-7901755

The company Cargill obtained an investment authorisation in 1997, then in June 1998 a building permit for the construction of a starch factory on farmland. In parallel the authorities amended the land-use plan on a number of occasions to allow the factory to be built. Other building permits were issued, together with an authorisation for waste production and management which was cancelled in 2004.

Between 1998 and 2000 the starch factory was built, in spite of the annulment by the Bursa Administrative Court and the Supreme Administrative Court of the numerous amendments to the land-use plan, as well as the suspension and/or annulment of various building permits issued by the Council of Ministers. Those decisions, which followed appeals by some of the applicants, were not enforced by the authorities. Currently the factory, which started production in 2000, is still operating.

The Court found that the application was admissible in respect of six applicants, who had participated actively in the domestic proceedings seeking the annulment of the impugned administrative decisions and could claim to be victims, within the meaning of Article 34 (right of individual application) of the Convention, of the alleged violations of the Convention. The Court declared inadmissible the application of other applicants. The Court took the view that Article 6 was applicable in the present case, as the dispute raised by the applicants had a sufficient connection with a "civil right" which they were entitled to claim. They had relied, among other things, on arguments concerning the harmful effects of the factory in question for the environment and the Court of Cassation, in its judgment of 26 May 2008, had acknowledged that they had a civil right.

In view of the aforementioned decisions of the ECHR as to interpretation 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 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 substantiated 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, 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 responsible. A remedy also includes an effective opportunity to contest investigation procedures.[152]

In the case of *Hatton and others v. the United Kingdom*[153] 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 such which requires availability of remedies with respect to violations which may be deemed as such which require 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

[152] 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

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

as to their compliance with the requirements of the Convention. Nor does it guarantee a possibility to appeal policy as such. In case a applicant has a disputable claim on violation of rights foreseen by the Convention, which can be proven, 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 scope of review by the 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*[154] the applicants complained about violation of their rights during the state of emergency when household wastes was 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 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*[155] 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 of 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

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

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

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*[156] the applicant who lost 9 relatives and his house 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 national level. On the other hand, neither Article 13 of the Convention nor other provisions guarantee a 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 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

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

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 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 practice of ECHR, 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 or right to safe and healthy 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."

In the Resolution[157] of the Parliamentary Assembly 2545(2024) the Assembly notes with dismay that the Council of Europe is now the only regional human rights system which has not yet formally recognized the right to a healthy environment. Thus, the Assembly calls on the Council of Europe and their member states to step up their efforts to promote the legitimacy and added value of the Council of Europe playing a leading role indrawing up a binding legal instrument recognizing an autonomous right to a healthy environment.

Thus, the development of the legal instrument recognizing the right to safe and healthy environment on the level of Council of Europe is decided, but certain timelines and organizational arrangements have to be determined on the level of the Council of Europe.

Article 8 Para 1

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

[157] https://pace.coe.int/pdf/af69ba1b5bfe8ec6644e3da010b6d7f862beafeb883aafc178809a580dba6d9d/res.%202545.pdf

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.[158] 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.[159]

Complaints under Article 8 of the Convention were filed in different occasions when concerns about the environmental pollution or interference were stated. However, in order to raise the issue under Article 8 of the Convention the interference, in respect of which the applicant complained, 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 complained 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.[160]

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 had reminded that there can not

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158 Case of Moreno Gomez v. Spain, 16.11.2004, http://hudoc.echr.coe.int/eng?i=001-67478, Case of Deés 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.

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

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

be a substantiated complaint under Article 8 of the Convention if the damage, with reference to which the complaint is filed, is insignificant as compared to the environmental risks inherent to life in every modern city.[161]

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.[162]

Considering the difficulty of proof, the ECHR considers the findings of national courts and other competent authorities to establish factual circumstances, but sometimes they are disregarded and ignored. 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 pays 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, are, for instance, his medical certificates and relevant reports, statements or research undertaken by private institutions.[163]

For instance, in the case *Dzemyuk v. Ukraine*[164] 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

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

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

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

[164] Case of Dzemyuk v. Ukraine, decision 4.09.2014, 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

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. Similar decision on the violation of art. 8 of the Convention by location of cemetery nearby of applicant`s house was taken by Court in case of *Solyanik v. Russia*[165].

In its decision on the eligibility of application of *Zbigniew Koceniak v. Poland*[166] 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 ill-founded.

In another recent case of *Thibaut v. France*[167] concerning alleged violation of art. 8 by France, the applicants (members of association) complained against the plan to construct extra-high-voltage power line due to the risk to health for people living near such power line generating magnetic fields.

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[165] Case of Solyanik v. Russia, decision 10.05. 2022, https://hudoc.echr.coe.int/eng-press?i=003-7330448-10004367

[166] Case of Zbigniew Koceniak v. Poland, decision 17.06.2014, http://hudoc.echr.coe.int/eng?i=001-145668

[167] Case of Thibaut v. France, decision 07.07.2022, https://hudoc.echr.coe.int/rus?i=002-12760

In its decision on admissibility from 7 July 2022 the Court declared the application of applicants who live near the site of a planned extra-high voltage power line (400,000 volts) inadmissible, as it is manifestly ill-founded. Applicants had not produced any evidence to show that the project would expose them to electromagnetic fields exceeding domestic or international standards.

The applicants had not demonstrated that the completion of the power line would expose them to an environmental danger such that their capacity to enjoy their private and family life, or their home, as protected by Article 8 of the Convention, would be directly and seriously affected.

The same decision was issued by Court in the case of *Calancea and others v. Republic of Moldova*[168], where the applicants (married couple and their neighbour) lived in the vicinity of high-voltage powerline. The Court declared the application inadmissible as being manifestly ill-founded. It had not being demonstrated that the strength of the electromagnetic field created by high-voltage power line had attained a level capable of having a harmful effect on the applicants private and family sphere. The minimum threshold of severity required to find a violation of art. 8 had not being attained in this case too.

The decision on admissibility of the application of *Fägerskiöld v. Sweden*[169], 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*[170], 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 from the facility. The ECHR came to that conclusion because of the available evidence of noise measurement which showed the normal range or a small excess of the norm,

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[168] Case of Calancea and others v. Republic of Moldova, decision from 6.02.2018, https://hudoc.echr.coe.int/rus?i=003-6020311-7722913

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

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

and also because of the fact that the applicants lived in the area which was not intended for residence.

In the case *Kyrtatos v. Greece*[171] 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*.[172] 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 in the Cases of Lopez Ostra v. Spain, Guerra and others v. Italy, Fadeyeva v. Russia). This means that in this situation there is less risk for sudden deterioration of the situation (unlike the Case of Tatar and Tartar v. Romania). 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

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

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

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 home was one that significantly adversely affected 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.

In case of *Pavlov and others v. Russia*[173] the Court assessed the applicability of article 8 to the case of the applicants living several km from sites of large industrial undertakings in Lipetsk and stated that in the present case it does not appear from the case material that the applicants in question lived or live in the immediate vicinity of any factory or plant. However, in the Court's opinion, this fact, by itself, is not sufficient to exclude their complaint from application of Article 8. The Court examined the evidence of excessive pollution in Lipetsk and mentioned that the causal link between the excessive level of pollution and the harmful effects on the applicants' health cannot however be automatically presumed in every case. It is conceivable that, despite the excessive pollution and its proven negative effects on the population of Lipetsk as a whole, the applicants did not suffer any special and extraordinary damage. The Court noted, in this regard, that the applicants did not, however, produce any medical evidence which could point to any conditions that they had allegedly developed as a result of air pollution in Lipetsk. The Court also reiterated that severe environmental pollution may affect individuals' well-being in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. The Court concluded that the authorities in the present case were in a position to evaluate the pollution hazards and take adequate measures to prevent or reduce them. The combination of these factors shows a sufficient link between the pollutant emissions and the State to raise an issue of the State's positive obligation under Article 8 of the Convention. The Court studied all the documents presented to national courts, evidence of pollution and actions from the side of local authorities to curb this pollution and considered that despite some improvements in air quality, the industrial air pollution in Lipetsk had not been sufficiently curbed, so as to prevent that the residents of the city be exposed to related health risks. The domestic authorities therefore failed to strike a fair balance in carrying out their positive obligations to secure the applicants' right to respect for their private life. The Court accordingly found that there has been a violation Article 8 of the Convention in respect of all applicants.

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[173] Case of Pavlov and Others v. Russia § 64,68, 69, 92, 93, decision 11 October, 2022, https://hudoc.echr.coe.int/rus?i=001-219640

In cases where domestic courts also have found violation of the right foreseen by art. 8 of the Convention, the Court relied on the conclusions of domestic courts concerning the fact of violation of art. 8 right, but reconsidered the issue of just satisfaction to the victim of violation. In case of *Otgon v. the Republic of Moldova*[174] the Court noted that the parties did not dispute the domestic court`s findings concerning the violation of the applicant`s right by state-owned company. In assessing whether the Moldovan authorities discharged their positive obligation under that provision, the Court noted that domestic courts provided a remedy in the form of establishing the company`s responsibility and awarding compensation (648 Euro for non-pecuniary damage). The only issue which remains to be determined is the amount of compensation. As it was too low for her sufferings (applicant spent near 2 weeks in the hospital after drinking contaminated water from the tap) and minimum of award generally awarded by Moldavian courts, the Court said that the applicant still claim to be a victim of a violation of art. 8. The Court awarded the applicant 4000 Euro for non-pecuniary damage. In the dissenting opinion of the Judge Lemmens concerning the fact of violation of art. 8 by the Republic of Moldova, the judge mentioned that the Court gave very generous interpretation of the notion of private life (in present case there has been only one incident of drinking of polluted water and it has not been demonstrated that the illness has affected the applicants quality of private life, except the period spent in the hospital), thus this case has been upgraded from an ordinary tort case to a case raising an issue under art. 8.

The case of *Kapa and Others v. Poland*[175] also represents the Court`s deliberations on application of the principle of fair balance between state or public interests and rights envisaged by the Convention. In this case the applicants — residents of town Stryków in Poland, complained for violation of their right to respect of their home by the State authorities which allowed extremely heavy day and night motorway traffic *via* a road unequipped for such a purpose, which ran through the middle of a town Stryków in very close vicinity to the applicants' home. By this the applicants were exposed to severe nuisance: noise (exceeding domestic and international norms), vibrations and exhaust fumes. The Court observed that the authorities faced a difficult task of mitigating the problem of very heavy traffic resulting from the rerouting of the A2 motorway down Warszawska Street. They also had a very limited choice of possible adaptation measures. The Court therefore accepted that the authorities

[174] Case of Otgon v. the Republic of Moldova, decision 25.10.2016, https://hudoc.echr.coe.int/rus?i=001-167797

[175] Case of Kapa and Others v. Poland, decision 14.10.2021, https://hudoc.echr.coe.int/fre?i=001-212138

made considerable efforts to respond to the problem. This, however, does not change the fact that these efforts remained largely inconsequential, because the combination of the A2 motorway and the N14 road was, for many reasons, the preferred route for drivers. As a result, the State put vehicle users in a privileged position compared with the residents affected by the traffic. The Court concluded that a fair balance was not struck in the present case. (§ 172, 173) The rerouting of heavy traffic *via* the N14 road, a road which was unequipped for that purpose and very near to the applicants' homes, and the lack of a timely and adequate response by the domestic authorities to the problem affecting the inhabitants of Warszawska Street, enabled the Court to conclude that the applicants' right to the peaceful enjoyment of their homes was breached in a way which affected their rights protected by Article 8, thus there had been a violation of Article 8 of the Convention. (§ 174, 175)

The Court extended the notion of home to prizon cell, where the applicant was detained and which became his only living space for many years. In the case of *Brânduşe v. Romania*[176] the applicant suffered from offensive smells emanating from waste tip in vicinity of prisoner's cell and affecting his quality of life and well-being. While noting that Mr Brânduşe's health had not deteriorated through proximity to the former refuse tip, the Court considered that, in the light of the conclusions of the environmental studies and the length of time for which the applicant had to suffer the nuisances concerned, the applicant's quality of life and well-being were affected to the detriment of his private life in a way which was not merely the consequence of his deprivation of liberty. Indeed, the applicant's complaint related to aspects which went beyond the context of his conditions of detention as such and which, moreover, concerned the only "living space" the applicant had had available to him for a number of years. It therefore considered that Article 8 was applicable in the case. The studies concluded that the activity was incompatible with environmental requirements, that there was a high level of pollution exceeding the standards established in 1987 and that persons living nearby had to put up with significant levels of nuisance caused by offensive smells. Thus, there had been a violation of Article 8 due to absence of adequate actions to deal with offensive smells from the tip by Romanian authorities.

The Court issued new decision with its position whether the right to respect for private and family life included the right to clean drinking water and sanitation as the lack of access to such amenities might have negative effect on health and human dignity. In case filed by few Roma comminity members from Slovenia, the Court discussed the possitive obligation of the state to ensure access to

[176] Brânduşe v. Romania, decision 07.04.09, https://hudoc.echr.coe.int/rus?i=002-1567

clean drinking water and sanitation and possibilities of the state to derive from its obligations in cases with Roma minorities, and also the assessment of the behaviour of applicants and their usage of the opportinities provided by the local authorities to improve their living conditions and family life were discussed by the Court. In the case *Hudorovic and others v. Slovenia*[177] the Court found that measures adopted by the State in order to ensure access to safe drinking water and sanitation for the applicants took account of the applicants` vulnerable position and satisfied the requirements of art. 8, thus there was no violation of art. 8. On the other hand the applicants received social benefits and have not used them for improving their living conditions, and applicants have not demostrated that the State`s failure to provide them with safe drinking water resulted in adverese consequences to their health and human dignity. With no unanimity the Court voted for the absence of violation of art. 8 by Slovenia in respect to two groups of applicants. Partly dissenting opinion of Judge Pavli and Judge Kuris raised the issue that Court was for the first time tasked to decide whether the right of access to clean water was guaranteed by art. 8 of the Convention. The Roma case also raised complex questions related to treatment of historicaly marginalised communities and presence of any special obligations for the States in this regard. Thus, the judges of the Court came to mutual agreement that the long-standing lack of access to a safe water supply, which by its very nature affects health and human dignity, comes under the scope of art. 8.

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 for violation of applicant`s rights 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.[178] 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

[177] Case of Hudorovic and others v. Slovenia, decision 10.03.2020, https://hudoc.echr.coe.int/fre?i=001-201646

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

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.[179]

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.[180]

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.[181]

In the case of *Moreno Gomez v. Spain*[182] 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 of *Bor v. Hungary,*[183] 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. ECHR found a violation of Article 8 by Hungary because of the failure of its positive obligation to guarantee the applicant's right

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[179] 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

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

[181] Case of Fadeyeva v. Russia, Case of Dubetska and others v. Ukraine.

[182] Case of Moreno Gomez v. Spain, decision 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

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

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 of *Di Sarno and Others v. Italy,*[184] the Court found a violation by the State of its positive obligation to introduce a system of collection of solid household waste and implement the appropriate legislative and administrative policy on waste. 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 governmental 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.

Few cases concerning operation or potential risks of operation of wind farms were considered by the Court. In recent case of *Inita VECBAŠTIKA and Others v. Latvia*[185] the applicants complained of a breach of their rights under Article 8 of the Convention on account of the fact that the State had authorised the construction of wind-energy farms near their homes in Dunika parish. The applicants stated that wind turbines generated high noise levels and caused other nuisance (vibrations, low-frequency sound, shade and shadow flicker) affecting their health and well-being. They also argued that the Contracting States had positive obligations inherent in an effective respect for private life under the Convention. The applicants relied on the Aarhus Convention, and the right to live in an environment adequate to one's health and well-being. The Court concluded that the applicants have not been able to produce any evidence showing that the operation of wind turbines near their properties or homes in Dunika parish would directly and seriously affect them with the necessary degree of probability. The Court considered that the mere mention of certain adverse effects arising from the operation of wind turbines in general

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

[185] Case of Inita VECBAŠTIKA and Others v. Latvia, decision from 19.11.2019, https://hudoc.echr.coe.int/fre?i=001-199496

is not enough in that regard. In such circumstances, the Court didn`t have reasonable and convincing evidence that there would be a risk of endangering the applicants' private and family life as a result of the adoption of the general and detailed spatial plans, which allowed the construction of wind farms in Dunika parish. The Court stated that the applicants' complaint under Article 8 of the Convention is incompatible *ratione materiae* with the provisions of the Convention and must be rejected in accordance with Article 35 § 4. Thus, the application was declared inadmissible. (similar decision on inadmissibility by the Court in wind turbines case *Lars and Astrid FÄGERSKIÖLD*[186] *v. Sweden*, taken on 26/02/2008)

The determination of the level of severity of interference of pollution with the applicants` rights under art. 8 of the Convention was considered by the Court in the case of *Jugheli and others v. Georgia*[187]. The applicants lived in the city centre, in close proximity (approximately 4 metres) to the "Tboelectrocentrali" thermal power plant. The plant was constructed in 1911 and reconstructed at a later date. For several decades it burned coal to generate power, before replacing it with natural gas. Applicants complained that nuisances were emanating from the plant such as air, noise and electromagnetic pollution and water leakage. An expert examination dated 28 October 2002 and carried out by the Expertise and Special Research Centre at the Ministry of Justice concluded as follows: "As the "Tboelectrocentrali" plant does not have a [buffer] zone and is immediately adjacent to a residential building, the plant's chimneys must be equipped with appropriate filters and other equipment to protect the population from the hazardous gases." As concerns the complaint under Article 8 of the Convention concerning the State's alleged failure to protect the applicants from the air pollution emanating from the thermal power plant in the immediate vicinity of their homes, the Court noted that this complaint must therefore be declared admissible. The Court concluded that even assuming that the air pollution did not cause any quantifiable harm to the applicants' health, it may have made them more vulnerable to various illnesses. Moreover, there can be no doubt that it adversely affected their quality of life at home, therefore the Court found that there has been an interference with the applicants' rights that reached a sufficient level of severity to bring it within the scope of Article 8 of the Convention. The Court noted that the Government did not present to the Court any relevant environmental studies or documents informative of their

[186] Case of Lars and Astrid FÄGERSKIÖLD v. Sweden, decision 26.02.2008, https://hudoc.echr.coe.int/eng?i=001-85411

[187] Case of Jugheli and others v. Georgia, decision 13.07.2017, https://hudoc.echr.coe.int/eng?i=001-175153

policy towards the plant and the air pollution emanating therefrom that had been affecting the applicants during the period concerned. The Court considered that the respondent State did not succeed in striking a fair balance between the interests of the community in having an operational thermal power plant and the applicants' effective enjoyment of their right to respect for their home and private life. There had been a violation of Article 8 of the Convention.

In recent years the Court produced few important judgements related to the effect of waste management sites on the enjoyment of the right to respect for private and family life. For example, in the case of *Kotov and others v. Russia,*[188] the applicants complained that the authorities had failed to take protective measures to minimise or eliminate the effects of the pollution allegedly caused by the continued operation of a landfill site near their homes, in breach of Article 8 of the Convention. The waste management company operating the dump site at quarry was found liable for violating sanitary, epidemiological and environmental regulations in 16 separate rounds of administrative proceedings between 2015–2018, after which a large-scale multi-level waste recycling and processing plant was set up in a quarry. In making an assessment the Court made a distinction between two separate periods in the case. It held that there had been a violation of art. 8 in respect to periods between 2015 and 2018, finding that authorities had failed in their positive obligation to protect the applicant's right to respect for his private life during this period. On the other hand, there had been no violation of art. 8 with regard to the period from 2019 until the present time, finding that since 2019 the Russian Government had managed to strike a fair balance between general socio-economic interests in having a sound waste management policy and effective waste management practices in place, and, on the other hand, the applicant`s individual interest in living in favourable environmental conditions.

In case of *Locascia and others v. Italy,*[189] the Court considered the implications of crisis of refuse collection, treatment and disposal in Campania region and pollution from a landfill site which was in an area near the homes of 19 applicants. The Court considered that even though it cannot be said, owing to the lack of medical evidence, that the pollution from the waste management crisis necessarily caused damage to the applicants' health, it was possible to establish, taking into account the official reports and available evidence, that living in the area marked by extensive exposure to waste in breach of the

[188] Case of Kotov and others v. Russia, judgement 11.10.2022, https://hudoc.echr.coe.int/fre?i=001-219648

[189] Case of Locascia and others v. Italy, Decision 19 October 2023, https://hudoc.echr.coe.int/eng?i=001-228155

applicable safety standards made the applicants more vulnerable to various illnesses. Moreover, the Court also reiterated that severe environmental pollution may affect individuals' well-being in such a way as to adversely affect their private life, without, however, seriously endangering their health. In the present case, the applicants were forced to live for several months in an environment polluted by waste left in the streets and by waste disposed of in temporary storage sites urgently created to cope with the prolonged unavailability of sufficient waste treatment and disposal facilities. The waste collection services in the municipalities of Caserta and San Nicola La Strada were repeatedly interrupted from the end of 2007 to May 2008. The accumulation of large quantities of waste along public roads led the local authorities to issue emergency measures including the temporary closure of kindergartens, schools, universities and local markets and the creation of temporary storage areas in the municipalities. Even assuming that the acute phase of the crisis lasted only five months, the Court considered that the environmental nuisance that the applicants experienced in the course of their everyday life affected, adversely and to a sufficient extent, their private life during the entire period under consideration. The Court also found that, given the protracted inability of the Italian authorities to ensure the proper functioning of the waste collection, treatment and disposal services, the authorities failed in their positive obligation to take all the necessary measures to ensure the effective protection of the applicants' right to respect for their home and private life. There had therefore been a violation of Article 8 of the Convention in this regard.

As further regards to the pollution caused by the pollution by landfill site near the applicants` homes, the Court held that Italian authroties had failed to take the necessary measures to protect the applicants` right to private life against the environmental pollution caused by the landfill site, in violation of the substantive aspect of art. 8.

Few cases concerning the noise in appicants home generated by bars, police stations and other facilities were considered by the Court and the Court found that the level of noise was capable of confirming the victim status of the applicant and triggering application of art. 8 to these cases. In the case of *Udovičić v. Croatia*[190], the applicant complained to the noise and other nuisance due to operation of the bar below his appartment for more than 10 years. The Court was satisfied that the disturbance affecting the applicant's home and her private life reached the minimum level of severity which required the authorities to implement measures to protect the applicant from that disturbance. The court

[190] Case of Udovičić v. Croatia, decision 24.04.2014, https://hudoc.echr.coe.int/eng?i=001-142520

stated that in these circumstances, by allowing the impugned situation to persist for more than ten years without finally settling the issue before the competent domestic authorities, the Court found that the respondent State has failed to approach the matter with due diligence and to give proper consideration to all competing interests, and thus to discharge its positive obligation to ensure the applicant's right to respect for her home and her private life. Accordingly, the Court found that there had been a violation of Article 8 of the Convention.

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

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.[191]

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.[192] However, this does not mean that decisions can be made only if comprehensive and statistical data are available on every aspect of the decision[193].

In the case of *Guerra and v. Italy*[194] 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

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[191] Cases of Guerra and Others v. Italy, Hatton and Others v. the United Kingdom, Taskin and Others v. Turkey.

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

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

[194] Case of Guerra and others v. Italy, decision 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

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, 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.[195]

In the case of *McGinley and Egan v. the United Kingdom*[196] 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

[195] 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.

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

dangerous activity which can have hidden negative impact on their health, to respect their private and family life, and in order to comply with the abovementioned law 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 of *Roche v. the United Kingdom*[197] 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 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.

In a new case of *Cordella and Others v. Italy*,[198] the case concerned on-going air pollution by a steelworks, operating since 1965 in Taranto (a town with about 200,000 inhabitants) and owned by a former public company which was privatised in 1995. In 1990 a resolution of the Council of Ministers identified the town of Taranto and four other neighbouring municipalities as being at "high environmental risk" on account of the emissions from the steelworks. In 1998 the President of the Republic approved a decontamination plan. In 2000 a ministerial decree included the municipalities of Taranto and Statte in the "sites of national interest sites for decontamination" (SIN). The authorities concluded agreements with the company. In 2011 substantive and information-related conditions were imposed in the context of an administrative operating licence. Several legislative decrees aimed at preserving Taranto's steel-producing activity, adopted from 2012 onwards, extended the deadlines imposed. In 2015, as a result of its insolvency, the company was placed in compulsory administration, and the

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

[198] Case of Cordella and Others v. Italy, decision 24.06.19, https://hudoc.echr.coe.int/eng?i=001-189421

administrator was granted exemption from administrative and criminal liability in introducing the planned environmental measures. In the meantime, European Union institutions (the Court of Justice and the Commission) concluded that Italy had failed in its obligation to guarantee compliance with the applicable directives. Various civil or criminal proceedings were brought. Nonetheless, the toxic emissions persisted. The applicants are several dozen physical persons who live or lived in the more or less immediate vicinity of the steelworks. They complained of a lack of action by the State to avert the effects of the factory's toxic emissions on their health. While it was not the Court's task to determine exactly what measures should have been taken in the present case to reduce pollution in a more efficient way, it was certainly within the Court's jurisdiction to assess whether the national authorities had approached the problem with due diligence and given consideration to all the competing interests. The onus here was on the State to justify, using detailed and rigorous data, a situation in which certain individuals bore a heavy burden on behalf of the rest of the community. Thus, the Court held, unanimously, that there had been a violation of Article 13 taken in conjunction with Article 8 of the Convention.

Few more cases with applicants from the same city Taranto were heard by the Court and the Court by Decisions taken on 5 May 2022 found violation of art. 8 of the Convention and in some cases awarded compensation to applicants (e.g. A. A. and others v. Italy, Perelli and others v. Italy, Ardimento and others v. Italy, Briganti and others v. Italy)[199].

Several cases related to climate change impacts on human rights approached the Court and the Court found that art. 8 encompasses the right to effective protection by the State authorities from a serious adverse effects of climate change on lives, health, well-being and quality of life. In Grand Chamber judgement in case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*[200], the Court found violation of art. 6 and art. 8 of the Convention. The case concerned a complaint by four women and a Swiss association, Verein KlimaSeniorinnen Schweiz whose members are all older women concerned about the consequences of global warming on their living conditions and health. They considered that Swiss authorities were not taking sufficient action, despite their duties under the Convention, to mitigate the effects of climate change. The applicant association had the right to bring a compliant regarding the threats arising from climate

[199] https://hudoc.echr.coe.int/eng?i=001-217123, https://hudoc.echr.coe.int/rus?i=001-217125

[200] Case of Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, https://hudoc.echr.coe.int/#{%22fulltext%22:[%22KlimaSeniorinnen%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-233206%22]}, 9/04/24

change in the respondent state on behalf of those individuals who could arguably claim to be subject to specific threats or adverse effects of climate change on their life, health, well-being and quality of life as protected under the Convention. The Court found that the Swiss Confederation had failed to comply with its duties under the Convention concerning climate change. There had been critical gaps in the process of putting in place the relevant domestic regulatory framework, including a failure by the Swiss authorities to quantify, through a carbon budget or otherwise, national greenhouse gas emission limitations. Switzerland had also failed to meet its past GHG emission reduction targets. While recognising that national authorities enjoy wide discretion in relation to implementation of legislation and measures the Court held that the Swiss authorities had not acted in time and in an appropriate way to devise develop and implement relevant legislation and measures in this case. The Court also concluded that 4 applicants — older Swiss individuals — failed to fulfill the victim-status criteria under art. 34, thus their complaints were declared inadmissible as being incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3. (para 535 of the judgement)

> ***Article 8 Para 2***
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> *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 of *Dzemyuk v. Ukraine*[201] 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 at 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 home 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

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

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 came 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 with private and family life, and home 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 State must be given a wide discretion and choice between different ways and means of compliance with their obligations. The main issue for ECHR is whether the state managed to keep the fair balance between the competing interests of affected individuals and society as a whole.[202] In carrying out this assessment in the context of a particular case, all factors must be analyzed, including national legal issues.[203]

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 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

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

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

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.[204]

Since the Convention is designed to protect real, not illusory human rights, a fair balance between different interests in question may be not followed not only when there are no provisions for the protection of the guaranteed rights, but if they are not duly observed.[205] 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 prolonged or if as a result the adopted decision remains unfulfilled over a considerable period.[206]

In the case of *Lopez Ostra v. Spain,*[207] 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, persistent 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 about 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, if affected her private and family

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

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

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

[207] Case of Lopez Ostra v. Spain, decision 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

life and amounted to 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 pediatrician recommended that they do so. Having regard to the foregoing, and despite the margin of appreciation left to the respondent State, the ECHR considered 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 had 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 of *Bacila v. Romania,*[208] the applicant lived near a plant which was one of the Europe's biggest producers of lead and zinc and at the time the biggest 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 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.

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

In a famous case of *Taşkın and others v. Turkey,*[209] 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.

In a similar case of *Ockan and others v. Turkey,*[210] the ECHR was addressed by 315 Turkish nationals living in Bergama area 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.

In the case of *Ferhan ÇIÇEK and others against Turkey*[211], the Court deliberated on the application of art. 8 to the case of operation of lime production plant with a quarry in the vicinity of applicants` homes (500 m). The court said that the mere allegation that an industrial activity was not carried on legally because It lacked one or more of the necessary permits or licences is not sufficient to ground the assertion that the applicants` rights under art. 8 have been interfered with. In this case, the Court can not establish the extent of air pollution allegedly caused by the plant as applicants did not provide any

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

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

[211] Case of ÇIÇEK and others v. Turkey, decision 27.02.2020, https://hudoc.echr.coe.int/eng?i=001-188957

specific information concerning the plant`s operations but referred to general scientific studies, the applicants did not provide medical or environmental expert reports relevant to their situation or any other evidence of air pollution or nuisance allegedly caused by the Plant. In the absence of proof of any direct impact on the applicants or their quality of life, the Court was not persuaded that the nuisance complained of amounted to an interference with applicants` private lives, thus article 8 is not applicable to this case.

The case of *Fadeyeva v. Russia*[212] 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*[213], 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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[212] Case of Fadeyeva v. Russia, decision 09.06.2005, http://hudoc.ECHR.coe.int/eng?i=001-69315

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

In the case of *Giacomelli v. Italy*,[214] 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 licenses 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 license for the plant nor the decision to authorize 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 respect for home 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 of *Tătar v. Romania*[215] is interesting in terms of the position of the court and the application of the international principle of precaution. The applicants, father and son declared that the use of cyanide in the gold

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

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

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 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 safe 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 of *Dubetska and others v. Ukraine,*[216] 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 safety 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

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

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 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 facilities. Such actions constitute a violation of Art. 8 of the Convention.

In the case of *Hatton and others v. the United Kingdom*[217], 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 that 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.

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

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 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 of *Flamenbaum and others v. France*[218], 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

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

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 *Deés v. Hungary*[219] and *Grimkovska v. Ukraine*[220] are the most important.

In the case of *Deés 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 of 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 transport. In addition, the local authorities have not conducted regular monitoring of pollution and other impacts from 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,*[221] 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 application was considered inadmissible. The German government has proven that it has taken some measures to reduce emissions of diesel vehicles

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

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

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

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.

The Court considers not only the gravity of environmental nuisance and severity of impact of environmental conditions on health and wellbeing of citizens, but also all the conditions of location of houses of applicants and legality of their homes. In case *Martinez Martinez and Maria Pino Manzano v. Spain*[222] the Court found no violation of art. 8 of the Convention due to the fact that applicants lived in industrial zone which was not intended for residential use and thus location of stone quarry in the vicinity of their house, which generated noise and pollution of the levels equal or slightly above the norm, was not considered as disrespect for their home and family life.

The applicants which rights to respect for private and family life had been violated by national authorities or private entities, are entitled to just satisfaction, under the article 41 of the Convention. When satisfaction awarded by national courts or other entities was deemed to be not just, the Court can award just satisfaction to the injured Party which rights under Convention had been violated. In the case of *Otogon v. the Republic of Moldova*[223] (application no.22743/07) the applicant drank contaminated water from the tap which resulted in hospital stay and worthening of health of the applicant. The national courts ruled in her favor but awarded her very small amount of compensation to her physical and moral sufferings due to drinking unsafe water (around 310 EUR). The ECHR stated that domestic courts provided a remedy to applicant in the form of establishing the company's responsibility and awarding compensation of non-pecuniary damage. Finally, the Court stated that the applicant can still claim to be a victim of a violation of art. 8 of the Convention and there has been a violation of article 8. It awarded the applicant 4000 Euro of just satisfaction as compensation of non-pecuniary damage.

In another case, the Court also relied and confirmed the decisions of national courts stating violation of the applicants' rights established by article 8 of the Convention. In addition, the court in *case of Genç and Demirgan v. Turkey*[224]

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[222] Martinez Martinez and Maria Pino Manzano v. Spain, decision 3.07.2012, https://hudoc.echr.coe.int/rus?i=003-4008133-4669143

[223] Otogon v. the Republic of Moldova, judgement on 25.10.2016, https://hudoc.echr.coe.int/rus?i=001-167797

[224] Genç and Demirgan v. Turkey, judgement on 10 October 2017, https://hudoc.echr.coe.int/rus?i=001-177387.

stated that notwithstanding the procedural guarantees afforded by Turkish legislation and the implementation of guarantees by judicial decisions, the administrative authorities deprived them of any useful effect in respect of the applicants. Thus, therefore the respondent State did not fulfil its obligation to secure the applicants' right to respect for their private and family life, in breach of art. 8 of the Convention. In this case the administrative bodies refused to comply with administrative court decisions and issued a permit to operate the Ovacik gold mine using cyanide process. So the gold mine was in operation regardless numerous national court decisions and national authorities resumed its operation many times. Thus, the Court also stated the violation of art. 6 of the Convention.

The Court also reminded in the Judgement on the case of *Karin Andersson and Others v. Sweden*[225] that article 8 of the Convention entails the right to appeal to the courts against any decision, act or omission where their interests or their comments had not been given sufficient weight in the decision-making process.

From ECHR's practice on the application of Article 8 in environmental matters it follows that this article can be applied in such 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 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 authority.

[225] Karin Andersson and Others v. Sweden, judgement on 25 September 2014, https://hudoc.echr.coe.int/rus?i=001-146399

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 Court 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 for damages in civil proceedings), requests from journalists to reveal their sources, disciplinary measures or confiscation of materials.

Analysis of "environmental" cases of the Court 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 quality of life. Nevertheless, the Court 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.

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

In the case of *Guerra and Others v. Italy*[226] (more information on the case can be found in sections 2.2. and 2.4.) the applicants complained that the relevant

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

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.[227]

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[228]. 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."[229]

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 which 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 connection with a violation of the State's 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 binding obligation of a State to provide access to such environmental information to the right to life and the right to respect for private and family life makes this obligation 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 —

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227 Öneryildiz v. Turkey, http://hudoc.echr.coe.int/eng?i=001-67614, para. 90; Guerra and others v. Italy, http://hudoc.echr.coe.int/eng?i=001-58135, para. 60.

228 Öneryildiz v. Turkey, http://hudoc.echr.coe.int/eng?i=001-67614, para. 90

229 Budayeva and Others v. Russia, http://hudoc.echr.coe.int/eng?i=001-117225, para. 131.

in some circumstances is deemed by the Court as a positive obligation of the State to protect life, physical integrity and privacy.

Nevertheless, at least one recent case under Article 10 delt with an unlawful refusal of public authorities to provide environmental information. In *Rovshan Hajiyev v. Azerbaijan*[230] (applications 19925/12 and 47532/13, judgement of 9 December 2021) a journalist requested information on the environmental and public-health impact of the military radar station and requested copies of any reports. The Ministry of Healthcare replied that a report had been prepared and transmitted to the Cabinet of Ministers. The latter did not respond at all to the applicant's request. The applicant instituted court proceedings against the authorities but was unsuccessful.

The Court reiterated that although Article 10 did not confer on the individual a right of access to information held by a public authority or oblige the Government to impart such information, such a right or obligation could arise where access to the information was instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constituted an interference with that right. The Court was satisfied that the information requested, which had been ready and available, constituted a matter of public interest and access to this information had been instrumental for the applicant, as a journalist, to exercise his right to receive and impart information.

Furthermore, the Court took note that both the authorities and later on the domestic courts failed to duly examine the requests / lawfulness of the denial in accordance with the domestic law on processing individual requests for information. According to the applicable law the information owners indeed were required to provide access unless the information was lawfully restricted or there were other specifically defined grounds for refusing to provide access. However, as Court observed, the existence of any such substantive grounds for denial was not put forward by the domestic courts or the authorities. Therefore, the violation of Article 10 was confirmed.

Most of the "environmental" cases, in which the Court found a violation of Article 10 of the Convention, however, are related to the protection of individuals from state censorship and 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

[230] Rovshan Hajiyev v. Azerbaijan, https://hudoc.echr.coe.int/rus#{%22itemid%22:[%22001-213788%22]}

and groups to contribute to the public debate by disseminating information and ideas on matters of general public interest.[231]

In the case of *Sapundzhiev v. Bulgaria*[232] (application no. 30460/08, judgment of 6 September 2018) a neighbour of an applicant started a printing company near the building where he lived with his family causing the nuisance (smell of ink and solvents, vibrations). The applicant submitted a series of complaints to the relevant public authorities claiming that the company was operating contrary to legal requirements and asking for help in forcing them to cease its operations. He also produced some posters, calling on the community's support for the termination of the company's operations and claiming that it had been licensed in breach of the relevant legal requirements and that the pollution it was causing was harmful to the people living nearby.

The owner of the printing company brought defamation proceedings against the applicant under the Criminal Code complaining that the applicant's actions had damaged his printing business and his personal reputation. The national courts found the applicant guilty of defamation and ordered to pay a fine and damages to the victim.

Considering this case the Court underlined that the applicant has exercised his right to make complaints to the authorities competent to deal with such an issue on alleged irregularity in the conduct of another person. As regards statements to the relevant authorities, the Court observes that these written complaints were not made public and thus their potentially negative impact on the owner's reputation, if any, was quite limited. They were made to draw the authorities' attention to the business which the applicant considered was polluting the environment and damaging people's health. For these reasons the Court found that no pressing social need for the interference with the applicant's freedom of expression was convincingly demonstrated in this regard.

Regarding the posters the Court said that since by the time the applicant had displayed them in his shop, he had been informed by the authorities that the chemical agents' levels in the air around his home were within the applicable legal norms, some form of an appropriate sanction for this conduct would not have been incompatible with Article 10. However, the Court disagreed as to the severity of the sanction (EUR 770), which in view of the applicant's personal situation was not insignificant. The Court found that this risked having the

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

[232] Sapundzhiev v. Bulgaria, decision 06.09.2018, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-186036%22]}

effect of stifling complaints before relevant authorities, as well as dissuading all public expression on issues about environmental protection and people's health and well-being. The Court ruled that the interference in question was not "necessary in a democratic society" and confirmed a violation of Article 10.

In the context of Article 10, the Court also considered a number of cases related to dissemination of information by environmental NGOs. In the case of *Vides Aizsardzības Klubs v. Latvia*[233] (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 false. Latvian courts have concluded that the applicant had not proved the truth of his allegations and ordered them to publish an official apology and compensate the damage to the mayor for publishing defamatory statements.

In this case the court reiterated that 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. The Court 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 relevant 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 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 limitation of the applicant's right to freedom of expression was not proportionate to the legitimate goal (protection of reputation and rights of others).

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

In the case of *Verein gegen Tierfabriken v. Switzerland*[234](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 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.

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*[235]. 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?" 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

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

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

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 to the press. The Court however 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 in enabling 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[236] 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 them of the right to defend their 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. Failure of the State to provide such guarantees in this case was established by the Court

[236] Defamation lawsuit is a civil lawsuit 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 along with the violation of Article 10. 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.

In one of the more recent cases the Court considered a violation of Article 10 in conjunction with Article 11 (freedom of assembly and association) in case of a fine imposed on an environmental protestor. In *Bumbeș v. Romania* (application, judgment of 3 May 2022) a known activist was fined for handcuffing himself near the main Government building and displaying signs in a protest against a mining project without a prior notice.

The Court highlighted that in the given situation the penalty imposed on the applicant could not be dissociated from the views expressed by him through his actions. The Court observed that the applicant had wished to draw the attention of the fellow citizens and public officials to his disapproval of the government's policies concerning the mining project. This was a topic of public interest and contributed to the ongoing debate in society about the impact of this project and its green-lighting by governmental and political powers. Therefore, the Court reminded that there is little scope for restrictions on political speech or debates on questions of public interest and very strong reasons are required for justifying such restrictions.

The Court found that the interference with the applicant's right to freedom of expression had not been "necessary in a democratic society". It noted that the domestic courts had not focused on the issue of public speech on a matter of public interest and had not duly considered the extent of the "disruption of ordinary life" caused by the protest, instead looking primarily at the lack of prior notification of the protest. Finally, although the fine imposed had been the minimum statutory amount, the imposition of a sanction, however lenient, on the author of an expression which qualified as political, in Courts view, could have an undesirable chilling effect on public speech. The Court therefore found a violation of Article 10.

Having analysed the jurisprudence of the Court on access to and dissemination of environmental information, we could extrapolate 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 considers the State's duty to disseminate such information in the event of a real and imminent danger to be — an element of the positive obligation of the State to protect physical integrity or private life of individuals within its jurisdiction.

2. Unlawful refusal of public authorities to provide environmental information could however constitute an interference with Article 10 right where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information.
3. Subjects relating to the protection of nature and the environment, health and respect for animals are *issues of general concern* which, in principle, enjoy a high level of protection under the right to freedom of expression.
4. 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.
5. Effective functioning of non-governmental organizations performing the role of a "watchdog" is very important in a democratic society.
6. In a democratic society even small and informal groups should be able to effectively carry out their activities. There is considerable public interest in enabling individuals and groups to contribute to the public debate by disseminating information and ideas about health and the environment.
7. 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.
8. The pressing social need must be demonstrated convincingly by the State for an interference with the freedom of expression in respect of complaints to the authorities.
9. 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.
10. 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.
11. 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.
12. The imposition of a sanction, however lenient, on the author of political speech could have an undesirable chilling effect on public speech and thus is not necessary in a democratic society.

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 three 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) cases where the Court decided on the legality of government's interference with the right to peaceful enjoyment of property in general public interests, in particular in the interest of environmental protection;
3) a case where the Court decided whether a costs award made against an environmental association in the result of unsuccessful legal proceedings against a nuclear power plant amounted to unjustified interference with the association's rights.

In the case of *Oneryildiz v. Turkey*[237] (application № 48939/99, judgement of 30 November 2004) — for more details 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 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

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

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 destruction 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 pointed out that provision by the State to the applicant of the right to buy housing on favourable terms does not deprive the applicant of victim 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 another case against Turkey, *Taskin and Others v. Turkey*[238] — for further information 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.

In the case of *Dubetska and others v. Ukraine*[239] (application № 30499/03, judgement of 10 February 2011) — for more details on the facts on the case see the section on Article 8 — 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

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

[239] Dubetska and Others v. Ukraine, decision 10.02.2011p., https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-103273%22]}

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.

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 of *Budayeva v. Russia*[240] (application № 15339/02, judgement of 20 March 2008) — 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 have alleviated the exceptional strength of mudslides. Nor was it established that damage to homes and property of the applicants could have been prevented by 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. In Court's opinion, the compensation provided to the applicant 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 was deemed by the Court as 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

[240] Budayeva and others v. Russia, decision 20.03.2008, https://hudoc.echr.coe.int/eng#{%22appno%22:[%2215339/02%22],%22itemid%22:[%22001-85436%22]}

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[241]. Article 1 of Protocol 1 does not guarantee the right to continuous possession of the property in favourable natural environment[242]. It 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 is an increasingly important consideration[243].

For example, *Fredin v. Sweden*[244] (application № 12033/86, judgement of 18 February 1991) is focused on termination of the permit for exploitation of a gravel pit located on the land of the applicant on the basis of the Law on Nature Protection. 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 goal 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 *Pine Valley Developments Ltd and Others v. Ireland*[245] (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 centre. The applicants complained of interference with their right to peaceful

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241 Case of Brosset-Triboulet and Others v. France, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-98036%22]}, paragraph. 80.

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

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

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

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

enjoyment of property, namely the prohibition to perform construction works on the land lot they owned without any compensation.

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 the area of agriculture planned for the development 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 of *Kapsalis and Nima-Kapsali v. Greece*[246] (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 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*[247] (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

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

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

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 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 of *Turgut and Others v. Turkey*[248] (application № 1411/03, judgement of 8 July 2008) and *Satir v. Turkey*[249] (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

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

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

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 cancelled 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 of the protection of individual rights.

The Court also concluded on violation of a fair balance between competing social and individual interests in the case of *Papastavrou and Others v. Greece*[250] (application № 46372/99, judgement of 10 April 2003). The case 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 was sixty years old and was not in any way updated, geological studies that had established the unsuitability of the sites for afforestation and absence in Greek law of the possibility for compensation, established the breach of Article 1 of Protocol No. 1.

In the cases against France, *Depalle v. France*[251] (application № 34044/02, judgement of 29 March 2010) and *Brosset-Triboulet and Others v. France*[252] (application № 34078/02, judgement of 29 March 2010) the Court 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 situations where public authorities ordered the applicants to restore the coast to previous state at their own expense and without compensation. Houses that were to be demolished, were built on community lands based on permission issued half a century ago, which formally did not prove the ownership right or the right of temporary residence of the applicants on lands belonging to community property.

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

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

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

In the case of *O'Sullivan McCarthy mussel development Ltd v. Ireland*[253] (Application № 44460/16, judgement of 7 June 2018) the Court sustained a temporary prohibition on mussel seed fishing in a "Natura 2000" site imposed by the State following the results of an infringement procedure brought by the EU against Ireland for not complying with two environmental directives. The applicant company in this case was engaged in the cultivation of mussels in Castlemaine harbour — a subject to the Bird Directive and the Habitat Directive — obtaining the necessary licences and permits each year since the 1970s. In 2007 the Court of Justice of the European Union declared that Ireland had failed to fulfil its EU obligations under the aforementioned directives. In view of the judgment, the authorities temporarily prohibited mussel seed fishing from June 2008. Later same year the applicant company was able to resume its activity, however, according to the applicant they sustained financial loss. Its compensation proceedings against the State was unsuccessful.

In this case the Court concluded that the interference of the State had the clear aim to protect the environment and ensure State's compliance with its obligations under EU law, both of which were legitimate general-interest objectives of considerable weight. The Court took notice that there was no legal basis for the applicant company to entertain a legitimate expectation of being permitted to operate as usual in 2008, following the finding by the CJEU of December 2007. Furthermore, in these circumstances being a commercial operator the applicant was expected to display a high degree of caution and take special care in assessing the risks in their activities. Instead, they purchased its new boat in May 2008.

Furthermore, the Court highlighted that achieving compliance on the nationwide scale, and within an acceptable timeframe, with the respondent State's obligations under EU law afforded a wide margin of appreciation for the domestic authorities, and thus it was for them to decide the nature and extent of the measures required. The partial restriction applied to commercial activities in the harbour, as opposed to a total one, was to the benefit rather than the detriment of the applicant company. In sum, the Court concluded that Ireland had not failed in finding a fair balance between the general interest of the community and the protection of individual rights.

In the case of *Yaşar v. Romania*[254] (Application № 64863/13, judgement of 26 November 2019) the Court considered the confiscation of a vessel used for illegal fishing in light of the right of peaceful enjoyment of one's property. The applicant

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[253] Case of O'Sullivan McCarthy mussel development Ltd v. Ireland, decision 07.07.2018, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-183395%22]}

[254] Case of Yaşar v. Romania, decision 26.11.2019, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-198637%22]}

rented his vessel to a person who subsequently was arrested and convicted for illegal fishing in the Black Sea. In the result of criminal proceedings brought against its captain the vessel was confiscated and later on sold by the State.

The Court concluded that interference had been in accordance with the law, namely the domestic law on fishing and aquaculture, and had pursued the legitimate aim of preventing activities which posed a serious threat to the biological resources in the Black Sea, such as illegal fishing. The confiscation had therefore been in the general interest. The Courts in this case had carefully balanced the rights at stake and had found that the demands of the general interest to prevent activities which posed a serious threat to the biological resources in the Black Sea had outweighed the applicant's property rights given the fact that he had been fully aware of what the vessel was used for and the ultimate value of the vessel itself.

When assessing the achievement of a fair balance between the competing interests of environmental protection and individual property rights the Court gives direct importance to the fact of paying compensation to the person concerned. A good example of this would be the case of *Bērziņš and Others v. Latvia*[255] (Application № 73105/12, judgement of 21 September 2021) concerning a disproportionate denial of access to and use of applicants' plot of land for over a decade to ensure access to clean drinking water for others. In 2004 the applicants purchased a land plot with the following permitted use: "designated for the needs of a farm" and in early 2005 registered their property rights in the Land Register. The relevant entry contained no record as regards any water protection zones. In the autumn of 2005, they discovered that a fence had been built around their land plot and a "no entry" sign had been placed on it. The applicants were informed that a "strict" protection zone (covering their land) had been envisaged around a water supply source. A project to establish that protection zone had been prepared in 2003, yet the protection zone had not been marked in any relevant spatial plan. Later on the Municipal Council established a "strict" protection zone on the applicants' land plot and the permitted use from then onwards was designated as: "a specially protected nature territory where any economic activity shall be prohibited" and approved the relevant spatial plan. No compensation or allocation of another plot of land were offered to the applicants.

The Court accepted that the protection of that zone was in public interest as it guaranteed access to clean drinking water for others and in order to ensure the preservation and renewal of water resources, and, more generally, the environment conservation, which in today's society is an increasingly important

[255] Case of Bērziņš and Others v. Latvia, decision 21.09.2021, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-212012%22]}

consideration. However, giving regard to the lack of domestic law provisions on compensation in the regulatory framework concerning the protection zones and the manner in which the case was handled by the authorities in general, the Court found that the domestic authorities have not ensured a fair balance between the demands of the general interest of the community and the requirements for the protection of the applicants' property rights as the applicants have had to put up with significant interference for more than a decade without being offered any compensation or other redress; therefore, concluding that the interference complained of was disproportionate to the aim pursued.

In the light of Article 1 Protocol 1 the Court considered another interesting question — whether an allegedly excessive costs award made against the applicant, an environmental association, for the legal representation of the successful respondent party, a nuclear power plant, in reopening proceedings amounted to unjustified interference with the applicant association's rights. In *National Movement Ekoglasnost v. Bulgaria*[256] (application № 31678/17, judgment 15 December 2020) an environmental non-profit organisation unsucessfully tried to join as a third party judicial-review proceedings of a ministerial decision concerning the only nuclear power plant in the State. At the final stage the applicant applied for the reopening of proceedings to the Supreme Administrative Court which upheld the decisions of the lower courts and ordered the applicant to pay the legal fees of the nuclear power plant in the amount of 6,000 euros (EUR). Before the Court the applicant argued that the costs award made against it had overall been excessive and had failed to balance the interests of society and the individual's fundamental rights, particularly given non-governmental organisations' "watchdog" role.

The Court examined the "interference" with the association's property in the light of its lawfulness, the public interest, and the balance between the general interest and the association's rights. The Court reiterated that costs are a well-established and necessary feature of a legal system. Thus, the order in this case had had a legitimate aim. The Court noted that in Bulgaria, the general rule was that the "loser pays". The amount due is assessed by the courts taking into account the complexity of and interest in the case and could be reduced (but not below a statutory minimum). In its decision the Court higlited that the Supreme Administrative Court had not specified sufficiently how it had assessed the costs as well as the fact that the amount ordered had been 24 times the minimum set out in law even thought the issues had been mainly procedural and not particularly complex. The Court thus concluded that the Supreme Administrative Court had not given sufficient thought to the specifics of the case, and had failed

[256] Case of National Movement Ekoglasnost v. Bulgaria, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-206506%22]}

to balance the general interest and the applicant association's rights, leaving the association to the bear an excessive individual burden.

Having analysed the case-law of the Court on Article 1 of Protocol No. 1 the following conclusions could be drown:

1. 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.
2. However, in the context of natural disasters, the obligation of the State to protect private property cannot be regarded as identical with 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.
3. 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[257].
4. Authorities have the right to control the use of property in compliance with general interest[258]. In this context, the Court gives to the environment an increasingly significant attention. The State enjoys wide discretion when making decisions on regional planning and policy on environmental protection where common interests of a community prevail[259].
5. 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.
6. Regarding judicial costs payable by an environmental organisation the Court considers the "watchdog" role of the applicant when balancing general interest and the association's rights.

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

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

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

CONCLUSIONS

At the time of adoption of the Convention in 1950 environmental rights did not draw as much attention as fundamental human rights. As the result, the Convention does not provide direct protection of environmental human rights in its text. Nevertheless, over the years such protection was offered through the application of other rights enshrined in the Convention such as the right to life, respect for private and family life and other rights. Limited Court's case-law covering the cases that could be considered environmental ones or related to the protection of environmental rights in the last three decades, however, suggests that the Court was not particularly eager to give environmental rights the same level of protection as to those rights that are explicitly set forth in the Convention before seeing corresponding amendments to the Convention or the adoption of an additional protocol on the right to safe and healthy environment. Therefore, to submit a case related to violation of environmental rights to the Court, the application should be carefully prepared and substantiated with evidence of violations by the State of the basic human rights covered by the Convention.

The Court provides environmental protection mainly indirectly and predominantly in cases when damage or pollution had occurred. Due to its nature, the Court decision has no impact on prevention, limitation, control, or clean-up of pollution. The only category of cases where the Court directly protected the environment were the cases related to limitation by the State of some human rights (right to peaceful enjoyment of property) on the basis of the need to protect common interests (environment is this case). However, such cases are scarce and the role of the Court in them comes to recognizing the absence of violation of the Convention by the State that gave priority to environmental protection.

Analysis of the Court's case-law in environmental cases highlights the following tendencies and opportunities for potential applicants — individuals and NGOs: the Convention can be used for protection of environmental rights of individuals and protection of individuals' rights from adverse environmental factors, but such adverse impact has to reach certain level of seriousness and cause significant damage to the applicant. Due to the subsidiary role of the Court, the latter will rely on decisions of national courts and public authorities

in assessing the degree of seriousness of damage and impact on citizens, and causation link between environmental pollution and worthening health conditions of applicants. One should not expect an active role of the Court in finding and obtaining evidence, but potential applicants should first prepare utmost acceptable 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 Court' case-law for stipulating all aspects of violations of rights enshrined in the Convention.

Equally important if not greater role the Court' case-law could play in the formation of domestic jurisprudence. Being directly binding on national courts carefully selected refences to the Court' case-law in claims brought domestically, could strengthen the position of plaintiffs protecting the environment or their environmental rights. Special attention in this regard should be paid to the position of the Court in environmental cases that emphasized positive obligations of the State, such as an obligation to assess the risks and mitigate those risks to human rights originated from the environmental condition or human activity, to provide for the release and dissemination of information on environmental risks, involvement of the public concerned in decision-making with a possibility to challenge such a decision, as well as for taking into account a watchdog role of environmental NGOs, including all the aspects of access to court. The Court recognizes the right of non-governmental environmental organizations 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 Council of Europe. Moreover, the Court has long ago acknowledged the important role of the civil society organisations in holding the states accountable to their actions and failures to act in the area of fundamental human rights and public interest implying the obligation of the states to promote and support their activities. Being sufficient on their own, these conclusions also align with the provisions of the UNECE Convention on on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) to which Ukraine is a Party.

The Court's case-law becomes increasingly known among the jurists and judges. Given the Ukraine's accession process on becoming EU member-state, this tendency will develop and more and more Court's judgments will be cited by both the applicants and national courts. Despite the overall cautiousness, the interpretation by the Court of norms of the Convention in view of modern conditions opens new potential possibilities for protection of environmental rights (2024 judgments on climate change being the most recent and prominent examples). This publication with the analysis and translation (in Ukrainian version of publication) of the most important

judgements of the Court in environmental cases aims to promote the use of the Court's case-law by the lawyers and attorneys supporting environmental activists and organisations filing claims in domestic courts as well as to inspire public interest environmental lawyers to creatively interpret the Convention's provisions to tackle contemporary environmental challenges thus contributing to further development of an environmental pillar of the Court's jurisprudence.

ANNEXES

Summaries and press-releases of certain decisions of the ECHR in environmental cases

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 coun-

cil 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[1], 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.

---

[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.

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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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[1], 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.

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[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.

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 repre-

sented. 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

Information Note on the Court's case-law 257
December 2021

Rovshan Hajiyev v. Azerbaijan — 19925/12 and 47532/13

Judgment 9.12.2021 [Section V]

Article 10

Article 10-1. Freedom to receive information

Unlawful refusal to provide a journalist access to information of public interest on the environmental and health impact of a former Soviet military radar station: *violation*

Facts — The applicant was a journalist and editor of the newspaper *Azadliq*. He sent requests to the Ministry of Healthcare and the Cabinet of Ministers for information concerning the environmental and public-health impact of the Gabala Radar Station, a Soviet military early warning radar located in Azerbaijani territory. After the Soviet Union's dissolution this station had become the property of Azerbaijan but had been operated by Russia under a lease agreement until its closure in 2012. The applicant mainly inquired whether the Commission appointed to carry out the impact assessment was still active and requested copies of any reports. The Ministry of Healthcare replied that a report had been prepared by the Commission and transmitted to the Cabinet of Ministers. The latter did not respond at all to the applicant's request. As he was not provided with the requested information, the applicant instituted two separate sets of proceedings against the mentioned authorities but was unsuccessful.

Law — Article 10:

(a) *Applicability* — Both requests concerned access to the same State-held information and, as such, constituted essentially the same information request. Although Article 10 did not confer on the individual a right of access to information held by a public authority or oblige the Government to impart such information, such a right or obligation could arise where access to the information was instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constituted an interference with that right. The Court, applying the criteria for right of access to State-held information laid down in *Magyar Helsinki Bizottság v. Hungary* [GC] was satisfied that the information requested by the applicant, which had been ready and available, constituted a

matter of public interest. Access to this information had been instrumental for the applicant, as a journalist, to exercise his right to receive and impart information. Article 10 was therefore applicable.

(b) *Merits* — As the applicant had not received the Commission's report, there had been an interference with his rights enshrined in Article 10 § 1. The Court then found that the interference had not been "prescribed by law" for the following reasons:

First, the crux of the applicant's claim had not concerned any failure by the State authorities to disclose the contents of the report of their own accord, but rather the alleged breach of the legal requirements applicable to processing individual requests for information. The domestic courts, however, had failed to duly examine the lawfulness of the denial of access to the requested information by either of the two authorities, even though arguably that denial had not complied with the procedural requirements of the applicable domestic law.

Second, the domestic courts had dismissed the applicant's claim against the Cabinet of Ministers solely on the basis of Article 29.1 of the 2005 Law on Access to Information, finding that this provision "[did] not provide for an obligation of an information owner to disclose reports of commissions created for a specific purpose". This reasoning, however, had been based on a manifestly unreasonable interpretation and application of the domestic law. Further, the courts had not dealt with the scope of applicability and exact meaning of the above provision which in fact did not, as such, limit access by members of the public to State-held information but facilitated such access by requiring information owners to disclose certain types of often-sought information. Moreover, it appeared that access to information, which, as in the present case, did not belong to the types that information owners were obligated to "disclose" under in Article 29.1, could be sought by individual request. The information owners were then required to provide such access unless the information was lawfully restricted or there were other specifically defined grounds for refusing to provide access. However, the existence of any such substantive grounds for denial was not put forward by the domestic courts or, for that matter, by the authorities or the Government.

CONCLUSION: violation (unanimously)

ANNEX 12

FIFTH SECTION

CASE OF SAPUNDZHIEV v. BULGARIA

(Application no. 30460/08)

JUDGMENT

STRASBOURG
6 September 2018

This judgment is final but it may be subject to editorial revision.

In the case of Sapundzhiev v. Bulgaria,

The European Court of Human Rights (Fifth Section), sitting as a Committee composed of:

Gabriele Kucsko-Stadlmayer, *President,*
Yonko Grozev,
Lado Chanturia, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated in private on 10 July 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 30460/08) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, Mr Leonard Dimitrov Sapundzhiev ("the applicant"), on 30 April 2008.

2. The applicant was represented by Mr G. D. Georgiev, a lawyer practising in Ruse. The Bulgarian Government ("the Government") were represented by their Agent, Ms V. Hristova, of the Ministry of Justice.

3. On 11 October 2016 the complaint concerning the sanctions imposed on the applicant for having complained to the authorities and for having publicly exhibited posters critical of another individual's business was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1963 and lives in Silistra.

A. Background

5. In 2003 an individual installed a printing company in a building situated in close proximity to the building where the applicant was living with his family. Shortly after the printing company began operating, the applicant and his family started resenting the nuisance it was causing. In particular, they found the constant smell of ink and solvents intolerable; also, they were continuously disturbed by the vibrations caused by the printing machines, which reverberated through the walls of their dwelling. Moreover, as time went by, the applicant's young daughter developed an allergy, which the applicant believed was due to the chemicals used in the printing process and had to take daily medication to keep it under control.

B. Complaints to the authorities and their related action

6. Between July 2006 and August 2007, the applicant turned to several State institutions, including regional branches of the hygiene and epidemiological inspectorate, the public health directorate at the Ministry for Health, the regional building inspectorate, the mayor of Silistra and the prosecution service. He complained to them in writing about the nuisance caused by the printing company. He claimed that the latter was operating contrary to a number of legal requirements found in different ministerial regulations. He also asked the authorities for help in forcing the printing company to cease its operations.

7. More specifically, the chronology of his correspondence with the authorities can be traced as follows.

1. Complaints and replies in 2006

8. On 15 August 2006, the director of the regional agency for public health (*Регионална инспекция за опазване и контрол на общественото здраве* — hereafter "the public health agency") informed the applicant that on 10 August 2006 two junior inspectors from the agency had visited the printing company in question. He did so in a brief one-paragraph letter in reply to a complaint made by the applicant on 31 July 2006. The inspectors had established during that visit that two printing machines (without specifying their type, power or capacity) were operating at that time in the printing company and that this number was in line with the requirements set out in Regulation No. 7 of 1992 of the Ministry for Health. The letter invited the applicant to propose a day and time for the measuring of the noise generated by the printing company.

9. Two days later, on 17 August 2006, the applicant together with three of his neighbours complained in writing to the public health directorate at the

Ministry for Health that the printing company was operating in contravention of relevant legal requirements. On 22 August 2006, the applicant and the same three neighbours wrote again to the same directorate expressing concern about and dissatisfaction with the manner in which the measurements in respect of noise and air pollution had been taken on 18 August 2006. In particular, two individuals who had not shown any credentials had turned up and measured the noise with a machine which had not reacted to sudden high-pitched noises but was set up to measure only background noise. Furthermore, when the applicant had invited the inspectors to also measure the purity of the air, one of them had opened the window, sniffed the air and stated that it was not that bad and that, in all likelihood, it would turn out to be within the relevant norms when measured. The applicant further stressed in the letter that the printing company was operating in close proximity to inhabited dwellings, whereas according to the relevant regulations this was prohibited within less than 50 metres of such buildings.

10. The applicant and his three neighbours also wrote to the building inspectorate on 23 August 2006, complaining that the printing company' premises had been built in contravention of the relevant construction norms.

11. On 25 August 2006 the Ministry for Health wrote to the public health agency, asking that a check be carried out and the applicant informed of the results accordingly. On 29 August 2006 the Ministry for Health issued an instruction to the owner of the printing company, inviting him to bring the noise levels generated by his business within the limits stipulated in the relevant regulations.

12. On 30 August 2006, apparently in reply to the applicant's letter of complaint of 31 July 2006, the head of the public health agency informed the applicant that: the chemical agents identified at the work stations at the printing company in question were within the limits listed in Regulation No. 13 of 2003 for the protection of individuals exposed to chemical agents at their work station; the noise reaching the applicant's home when the windows were open, as well as the dwelling of one of his neighbours, was not in conformity with the requirements of Regulation No. 6 of 2006; and that instructions had been issued to the owner of the printing company to ensure that the noise levels produced by his business were brought within the legal limits.

13. On 5 October 2006 a representative of the Ministry for Health wrote to the applicant informing him that staff from the public health agency had carried out two checks at the printing company; neither the dates of those checks, nor any further details about them were mentioned. The letter then read that on 18 August 2006 officials had measured the reverberating noise and the chemical agents produced at the printing company. As the noise levels had been found to be beyond the legal limits, the owner had been instructed to lower them by 29 October 2006.

14. On 27 October 2006 the applicant and his three neighbours wrote to the Ministry for Health, expressing their dissatisfaction with the reply they had received on 5 October 2006. They reiterated that the printing company was surrounded on three sides by inhabited dwellings, in which a number of small children lived. They referred to point 393 of Regulation No. 7 of 1992, which prohibited the installation of printing houses less than 50 metres from inhabited buildings and to the fact that the owner of the printing company had not obtained an agreement from any of his neighbours for installing his business at that location. They pointed out too that the noise levels had not been lowered, contrary to the authorities' instructions, and stressed that the record which they had signed on the day when the noise measurements had been taken had indicated 58 decibels (dB) and not 38 as stated in the record included in the file. They asked once again that the authorities order the printing company to cease its operations on the ground that they were in breach of point 393 of Regulation No. 7 of 1992.

2. Complaints and replies in 2007

15. On 20 August 2007 the applicant and four of his neighbours wrote to the regional inspectorate for the environment and water in Ruse (*Регионална инспекция за околната среда и водите*). They stated that, although the printing company had been apparently functioning on the basis of a lawful permit since 2003, given that it was located in a densely populated area, in their opinion, this was inappropriate. The letter then listed the exact name of the machines operating at the printing company and the type of ink used. The applicant and his neighbours further pointed out that, according to Regulation No. 7 of 1992 of the Ministry for Health, printing houses had to be located at least 50 metres from inhabited dwellings and that the printing company in question was joined on three sides to the complainants' dwellings. The printing business in question had been formally registered as "a workshop for printing services with up to two work stations" and not as a "printing house"; in this way it had successfully circumvented the legal requirements applicable to printing houses, despite the fact that the notice exhibited at its entrance read "printing house" (*печатница*).

16. The letter further stated that in reality, for a number of consecutive years, more than two people had been working at the printing house at any given time. The applicant and his neighbours had learned from the staff that no antidote was being given to them; this was obligatory as protection against carcinogens present in printing inks and solvents used to clean the machines (up to ten times a day on a busy day). The authors of the letter then wondered whether they as well as the people living in the immediate vicinity of the printing house should also have been taking such antidotes. The applicant's daughter had developed an allergy towards some of the chemicals used by the printing house and was

taking daily medication called Zertec. Whenever the door of the printing house was opened a pungent smell entered directly into the bedroom of the applicant's children, the window of which was situated directly opposite it at about seven metres' distance.

17. Like the staff at the printing company, the applicant and his neighbours suffered frequently from headaches, their washing turned grey whenever it was hung to dry and the noise produced by the machines when operating was unbearable. In particular, at the house of one of the applicant's neighbours the noise was so loud it was as though an earthquake had started every time the guillotine was operating. The applicant and his neighbours had sought a copy of the original record signed at the time the noise had been measured but had not received one. The letter concluded that the residents whose dwellings adjoined the printing company were doomed to bringing up their children for the foreseeable future in an environment of noise and chemicals, without any guarantee for their health and normal development. One of the staff working for several years at the printing company had developed a brain tumour, which was a source of serious worry for everyone in the vicinity. The applicant and his neighbours were also worried that the owner did not wish to hear any suggestion of moving his printing business away, but insisted that it was harmless as he preferred to profit from the commercial advantages a central location offered. The letter's authors then invited the authorities to carry out an unannounced nuclear magnetic resonance spectrometry in order for the community to learn about the poisons they were being exposed to, as well as to proceed with closing down the business. They enclosed a copy of the 810 signatures collected in support of their cause.

18. On 10 September 2007 the head of the Ruse regional inspectorate for the environment and water wrote to the applicant in reply to the letter of 20 August 2007. The reply stated that two experts sent by the inspectorate had carried out a check on 30 August 2007 at the printing company in the presence of its owner. The conclusions of that check were that the printing company was operating on the basis of a permit issued by the building authorities on 25 July 2003. The type of operation — offset printing on sheets of paper — was not among the operations listed in Annex I of Regulation No. 7 of 2003 on limiting emissions of volatile organic compounds released into the environment as a result of the use of solvents in certain installations. Lastly, the noise emissions had been measured at 49.7 dB, which was lower than the legal limit of 60 dB to be found in Annex II — Table 2, point 2 of Regulation No. 6 of 26 June 2006.

C. Posters exhibited in the applicant's own shop

19. In addition to his appeals to the above-mentioned institutions, the applicant decided to attract public attention to his dispute with the printing company. He produced some posters for that purpose, calling on the community in the

town of Silistra to express support for the termination of the printing company's operations. The text on the posters claimed that the printing company had been licensed in breach of the relevant legal requirements and that the pollution it was causing was harmful to the people living in the vicinity. The posters also listed parts of three regulations issued by the Ministry of Health and the Ministry of Regional Development and concerning sanitary requirements and, protection of public health in an urban environment.

20. The applicant exhibited the posters described above on the windows of his own shop, which was situated close to both his home and the printing company. The posters were exhibited between 12 December 2006 and 22 February 2007, and within a little over a month the applicant had collected more than 800 signatures from individuals in support of his cause.

D. Proceedings for defamation brought against the applicant

21. On an unspecified date the owner of the printing company, V. V., brought defamation proceedings against the applicant under Article 147 of the Criminal Code 1968. V. V. complained in particular that the applicant's actions had damaged his printing business and his personal reputation.

22. The applicant's three neighbours, who together with the applicant had been continuously complaining to the authorities, submitted a signed declaration in support of the applicant. They stated that, irrespective of all the different permits which the printing company might have obtained from the authorities, this did not change the fact that it was causing a chemical and noise-related nuisance to the community on a daily basis.

1. Proceedings before the Silistra District Court

23. On 5 June 2007 the Silistra District Court found the applicant guilty of libel. It held that he had defamed V. V. by complaining in writing to various institutions about the latter's printing operations and by printing and publicly disseminating material which claimed that the business was operating unlawfully. Contrary to the requirements of Article 147 of the Criminal Code 1968, the applicant had not submitted proof showing that his complaints to the authorities and the claims he had made in the posters were true. While officials from the Ministry of Health had indeed established that the noise emitted by the printing business had been beyond the authorised limits, the authorities had instructed its owner to bring it within the relevant norms and had given him a deadline, with which he had complied. The court then stated that, as seen from a chemical agents inspection report of August 2006 and from the subsequent explanations of the person who had carried out the check, it was clear that measurements had been taken throughout the working process at the printing premises and that the level of the chemical agents measured was not above the norms.

24. As to the claim that the printing business had been set up in breach of Regulation No. 7 of 2003, that was impossible as the said regulation had become applicable as of 13 January 2004, whereas the printing business had been lawfully operating since 25 July 2003. In respect of the claim that Regulation No. 7 of 1992 had also been breached, the court found that while point 393 of that regulation indeed provided that printing houses had to be at least fifty metres away from inhabited dwellings, this only concerned "printing houses", while the business in question had been registered as a "workshop for printing services and a shop with an office", and the printing-house regulations did not apply to workshops.

25. The allegation that the applicant's daughter had developed an allergy had also remained entirely unproven, given that the applicant had presented as evidence only a medical document stating that she was suffering from "bronchitis". The court went on to say that "every biological parent of average intelligence whose child was frequently ill had to know that respiratory ailments were the most frequent ones in early childhood".

26. The court concluded that, given that the applicant's claims were factually wrong, they had inevitably damaged the printing business owner's reputation. That amounted to defamation, which was in breach of the law and had to be sanctioned. The court then waived the applicant's criminal liability and imposed on him an administrative penalty in the form of a fine in the amount equivalent to 250 euros (EUR). It further partially upheld the claimant's civil claim submitted in the criminal proceedings and ordered the applicant to pay EUR 500 for non-pecuniary damages to V. V. and EUR 20 in court fees.

2. Proceedings before the Silistra Regional Court

27. Following an appeal by the applicant, the Silistra Regional Court upheld the first-instance court's findings in a final judgment of 30 October 2007. It observed that the relevant authorities had carried out a number of inspections at the printing business in question in response to the applicant's complaints. Contrary to the applicant's allegations, none of those checks had established either a breach of the relevant legislation or the existence of pollution caused by the printing company. Despite this, the applicant had continued to disseminate false and discrediting information about V. V. by exhibiting posters on the windows of his own shop.

28. The court agreed with the finding at first instance that the applicant could not be absolved from responsibility as he had been unable to prove the veracity of his allegations. It further found that the punishment had been neither excessive nor unfair and, if anything, it had been too lenient.

II. RELEVANT DOMESTIC LAW

29. Article 45 of the Constitution of 1991 provides that citizens have the right to make complaints, proposals and petitions to the authorities.

30. Article 147 of the Criminal Code 1968 provides as follows:

"1. Any person who disseminates an injurious statement of fact about another or imputes an offence to him or her shall be punished for defamation by a fine ranging from three to seven thousand levs, as well as by a public reprimand.

2. The perpetrator shall not be punished if he or she proves the truth of the said statement or imputation."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

31. The applicant complained that he had been fined and ordered to pay damages in relation to the complaints he had made to various competent public authorities, as well as for expressing his concerns and his own opinion on posters in his shop. He claimed that that was in breach of his right to freedom of expression as provided for in Article 10 of the Convention, which reads, insofar as relevant, as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 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."

32. The Government contested that argument.

A. Admissibility

33. 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. Merits

1. The parties' positions

34. The applicant stated that he had not sought to smear V. V.'s reputation but merely to point out publicly the legal provisions which the latter had

breached, with the sole purpose of protecting his health and that of his children. The defamation proceedings brought against him had demonstrated that he had been denied his freedom of expression, despite the broad public support which his actions had received in his town. Both the fine imposed on him and the compensation he had been ordered to pay to V. V. had caused him and his family acute psychological stress and had resulted in permanent damage to his health. For the past seven years he had been regularly taking medication for high blood pressure. He needed that medication because every time he looked out of his window he was exposed to the sight of the printing house, the operation of which he perceived as an injustice.

35. The Government submitted that they had asked the Prosecutor General in January 2017 to inform them about the prospects of reopening the criminal proceedings against the applicant at the domestic level. They had referred in their request to the Court's judgment in the case of *Marinova and Others v. Bulgaria* (nos. 33502/07, 30599/10, 8241/11 and 61863/11, 12 July 2016). The Prosecutor General had replied in February 2017 that there were no grounds for reopening the applicant's case, in particular because his conduct had consisted not only of making complaints to the competent authorities, in respect of which he could claim protection under Article 10 of the Convention, but also of public dissemination of injurious statements, which was not covered by the protection of that Convention provision.

36. The Government in turn reiterated the above position in their observations before the Court, acknowledging that part of the applicant's actions, namely his complaints to various authorities, were protected under Article 10 of the Convention. However, they emphasised that the applicant's conduct had also involved the public dissemination of damaging statements in respect of a third party. Such action was not covered by the protection of Article 10 and the sanctions that had been imposed were justified as they fell within the permissible limitations on the right to freedom of expression, had pursued a legitimate aim, namely protection of the rights of others, and had been proportionate to the applicant's conduct in the circumstances of the case.

37. The Government stressed that freedom of expression could not be exercised by smearing the good name and reputation of another, in the present case that of V. V. The applicant had been unable to prove the veracity of his allegations and the domestic courts had rightly punished him for this conduct.

2. The Court's assessment

(a) General principles

38. The general principles concerning freedom of expression and its limits, reiterated many times by the Court since its judgment in *Handyside v. the United Kingdom* (7 December 1976, Series A no. 24), have been summarised

more recently in the cases of *Morice v. France* [GC], no. 29369/10, §§ 124–27, ECHR 2015 and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no 17224/11, §§ 75–77, 27 June 2017.

39. In cases where individuals have been found guilty of defamation for complaints they had made to the authorities about irregularities in the conduct of officials, the Court has examined the proportionality of the interference by considering in particular the following main elements: the nature of the statements and the exact manner in which they were communicated; the context in which they were made; the extent to which they affected the officials concerned; and the severity of the sanctions imposed (see *Marinova and Others*, cited above, § 86 with further references). In the context of cases concerning disparaging comments made in respect of third parties who were private individuals, as opposed to public officials, the Court has upheld the right to impart, in good faith, information on matters of public interest, even where this involved damaging statements about private individuals (see *Bodrožić v. Serbia*, no. 32550/05, § 46, 23 June 2009, and *Tešić v. Serbia*, nos. 4678/07 and 50591/12, § 62, 11 February 2014).

40. The Court has also held that there existed a strong public interest in enabling even small and informal 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 (see *Steel and Morris v. the United Kingdom*, no. 68416/01, § 89, ECHR 2005-II). Furthermore, the Court has repeatedly held that the exercise of certain Convention rights may be undermined by the existence of harm to the environment and exposure to environmental risks, and that individuals have the right to effectively enjoy their home and private life (see, among others, *Di Sarno and Others v. Italy*, no. 30765/08, § 104 with further references, 10 January 2012). More generally, individuals have a right to enjoy a healthy and protected environment (see, among other authorities, *Tătar v. Romania*, no. 67021/01, § 112, 27 January 2009).

(b) Application of these principles to the present case

41. The Court observes that the final judgment against the applicant, by which he was found guilty of defamation and ordered to pay a fine and damages to the victim, constituted an interference with his right to freedom of expression under Article 10 of the Convention. Although the law that was applied was accessible to the applicant, the Court finds that it does not have to pronounce on the question whether that law was sufficiently clear and whether the consequences of its application were foreseeable (compare with *Marinova and Others*, cited above, § 82) because in any event, it finds that the interference was not necessary in a democratic society.

42. To start with, the applicant had expressed his grievances by exercising his constitutional right to make complaints to the authorities (see paragraph 29 above). He was also exercising the possibility in a democratic society governed by the rule of law for a private person to report an alleged irregularity in the conduct of another to an authority competent to deal with such an issue (see, *mutatis mutandis*, *Marinova and Others*, cited above, § 89).

43. As regards the manner in which the applicant's statements were communicated to the relevant authorities, the Court observes that they were in the form of written complaints which the applicant did not make public (see paragraph 8–18 above). Accordingly, the protection enjoyed by V. V. under Article 8 of the Convention has to be weighed not in relation to the interests of the freedom of the press or of open discussion on matters of public concern under Article 10, but rather against the applicant's right to report irregularities to a body competent to deal with such complaints (see, similarly, *Sofranschi v. Moldova*, no. 34690/05, § 29, 21 December 2010). The Court finds that, given that the letters were not made public, their potentially negative impact on V. V.'s reputation, if any, was quite limited (see, similarly, *Bezymyannyy v. Russia*, no. 10941/03, § 42, 8 April 2010).

44. As to the nature of the applicant's statements, they referred to specific provisions of relevant secondary legislation which he considered had been breached by the printing business. The tone and type of the applicant's complaints to the authorities changed in parallel with the partial responses he was receiving from them: in 2006 he was making claims about unlawful printing operations, whereas in the second half of 2007 his statements were primarily expressing his concern about people's well-being and health (see paragraphs 15–17 above). His letters contained expressions of his discontent with the situation but did not contain aggressive, denigrating or insulting comments towards the individual owner of the printing business. He raised the issue of pollution (air and noise) and its danger for people's health; he limited his statements to the professional activities of the business owner and their consequences for the residential environment and the well-being of the community.

45. With regard to the particular context, the Court observes that the complaints were made in an attempt to draw the authorities' attention — and provoke the reaction of officials — to the business operation which the applicant considered was polluting the environment and damaging people's health. This was clearly a matter of public interest (see paragraph 40 above), demonstrated also by the fact that most of the applicant's letters had been co-signed by three or four of his neighbours (see paragraphs 9, 10, 14–17 above).

46. As to the damage caused by those complaints, the domestic courts did not examine that aspect in detail. Instead, they concluded that because the

claims were factually wrong, they inevitably damaged the reputation of the owner of the printing business, which amounted to the punishable offence of defamation.

47. For the reasons examined above, the Court finds that no pressing social need for the interference with the applicant's freedom of expression was convincingly demonstrated as regards his complaints to the authorities.

48. At the same time, the Court is mindful of the fact that by the time the applicant had displayed the posters in his shop — namely mid-December 2006 — he had been informed by the relevant authorities that the chemical agents' levels in the air around his home were within the applicable legal norms (see paragraph 12 above). Despite that, he continued to display the posters for about two months (see paragraph 23 above), claiming in them that the people living in the vicinity of the printing business were being systematically poisoned by the chemicals it was emitting. The Court finds on this point that, since the applicant pursued his campaign by publicly persisting with the above-mentioned claims while knowing that there was no justification for them, some form of an appropriate sanction for this conduct would not have been incompatible with the Court's standards under Article 10 § 2 of the Convention.

49. With respect to the severity of the sanction effectively imposed on the applicant the Court observes that, although the domestic courts ultimately waived his criminal liability, he was still tried in fully-fledged criminal proceedings, was found guilty of a crime and, ultimately, ordered to pay an amount of money (EUR 770 in all), which in view of the applicant's personal situation was not insignificant. The Court finds that this risked having the effect of stifling complaints before relevant authorities, as well as dissuading all public expression on issues about environmental protection and people's health and well-being.

50. Having regard to the above considerations, and particularly bearing in mind the authorities' failure to demonstrate convincingly the pressing social need for an interference with the applicant's freedom of expression in respect of his complaints to the authorities as well as the severity of the sanction imposed on him, the Court finds that the interference in question was not "necessary in a democratic society".

51. There has therefore been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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

53. The applicant claimed 845 euros (EUR) in respect of pecuniary damage, which corresponded to the principal amount (EUR 770, see paragraph 26 above) which the courts had ordered him to pay for having defamed V. V., plus the interest accumulated on that amount as he had been unable to pay it in due time (EUR 75). The applicant also claimed non-pecuniary damages without specifying the amount.

54. The Government submitted that the claim in respect of pecuniary damage was unsubstantiated and unreasonably high. As regards the claim in respect of non-pecuniary damage, they stated that any award that might be made should only be in respect of the violation found.

55. The Court observes that it found a breach of Article 10 of the Convention in the present case as a result of the penalty imposed on the applicant and, therefore, the applicant is in principle entitled to the repayment of the sums that he has paid in fines, damages and costs as a result of the judgment against him (see, among other authorities, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, §§ 75 and 77, ECHR 1999-III, and *Marinova and Others*, cited above, § 118). The Court therefore awards the applicant EUR 845 in respect of pecuniary damage.

56. As regards non-pecuniary damage, the Court considers that, given the circumstances of the case, the finding of a violation is sufficient just satisfaction for any non-pecuniary damage suffered by the applicant.

B. Costs and expenses

57. The applicant also claimed EUR 500 for the costs and expenses incurred before the Court in the form of a legal fee paid to his lawyer.

58. The Government pointed out that the applicant's claim related only to the legal fee. Therefore any award by the Court should be in an amount comparable to what was usually awarded.

59. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the sum of EUR 500 covering the costs of legal fees for the proceedings before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that the finding of violation is sufficient just satisfaction for any non-pecuniary damage suffered by the applicant;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into Bulgarian levs at the rate applicable at the date of settlement:
  (i) EUR 845 (eight hundred and forty-five euros), plus any tax that may be chargeable, in respect of pecuniary damage;
  (ii) EUR 500 (five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

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

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

Done in English, and notified in writing on 6 September 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Gabriele Kucsko-Stadlmayer
President

ANNEX 13

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 14

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)[1]. 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".

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[1] 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[2]

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

[2] This summary by the Registry does not bind the Court.

its commercial would not be broadcast and the interference with the applicant 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 15

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[1] 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

[1] 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.

London 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[2]

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

[2] This summary drafted by the Registry is not binding on the Court.

were drafted by lawyers. For the bulk of the proceedings, however, including 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 16

Information Note on the Court's case-law 262
May 2022

Bumbeș v. Romania — 18079/15

Judgment 3.5.2022 [Section IV]

Article 10

Article 10-1. Freedom of expression

Activist fined for a short and peaceful gathering, without prior notice, with three other persons, who handcuffed themselves to a government car park barrier, in protest against a mining project: *violation*

Facts — The applicant, a known activist involved in various civic actions, was fined with three other persons for handcuffing themselves to a car park barrier blocking access to the government's headquarters and holding up signs, without having given the required prior-notification, in protest of acontroversial mining project. The applicant unsuccessfully challenged the fine before the domestic courts.

Law — Article 10 read in light of Article 11:

(a) *Applicability* — Both Articles 10 and 11 were applicable. In particular, in the circumstances of the case the Court could not accept that the penalty imposed on the applicant could be dissociated from the views expressed by him through his actions or endorse the Government's argument that the applicant had been punished merely for committing acts affecting public order. In this connection, the Court noted that it had consistently found Article 10 to be applicable to views or opinions expressed through conduct. In so far as Article 11 was concerned, it transpired from the evidence that the applicant's conduct had not amounted to violence or incitement to it, no one had been injured during the event in question and he had not been held liable for any damage.

(b) *Scope of the Court's assessment* — Given that the thrust of the applicant's complaint was that he had been punished for protesting, together with other participants in the non-violent direct action, against the government's policies, the Court was persuaded that the event had constituted predominantly an expression. This was all the more so since it had involved only four persons and lasted a very short time. Moreover, as it had been the result of a rather spontaneous decision and lacked any prior advertisement, it was difficult to conceive that such an event could have generated the presence of further participants or the

gathering of a significant crowd warranting specific measures on the part of the authorities. The Court therefore found it appropriate to examine the case under Article 10, interpreted in the light of Article 11.

(c) *Merits* — The applicant's sanctioning had constituted an interference with his right to freedom of expression which had a legal basis in domestic law. The Court also accepted that the sanction imposed could have been aimed at the prevention of disorder and at the protection of the rights and freedoms of others; hence it proceeded on the assumption that it had pursued those legitimate aims.

As to whether the interference had been necessary in a democratic society, the Court observed that the applicant and the other participants in the event had wished to draw the attention of their fellow citizens and public officials to their disapproval of the government's policies concerning the mining project. This was a topic of public interest and contributed to the ongoing debate in society about the impact of this project and the exercise of governmental and political powers green-lighting it. In this connection, the Court reiterated that there was little scope under Article 10 § 2 for restrictions on political speech or debates on questions of public interest and very strong reasons were required for justifying such restrictions.

In the present case, the protest action had taken place in a square freely open to the public. It had been terminated swiftly by the law-enforcement officials and the applicant, with the other participants, had been taken to a police station where they were fined after having been given hardly any time to express their views. The domestic courts seemed to have dealt with the situation arising from the applicant's protest as a matter falling primarily within the ambit of the regulations concerning public events requiring prior notification and the exercise of one's right to freedom of peaceful assembly. The Court thus referred to the principles established in its case-law in the context of Article 11 concerning, in particular, the rules governing public assemblies such as the system of prior notification and the degree of tolerance that had to be shown by public authorities towards peaceful gatherings.

When dismissing the applicant's challenge against the police report and the fine imposed on him, the national courts had not assessed the level of disturbance his actions had caused, if any. They had not sought to strike a balance between the requirements of the purposes listed in Article 11 § 2 on the one hand, and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places, on the other, giving the preponderant weight to the formal unlawfulness of the event in question. The national courts' assertion of a prior notification of the event staged by the applicant being required had not been accompanied by any apparent consideration of the fact whether, given the number of participants, such a notification would have served the purpose of enabling the authorities

to take necessary measures in order to guarantee the smooth conduct of the event. Further, the application of that rule to expressions — rather than only to assemblies — would create a prior restraint which was incompatible with the free communication of ideas and might undermine freedom of expression.

The authorities' impugned actions had disregarded the emphasis repeatedly placed by the Court on the fact that the enforcement of rules governing public assemblies should not become an end in itself. The absence of prior notification and the ensuing "unlawfulness" of the event, which the authorities considered to be an assembly, did not give *carte blanche* to the authorities; the domestic authorities' reaction to a public event remained restricted by the proportionality and necessity requirements of Article 11.

Finally, although the fine imposed had been the minimum statutory amount envisaged for the impugned contravention and the applicant had not argued or submitted evidence that paying the fine had been beyond his financial means, the imposition of a sanction, administrative or otherwise, however lenient, on the author of an expression which qualified as political could have an undesirable chilling effect on public speech.

In the light of the above, the decision to restrict the applicant's freedom of expression had not been supported by reasons which had been relevant and sufficient for the purposes of the test of "necessity" under Article 10 § 2. The interference had thus been not necessary in a democratic society within the meaning of Article 10.

CONCLUSION: violation (unanimously).

Article 41: EUR 117 in respect of pecuniary damage corresponding to the amount of the fine imposed on the applicant; EUR 5,000 in respect of non-pecuniary damage.

ANNEX 17

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 18

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[1],

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")[2] 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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1 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.

2 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.

Marc-André EISSEN
Registrar

Denise BINDSCHEDLER-ROBERT
President

ANNEX 19

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 20

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 21

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).

ANNEX 22

Information Note on the Court's case-law 219
June 2018

O'Sullivan McCarthy Mussel Development Ltd v. Ireland — 44460/16

Judgment 7.6.2018 [Section V]

Article 1 of Protocol No. 1

Article 1 para. 2 of Protocol No. 1. Control of the use of property

Temporary prohibition on commercial mussel-seed fishing to comply with European Union directives: *no violation*

Facts — The applicant company is engaged in the cultivation of mussels in Castlemaine harbour, obtaining the necessary licences and permits each year. The harbour became subject to two EU directives seeking to protect the environment.

In December 2007 the Court of Justice of the European Union (CJEU) delivered a judgment in *Commission v. Ireland* (C-418/04) declaring that Ireland had failed to fulfil its obligations under the aforementioned directives. In view of the judgment, the authorities considered that it was not legally possible to permit commercial activity in Castlemaine harbour until the necessary assessments had been completed, thus prohibiting mussel seed fishing from June 2008. In October 2008, following successful negotiations between the Government and the European Commission, the applicant company was able to resume mussel seed fishing, however, natural predators had already decimated the mussel seed. Since mussels needed two years to grow to maturity, the applicant company sustained financial loss in 2010, having no mussels for sale.

It instituted unsuccessful compensation proceedings against the State.

Law — Article 1 of Protocol No. 1: The complaint was within the scope of Article 1 of Protocol No. 1 as the case concerned a "possession", namely the underlying aquaculture business of the applicant company. The temporary prohibition of part of the applicant company's activities, which was to be regarded as a restriction placed on a permit and connected to the usual conduct of business, amounted to an interference with its right to the peaceful enjoyment of its possessions, including the economic interests connected with the underlying business and was declared admissible. Unlike in cases previously

decided by the Court, the authorisation, which was subject to conditions, had not been withdrawn or revoked. The nature of the interference was considered a "control of the use of property".

Concerning the lawfulness of the interference, there was no uncertainty about the nature and scope of the restrictions that were applied to the harbour in 2008, nor about their legal basis. The applicant company had had continuing contact with the Government and been informed of all relevant developments. As an economic operator active for many years in the aquaculture sector, it had not been claimed that the applicant company was not aware of the protracted pre-contentious phase of the legal proceedings involving the European Commission and the respondent State, or of the infringement judgment of the CJEU.

The interference had the clear aim to protect the environment and the impugned measures taken had been adopted to ensure the respondent State's compliance with its obligations under EU law, which was a legitimate general-interest objective of considerable weight.

As the respondent State had not been wholly deprived of a margin of manoeuvre with regard to how to achieve compliance with the relevant EU directive and the CJEU judgment, the *Bosphorus* presumption of equivalent protection did not apply.

Considering the justification for the interference, the applicant company was engaged in a commercial activity that was subject to strict and detailed regulation by the domestic authorities, and operated in accordance with the conditions stipulated in the authorisations granted to it from year to year. This included the condition that it was not permitted to fish for mussel seed in an area where such activity had been prohibited by the Minister. Furthermore, it was relevant to the Court's assessment that the Supreme Court had been unanimous in finding that there was no legal basis for the applicant company to entertain a legitimate expectation of being permitted to operate as usual in 2008, following the finding by the CJEU that Ireland had failed to fulfil its relevant obligations under EU law.

Secondly, the applicant company was a commercial operator and therefore could not disclaim all knowledge of relevant legal provisions and developments. Rather, it could be expected to display a high degree of caution in the pursuit of its activities, and to take special care in assessing the risks that might be attached. However, the applicant company had purchased its new boat in May 2008, though it should have been aware of a possible risk of interruption of its usual commercial activities at least from December 2007, when the CJEU infringement judgment had been delivered.

Moreover, the Court was not in a position to find, as an established fact, that the applicant company's loss of profits in 2010 was the inevitable and immitigable consequence of the temporary closure of the harbour in 2008. The

applicant company's activities had not been completely interrupted in 2008 and the State had succeeded in obtaining the agreement of the Commission to allow mussel seed fishing to resume at a much earlier stage, namely from October 2008. While this had not avoided the delayed loss in relation to 2008, the following year the applicant company had been able to resume its usual activities.

The fact that the respondent State had been found not to have fulfilled its obligations under EU law should not be taken, for the purposes of Article 1 of Protocol No. 1, as diminishing the importance of the aims of the impugned interference, or as lessening the weight to be attributed to them. Until the CJEU had handed down its judgment it was difficult to see how the respondent State could have known of the extent and consequences of the infringement thereby established. The Court saw no basis to second-guess the technical assessment of qualified authorities which had ruled out the possibility to open the harbour earlier. Even though the environmental assessments had eventually demonstrated that the blanket ban was not necessary, the State was required, as a matter of EU law, to be concerned not with unproven risk but rather with proven absence of risk. Achieving compliance on the nationwide scale, and within an acceptable timeframe, with the respondent State's obligations under EU law attracted a wide margin of appreciation for the domestic authorities. Although the applicant company saw an anomaly, and even arbitrariness, in the fact that one type of activity (mussel seed fishing) had been prohibited while another similar activity (the harvesting of mature mussels) had not, it was first and foremost for the domestic authorities, within their margin of appreciation, to decide the nature and extent of the measures required. The partial restriction applied to commercial activities in the harbour, as opposed to a total one, was to the benefit rather than the detriment of the applicant company.

In sum, the Court was not persuaded that the impugned interference had constituted an individual and excessive burden for the applicant company, or that the respondent State had failed in its efforts to find a fair balance between the general interest of the community and the protection of individual rights.

CONCLUSION: no violation (unanimously).

The Court also found unanimously no violation of Article 6 § 1 with regard to the duration of the domestic proceedings.

ANNEX 23

Press Release

issued by the Registrar of the Court

ECHR 406 (2019)
26.11.2019

Confiscation of vessel used for illegal fishing in the Black Sea was justified

In today's Chamber judgment in the case of ***Yaşar v. Romania*** (application no. 64863/13) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights.

The case concerned the confiscation of Mr Yaşar's vessel because it had been used for illegal fishing in the Black Sea.

The Court found in particular that the confiscation had amounted to a deprivation of property as the vessel had ultimately been sold to a private party and the money from the sale collected by the State. However, the courts had carefully balanced the rights at stake and had found that the demands of the general interest to prevent activities which posed a serious threat to the biological resources in the Black Sea had outweighed Mr Yaşar's property rights.

Principal facts

The applicant, Erol Yaşar, is a Turkish national who was born in 1971 and lives in Çayırlı (Turkey).

Mr Yaşar's vessel was confiscated in 2010 when criminal proceedings were brought against its captain, Kadir Dikmen, who had been using it on the basis of a verbal agreement with him.

Mr Dikmen was convicted in 2012 following a simplified procedure based on him acknowledging, in particular, that he had been fishing without a permit for the vessel and had used fishing equipment without authorisation. In the proceedings Mr Yaşar had submitted a copy of his title to the vessel, which he said had been "caught without his knowledge within Romanian territorial waters".

The judgment became final as concerned Mr Dikmen, but the case was sent for retrial with regard to the confiscation. The courts considered that the confiscation measure had not been taken following an adversarial procedure as the vessel's owner had not been summoned in the proceedings against Mr Dikmen.

In the second set of proceedings, Mr Yaşar was summoned and represented by a lawyer of his choice who argued that confiscation was disproportionate, given the significant value of the vessel and the absence of any proven damage. However, in a final judgment in 2013, the courts found that Mr Yaşar had to have been aware that the vessel had been used for the offences in question, given the presence on board of equipment used specifically for illegal fishing, which he had claimed as his own. They also referred to the gravity of the crime committed using the confiscated vessel, involving potential damage to protected fish stocks in the Black Sea and frequent injuries to dolphins.

The vessel was ultimately sold to a private party in 2016 for approximately 1,900 euros, its value having in the meantime severely depreciated. The money was collected by the State Treasury.

Decision of the Court

Neither party contested the fact that the confiscation of Mr Yaşar's vessel had constituted an interference with his right to peaceful enjoyment of his possessions. Moreover, the Court considered that the confiscation had amounted to a deprivation of property as it was a permanent measure, entailing a conclusive transfer of ownership in 2016.

That interference had been in accordance with the law, namely the domestic law on fishing and aquaculture, and had pursued the legitimate aim of preventing activities which posed a serious threat to the biological resources in the Black Sea, such as illegal fishing. The confiscation had therefore been in the general interest.

The Court went on to examine whether the interference had struck a fair balance between the demands of the general interest and the protection of the applicant's property rights.

First, the Court noted that Mr Yaşar had been given a reasonable opportunity to put his case to the authorities. In particular, the case had been sent for retrial so that the confiscation measure could be decided in adversarial proceedings. In the new proceedings he had been legally summoned, represented by the lawyer of his choice and given the opportunity to submit the evidence and arguments which he had considered necessary to protect his interests. Nothing in the case file suggested that the Romanian courts had acted arbitrarily in their assessment of the evidence. Furthermore, the courts had carefully balanced

the rights at stake, referring to the gravity of the crime committed using the vessel and holding that forfeiture in the form of a monetary equivalent would not be appropriate.

Nor had the confiscation imposed an excessive burden on Mr Yaşar: he had failed to prove to the courts the value of the vessel or his allegation that renting it had been his only source of income.

Indeed, the vessel had ultimately been sold for approximately EUR 1,900.

There had therefore been no violation of Article 1 of Protocol No. 1.

ANNEX 24

Press Release

issued by the Registrar of the Court

ECHR 372 (2020)
15.12.2020

Excessive costs ordered against environmental NGO

In today's Chamber judgment in the case of ***National Movement Ekoglasnost v. Bulgaria*** (application no. 31678/17) the European Court of Human Rights held, unanimously, that there had been: a violation of Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights.

The case concerned the applicant association's being ordered to pay allegedly excessive costs to a nuclear power plant in proceedings for the reopening of a civil trial. The Court found in particular that the Supreme Administrative Court had failed to give sufficient reasoning as to why it had made such a large order, and had failed to balance the general interest with the rights of the applicant association.

Principal facts

The applicant association, National Movement Ekoglasnost, is a Bulgarian association that was founded in 1992 and is registered in Sofia.

The applicant association is a non-profit legal person which works to solve environmental problems in Bulgaria. In February 2015 the applicant association applied for leave to join as a third party judicial-review proceedings of a ministerial decision concerning the only nuclear power plant in the State. That application was found inadmissible.

Following the Supreme Administrative Court panel's finding that the decision had been lawful, an appeal on points of law by the applicant association was found inadmissible. The first court decision was upheld on the merits.

In 2016 the applicant association applied for the reopening of proceedings. That application was dismissed, with the Supreme Administrative Court panel finding that the case had been finally adjudicated. It ordered the applicant to pay the legal fees of the nuclear power plant in the amount of 6,000 euros (EUR).

In December 2016, following the issuing of a writ of execution, bailiffs collected EUR 17. After a further attempt by bailiffs to enforce the court decisions, it was noted that the applicant association could no longer be found at its address. The enforcement proceedings are ongoing.

Decision of the Court

The Court noted initially that, contrary to the Government's argument, the applicant association's legal personality had not been in dispute at any point in the domestic proceedings and that it continued to exist as a legal person. The application was thus admissible.

The applicant association argued in particular that the costs award made against it had overall been excessive and had failed to balance the interests of society and the individual's fundamental rights, particularly given non-governmental organisations' "watchdog" role. It contended that the court assessment had been subjective, as the relevant law did not provide criteria regarding "excessive" legal fees and yet was overly inflexible in terms of minimum amounts. It also pointed out that it was unclear how those fees had been calculated.

The Court reiterated that according to its case-law court fees are "contributions" which are controlled by the State. However, in the current case the costs to be paid by the applicant association had not been "contributions" as they had been ordered in favour of the successful party in proceedings. The awards thus had to be examined as an "interference" with the association's property in the light of its lawfulness, the public interest, and the balance between the general interest and the association's rights.

The Court noted the legal basis for the interference, but also noted the applicant's argument concerning flexibility, which implied a question concerning proportionality.

The Court reiterated that costs are a well-established and necessary feature of a legal system. Thus the order in this case had had a legitimate aim.

The Court noted that in Bulgaria, the general rule was that the "loser pays". The amount was then assessed by the courts, which take into account the complexity of and interest in the case. They could reduce the award, but not below a statutory minimum.

The Court considered that the Supreme Administrative Court had not specified sufficiently how it had assessed the costs. The Court noted, in particular that the amount ordered had been 24 times the minimum set out in law. This is despite the fact that the issues had been mainly procedural, not particularly complex and already partially adjudicated. In the Court's view, the Supreme Administrative Court had not given sufficient thought to the specifics of the case, and had failed to balance the general interest and the applicant association's rights, leaving the association to the bear an excessive individual burden.

In the light of the above, there had been a breach of the applicant association's property rights.

Just satisfaction (Article 41)

The Court held that Bulgaria was to pay the applicant 3,000 euros (EUR) in respect of non-pecuniary damage and EUR 1,500 in respect of costs and expenses.

ANNEX 25

SECOND SECTION

CASE OF GENÇ AND DEMİRGAN v. TURKEY

(Application nos. 34327/06 and 45165/06)

JUDGMENT

STRASBOURG
10 October 2017

This judgment is final but it may be subject to editorial revision.

In the case of Genç and Demirgan v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Committee composed of:

Julia Laffranque, *President,*
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having deliberated in private on 5 September 2017,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 34327/06 and 45165/06) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Turkish nationals, Ms Feride Genç, Mr Mustafa Demirgan (Demircan) and Mr Yılmaz Acar ("the applicants"), on 28 July and 19 October 2006 respectively.

2. The applicants were represented by Mr S. Özay, a lawyer practising in Izmir. The Turkish Government ("the Government") were represented by their Agent.

3. On 11 September 2014 the complaints brought by the three applicants concerning the non-enforcement of domestic judgments and the right to respect for their private and family life were communicated to the Government and the remainder of the applications was declared inadmissible.

4. By a letter dated 7 July 2017 the Government objected to the examination of the applications by a Committee. After having considered the Government's objection, the Court rejects it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1971, 1953 and 1976 respectively and live in Bergama, İzmir.

A. The Supreme Administrative Court's decision of 13 May 1997

6. On 16 August 1989 the public limited company E. M. Eurogold Madencilik ("the company"), subsequently renamed Normandy Madencilik A. Ş., received an authorisation to begin prospecting for gold. Subsequently, the company was authorised to use cyanide leaching in the gold extraction process by the Ministry of Energy and Natural Resources.

7. On 19 October 1994 the Ministry of the Environment decided to issue an operating permit to the company for the Ovacık gold mine.

8. On 2 July 1996 the İzmir Administrative Court dismissed a case brought before it for the annulment of the permit of 19 October 1994. On 13 May 1997 the Supreme Administrative Court quashed the first-instance judgment and decided that the permit should be annulled. It referred to the State's obligation to protect the right to life and to a healthy environment and assessed the physical, ecological, aesthetic, social and cultural effects of the mining activity in question as described in the environmental impact report and the various expert reports which had been submitted to it. It held that those reports demonstrated the risk posed to the local ecosystem and to human health and safety by sodium cyanide use. It concluded that the operating permit in issue did not serve the public interest and that the safety measures which the company had undertaken to implement did not suffice to eliminate the risks involved in such an activity. On 15 October 1997, in compliance with the Supreme Administrative Court's judgment, the Administrative Court annulled the Ministry of the Environment's decision to issue a permit for the mine. On 27 February 1998 the İzmir provisional governor's office ordered that the mine be closed. On 1 April 1998 the Supreme Administrative Court upheld the judgment of 15 October 1997.

B. Opinion of the Prime Minister and application for its judicial review

9. On 5 April 2000 the Prime Minister's office drew up a report on the mine. It concluded that operations at the mine could be authorised, having regard to the additional measures taken by the company, the conclusions of a report by the Turkish Institute of Scientific and Technical Research ("TÜBİTAK"), the Ministry of the Environment's favourable opinion and an opinion of the President's Administration, which had emphasised the economic importance of an investment of that type.

10. On 1 June 2001 the İzmir Administrative Court delivered a judgment on an application for judicial review of the report of the Prime Minister's

office, brought by twenty-five residents of Bergama, including the second and third applicants, Mr Mustafa Demirgan (Demircan) and Mr Yılmaz Acar. The administrative court decided to set aside the report, which, in its opinion, constituted an enforceable administrative decision giving rise to the issuing of permits. Notwithstanding the measures taken by the company, the court held that judicial decisions which had become final had found that the "risk and threat" in question resulted from the use of sodium cyanide in the gold mine and that it was impossible to conclude that those risks could be avoided by implementing new measures. Equally, it had been established that the risk connected with the accumulation of heavy elements or cyanide could persist for twenty to fifty years and was likely to infringe the right of the area's inhabitants to a healthy environment. Accordingly, it was appropriate to conclude that the decision at issue could lead to the circumvention of a final judicial decision and was incompatible with the principle of the rule of law.

11. On 29 March 2006 the Supreme Administrative Court upheld the judgment of 1 June 2001 in so far as it had been brought by nineteen of the plaintiffs, including the second and third applicants and dismissed a rectification application by the Prime Minister's office on an unspecified date.

C. The provisional operating permit issued by the Ministry of Health and application for judicial review

12. In the meantime, on 22 December 2000 the Ministry of Health decided to authorise the continued use of the cyanidation process at the mine for an experimental period of one year. The company re-started mining operations on 13 April 2001.

13. In a judgment of 27 May 2004, the İzmir Administrative Court set aside the provisional permit issued by the Ministry of Health on 22 December 2000 in a case brought by fourteen people, including the first applicant, Ms Feride Genç. In particular, it considered that the risks highlighted in the judgment of 13 May 1997 were, inter alia, linked to the use of sodium cyanide in the gold mine and to the climatic conditions and features of the region, which was situated in an earthquake zone. It held that those risks and threats could not be eliminated by supplementary measures which continued to be based on the same leaching process. It also concluded that the issuing of the permit in question had been incompatible with the principle of the rule of law as that administrative decision had in reality been intended to amend a judicial decision that had become final.

14. On 2 February 2005 the Supreme Administrative Court upheld the judgment of 27 May 2004 and dismissed a rectification application by the Ministry of Health on 3 April 2006.

D. Decision by the Cabinet of Ministers of 29 March 2002 and application for judicial review

15. On 29 March 2002 the Cabinet of Ministers took a "decision of principle", stating that the gold mine situated in the area of Ovacık and Çamköy, in the district of Bergama (İzmir) and belonging to the Normandy Madencilik A.Ş. company, could continue operations. The decision was not made public.

16. On 23 June 2004 the Supreme Administrative Court ordered a stay of execution of the Cabinet decision in a case brought by twenty-four plaintiffs, including the second and third applicants. The Supreme Administrative Court found that the Prime Minister's decision had been unlawful as the environmental impact assessment report which had allowed for the operating of the gold mine had been previously annulled. The Prime Minister's office objected.

17. On 18 August 2004 referring to the decision of 23 June 2004, the İzmir governor's office ordered the closure of mine.

18. On 7 October 2004 the Supreme Administrative Court upheld the stay of execution of 23 June 2004.

19. On 20 May 2005 the goldmine began operating again under a permit of the same date issued by the İzmir governor's office.

20. On 22 March 2006 the Supreme Administrative Court annulled the decision of the Cabinet of Ministers a decision which was upheld on 21 February 2008 by the Supreme Administrative Court.

21. According to the documents in the case file, various sets of other proceedings were brought between 2006 and 2012 by other residents of Bergama against various administrative authorities and Normandy Madencilik A.Ş. before the administrative courts, some of which are still ongoing. The gold mine was in operation until at least 2014.

THE LAW

I. JOINDER OF THE APPLICATIONS

22. In accordance with Rule 42 § 1 of the Rules of Court, the Court decides to join the applications given their factual and legal similarities.

II. THE GOVERNMENT'S OBJECTION

23. The Government submitted that the applicants' representative had failed to submit authority forms indicating that he represented the first and third applicants. They further submitted that the facts and the applicants' complaints in the application forms had not been in accordance with Rule 47 of the Rules of Court. They therefore asked the Court to reject the application for failing to meet the requirements of Rule 47.

24. The Court reiterates that it has already examined and dismissed that objection after it was made by the respondent Government in the cases of *Öner Aktaş v. Turkey* (no. 59860/10, § 29, 29 October 2013); *Yüksel v. Turkey* ((dec.), no. 49756/09, § 42, 1 October 2013); and *T. and A. v. Turkey* (no. 47146/11, § 41, 21 October 2014). The Court finds no reason to depart from that conclusion in the present case. Moreover, the applicants' representative submitted authority forms indicating that he represented all three applicants. The Government's argument on those points should therefore be rejected.

III. AS REGARDS THE THIRD APPLICANT

25. The Court observes that Mr Yılmaz Acar, the third applicant, was among the applicants in the case of Öçkan and Others v. Turkey (no. 46771/99, 28 March 2006). It is true that the present case concerns different sets of proceedings in domestic law than Öçkan and Others. *However, given that the essence of both applications pertains to alleged breaches of the applicants' rights guaranteed under Articles 2, 6, 8 and 13 of the Convention on account of the operation of the Ovacık gold mine despite the judicial authorities' decisions, the Court* finds that the complaints made in the present application are substantially the same as those submitted in the case of Öçkan and Others. *Accordingly,* the Court declares the present application inadmissible in so far as it was lodged by Mr Yılmaz Acar, in accordance with Article 35 § 2 (b) of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

26. The first and second applicants alleged that the national authorities' decisions to issue operating permits to the Ovacık gold mine, authorising the use of the cyanidation process, and the related decision-making process had given rise to a violation of their rights guaranteed by Article 8 of the Convention.

27. The Government contested that argument.

A. Admissibility

28. 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. Merits

29. The first and second applicants complained, firstly, about the national authorities' decision to issue a permit to operate a gold mine using the cyanidation process. Furthermore, the existence of a risk to their right to respect for their private and family life had been established by judicial decisions. In that regard, they referred to the judgments delivered under domestic law. The applicants also emphasised that several tonnes of explosives had been used

in the course of the gold mine's operations and that this had resulted in considerable noise pollution. In addition, the applicants alleged that the long legal dispute between the authorities and the local population, triggered by the State authorities' deliberate defiance of final judicial decisions, had made their private lives unbearable.

30. The Government submitted, firstly, that they were aware of the Court's judgments in the cases of Taşkın and Others v. Turkey (no. 46117/99, ECHR 2004-X); Öçkan and Others *(cited above);* and Lemke v. Turkey (no. 17381/02, 5 June 2007). However, they noted that the Ovacık gold mine had started operating twenty years ago and that the applicants had failed to prove that it had had any negative impact on their rights guaranteed under Article 8 of the Convention. They submitted that there was no data showing that the gold mine presented a danger to the health of the local population, agricultural land or underground water sources.

31. The Court held in the cases of Taşkın and Others (cited above, § 119); Öçkan and Others *(cited above, § 43);* and Lemke (cited above, § 41) that the administrative authorities formed one element of a State subject to the rule of law, and that their interests coincided with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose (see Taşkın and Others, *cited above, § 124;* Öçkan and Others, *cited above, § 48;* and Lemke, *cited above, § 42).*

32. *In the present case, the Court observes that when* on 13 May 1997 the Supreme Administrative Court annulled the decision of 19 October 1994, it cited the State's positive obligation concerning the right to life and the right to a healthy environment. It held that owing to the gold mine's geographical location and the geological features of the region, the operating permit did not serve the general interest and that the reports submitted to it had pointed to the danger of the use of sodium cyanide for the local ecosystem and human health and safety (see paragraph 8 above). The Ovacık gold mine was ordered to close on 27 February 1998, that is, ten months after the delivery of the Supreme Administrative Court's decision and four months after it had been served on the authorities.

33. The Court further observes that despite the aforementioned decision by the Supreme Administrative Court, on 22 December 2000 the Ministry of Health authorised continued use of the cyanidation process at the mine with the company re-starting mining operations on 13 April 2001 (see paragraph 12 above). What is more, the Cabinet of Ministers, by a decision of 29 March 2002 which was not made public, authorised the continuation of production at the gold mine (see paragraph 15 above, and Taşkın and Others, cited above, § 75).

34. The Court notes that at the end of the administrative proceedings brought against the decisions of the Prime Minister's office, the Ministry of Health and the Cabinet of Ministers by the residents of Bergama, including the first and second applicants, the judicial authorities ruled in favour of the plaintiffs. They referred to the Supreme Administrative Court's decision of 13 May 1997, to the risks linked to the use of sodium cyanide in the gold mine and to the fact that the environmental impact assessment report allowing for the operation of the gold mine had been set aside (see paragraphs 10, 11, 13, 14 and 16 above). The administrative authorities, on the other hand, granted a permit for operations at the gold mine on 20 May 2005, despite the fact that the Supreme Administrative Court had ordered a stay of execution of the Cabinet decision that the gold mine could continue to operate. What is more, the gold mine remained in operation even after the judgments of 1 June 2001, 27 May 2004 and 22 March 2006 had become final.

35. Hence, notwithstanding the procedural guarantees afforded by Turkish legislation and the implementation of those guarantees by judicial decisions, the administrative authorities deprived them of any useful effect in respect of the applicants (see Taşkın and Others, *cited above, § 125;* Öçkan and Others, *cited above, § 49;* and Lemke, *cited above, § 45).* The Court finds therefore that the respondent State did not fulfil its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8 of the Convention.

There has consequently been a violation of that provision.

V. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

36. The second and third applicants alleged that the authorities' refusal to comply with the administrative courts' decisions had infringed their right to effective judicial protection in the determination of their civil rights.

37. The Government contested that argument.

A. Admissibility

38. The Government argued that Article 6 § 1 did not apply in the instant case, given that the applicants based their allegations only on a probable and hypothetical risk which, in particular, was not at all imminent. Consequently, the applicants' complaint did not concern "civil rights and obligations" within the meaning of this provision. The Government also argued that pursuant to Law no. 6384 a Compensation Commission was established to deal with applications concerning, *inter alia*, the non-execution of judgments. They maintained that the applicants had not exhausted domestic remedies, as they had not made any application to that Commission requesting compensation.

39. The applicants did not make any submission on the issue of applicability of Article 6. As regards the Government's submissions regarding the rule of exhaustion of domestic remedies, the applicants argued that they had exhausted every remedy available to them.

40. As regards the Government's objection that Article 6 is not applicable in the present case, the Court notes that it has already examined and rejected the same argument raised by the Government in the aforementioned case *Taşkın and Others* (cited above, §§ 128–134) and reiterated that conclusion in the case of *Öçkan and Others* (cited above, § 52). It finds no reason to depart from its considerations in the above-mentioned cases and rejects the Government's objection. Consequently, Article 6 of the Convention is applicable in the case.

41. As regards the Government's objection that the applicant failed to exhaust the domestic remedies, the Court notes that the Turkish National Assembly enacted Law no. 6384 on the resolution, by means of compensation, of applications lodged with the Court concerning length of judicial proceedings and non-enforcement or delayed enforcement of judicial decisions. Law no. 6384 provided for the establishment of a Compensation Commission empowered to award compensation to individuals to deal with the Convention complaints falling within its scope (see *Sayan v. Turkey* (dec.), no. 49460/11, § 22, 14 June 2016). The Court considers that the applicants could claim compensation from the Compensation Commission, set up by Law no. 6384. However, in the circumstances of the present case, the award of compensation would not be a sufficient redress for the applicants' Convention grievances since their complaint pertains to the non-enforcement of binding final judicial decisions to stop the operation of Ovacık gold mine (see *Okyay and Others v. Turkey* (dec.), no. 36220/97, 17 January 2002). Besides, the Turkish Government did not submit any decision showing that recourse to the Compensation Commission had led to the cessation of the activities of a gold mine or a similar mining or industrial activities in respect of which national courts had annulled operation permits. Against this background, the Court finds that the applicants were not required to apply to the Compensation Commission set up by Law no. 6384. The Court accordingly rejects the Government's objection under this head.

42. 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. Merits

43. The Government asserted that the administrative authorities had taken action subsequent to the judgments by the administrative courts with a view

to complying with those judgments. In the Government's view, the administrative authorities could not be considered to have failed to enforce the judicial decisions in question.

44. The applicants challenged the Government's assertion and contended that the gold mine remained in operation despite the administrative courts' judgments and that the non-enforcement of the administrative courts' decisions was incompatible with the rule of law and contravened the requirements of Article 6 § 1 of the Convention.

45. The Court notes that the administrative authorities' decisions authorising the operation of the Ovacık gold mine and the resumption of the production at the mine between 13 April 2001 and 18 August 2004 and from 20 May 2005 onwards was tantamount to circumventing a judicial decision as the administrative courts relentlessly emphasised. Such a situation adversely affects the principle of a law-based State, founded on the rule of law and the principle of legal certainty (see Taşkın and Others, cited above, § 136, and *Okyay and Others v. Turkey*, no. 36220/97, § 73, ECHR 2005-VII).

46. In the light of the above considerations, the Court considers that the national authorities failed to comply in practice and within a reasonable time with the decisions and judgments given by the İzmir Administrative Court and the Supreme Administrative Court on 1 June 2001, 27 May 2004, 23 June 2004 and 22 March 2006, thus depriving Article 6 § 1 of any useful effect.

There has therefore been a violation of Article 6 § 1 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLES 2 AND 13 OF THE CONVENTION

47. The second and third applicants submitted that the administrative authorities' decision to issue a permit authorising the gold mine to use the cyanidation process and the refusal by those authorities to comply with the decisions of the administrative courts had constituted violations, respectively, of their right to life and their right to an effective remedy. They relied on Articles 2 and 13 of the Convention.

48. The Court notes that the applicants' complaints under Articles 2 and 13 of the Convention are, in essence, the same as those submitted under Articles 6 § 1 and 8, examined above. Accordingly, it considers that it is not necessary to examine them separately under the other provisions (see Taşkın and Others, cited above, §§ 139 and 140).

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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."

50. The first and second applicants each claimed 25,000 euros (EUR) and EUR 50,000 in respect of pecuniary and non-pecuniary damage. They also claimed a total of EUR 178,750 for the costs and expenses incurred before the Court. They did not, however, provide proof for the costs and expenses.

51. The Government contested those claims.

52. The Court observes that the applicants did not submit any document in support of their claim that they had suffered pecuniary damage and the Court therefore rejects it. On the other hand, ruling on an equitable basis, it awards the applicants EUR 3,000 each in respect of non-pecuniary damage.

53. As regards the claims for costs and expenses, the Court reiterates that according to its case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the above criteria and given the applicants' failure to submit any documents in support of their claims in respect of the costs and expenses incurred before the Court, the Court makes no award under this head.

54. 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. *Decides* to join the applications;

2. *Declares* the first and second applicants' complaints under Articles 6 § 1 and 8 of the Convention admissible and the third applicant's complaints inadmissible;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention in respect of the first and second applicants;

4. *Holds* that there has been a violation of Article 8 of the Convention in respect of the first and second applicants;

5. *Holds* that there is no need to examine the admissibility or the merits of the first and second applicants' remaining complaints under Articles 2 and 13 of the Convention;

6. *Holds*

(a) that the respondent State is to pay EUR 3,000 (three thousand euros) each, plus any tax that may be chargeable, to the first and second applicants in respect of non-pecuniary damage, within three months, the

following amounts, to be converted into the 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;

7. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 10 October 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Deputy Registrar

Julia Laffranque
President

ANNEX 26

FIFTH SECTION

CASE OF JUGHELI AND OTHERS v. GEORGIA

(Application no. 38342/05)

JUDGMENT

STRASBOURG
13 July 2017

FINAL
13/10/2017

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Jugheli and Others v. Georgia,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Angelika Nußberger, *President,*
Erik Møse,
Nona Tsotsoria,
Yonko Grozev,
Síofra O'Leary,
Mārtiņš Mits,
Lətif Hüseynov, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 20 June 2017,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 38342/05) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Georgian nationals, Mr Ivane Jugheli ("the first applicant"), Mr Otar Gureshidze ("the second applicant") and Ms Liana Alavidze ("the third applicant"), on 3 March 2005.

2. The applicants were represented by Ms S. Japaridze of the Georgian Young Lawyers Association (GYLA) and Mr P. Leach of the European Human Rights Advocacy Centre (EHRAC), as well as Ms N. Jomarjidze, Ms T. Abazadze and Ms T. Dekanosidze, lawyers of GYLA and Ms J. Evans, a lawyer of the EHRAC. The Georgian Government ("the Government") were represented by their successive Agents, most recently Mr B. Dzamashvili of the Ministry of Justice.

3. The applicants alleged that a thermal power plant in close proximity to their homes had endangered their health and well-being.

4. On 12 February 2007 the complaint under Article 8 of the Convention was communicated to the Government.

5. On 29 July 2016, after the parties had filed with the Court all their submissions on the admissibility and merits of the case and the application of Article 41 of the Convention, the applicants' representative, Ms Japaridze, informed the Court that she could no longer represent her clients on account of her appointment to a position in the Government.

6. On 1 February 2017 the Government informed the Court that the first applicant had died on 12 March 2016 and requested to strike the application out in respect of the latter. On 8 May 2017 the applicants' representative informed the Court that the first applicant's heir did not wish to pursue the proceedings before the Court and agreed with the Government's request.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

7. The applicants, all Georgian nationals, were born in 1946, 1947 and 1957 respectively. At the material time they lived in different flats in a residential block ("the building") constructed in 1952 and situated at 4 Uznadze Street in Tbilisi.

8. The building is located in the city centre, in close proximity (approximately 4 metres) to the "Tboelectrocentrali" thermal power plant ("the plant"). The plant was constructed in 1911 and reconstructed at a later date. It started operations in 1939. For several decades it burned coal to generate power, before replacing it with natural gas. The plant provided the adjacent residential areas with electricity and heat.

9. Several accidents have been reported throughout the plant's history. An accident on 10 April 1996 rendered it inoperative for more than thirty days. An expert report concerning the incident disclosed that the main reason behind the accident was the fact that no major repairs had been carried out there since 1986.

10. On 2 November 1999 Presidential Decree No. 613 was issued, stating that the plant was to be privatised and sold directly to a private company. The privatisation agreement between the Government and the company was concluded on 6 April 2000.

11. On 2 February 2001 the plant partially ceased generating power owing to financial problems. However, it continued to use some of the generators.

12. According to the applicants, while operational the plant's dangerous activities were not subject to the relevant regulations, as a result of which, in addition to some other alleged nuisances, it emitted various toxic substances into the atmosphere negatively affecting their well-being.

B. Domestic proceedings

1. First set of proceedings

(a) Correspondence with the domestic authorities

13. On unspecified dates the applicants and other residents of the building lodged complaints with the municipal authorities, alleging that nuisances were emanating from the plant such as air, noise and electromagnetic pollution and water leakage. By official letters dated 22 March 2000, 19 October 2000 and 16 January 2001 the Tbilisi City Hall ("the City Hall") acknowledged that the residents of the building had been affected by the nuisances they had complained of. It advised the central Government that relocation of the plant would not be in the public interest in view of the acute energy crisis in the country and suggested that the residents of the affected area be offered electricity and heat free of charge as a form of compensation.

14. In the letter dated 22 March 2000 the City Hall asked the plant to implement certain environmental protection measures, including the installation of chimney filters to reduce the air pollution emanating from the plant. The request was left unaddressed.

15. On 1 October 2001, in an official response to a query by the applicants, the City Hall confirmed that the plant's activities fell within the "first category" within the meaning of the Environmental Permits Act (see paragraphs 43–44 below) and that the Ministry of the Environment and Natural Resources ("the Ministry of the Environment") was responsible for issuing the relevant permit.

(b) Action for damages and the friendly settlement

16. On an unspecified date in the summer of 2000 the applicants and other residents of the building brought an action for damages against the plant concerning the environmental nuisances emanating from the plant. A friendly settlement was reached between the parties on 12 December 2000, according to which the claimants would renounce their claims in exchange for a commitment by the plant's management to provide them with hot water, electricity and

heat free of charge. Owing to technical difficulties and a lack of cooperation between the relevant authorities, the friendly settlement was left unenforced.

2. Second set of proceedings

(a) In the Tbilisi Regional Court

(i) The claimants' submissions

17. On 25 October 2001 the applicants and three other residents of the building ("the claimants") brought a fresh action against the plant and other respondents including the Tbilisi electricity distribution company, AES TELASI JSC ("AES"), the City Hall and the Ministry of the Environment. They claimed compensation for pecuniary and non-pecuniary damage for the harm caused to their health and well-being by the air, noise and electromagnetic pollution and water leakage emanating from the plant. They relied on privately commissioned independent expert opinions in support of their complaints.

(ii) Expert examinations commissioned by the court

18. On 7 March and 23 September 2002 the Tbilisi Regional Court granted a request by the claimants and ordered the Ministry of Justice, the Ministry of Labour, Health and Social Affairs and the Ministry of the Environment to arrange a number of expert examinations. The latter were intended to measure the environmental pollution caused by the plant, clarify how the associated harmful effects had affected the claimants' health and might have endangered human life, and identify appropriate remedies.

(α) Air pollution

19. An expert examination dated 28 October 2002 and carried out by the Expertise and Special Research Centre at the Ministry of Justice concluded as follows:

> "As the "Tboelectrocentrali" plant does not have a [buffer] zone and is immediately adjacent to a residential building, the plant's chimneys must be equipped with appropriate filters and other equipment to protect the population from the hazardous gases."

20. On 17 January 2003 the Institute of Environmental Protection ("the IEP") at the Ministry of Environment issued an expert opinion on the air pollution and noise levels in the residential area concerned. It noted that while the plant's equipment responsible for the emission of toxic substances stood idle, it was impossible to determine the real pollution situation with which the residents had had to cope for years and noted that "the results were considerably minimised compared to the possible real picture."

21. The expert opinion disclosed that the plant's technical compliance document was defective as it did not reveal all the chemical substances known to be emitted into the atmosphere in the course of natural gas burning. That

document also incorrectly indicated the height of the chimneys as 30.8 metres instead of the actual 27 metres, which could lead to the pollution data being misleadingly decreased.

22. With regard to the air pollution and the possible impact upon the residents of the building, the expert opinion concluded as follows:

> "Considering the fact that the plant does not have a [buffer] zone and is immediately adjacent to a residential building ..., taking into account the direction of the wind, a whole bouquet of emissions is reaching into the homes ... negatively affecting the population living in the adjacent area."

23. The opinion specified that even where individual hazardous substances were considered to be within the acceptable margin, it was necessary to consider the combined impact of various substances upon the health of the population as the combined toxicity might go beyond the acceptable limits. It continued to note in this connection that the concentrated toxicity of the gases emitted by the plant was twice the norm and the residents of the building concerned had to live in conditions where the concentration of toxic substances surpassed the acceptable limits twenty-four hours a day. The IEP proposed that the competent municipal authorities either ban those industrial activities or ensure the plant's relocation outside the town, where at least a buffer zone could be established.

24. On 4 March 2003 the Institute of Scientific Research in Health and Hygiene at the Ministry of Labour, Health and Social Affairs responded to a query by the applicants and listed the diseases that might potentially be caused by excessive concentrations in the air of substances such as SO_2, CO, NO_2, smoke and black dust. These were mucocutaneous disorders, conjunctivitis, bronchitis, bronchopulmonary and other pulmonary diseases, allergies, different types of cardiovascular disease and anoxemia (low oxygen levels in the blood), which could lead to other serious disorders.

(β) Noise levels

25. On 17 January 2003 the IEP issued an expert opinion concerning the noise levels in the building. Without specifying the noise levels in the individual flats of the applicants, the opinion concluded in generic terms that "the residential building ... situated at 4 Uznadze Street [was] affected by noise in excess of the permissible limits."

26. On 6 February 2004 the IEP expert carried out an additional investigation aimed at determining the noise levels in the individual flats of the claimants. It concluded that the permissible levels of noise were exceeded only with respect to two claimants and not in the applicants' apartments.

(γ) Electromagnetic pollution

27. An expert opinion issued by the IEP on 7 November 2002 stated that the intensity of the electromagnetic waves did not exceed the permissible levels.

28. The expert opinion produced by the Ministry of Labour, Health and Social Affairs on 17 January 2003 disclosed that, in some instances, the intensity of the electromagnetic fields in the vicinity of the building exceeded the permissible levels. It concluded however that it was impossible to establish the exact source of the electromagnetic pollution.

(δ) The applicants' health

29. On 13 May 2003 the court ordered the Forensic Medical Examination Centre at the Ministry of Labour, Health and Social Affairs to examine the health of four of the claimants. The third applicant and another claimant were not included, without any reasons being given for their exclusion. Its experts were asked to give an opinion on whether the claimants were suffering from any diseases which might have been caused by the pollution emanating from the plant.

30. The Forensic Medical Examination Centre carried out the court-commissioned examination between 7 August and 17 September 2003. A panel of experts concluded that the four claimants "[had] been affected by a combined impact of protracted exposure to harmful factors such as SO_2, NO, CO_2 as well as black dust, noise and electromagnetic pollution negatively impacting their health." The first and second applicants were found to be suffering from largely similar health conditions such as neurasthenia and asthenic syndrome. The panel considered it "possible that the asthenic syndrome and neurasthenia ... [had been] caused by the prolonged and combined effect of being exposed to harmful factors." It added that "taking into account the circumstances of the case, the worsening of the health conditions of the persons examined [had not been] excluded."

(iii) Regional Court's findings

31. On 12 March 2004 the Tbilisi Regional Court dismissed the claims of the applicants and another claimant, but partially allowed the claims of two other claimants ("the successful claimants") with respect to the noise pollution emitted by the plant's generators. Relying on the expert examination of the IEP concerning the noise levels, the court found that only the two successful claimants' flats were affected by noise in excess of the permissible limits. It awarded them 5,000 Georgian laris (GEL — equivalent to 1,981 euros (EUR))[1] each, holding the plant, the City Hall, and the Ministry of the Environment jointly liable:

> "... Both the City Hall and the Ministry failed to fulfil the obligations imposed on them by law. That is to say, despite the claimants' numerous requests and complaints, [the authorities concerned] failed to take specific measures to ensure an environment safe enough for the claimants' health."

[1] Exchange rate of 12 March 2004.

32. Furthermore, acknowledging that the plant was responsible for the infiltration of water into the foundations of the building, the court ordered it to halt the leakage and make the necessary repairs to the ruptured walls.

33. As regards the air pollution complained of, the court found that the material before it did not prove a causal link between the emissions and the claimants' health problems described in the Forensic Medical Examination Centre's expert report. It further suggested that the third applicant and another claimant had refused to undergo the medical examination.

34. While the court accepted the experts' conclusions that the plant had breached certain environmental standards by not having filters and other purification equipment in place to decrease the emission of toxic substances, it refused to order the plant to install such equipment on the grounds that the sole remedy requested by the claimants had been compensation for the damage caused by the pollution.

(b) In the Supreme Court

35. On 4 May 2004 the claimants appealed to the Supreme Court. Relying on the Court's judgment in the case of *López Ostra v. Spain* (9 December 1994, Series A no. 303-C) and the findings of the court-commissioned expert examinations at the domestic level, they reiterated their complaints about the lack of a buffer zone and the inherent risk of pollution, the absence of purification equipment over the plant's chimneys and its impact upon their health and well-being, and the defectiveness of the plant's technical compliance document. They further disagreed with the lower court's findings with respect to the alleged noise pollution emanating from the plant.

36. On 21 April 2005 the Supreme Court delivered a final judgment in the case. It upheld the appeals of the two already successful claimants and ordered the plant's operators, the City Hall and the Ministry of the Environment to pay them, jointly, GEL 7,000 (EUR 2,938)[2] each for the deterioration of their health caused by the noise pollution that persisted after the partial termination of the plant's activities on 2 February 2001 and affected them individually (see paragraphs 11 and 26 above). In addition, it ordered the plant to pay GEL 50 (EUR 21) monthly to one claimant and GEL 100 (EUR 42) to the other. It further upheld the lower court's finding concerning the plant's responsibility for the infiltration of water into the foundations of the building.

37. The Supreme Court rejected the complaint concerning the electromagnetic pollution as unsubstantiated.

38. As regards the submissions concerning the air pollution, the Supreme Court dismissed them as unsubstantiated. It reasoned that the claimants' refe-

[2] Exchange rate of 21 April 2005.

rence to violations of environmental standards, regardless of their validity, could not have served as a basis for awarding damages for air pollution considering that they had not requested that the plant's permit be revoked, that filters be installed over the chimneys, that other environmental protection measures be implemented, or that the hazardous activities be banned or relocated.

39. The court further noted that the Court's findings in the case of *López Ostra v. Spain* could not serve as grounds for requesting damages. It highlighted the fact that the plant in the instant case had been operational since 1939 while the flats had been built at a later date in 1952. It consequently concluded that the applicants had accepted the associated dangers when choosing to settle near the plant and were effectively barred from claiming any damages in that respect within the meaning of the Compensation for Damage Inflicted by Dangerous Substances Act (see paragraph 47 below). It thus concluded that the appellants had been under a duty to tolerate nuisances such as noise, smells, steam and gases caused by the ordinary industrial activities of the neighbouring plant, whose essential purpose had been to supply the nearby buildings with heating and hot water. The court interpreted the applicants' unenforced friendly settlement in an earlier set of proceedings (see paragraph 16 above) as their acceptance of the ecological discomfort.

40. The Supreme Court further reasoned that at the time of the proceedings the plant had suspended most of its operations and had no longer been emitting any substances into the air. Consequently, the appellants were no longer being affected by the pollution. Moreover, they had failed, in the court's opinion, to show what specific pecuniary damage, if any, had been sustained as a result of the air pollution in the previous years. It was further noted that the appellants had not specified the costs which they had incurred or would inevitably incur in the future for medical treatment for their health problems.

II. RELEVANT DOMESTIC LAW

A. The 1995 Constitution

41. Article 37 of the Constitution reads as follows:

Article 37

"3. Everyone has a right to live in a healthy environment and to use the natural and cultural environment. Everyone has a duty to protect the natural and cultural environment.

4. Taking into consideration the interests of current and future generations, the State shall guarantee the protection of the environment and the rational use of the natural resources as well as a sustainable development of the country in line with the economic and ecological interests of the society in order to create a safe environment for human health."

B. Environmental regulations

42. Section 40 of the Environmental Protection Act of 10 December 1996 ("the Environment Act") required all industrial units commencing operations to be equipped with reliable equipment designed for the processing, purification and environmental control of dangerous waste.

43. Section 4(1) of the Environmental Permits Act of 15 December 1996 ("the Environmental Permits Act") provided that for the purposes of obtaining environmental permits, industrial activities were divided into four categories based on their scope, importance and the degree of environmental impact. Section 4(2) defined the activities classified as "first category" as:

> "Activities that due to their scope, location and substance may cause serious negative and irreversible impact upon the environment, natural resources and human health."

44. Under section 4(2)(b), energy generating industrial activities, including those of thermal power plants, fell under the "first category" and required an environmental permit to be issued by the Ministry of Environment based on an environmental impact assessment study and an ecological expert report. It further stated that the population should participate in the decision-making process.

45. The Preamble specified that the Environmental Permits Act applied only to industrial activities to be commenced after its entry into force. As concerns companies that had commenced their industrial activities before its enactment, section 15(2) of Government Decree no. 154 of 1 September 2005 set 1 January 2009 as the deadline for submitting environmental impact assessment studies in order to obtain the relevant permits.

46. As regards regulations concerning buffer zones, Article 30 § 3 of the Health Code of 8 May 2003 stipulated that a buffer zone (had to be established in order to avoid air pollution in residential areas as a result of industrial activities. Under section 64(4)(a) and (b) of Order no. 234/n issued by the Ministry of Labour, Health and Social Affairs on 6 October 2003, the minimal size of a buffer zone between an industrial unit and a residential area, in circumstances where the concentration of various hazardous substances did not exceed the acceptable limits, must be at least 50 sq. m. and could be reduced to 25 sq. m. for industrial units using only natural gas for their operations.

47. Under section 6(6) of the Compensation for Damage Inflicted by Dangerous Substances Act of 23 July 1999, responsibility and the obligation to pay compensation for damage caused by dangerous substances to another person or his or her property is excluded if he or she was aware of the risk of pollution and knowingly put himself or herself or the property at risk.

THE LAW

I. PRELIMINARY ISSUES

48. The Court notes that the first applicant died in the course of the Convention proceedings, on 12 March 2016. The Government requested the Court to strike the application out in respect of the first applicant. On 8 May 2017 the applicants' representative informed the Court that the first applicant's heir did not wish to pursue the proceedings before the Court and agreed with the Government's request. In the light of the foregoing, the Court concludes that, in so far as the first applicant is concerned, it is no longer justified to continue examination of the application within the meaning of Article 37 § 1 (c) of the Convention. Furthermore, in accordance with Article 37 § 1 *in fine*, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the continued examination of that part of the case.

49. In view of the above, it is appropriate to strike the application out of the list in so far as the first applicant is concerned.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

50. The second and third applicants ("the applicants") complained that the State had failed to protect them from the air pollution as well as noise and electromagnetic pollution emanating from the thermal power plant located in the immediate vicinity of their homes. This had resulted in a severe disturbance to their environment and a risk to their health in violation of 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. The parties' submissions

1. The Government

51. The Government noted that considering the temporal scope of the Convention with respect to Georgia and the suspension date of the thermal power plant's main activities, the period of the applicants' situation that the Court was concerned with was from 20 May 1999 to 2 February 2001. According to the Government, the period in consideration was short and there was no evidence that a violation of the applicants' rights had taken place during this particular time.

52. The Government submitted that no causal link existed between the applicants' health conditions and the alleged air pollution and that the third applicant had refused to undergo the medical examination commissioned by the domestic court, making it impossible to argue that the plant's activities had had any direct impact upon her health.

53. The Government further argued that the alleged interference with the applicants' rights under Article 8 of the Convention had not been a direct interference by the authorities but had emanated from activities of a private company which was solely responsible for the operations of the plant in view of the privatisation agreement of 6 April 2000.

54. The Government further submitted that no element of domestic illegality was involved in the instant case. They referred to the fact that the relevant environmental legislation had been adopted at a later date than the launch of the power plant's activities in 1939 and that the pertinent regulatory framework, including the obligation to submit an environmental impact assessment study and obtain the relevant environmental permit, had not been applicable to the plant's activities until 1 January 2009 (see paragraph 45 above).

55. Lastly, referring to the absence of a buffer zone and the possible negative impact of the air pollution upon the residents of the relevant area, the Government noted that the plant in the instant case had been operational since 1939 while the building had been constructed at a later date in 1952. The Government submitted in this connection that, by having chosen to settle in such a building voluntarily, the applicants had assumed any possible risks emanating from the plant in question and were thus barred from claiming a violation of their rights under the Convention. They further argued that the applicants' earlier unenforced friendly settlement to accept the supply of hot water, electricity and heat free of charge for the alleged environmental discomfort (see paragraph 16 above) could mean that the nuisance complained of had not been of a sufficiently serious nature.

2. The applicants

56. The applicants submitted that they had suffered a serious interference with their rights under Article 8 of the Convention on account of the severe environmental pollution emanating from the thermal power plant in close proximity to their homes and the State's failure to regulate the hazardous industrial activity. They relied on the expert reports commissioned by the domestic courts in support of their claims (see paragraphs 18–24 and 29–30 above). They further argued that the third applicant had not refused to undergo the medical examination commissioned by the first-instance court, as it had selected the claimants at random.

57. The applicants maintained that the absence of a buffer zone between their building in the city centre, the dangerous industrial activities carried out

at the plant and the absence of appropriate purification equipment to minimise the impact of hazardous emissions had seriously interfered with their health and well-being protected under the Convention.

58. Furthermore, according to the applicants, the lower court had inaccurately concentrated on the impact of the air pollution in conditions where the plant had ceased most of its activities despite the core of the claimants' submissions referring to the period of the plant's active operations until 2 February 2001.

59. The applicants further submitted that the Supreme Court had been unfair in finding that they had accepted the interference with their rights by having chosen to settle in the building that had been built in 1952, after the launch of the plant's industrial activities in 1939. They argued that the building had been constructed during Soviet times when any construction of that type fell within the exclusive competence of the State and, in any event, they had only learnt about the danger emanating from the plant after they had moved into the building.

B. Admissibility

60. The Court notes at the outset that the applicants' complaints under Article 8 of the Convention relating to the noise and electromagnetic pollution allegedly emanating from the plant were not corroborated by any of the relevant expert examinations commissioned by the domestic courts (see paragraphs 25–28 above) and were accordingly rejected as manifestly ill-founded by the latter. In this connection, the Court, for its part, does not consider itself to be in a position to draw a conclusion on the issue, and reiterates that it cannot substitute its own findings of fact for those of the domestic courts, which are better placed to assess the evidence adduced before them (see *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, §§ 89–90, ECHR 2007-I, and *Murray v. the United Kingdom*, 28 October 1994, § 66, Series A no. 300-A). The Court thus finds that these complaints are manifestly ill-founded and should be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

61. As concerns the complaint under Article 8 of the Convention concerning the State's alleged failure to protect the applicants from the air pollution emanating from the thermal power plant in the immediate vicinity of their homes, 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.

C. Merits

1. General principles

62. The Court reiterates at the outset that Article 8 is not violated every time an environmental pollution occurs. There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8 (see *Hatton*

and Others v. the United Kingdom [GC], no. 36022/97, § 96, ECHR 2003-VIII; *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI; and *Fadeyeva v. Russia*, no. 55723/00, § 68, ECHR 2005-IV). Furthermore, the adverse effects of the environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8 (see, among other authorities, *López Ostra v. Spain*, 9 December 1994, § 51, Series A no. 303-C). The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or psychological effects. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city (see *Dzemyuk v. Ukraine*, no. 42488/02, § 78, 4 September 2014). Conversely, severe 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 (see *López Ostra*, cited above, § 51, and *Tătar v. Romania*, no. 67021/01, § 85, 27 January 2009).

63. The Court notes that it is often impossible to quantify the effects of serious industrial pollution in each individual case and to distinguish them from the influence of other relevant factors such as age, profession or personal lifestyle. The same concerns possible worsening of the quality of life caused by the industrial pollution. "Quality of life" 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, and *Dubetska and Others v. Ukraine*, no. 30499/03, § 79, 10 February 2011). It follows that, taking into consideration the evidentiary difficulties involved, the Court will have regard primarily, although not exclusively, 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, among other things, individual decisions taken by the authorities with respect to the applicants' particular situation and the environmental studies commissioned by the authorities (see *Dubetska and Others*, cited above, § 107, with further references). However, the Court cannot rely blindly on the decisions of the domestic authorities, especially if they are obviously inconsistent or contradict each other. In such situations it has to assess the evidence in its entirety (see *Ledyayeva and Others*, cited above, § 90).

64. The Court further points out that Article 8 does not merely compel the State to abstain from arbitrary interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in the effective respect for private or family life (see *Guerra and Others v. Italy*, 19 February 1998, § 58, *Reports of Judgments and Decisions* 1998-I). Whether the question is analysed in terms of a positive duty on the State to take reasonable and appropriate

measures to secure the applicant's rights under Article 8 § 1 or in terms of an "interference by a public authority" to be justified in accordance with Article 8 § 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (see *Hatton and Others*, cited above, § 98, and *López Ostra,* cited above, § 51).

2. Application of the above principles to the present case

(a) Applicability of Article 8

65. The Court bears in mind that, in the instant case, the Convention came into force with respect to Georgia on 20 May 1999. It follows that only the period after this date can be taken into consideration in assessing the nature and extent of the alleged interference with the applicants' private lives. It is further noted that the thermal power plant in question suspended most of its activities on 2 February 2001. The Court finds that the period of slightly less than a year and nine months during which the applicants were exposed to the alleged harmful emissions from the plant was sufficient to trigger the application of Article 8 of the Convention.

66. The Court notes at the outset that the activities of the thermal power plant in question, as expressly acknowledged by the relevant municipal authority, were classified as "first category" under domestic law (see paragraph 15 above) as they "could by their scale, location and substance cause serious negative and irreversible impact upon the environment, natural resources and human health" (see paragraphs 43–44 above). The Court is also mindful of the fact that the plant in question was located in the city centre and in the immediate vicinity of the applicants' homes, with a distance of only 4 metres between the plant and the building.

67. As regards the alleged impact of the plant's activities and the resultant air pollution upon the life and health of the applicants, the Court notes that the expert opinions commissioned by the domestic judicial authorities and produced by the competent State entities confirmed in unambiguous terms that the absence of a buffer zone between the plant and the building coupled with the absence of filters or other purification equipment over the plant's chimneys to minimise the potential negative impact of the hazardous substances emitted into the air created a real risk to the residents of the building (see paragraphs 19 and 22 above). The Court further notes that according to the IEP:

> "Considering the fact that the plant does not have a buffer zone and is immediately adjacent to a residential building ..., taking into account the direction of the wind, a whole bouquet of emissions is reaching into the homes ... negatively affecting the population living in the adjacent area."

It was further concluded that the concentrated toxicity of various substances emitted by the plant was twice the norm (see paragraphs 22–23 above).

68. Furthermore, the plant's technical compliance document was found to be defective, incorrectly indicating the height of the plant's chimneys, thus misleadingly decreasing the possible pollution indicators (see paragraph 21 above). The Court notes that, according to the Institute of Scientific Research in Sanitation and Hygiene at the Ministry of Labour, Health and Social Affairs, diseases potentially caused by prolonged exposure to excessive concentrations in the air of substances such as SO_2, CO, NO_2, smoke and black dust include mucocutaneous disorders, conjunctivitis, bronchitis, bronchopulmonary and other pulmonary diseases, allergies, different types of cardiovascular disease and low oxygen levels in the blood, which could lead to other serious disorders (see paragraph 24 above).

69. The Court takes further note of the findings of the Forensic Medical Examination Centre at the Ministry of Labour, Health and Social Affairs with respect to the health conditions of several claimants at domestic level (see paragraphs 29–30 above). According to the medical examination report, the persons concerned, including the second applicant, suffered from largely similar health conditions such as neurasthenia and asthenic syndrome. The experts concluded that the medical conditions in question could have been caused "by the prolonged and combined effect of being exposed to harmful factors" (see paragraph 30 above).

70. As regards the third applicant's alleged refusal to participate in the medical examination (see paragraph 33 above), it cannot be denied, in the Court's opinion, that she lived in identical conditions as the claimants participating in the examination and was subjected to the same environmental nuisances and health risks emanating from the plant's activities and that she pursued the relevant proceedings at domestic level until their completion. The Court further reiterates in this connection that, in any event, Article 8 has been found to apply to severe environmental pollution affecting individuals' well-being and preventing them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health (see *López Ostra,* cited above, § 51).

71. Against this background, the Court concludes that even assuming that the air pollution did not cause any quantifiable harm to the applicants' health, it may have made them more vulnerable to various illnesses (see paragraphs 30 and 68 above). Moreover, there can be no doubt that it adversely affected their quality of life at home (see *Fadeyeva*, cited above, § 88). The Court therefore finds that there has been an interference with the applicants' rights that reached a sufficient level of severity to bring it within the scope of Article 8 of the Convention.

72. Lastly, the Court finds that despite settling in the building built in 1952 voluntarily, at a time when the thermal power plant had been operational since 1939, the applicants may not have been able to make an informed choice at the time or possibly were not even in a position to reject the housing offered by the State during Soviet times (see *Fadeyeva*, § 120, and *Ledyayeva and Others*, § 97, both cited above). It therefore cannot be claimed that the applicants themselves created the situation complained of or were somehow responsible for it. Nor can the unenforced friendly settlement in an earlier set of proceedings (see paragraph 16 above) be interpreted to the detriment of the applicants.

(b) Compliance with Article 8

73. The Court reiterates that Article 8 may apply in environmental cases whether the pollution is directly caused by the State or where the State responsibility arises from a failure to regulate private industry properly (see *Hatton and Others,* cited above, § 98). The thermal power plant in the instant case was initially owned and operated by the State until it transferred ownership to a private company by means of a privatisation agreement signed on 6 April 2000. However, the Court reiterates in this connection that whether the present case is 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 or in terms of an interference by a public authority to be justified in accordance with Article 8 § 2, the applicable principles are broadly similar (see paragraph 64 above). In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.

74. The Court notes that on the one hand the pertinent regulatory framework, including the obligation to submit an environmental impact assessment study and obtain the relevant environmental permit, was not applicable to the plant's activities until 1 January 2009 (see paragraph 45 above). On the other hand, the activities of the thermal power plant in question were potentially dangerous, as confirmed by the domestic legislation in force at the material time that designated such activities as those which "could by their scale, location and substance cause serious negative and irreversible impact upon the environment, natural resources and human health" (see paragraphs 43–44 above). Their dangerous nature was further expressly confirmed by the Tbilisi City Hall (see paragraph 15 above). The Court observes that such dangerous industrial activities were effectively left in a legal vacuum at the material time.

75. Against this background, the Court considers that the crux of the matter is the virtual absence of a regulatory framework applicable to the plant's dangerous activities before and after its privatisation and the failure to address the resultant air pollution that negatively affected the applicants' rights under

Article 8 of the Convention. In the context of dangerous activities in particular, States have an obligation to set in place regulations geared to the specific features of the activity in question, particularly with regard to the level of risk potentially involved. They must govern the licensing, setting-up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of the citizens whose lives might be endangered by the inherent risks (see *Di Sarno and Others v. Italy*, no. 30765/08, § 106, 10 January 2012, and *Tătar*, cited above, § 88). The Court notes in this connection that the virtual absence of any legislative and administrative framework applicable to the potentially dangerous activities of the plant in the present case enabled it to operate in the immediate vicinity of the applicants' homes without the necessary safeguards to avoid or at least minimise the air pollution and its negative impact upon the applicants' health and well-being, as confirmed by the expert examinations commissioned by the domestic courts (see paragraphs 18–24 and 29–30 above).

76. The Court reiterates that it is not its task to determine what exactly should have been done in the present situation to reduce the impact of the plant's activities upon the applicants in a more efficient way. However, it is within the Court's jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests. In this respect the Court reiterates that 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). Looking at the present case from this perspective, the Court notes that the Government did not present to the Court any relevant environmental studies or documents informative of their policy towards the plant and the air pollution emanating therefrom that had been affecting the applicants during the period concerned.

77. The Court further notes that the situation complained of in the instant case was not a result of sudden turn of events, but constituted a longstanding problem of which the relevant authorities were certainly aware (see paragraph 13 above). Yet, despite ordering the plant to install the relevant filtering and purification equipment to minimise the impact of toxic substances emitted into the air upon the residents of the building, no effective steps were taken by the competent authorities to follow up on that instruction (see paragraph 14 above). Furthermore, the applicants' alleged failure to explicitly request the domestic courts to order the implementation of various protection measures in respect of the plant's activities and the emissions emanating therefrom (see paragraph 38 above) did not, in the Court's opinion, absolve the domestic judicial authorities from the obligation to consider the complaint in view of the State's positive obligations under Article 8 of the Convention and to remedy the situation accordingly. In other words, whereas the regulatory framework

proved defective in that virtually no environmental regulation was applicable to the plant's activities as it had commenced its operations before the adoption of the relevant rules, the situation was further exacerbated by the passive attitude adopted by the Government in the face of the resultant air pollution emanating from the plant, despite acknowledging the ecological discomfort suffered by the population affected on several occasions (see paragraphs 13-15 above).

78. Having regard to the foregoing and notwithstanding the margin of appreciation available to the national authorities in cases involving environmental issues, the Court considers that the respondent State did not succeed in striking a fair balance between the interests of the community in having an operational thermal power plant and the applicants' effective enjoyment of their right to respect for their home and private life.

There has accordingly been a violation of Article 8 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

79. The applicants complained under Article 8 of the Convention that they had been denied access to environmental information. The Court observes that this complaint was not included in the initial application but was raised in the applicants' observations of 26 November 2007 and refers to correspondence with the relevant authorities from 26 September 2007 onwards, more than two years after they had lodged their application. Consequently, the Court considers that this complaint was not specified or elaborated early enough to allow for an exchange of observations between the parties on the subject. It finds that, in the circumstances of the case, it is not appropriate to examine the matter separately at this stage in the proceedings (see *Nuray Şen v. Turkey (no. 2)*, no. 25354/94, § 200, 30 March 2004).

80. The applicants further submitted that the factual circumstances of the case demonstrated a breach of their rights protected by Articles 2, 3, 5, 6 and 17 of the Convention and Article 1 of Protocol No. 1 to the Convention.

81. However, having regard to the facts of the case, the submissions of the parties and its findings under Article 8 of the Convention, the Court considers that it has examined the main legal questions raised in the present application and there is no need to give a separate ruling on the remaining complaints (see, among other authorities, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, and *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 211, ECHR 2009).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. 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

83. The second and third applicants claimed 10,000 euros (EUR) each in respect of non-pecuniary damage.

84. The Government stated that the claim was manifestly ill-founded and excessive.

85. The Court accepts that the applicants suffered distress and frustration on account of the violation of their rights under Article 8 of the Convention. The resulting non-pecuniary damage would not be adequately compensated for by the mere finding of the breach. Taking into account the circumstances of the case and making an assessment on an equitable basis in accordance with Article 41, the Court awards the applicants EUR 4,500 each in respect of non-pecuniary damage.

B. Costs and expenses

86. The applicants also claimed EUR 2,000 and 1,550 pounds sterling (GBP — approximately EUR 1,787) for their representation before the Court by Ms S. Japaridze (see paragraph 5 above) and Mr P. Leach. The two amounts were broken down into the number of hours spent and the lawyers' hourly rates — forty hours at a rate of EUR 50 for Ms Japaridze and fifteen hours and thirty minutes at a rate of GBP 100 for Mr Leach. The itemisation also included the dates and the exact types of legal services rendered. No copies of the relevant legal service contracts, invoices, vouchers or any other supporting financial documents were submitted.

87. The applicants also claimed EUR 384 and GBP 700 for two expert reports commissioned of their own initiative relating to the domestic legislation and the possible impact of the pollution emanating from the plant respectively. They submitted a contract concluded with the expert in respect of the first amount and an invoice for the second, signed by an EHRAC representative.

88. The applicants further claimed EUR 587 and GBP 175 for postal, telephone, translation and other types of administrative expenses. In support of those claims, the applicants only submitted a copy of a postal receipt showing that 147 Georgian laris (GEL — EUR 61)[3] had been paid for posting the applicants' observations on the application together with their claims for just satisfaction from Tbilisi to Strasbourg on 26 November 2007. They submitted receipts for photocopying in the amount of GEL 116 (EUR 48), without any information capable of linking the photocopying to the present application.

[3] Exchange rate of 26 November 2007.

89. The Government submitted that the costs claimed for legal representation were exaggerated. However, they acknowledged that the applicants had necessarily incurred some legal costs and invited the Court to award, in accordance with its established case-law, a reasonable amount. As regards the claims concerning the fees for the two reports, the Government submitted that they were irrelevant to the proceedings before the Court and had thus been unnecessarily incurred. They further maintained that the claims concerning various administrative expenses were unsupported by evidence.

90. The Court reiterates that 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 (see *Jalloh v. Germany* [GC], no. 54810/00, § 133, ECHR 2006-IX). The Court further reiterates that in the absence of any additional financial documents confirming that the relevant financial transaction has actually, truly occurred, mere billing requests from lawyers cannot normally be taken as a proof that the legal costs and expenses claimed have "actually and necessarily" been incurred by the applicants themselves (see *Tchankotadze v. Georgia*, no. 15256/05, § 134, 21 June 2016). In the present case, however, the Court takes note of the detailed and credible itemisation of the hours spent by the respective lawyers from GYLA and EHRAC, and further observes that in a number of Georgian cases it has found that the teamwork of the lawyers from these two NGOs in proceedings before the Court could not be left uncompensated and that similar evidence of the lawyers' work was acceptable proof of the expenses incurred by the applicants' representatives (see *Klaus and Iouri Kiladzé v. Georgia*, no. 7975/06, §§ 91-94, 2 February 2010, and *Tsintsabadze v. Georgia*, no. 35403/06, § 105, 15 February 2011). The Court therefore considers it appropriate to award the applicants EUR 2,000 and GBP 1,550 (EUR 1,787) on account of their representation by their lawyers.

91. As regards the remaining expenses, according to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicants EUR 61 for posting their observations on the application together with their claims for just satisfaction.

C. Default interest

92. 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. *Decides* to strike the application out of its list of cases, in so far as the first applicant's complaints are concerned;

2. *Declares* the complaint concerning the State's failure to protect the second and third applicants from the air pollution emanating from the thermal power plant in the immediate vicinity of their homes, under Article 8 of the Convention, admissible and the remainder of the complaint under that provision inadmissible;

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

4. *Holds* that it is not necessary to examine the admissibility and merits of the other complaints of the second and third applicants;

5. *Holds*

(a) that the respondent State is to pay the second and third applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
   (i) EUR 4,500 (four thousand five hundred euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (ii) EUR 3,848 (three thousand eight hundred and forty-eight euros) to the second and third applicants jointly plus any tax that may be chargeable to them, in respect of costs and expenses;

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

6. *Dismisses* the remainder of the second and third applicants' claim for just satisfaction.

Done in English, and notified in writing on 13 July 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President

ANNEX 27

FIFTH SECTION

CASE OF KARIN ANDERSSON AND OTHERS v. SWEDEN

(Application no. 29878/09)

JUDGMENT

STRASBOURG
25 September 2014

FINAL

25/12/2014

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Karin Andersson and Others v. Sweden,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mark Villiger, *President,*
Ann Power-Forde,
Ganna Yudkivska,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 2 September 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 29878/09) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eighteen Swedish nationals, Ms Karin Andersson, Mr Per Bernhardtson, Ms Gunilla Bring, Mr Ulf Bäcklund, Mr Berndt Eriksson, Ms Carina Granberg, Ms Agneta Holmström, Mr Gustaf Härestål, Mr Björn Höjer, Ms Inga-Britt Höjer,

Mr Christer Johansson, Mr Curt Lindgren, Mr Håkan Olsson, Mr Roger Olsson, Mr Göran Osterman, Mr Lars Sjöstedt, Mr Christer Skoog and Mr Olle Stenlund ("the applicants"), on 4 June 2009.

2. The applicants were represented by Mr J. Ebbesson, a professor of environmental law, and Mr B. Rosengren, a lawyer, both practising in Stockholm. The Swedish Government ("the Government") were represented by their Agent, Mr A. Rönquist, of the Ministry for Foreign Affairs.

3. The applicants alleged, in particular, that they had been denied effective access to court in relation to decisions taken on the construction of a railway, in violation of their rights under Articles 6 and 8 of the Convention.

4. On 21 May 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants own property close to Umeå, in the vicinity of a Natura 2000 area, the European network of nature protection areas established under the EU Habitats Directive of 1992 (see further below at paragraph 33). Most of them live there (permanently or on a part-time basis).

A. Proceedings on permissibility of railway project

6. On 15 October 1999, the National Rail Administration (*Banverket*; hereinafter "the NRA") applied to the Government for permission, under the Environmental Code (*Miljöbalken*), to construct a 10 km long railway section in a river area in the north of Sweden (constituting the final section of a railway called "Botniabanan", the total length of which is 190 km). The NRA presented some alternative railway stretches, all located in a specified "corridor", but recommended the one named "alternative east". The proposed railway construction concerned certain areas which were or were going to be part of Natura 2000.

7. It appears that six of the present applicants own houses or land within the mentioned "corridor": Ms Carina Granberg, Ms Agneta Holmström, Mr Gustaf Härestål, Mr Björn Höjer, Ms Inga-Britt Höjer, and Mr Christer Skoog. Ownership of Mr Skoog's property was transferred to Ms Granberg on 7 January 2011. The properties of the other twelve applicants — houses and land in their ownership or owned houses located on non-freehold sites — are situated outside the "corridor". The distance from their properties to the "corridor" or the specific stretch of the railway fixed in later proceedings vary; the houses appear to be situated 300–2500 metres away whereas the closest piece of land is located about 50 metres from the "corridor".

8. On 12 June 2003 the Government, after having heard the European Commission, granted the application and allowed the construction of the railway in the proposed "corridor" under the condition, *inter alia,* that the NRA adopt

a railway plan before 1 July 2009 and also a specific plan for the realisation of the necessary environmental compensation measures in the Natura 2000 areas. The plan on compensation measures had to be presented to the Government before the railway plan was adopted. The Government stated, *inter alia*, that the activity could be permitted, despite its harmful effect on the environment in a Natura 2000 area, if there were no alternative solutions and the railway had to be constructed for reasons of public interest.

9. A number of individual property owners, including three of the applicants in the present case — Ms Bring, Mr Bäcklund and Mr Osterman — petitioned the Supreme Administrative Court (*Regeringsrätten*) for a judicial review of the case and requested that the Government's decision be quashed. The property owners claimed that the decision contradicted Swedish law as well as applicable European Union law, including the Habitats Directive. It was argued, firstly, that the decision contravened the general rule in the Environmental Code on the site to be chosen for activities and installations that may affect human health or the environment. This aspect allegedly had a direct and clear bearing on their civil rights. Secondly, they asserted that the Government's decision violated Swedish regulations on nature conservation by failing to consider relevant alternative sites for the railway.

10. On 1 December 2004 the Supreme Administrative Court dismissed the petitions for a judicial review because it was not possible to determine who should be considered an interested party at that stage of the railway planning. The exact route of the railway would not be established until the railway plan had been drawn up. Until then, it could not be assessed with any certainty who would be affected to the extent that they were entitled to bring an action or what account should be taken of their interests. Further stating that the parties affected to a sufficient extent by the future railway would be able to obtain a judicial review of the later decision to adopt the railway plan, the court refused the petitioners *locus standi*.

11. One judge dissented, finding that the issue of *locus standi* in respect of each petitioner should be further investigated by the court in order to ensure that the individual interests were taken into account, having regard to the binding character of the Government's decision in the later railway planning proceedings.

B. Proceedings on permits for construction of railway and bridges

12. In 2003 and 2004 the NRA applied to the County Administrative Board (*länsstyrelsen*) in the County of Västerbotten for a permit to construct the railway in the specific Natura 2000 area and to the Environmental Court (*miljödomstolen*) in Umeå for permits to build two bridges.

13. The County Administrative Board granted a construction permit for the railway by a decision of 14 October 2004, which was subsequently appealed against to the Environmental Court.

14. The Environmental Court decided to examine the cases jointly. By judgments of 24 May 2005 and 13 June 2005, considering itself bound by the Government's decision of 12 June 2003 on the permissibility of the railway project, the court decided to grant all the permits requested by the NRA.

15. On 15 June 2006 the Environmental Court of Appeal (*Miljööverdomstolen*) in Stockholm quashed the Environmental Court's judgments and referred the cases back to the latter instance. The appellate court found that the Government's decision had not contained a detailed examination of measures necessary to compensate for environmental harm caused by the railway project, and that these issues had to be settled as part of the determination of the construction permit requests.

16. On 26 April 2007 the Environmental Court decided anew to grant the permits requested by the NRA. The court considered itself bound by the Government's decision as to the permissibility of the railway project and thus limited its examination to the environmental compensation measures, as indicated by the decision of the Environmental Court of Appeal.

17. Two applicants — Ms Granberg and Mr Skoog — appealed against the Environmental Court's judgment in so far as it concerned the permit for the railway construction. All applicants except Mr Osterman appealed against the part which concerned the permit to construct the bridges.

18. By a judgment of 6 December 2007 the Environmental Court of Appeal affirmed the binding nature of the Government's permissibility decision and approved the construction of the railway and the bridges with certain added conditions.

19. On 9 May 2008 the Supreme Court (*Högsta domstolen*) refused leave to appeal and, thus, the Environmental Court of Appeal's judgment became final.

C. Proceedings on adoption of railway plan

20. On 21 June 2005 the NRA adopted a railway plan for the area in question.

21. Twelve applicants — all but Ms Holmström, Mr Härestål, Mr Höjer, Ms Höjer, Mr Sjöstedt and Mr Stenlund — appealed to the Government against the railway plan. They essentially complained of the specific stretch of the railway, invoking, *inter alia*, nuisance such as noise and vibrations affecting the enjoyment of their property.

22. By a decision of 28 June 2007 the Government referred to its decision on permissibility of 12 June 2003. It found that the specific stretch chosen in the railway plan was situated within the permitted "corridor" and thus rejected the appeals.

23. All of the applicants and several other petitioners turned to the Supreme Administrative Court and requested that it, by way of a judicial review, order the quashing of the Government's decision. They claimed, *inter alia*, that, although

their civil rights were affected by the planned railway, they had not had these rights considered and determined by a court, in violation of the Convention. As to the chosen location of the railway, they also asserted that the Government's decision was contrary to provisions of the Environmental Code and the EU Habitats Directive.

24. On 10 December 2008 the Supreme Administrative Court, after having held a hearing in the case, rejected the petition, finding that the railway plan was in line with the Government's decision of 12 June 2003 on the permissibility of the railway project and that the proceedings for the adoption of the plan did not demonstrate any failings. The court considered that the question of permissibility of a railway project was within the power of the Government, which had to take into account public interests such as environmental, industrial, economic and regional policy. The Government's permissibility decision was binding for the subsequent proceedings in that courts and other decision-making bodies could not examine issues that had been determined by that decision. Thus, in the proceedings concerning the construction permits requested by the NRA, the various instances could decide on conditions and other details but not on the general permissibility as defined in the Government's decision. Similarly, in the third stage of the decision process — the adoption of the railway plan — it was for the authorities and courts to decide only on the precise location of the railway, within the area designated by the Government's decision. The Government had not been obliged to review its decision of 12 June 2003 on the permissibility of the railway project and the designation of the "corridor" in which the railway could be located. These issues could not be examined in the third stage of the decision process. The Supreme Administrative Court further stated that, if private interests were affected by the location of a railway project, judicial review could be obtained by petitioning the court in proceedings against the Government's permissibility decision. The fact that the court, on 1 December 2004, had concluded that no individual petitioner could be considered to have *locus standi* in relation to the permissibility decision did not compel it to include in its current examination of the adoption of the railway plan the issues of permissibility of the project or its general location.

25. One judge dissented, considering that the Supreme Administrative Court's judgment contravened its decision of 1 December 2004. She noted, *inter alia*, that the adoption of a railway plan — as opposed to the construction permits — had direct consequences for the individual as it entailed a right for the railway company, under certain conditions, to expropriate land. Consequently, the court, in the instant case, should have examined all the objections presented by the appellants, including the claim that there were better alternative locations for the railway. According to the dissenting judge, a full judicial review had also been foreseen by the court in its earlier decision.

D. Compensation and others measures taken

26. It appears from the parties' observations in the case that at least ten of the applicants (including seven with houses or land situated outside the "corridor") have received some form of compensation as a consequence of the railway construction, either for land requisitioned or for reduced residential value or market value. In one case, the change to noise-reducing windows was partly paid by the NRA. It is not clear whether the other applicants requested compensation. In the vicinity of some properties, whose owners have not received compensation, noise barriers have been erected in order to keep the noise from the railway below the applicable target values.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Planning of railway construction

27. The planning of railway construction is regulated in the Railway Construction Act (*Lagen om byggande av järnväg*, 1995:1649). In addition, during planning and review of a railway construction, the general provisions in Chapter 2–4 of the Environmental Code (*Miljöbalken*) apply, stipulating, *inter alia*, that the site least intrusive on the interests of human health and the environment should be chosen for activities and installations.

28. The planning process of a railway construction is divided into three phases, in which the work is intended to gradually develop from outline studies to detailed plans and in which the outcome of one phase is intended to serve as a starting point for the next phase. Consideration is to be given to private interests as well as public interests such as the protection of the environment. The process begins with a preliminary study to identify and examine possible options to find out which alternatives warrant further study. The enterprise intending to build the railway is required by the regulations in the Environmental Code to consult relevant county administration boards, municipalities and non-profit organisations whose purpose is to safeguard nature protection and environmental interests, as well as parts of the general public who are likely to be particularly affected.

29. A railway investigation is to be conducted when the preliminary study shows that alternative routes should be examined. The alternatives and their consequences should be described so as to allow them to be compared both with one another and with the alternative of not carrying out any railway expansion at all. A railway investigation should include consultation with the country administrative board, supervisory authorities and individuals who are likely to be particularly affected. The investigation must contain an environmental impact assessment formulated in accordance with the regulations of the Environmental Code. The investigation results in the National Transport

Administration (*Trafikverket*; before April 2010: the NRA) deciding on a corridor in the terrain where the railway should be located.

B. The Government's permissibility assessment

30. Major railway projects are also subject to a Government permissibility assessment (Chapter 17 of the Environmental Code). The permissibility assessment is made on the basis of the railway investigation. No appeal lies from the Government's decision, but a judicial review of the decision can be obtained through an application to the Supreme Administrative Court.

31. According to the preparatory works of the Environmental Code, the Government's decision on the issue of permissibility is binding on subsequent reviews. Hence, if the Government has reviewed the permissibility of an activity, courts and authorities cannot review this issue (Government Bill 1997/98:45, part 1, pp. 436 et seq.). In principle, the Government's assessment should take place at a relative early stage of the process and primarily concern the permissibility of an activity. The issue of permissibility under the Code also includes the issue of the location of the activities (*ibid*., pp. 440 et seq.). A permissibility review for a railway results in the Government granting permission to construct the railway within a defined corridor.

C. The environmental courts' review

32. Pursuant to Chapter 11 of the Environmental Code, a permit is required for water operations. The term "water operations" refers, *inter alia*, to the construction in water areas and the diverting of water away from water areas. Decisions on permits are taken by an environmental court and may be appealed to the Environmental Court of Appeal and the Supreme Court. Appeals may be made by any person subjected to an adverse judgment or decision, or by authorities, municipality committees or other bodies entitled to appeal pursuant to specific provisions.

33. The EU Habitats Directive (Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora) — which defines how Natura 2000 sites are managed and protected — and the EU Birds Directive (Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds) have been implemented in Swedish legislation, primarily through the provisions of the Environmental Code and the Ordinance on Site Protection under the Environmental Code (*Förordningen om områdesskydd enligt miljöbalken m.m.*,1998:1252).

34. Pursuant to Chapter 7, section 28a of the Code, a permit is required for activities or measures which may significantly affect the environment in a Natura 2000 site. Such a permit may only be granted if the activity or measure will not damage the habitats under protection or cause that the species under protection are exposed to a disturbance that may significantly impinge on their

conservation in the area. However, a permit may nevertheless be granted if 1) there is no alternative solution, 2) the activity or measure must be carried out for imperative reasons of vital public interest, and 3) the necessary measures are taken to compensate for environmental losses, so as to ensure that the purpose of protecting the site concerned can still be achieved (Chapter 7, section 29).

35. If a permissibility review under Chapter 7, section 29 of the Code concerns an activity or measure that may affect the environment in an area that contains a prioritised species or habitat, the review may only take account of circumstances that concern 1) human health, 2) public safety, 3) vital environmental protection interests, or 4) other imperative circumstances of overriding public interest. With regard to circumstances referred to in point 4 the European Commission must be given the opportunity to state an opinion before the matter is settled.

36. Decisions on permits under Chapter 7, section 28a of the Code are taken by a county administrative board. If, however, a permit is required according to, *inter alia,* Chapter 11 of the Code, the decision should be taken by the authority deciding on the latter permission. Decisions by the county administrative board may be appealed to an environmental court and further to the Environmental Court of Appeal and the Supreme Court.

D. The Government's review of a railway plan

37. In the third planning phase a railway plan is elaborated by the enterprise that intends to construct the railway, pursuant to the provisions of the Railway Construction Act. The plan must describe the location and design of the railway construction in detail as well as the land and the special rights that need to be claimed for the railway itself and its construction. The railway plan must contain an environmental impact assessment. Moreover, consultation is required with affected property owners, municipalities and country administrative boards, and with other parties who may have a substantial interest in the matter. Subsequently, the National Transport Administration, having consulted the county administrative board, must assess whether the plan is to be adopted. If the plan involves making compulsory claims on, *inter alia*, land or special rights, the National Transport Administration must make a special assessment whether the advantages that may be secured by the plan outweigh the inconvenience that it causes the individual parties. A decision by the National Transport Administration to adopt a plan may be appealed to the Government. The Government's decision is final. However, it is possible to request judicial review of the decision.

38. By virtue of an adopted railway plan, the railway constructor has the right to purchase necessary land, through a court decision or by a cadastral procedure. In cases concerning purchases and compensation the Expropriation Act (*Expropriationslagen*, 1972:719) applies.

E. Judicial review and domestic case-law

39. The 1988 Act on Judicial Review of Certain Administrative Decisions (*Lagen om rättsprövning av vissa förvaltningsbeslut*, 1988:205) was introduced as a result of the European Court's findings in several cases that the lack of judicial review of certain administrative decisions infringed Article 6 § 1 of the Convention. It was replaced by the 2006 Act on Judicial Review of Certain Government Decisions (*Lagen om rättsprövning av vissa regeringsbeslut*, 2006:304), which entered into force on 1 July 2006.

40. In 2004, at the time of the judicial review of the Government's permissibility decision, the 1988 Act applied. It stipulated that an individual who was a party to administrative proceedings before the Government or any other public authority concerning, *inter alia*, the right to property or the relations between private subjects and public bodies which related to the individual's personal and economic circumstances could, in the absence of any other remedy, apply to the Supreme Administrative Court, as the first and only court, for review of any decisions which involved the exercise of public authority *vis-à-vis* the individual. In proceedings brought under the 1988 Act, the Supreme Administrative Court examined whether the contested decision "conflicted with any legal rule". According to the preparatory works (Government Bill 1987/88:69, pp. 23–24), its review of the merits of the cases concerned essentially questions of law but could, in so far as relevant for the application of the law, extend also to factual issues; it also had to consider whether there were any procedural errors which could have affected the outcome of the case. If the Supreme Administrative Court found the impugned decision unlawful, it had to quash it and, where necessary, refer the case back to the relevant administrative authority.

41. In 2008, at the time of the judicial review of the Government's decision on the railway plan, the 2006 Act applied. The procedural framework is essentially the same as described above with some exceptions. For example, in contrast to the 1988 Act, it is no longer required that the individual has been a party to previous proceedings to be able to apply for a judicial review (Government Bill 2005/06:56, p. 12). Thus, any individual can apply for judicial review of decisions by the Government as long as they concern the individual's civil rights or obligations within the meaning of Article 6 § 1 of the Convention. However, in practice this had already applied for a number of years in accordance with domestic case-law (RÅ 1999 ref. 27).

42. In a judgment from 2011 concerning the Government's permissibility decision on the construction of a road in Stockholm, the Supreme Administrative Court found that, although it could not be established at that stage which petitioners (all of whom owned property within the suggested corridor) would finally be affected by the road construction, the location of the road was in fact decided through the Government's decision and could not be subject to review

in any subsequent proceedings concerning the road project. Consequently, in the Supreme Administrative Court's view, the contested decision entailed an assessment of the petitioners' civil rights or obligations within the meaning of Article 6 § 1 of the Convention, and thus, the petitioners were considered to have *locus standi* in the judicial review of the Government's permissibility decision (HFD 2011 not. 26).

THE LAW

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

43. The applicants complained under Article 6 of the Convention that they had been denied a fair trial with regard to their civil rights, as they had been refused a full legal review of the Government's decision to permit the construction of the railway, which was situated on or close to their properties. The latter decision had significantly affected the applicants' property as well as the environment in the area concerned. Article 6 § 1 of the Convention reads, in so far as relevant, as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to [a] ... hearing ... by an independent and impartial tribunal established by law..."

A. Admissibility

1. Compatibility ratione materiae

44. The respondent Government contended that Article 6 was not applicable in relation to the twelve applicants who did not own houses or land located in the "corridor" specified by the NRA, within which the railway was constructed. As, allegedly, their civil rights had not been affected, their complaints should be declared inadmissible for being incompatible *ratione materiae*.

45. The applicants contested the Government's objection. They claimed that they had submitted maps showing the location of their properties to the Supreme Administrative Court in the proceedings concerning the adoption of the railway plan. The opposing party — the Government — had not objected to the standing of the applicants, nor had their request been rejected by the court on the ground that they or their properties were not affected by the railway construction.

46. The Court first notes that the applicants, in the domestic as well as the instant proceedings, have complained about the railway construction and its location, invoking both general environmental aspects and more individual concerns such as the impact of noise and vibrations on the enjoyment of their homes and property and on human health, necessarily including their own, as well as the reduction in value of their property. While public interests such

as environmental harm in general may be recognised as valid grounds for an individual complaint under domestic law, in the present case the Court cannot find that these claims concerned the applicants' "civil rights" within the meaning of Article 6. However, the other issues raised by the applicants, in particular the effects of the railway project on their homes and land, related to their "civil rights". Furthermore, there was a genuine and serious dispute over those rights and the domestic proceedings were decisive for them (see, for instance, *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 43, ECHR 2000-IV).

47. As regards the Government's claim that Article 6 is not applicable to the twelve applicants who did not own houses or land inside the "corridor", the Court is not in a position to determine how close to the "corridor" or the actual railway the individual properties need to be in order for the rights of property owners to be considered affected. It should be noted, however, that, except for the Supreme Administrative Court's decision of 1 December 2004 — which concluded that, at that stage of the proceedings, it was not possible to assess who would be affected by the construction of the railway — the applicants' domestic appeals and requests were not dismissed on the ground that they were not sufficiently concerned by the construction. Furthermore, at least ten of the applicants — of which seven have their houses and land situated outside the "corridor" — have received some form of compensation. There is no indication that any applicant's request for compensation has been refused. In these circumstances, the Court considers that the applicants' "civil rights" were sufficiently affected for their complaints to fall under Article 6 of the Convention.

48. The Government's objection as to the compatibility *ratione materiae* of the twelve applicants' complaints must accordingly be rejected.

2. Compatibility ratione personae

49. The Government further claimed that the application should be declared inadmissible for being incompatible *ratione personae* in so far as it concerned the complaints of Mr Johansson and Mr Skoog. With respect to Mr Johansson, they stated that he had only been subject to compensatory measures in regard to land owned by a joint-property association in which he was a member. They pointed out that rights and obligations incumbent on joint property fall within the competence of the association and not its individual members. With respect to Mr Skoog, they referred to the fact that he had transferred his property to Ms Granberg in January 2011.

50. The applicants pointed out that Mr Skoog had been the owner of the property in question at the time of the events in the case and during the following years.

51. The Court notes that Mr Johansson, in addition to jointly owned property, owned individual property in the area at issue (located outside the "corridor";

see further paragraph 7 above) and that this was the basis for his membership in the joint-property association. In so far as the applicability of Article 6 is concerned, his situation is thus no different from the other applicants in the case (see paragraph 47 above). As to Mr Skoog, it should be stressed that the applicants' complaint under Article 6 concerns access to court, which issue must be determined on the basis of the facts pertaining at the time of the domestic proceedings in the case. While Mr Skoog's property was transferred to another applicant in January 2011, he was the owner of said property throughout those proceedings and also at the time when the present application was lodged. Consequently, there is no reason to find that either Mr Johansson or Mr Skoog could not be a victim within the meaning of Article 34 of the Convention.

52. The Government's objection as to the compatibility *ratione personae* of their complaints must accordingly also be rejected.

3. Exhaustion of domestic remedies

53. The Government finally maintained that all the applicants had failed to exhaust domestic remedies. They pointed out that only three applicants had requested a judicial review of the Government's permissibility decision of 2003 before the Supreme Administrative Court. Further, the judgment of the Environmental Court of 2007, approving the construction of the railway and two bridges, had not been appealed against by one applicant. Moreover, in the proceedings concerning the adoption of the railway plan, six applicants had failed to appeal to the Government against the decision of the NRA.

54. In addition, the Government asserted that the applicants had, and still have, the possibility to claim compensation before the Swedish courts or the Chancellor of Justice. Referring to several judgments and decisions by the Supreme Court in recent years, the Chancellor's subsequent compensation awards as well as the European Court's conclusions in, *inter alia*, the cases of *Eskilsson v. Sweden* ((dec.), no. 14628/08, 24 January 2012) and *Eriksson v. Sweden* (no. 60437/08, 12 April 2012), they stated that Swedish law provided a remedy in the form of compensation for both pecuniary and non-pecuniary damage in respect of any violation of the Convention, including violations under Article 6. The Government pointed out that the limitation period in respect of compensation claims against the State — ten years from the point in time when the damage had occurred, under Section 2 of the Limitation Act (*Preskriptionslagen*, 1981:130) — had not yet run out.

55. The applicants disagreed. In regard to the permissibility proceedings, they stated that, while only three of them had requested a review before the Supreme Administrative Court, their request had been dismissed for lack of standing because the court had found that it could not be established which property owners would be affected by the project until the railway plan had been adopted. There was nothing to suggest that that outcome would have been any different

if all the applicants had requested a review. With respect to the examinations of the environmental courts and the Supreme Court, the applicants maintained that these proceedings had not provided an effective remedy to challenge the Government's decision of 2003 on the permissibility of the railway construction in the specified location, as the courts had clearly stated that they were bound by that decision. As to the proceedings concerning the adoption of the railway plan, the applicants submitted that what mattered in terms of exhaustion of remedies was that all of them had requested a judicial review by the Supreme Administrative Court of the Government's decision. The right to request such a review was not dependent on whether a petitioner had been active in the proceedings before the Government's decision.

56. Finally, in respect of the issue of non-exhaustion based on failure to claim compensation domestically, the applicants claimed that no such procedure provided a remedy addressing the lawfulness of the Government's decisions concerning the site of the railway construction.

57. The Court reiterates that normal recourse should be had by an applicant to a remedy which is available and sufficient to afford redress in respect of the breaches alleged. If there are several potentially effective remedies, it is normally enough if the applicant has recourse to one of them.

58. In the present case, a number of individual property owners — including three of the applicants — petitioned the Supreme Administrative Court for a judicial review of the Government's decision of 12 June 2003 to allow the construction of the railway in question. Given the binding nature of the Government's permissibility decision on the later proceedings — as confirmed by the judgments and decisions taken in regard to construction permits and the adoption of the railway plan — it would seem natural for discontented property owners to challenge that very decision by the only means available, a petition for judicial review. However, the Supreme Administrative Court dismissed the petition without an examination of its merits in respect of all petitioners. The reason for the dismissal was not that the court found itself incompetent to rule on such a petition or that the particulars of the individual property owners were such that they lacked a justifiable interest in having a judicial review of the Government's decision. Instead, the Supreme Administrative Court considered that it could not be assessed with any certainty who would be sufficiently affected by the railway project until the railway plan had been drafted. In other words, it was too early to determine who would be entitled to bring a legal action against the Government's decision. The court added that a judicial review would instead be available of the later decision to adopt the railway plan.

59. Given the Supreme Administrative Court's decision to dismiss the challenge against the Government's permissibility decision — and the reasons given for the dismissal — it must be concluded that, in this particular case, the petition for judicial review was not an effective remedy, at least not at that point in time.

It would not have made any difference if all applicants had joined that petition. The same goes for the subsequent proceedings relating to construction permits. Whether or not it was at all possible to have an assessment of the impact of the railway project on the enjoyment of individual homes and property in these proceedings, it is clear that the environmental courts found themselves bound by the Government's permissibility decision and limited their examination to more general environmental issues. For these reasons, the applicants who did not partake in the various petitions and appeals during the first two sets of proceedings must be excused for their lack of action.

60. Coming to the third stage of the domestic examination of the railway project — the proceedings on the adoption of the railway plan — it is true that six applicants failed to appeal to the Government. However, such an appeal was not a prerequisite for the right to subsequently request a judicial review. This is shown by the fact that when the applicants made a petition for judicial review, they were all accepted as petitioners by the Supreme Administrative Court. None of them had their case dismissed for failure to exhaust previous remedies. Therefore, since all of the applicants participated in these judicial review proceedings and since the Supreme Administrative Court had previously, in its decision of 1 December 2004, indicated that this was the time to obtain a judicial examination of their individual interests, all of the applicants must be considered to have exhausted the potentially effective domestic remedies available in relation to the construction of the railway.

61. Finally, with respect to the Government's submission that the applicants could claim compensation for a violation of the Convention before the Swedish courts or the Chancellor of Justice, the Court, in several cases, has observed that domestic case-law has developed since 2005 and has concluded that, following a Supreme Court judgment of 3 December 2009 (NJA 2009 N 70), there is now an accessible and effective remedy of general applicability, capable of affording redress in respect of alleged violations of the Convention (see, among other authorities, *Eriksson v. Sweden*, cited above, §§ 48–52, and *Marinkovic v. Sweden* (dec.), no. 43570/10, § 43, 10 December 2013, and — in regard to the domestic case-law developments — the latter decision, §§ 21–31). However, this remedy, which introduced a general principle of law that compensation for Convention violations can be ordered without direct support in Swedish law, was established after the present application had been lodged on 4 June 2009. The assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged to the Court. The question arises whether the applicants should still be obliged to make use of this remedy, for which the limitation period has not yet expired. Such an obligation may exceptionally exist, depending on the particular circumstances of each case (see, for example, *Brusco v. Italy* (dec.), no. 69789/01,

ECHR 2001-IX, and *Andrei Georgiev v. Bulgaria*, no. 61507/00, § 78, 26 July 2007). In this respect, it should be noted that the domestic developments have been gradual and set out in case-law with no specific reference to the type of case or situation in which the applicants have been involved. Moreover, the various domestic proceedings relating to the construction of the railway in question lasted for nine years, from 1999 to 2008. In these circumstances, it would not be reasonable to expect the applicants to turn again to the domestic courts or to the Chancellor of Justice to make use of a remedy established after the introduction of the present application. Consequently, there are no exceptional circumstances in the instant case which would justify a departure from the general rule that the issue of exhaustion of domestic remedies is assessed with reference to the time when the application was lodged to the Court. It has not been shown that, at that time, there was case-law demonstrating that compensation for Convention violations could be awarded for a lack of access to court. Nor had a compensation remedy of general applicability been established yet.

62. The Government's objection as to the exhaustion of domestic remedies must accordingly also be rejected.

63. No other ground for declaring the application inadmissible has been invoked or established. It must therefore be declared admissible.

B. Merits

1. The applicants' submissions

64. The applicants submitted that the Swedish courts had failed to ensure them a fair trial in respect of their civil rights by denying them a judicial review of the Government's permissibility decision of 12 June 2003. Once that decision had taken effect the administrative authorities and courts were bound by it in all the subsequent examinations and could only decide on issues relating to the construction and design of the railway. In the applicants' view, the only effective way to determine their civil rights would have been a judicial review before the Supreme Administrative Court. However, that possibility had been closed through the court's decision of 1 December 2004 to dismiss the petition for judicial review, referring to later proceedings concerning the railway plan, and its judgment of 10 December 2008 not to examine the issues of location and effects of the railway in the proceedings concerning the railway plan.

2. The Government's submissions

65. The Government submitted that the question of permissibility lay within the Government's power since they were best placed to make the overall review required, taking account of the relative weight of environmental protection, employment policy, regional policy and other aspects. The permissibility review was therefore mainly of a political nature. Furthermore, in relation to issues of

urban and regional planning policies, where the community's general interest was pre-eminent, the State's margin of appreciation was arguably greater than when exclusively civil rights were at stake. Moreover, there was nothing to indicate that the decision on permissibility of the railway had been arbitrary or taken in conflict with national or international legislation or that the Government had erred in fact or in law. A fair balance had allegedly been struck between the competing interests of the individuals concerned and the community as a whole.

66. Moreover, the Government asserted that the applicants had had a clear and practical opportunity to challenge the issues that they believed interfered with their rights in the various proceedings relating to the railway. They contended, *inter alia*, that the minimum safeguards to ensure a fair balance between the applicants' and the community's interests had been put into place in the present case; the construction of the railway had been preceded by an environmental impact assessment procedure, assessing the probability of compliance with applicable environmental standards and enabling interested parties, including the applicants in the instant case, to contribute their views.

67. The Government further argued that the applicants' claims as concerned human health, the environment and the consideration of alternative sites for the railway had indeed been considered in the proceedings on the adoption of the railway plan, including the 2008 judicial review of the Supreme Administrative Court. The applicants had also had the opportunity to have the alleged nuisances emanating from the railway, including loss of residential value and noise issues, examined by the relevant authorities and courts. The Government further pointed out that the majority of the applicants had received compensation for reduced residential value or permanent loss of market value and that measures had been taken to reduce or exclude noise nuisance. Allegedly, affected applicants still had the possibility of instituting proceedings to claim compensation.

3. The Court's assessment

68. From the outset, the Court recognises the complexity of the planning and construction of infrastructure, such as a railway in the present case, as well as the public and economic concerns that such a process entails. The choice of how to regulate the construction of railways is a policy decision for each Contracting State to take according to its specific democratic processes. Article 6 § 1 cannot be read as expressing a preference for any one scheme over another. What Article 6 § 1 requires is that individuals be granted access to a court whenever they have an arguable claim that there has been an unlawful interference with the exercise of one of their (civil) rights recognised under domestic law (see *Athanassoglou and Others v. Switzerland* [GC], cited above, § 54).

69. Turning to the facts of the present case, it is clear — and undisputed — that the applicants had civil rights, at least in relation to the enjoyment of their property, which they wished to invoke in the domestic proceedings. As has

been mentioned above (paragraph 58), the Government's decision of 12 June 2003 to permit construction of the railway in the specified "corridor", as soon as it was final, acquired binding force on the further examinations relating to the railway. Thus, the Supreme Administrative Court's judicial review of the Government's decision would have been the natural point in time for the rights of the local property owners to be determined. However, the court, on 1 December 2004, denied the petitioners *locus standi* and stated that the parties sufficiently affected by the future railway could have a judicial review of the later Government decision on the railway plan. Nevertheless, the courts in the subsequent proceedings, including the Supreme Administrative Court when it examined the railway plan in 2008, found, in accordance with the applicable rules, that they were bound by the Government's permissibility decision, and accordingly did not examine any issues that had been determined by that decision.

70. It is true that certain details of the railway project could be determined in the subsequent proceedings and that several applicants have received some form of compensation for the effects of the railway construction. The fact remains, however, that the applicants were not able, at any time of the domestic proceedings, to obtain a full judicial review of the authorities' decisions, including the question whether the location of the railway infringed their rights as property owners. Thus, notwithstanding that the applicants were accepted as parties before the Supreme Administrative Court in 2008, they did not have access to a court for the determination of their civil rights in the case.

There has therefore been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

71. Referring to the same facts and to the Court's findings in the case of *Taşkın and Others v. Turkey* (no. 46117/99, § 119, ECHR 2004-X), the applicants submitted that there had been a violation also of their right to respect for their private and family life under Article 8 of the Convention, as it entailed a right "to appeal to the courts against any decision, act or omission where they consider[ed] that their interests or their comments [had] not been given sufficient weight in the decision-making process".

72. The Government disagreed. They made the same preliminary objections as under Article 6. In addition, they claimed that, even if there had been an interference with the applicants' rights under Article 8, it had not been shown that the railway in question entailed such adverse effects for them that the minimum level required to attract the application of Article 8 had been reached.

73. The Court notes that this complaint is in substance the same as the one examined above under Article 6. As it is so linked, the present complaint must be declared admissible. However, having regard to the findings under Article 6, the Court finds that no separate issue arises under Article 8.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. 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

75. The applicants stated that they did not request any other compensation than costs and expenses for their legal representation, as they had introduced the application for reasons of principle.

76. The Court, accordingly, does not award any amount under this head.

B. Costs and expenses

77. The applicants claimed a total of 562,500 Swedish kronor (SEK; approximately 61,000 euros (EUR)) in costs and expenses for the proceedings before the Supreme Administrative Court concerning the railway plan and the proceedings before the European Court. This amount corresponded to legal fees for 100 hours of work by Mr Rosengren (60 hours in the domestic proceedings and 40 hours in the present proceedings) and expenses for 50 hours of work by Mr Ebbesson (20 hours in the domestic proceedings and 30 hours in the present proceedings), all at an hourly rate of SEK 3,750 (approximately EUR 410), inclusive of value-added tax (VAT).

78. The Government submitted that the claims for legal fees incurred during the domestic proceedings were excessive and not sufficiently specified as to the time spent on every measure. They also noted that Mr Rosengren had represented six petitioners who were not applicants in the present proceedings. Furthermore, the hourly rate claimed exceeded the Swedish hourly legal aid fee, which for 2013 was SEK 1,552.50 (VAT included). In total, the Government accepted compensation for the domestic proceedings in the amount of SEK 62,125 (approximately EUR 6,800), corresponding to 30 hours of work by Mr Rosengren and 10 hours by Mr Ebbesson. As regards the proceedings before the European Court, the Government found also these claims excessive, noting that both representatives were already familiar with the circumstances of the case as they had acted on the applicants' behalf in the domestic proceedings. The compensation for the present proceedings should thus not exceed SEK 54,375 (approximately EUR 5,900), corresponding to 20 hours of work by Mr Rosengren and 15 hours by Mr Ebbesson. Finally, the Government submitted that the compensation should be reduced in the event that the Court found a breach of the Convention in relation to only part of the applicants' complaints.

79. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these

have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard should be had to the fact that Mr Rosengren represented also other petitioners than the applicants in the domestic proceedings, that a substantial part of the applicants' pleadings, notably in the domestic proceedings, concerned environmental issues which have not been considered to fall under the applicants' "civil rights" within the meaning of Article 6 of the Convention and that, albeit of lesser importance, the complaint under Article 8 has been found to raise no separate issue. Making an overall assessment, the Court considers it reasonable to award the total amount of EUR 20,000, including VAT, for costs and expenses in the domestic proceedings and the proceedings before the Court.

B. Default interest

80. 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 6 § 1 of the Convention;

3. *Holds* that no separate issue arises under Article 8 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to them, to be converted into the 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 25 September 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President

ANNEX 28

FIRST SECTION

CASE OF KAPA AND OTHERS v. POLAND

(Applications nos. 75031/13 and 3 others)

JUDGMENT

Art 8 • Respect for home • Fair balance not struck when rerouting heavy traffic to unequipped road near applicants' homes, exposing them to severe nuisance • Lack of timely and adequate response by domestic authorities to the problems affecting nearby inhabitants

STRASBOURG
14 October 2021

FINAL

28/02/2022

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kapa and Others v. Poland,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Ksenija Turković, *President,*
Péter Paczolay,
Krzysztof Wojtyczek,
Alena Poláčková,
Gilberto Felici,
Erik Wennerström,
Ioannis Ktistakis, *judges,*
and Renata Degener, *Section Registrar,*

Having regard to: the applications (nos. 75031/13, 75282/13, 75286/13 and 75292/13) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 22 November 2013 by four Polish nationals, the

first applicant, Ms Katarzyna Kapa, the second applicant, Mr Jacek Juszczyk, the third applicant, Mr Mateusz Juszczyk and the fourth applicant, Ms Barbara Juszczyk ("the applicants"), as indicated in the appended table;

the decision to give notice of the applications to the Polish Government ("the Government");

and the parties' observations;

Having deliberated in private on 21 September 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case raises an issue under Article 8 in so far as the State authorities, for a period of over two years, routed extremely heavy day and night motorway traffic *via* a road unequipped for such a purpose which ran through the middle of a town in very close vicinity to the applicants' home. This, according to the applicants, had the effect of exposing them to severe nuisance: noise (exceeding domestic and international norms), vibrations and exhaust fumes.

THE FACTS

2. The first applicant was born in 1984. The second applicant was born in 1958. The third applicant was born in 1991 and the fourth applicant was born in 1959. The applicants are relatives and they all live in Smolice. They were represented by Mr Ł. Brydak, a lawyer practising in Warsaw.

3. The Government were represented by their Agent, Ms J. Chrzanowska, and subsequently by Mr J. Sobczak, of the Ministry of Foreign Affairs.

4. The facts of the case, as established by the domestic courts in the course of the civil proceedings described below and as submitted by the parties, may be summarised as follows.

I. BACKGROUND

5. Since an unspecified date the applicant family has lived in a detached house situated in Smolice at no. 11 Cegielniana Street, several metres from national road no. 14 ("the N14 road").

6. The N14 road runs parallel to the applicants' street through the middle of the neighbouring town of Stryków, which has approximately 3,500 inhabitants. Where the N14 road runs through Stryków, it is known as Warszawska Street.

7. In the southern part of Stryków, approximately 1 km from the applicants' house, the A2 motorway crosses the N14 road. The intersection of the two roads is known as "the Stryków II junction".

8. The A2 motorway forms part of the Second European Transport Corridor, linking Hanover, Berlin, Frankfurt, Poznan, Warsaw, Brest, Minsk and Moscow. It runs through all of central Poland and is one of the most important roads in the country.

9. The Polish part of the motorway, which bears the name "Liberty Motorway" (*Autostrada Wolności*), was built in sections over several years, with construction starting in 2001. It currently comprises eleven sections totalling 475 km. Tolls are payable on some sections of the motorway, and other sections are toll-free.

10. One of the motorway's sections runs between Konin and Stryków and is 103 km long. It currently has three lanes which are operational. It was free to use this section of the A2 motorway from 2006 until the middle of 2011. Currently, the toll costs approximately 2.50 euros (EUR).

11. When it was built in 2006, the section of the motorway in question ended at the Stryków II junction, and all the motorway traffic was temporarily diverted directly onto the N14 road.

12. Stryków is under the administration of the local authorities of Łódzkie Province (*Województwo łódzkie*).

13. The 1994 local master plan (*plan zagospodarowania przestrzennego*) for Stryków, and the later versions of that plan, feature a motorway project with a ring road around the city.

II. PROCEEDINGS CONCERNING THE CONSTRUCTION AND OPERATION OF THE A2 MOTORWAY SECTION BETWEEN KONIN AND STRYKÓW

14. The first phase of the two-tier procedure concerning the construction of the A2 motorway started on 25 August 1995 when the Head of the Central Planning Office (*Centralny Urząd Planowania*) issued a decision indicating where the motorway would be located.

15. On 13 February 1996 the Minister for the Environment decided on the course of the relevant section of the motorway, between the towns of Września (near Konin) and Stryków.

16. The second phase of the procedure, namely administrative proceedings concerning the location of the relevant section of the A2 motorway, were initiated on 18 April 1996.

17. On 26 April 1996 the mayor of Stryków (*burmistrz miasta-gminy*) raised a formal objection (*sprzeciw*) to a plan to locate the temporary end point of the A2 motorway (the future Stryków II junction) on the territory of the Stryków Municipality (*gmina*).

18. Among other things, the mayor suggested two alternative locations for the section's end point, namely Łowicz, belonging to Łódzkie Province (*Województwo Łódzkie*), and Żyrardów, belonging to Masovian Province (*Województwo Mazowieckie*). The mayor argued that the traffic on national road no. 71 and regional road no. 712, both passing through Stryków, was already very heavy. Redirecting the motorway traffic through the town, without putting in place

any alternative road connection, was likely to obstruct the local road traffic and create environmental risks.

19. On 23 July 1996 the Governor of Łódzkie Province (*wojewoda*) decided that the relevant section of the A2 motorway would run through the southern part of the town of Stryków.

20. To that end, the governor set out various technical specifications relating to the A2 motorway project.

21. In particular, the following actions had to be undertaken during the planning phase. The so-called "zone of nuisance" (*strefa uciążliwości*) was to be determined in the light of the results of an enhanced and extensive environmental impact assessment (*nasilona i pogłębiona ocena oddziaływania na środowisko*). Extensive environmental studies were to be carried out in relation to the problematic areas. The construction project was to reflect the results of those studies. Residential areas along the motorway were to be protected from noise by means of anti-noise screens and other measures. Areas along the motorway were to be forested. At each phase of the project, the owners of properties affected by the motorway were to be protected from the burden of nuisance (noise, air and water pollution) if the latter was of an above-average degree (*ponad przeciętną miarę*).

22. The governor instructed the investor that the relevant application for a construction permit would have to be accompanied by an assessment of the results of local noise monitoring, as well as an extended environmental impact assessment (*pogłębiona ocena oddziaływania na środowisko*).

23. The governor considered himself precluded from examining the objection raised by the mayor of Stryków because, as he explained, in the light of the relevant provisions of the Law on Paid Motorways, a decision on the location of a motorway could not go beyond the scope of the decision issued by the Head of the Central Planning Office on 25 August 1995, which only concerned the section of the motorway within the limits of Łódzkie Province. The governor found that the development of the motorway did have to be organised section by section. Waiting for the section after Stryków to be planned before approving the location of the section up to Stryków would make the whole project unprofitable for the investor.

24. The above-mentioned decision of 23 July 1996 did not address the question of rerouting the motorway traffic *via* the N14 road.

25. It appears that in 2002 a number of environmental impact assessment reports were produced. These documents have not been submitted to the Court.

26. In the course of a public consultation on the motorway project, one association for the protection of the environment made a series of submissions and was ultimately admitted as a party to the administrative proceedings in question. In particular, the association asked that studies be carried out to measure the

impact of the motorway on the health of the population concerned. To that end, they asked that the health of residents living within 1 km of the motorway be monitored. The association also asked that individual vulnerable residents be protected from the impact of the future motorway traffic.

27. On 12 February 2003, considering the results of an assessment of the auditory effects of the motorway on the health of the population concerned, the Governor of Łódzkie Province issued an ordinance. The governor thus declared the part of the section of the motorway which was located directly before Stryków a reduced traffic zone (*obszar ograniczonego użytkowania*).

28. On 26 March 2003 the Governor of Łódzkie Province approved the investor's construction project for the relevant section of the A2 motorway and issued the General Directorate of National Roads and Motorways (*Generalna Dyrekcja Dróg Krajowych i Autostrad*, hereinafter "the roads and motorways authority") with a building permit. As to the environmental association's request to have the health of the population concerned monitored, the governor observed that no legal provisions existed to regulate such action. Overall, the governor considered that the project offered solutions ensuring the protection of the environment.

29. The above-mentioned decision did not address the question of rerouting the motorway traffic *via* the N14 road.

30. On 14 July 2003 the Chief Inspector of Construction Supervision (*Główny Inspektor Nadzoru Budowlanego*) rejected as out of time an appeal lodged by the environmental association against the decision to issue the construction permit.

31. On 25 July 2006 the Inspector of Construction Supervision for Łódzkie Province permitted the roads and motorways authority to use that section of the motorway. That decision did not address the question of rerouting the motorway traffic *via* the N14 road.

III. OPERATION OF THE SECTION OF THE A2 MOTORWAY BETWEEN KONIN AND STRYKÓW

A. Timeline of events and monitoring of the N14 road

32. On 26 July 2006 the roads and motorways authority opened the new, two-lane, section of the A2 motorway running between the cities of Konin and Stryków (the Stryków II junction).

33. The motorway was then directly connected to the N14 road leading North, to Warsaw and Łódź.

34. Following the opening of the section of the A2 motorway in question, traffic in the centre of Stryków, especially that made up of trucks, seriously increased.

35. An impact assessment carried out in September 2006 by the Warsaw Institute for Environmental Protection (*Instytut Ochrony Środowiska*) revealed that noise levels on the N14 road significantly exceeded the statutory norms.

36. Protests erupted and the residents of Stryków and the surrounding area called on the authorities to urgently limit the traffic on the N14 road, especially at night.

37. Between 2006 and 2017 the applicants did not lodge any complaints about the noise, vibrations or air pollution with the local authorities responsible for environmental protection. They also did not ask for any specific pollution or noise assessment to be carried out in respect of their property.

38. As a result of the protests and complaints lodged by other residents of Stryków, on 10 August 2006 the roads and motorways authority presented to the city council (*Rada Miasta*) a plan for the fast-track construction of a ring road to link the A2 motorway with the N14 road outside the city limits. In the alternative, a 1.7-km extension of the A2 motorway beyond the southern city limits was proposed, in order to connect it with the nearby A1 motorway.

39. In September 2006 noise monitoring was carried out by privately commissioned experts of the Institute for Environmental Protection (*Instytut Ochrony Środowiska*). Their report was drawn up on 15 January 2007.

40. According to that report, the average number of vehicles passing through Stryków *via* the N14 road was 15,381 during the day and 2,818 at night, as measured in September 2006. The noise levels measured in Stryków at the same time significantly exceeded the national norms which at the relevant time were: 60 dB during the day and 50 dB at night (see paragraph 108 below). In particular, the noise levels in residential areas exceeded the norms by between 9.9 dB (L_{Aeq} — the equivalent continuous sound level) and 12.7 dB (L_{Aeq}) during the day, and by between 18.5 dB (L_{Aeq}) and 21.3 dB (L_{Aeq}) at night.

41. The experts observed that the main cause of the noise was truck traffic, which constituted between 40 and 47% of all the traffic in Stryków.

They considered that such a large number of trucks was highly unusual for traffic within a city.

42. The experts concluded that the noise should not be tolerated in the long term, even assuming that the situation was temporary. They recommended that stringent measures be taken in order to move a large portion of the traffic beyond the city limits.

43. Also in 2006, air and water pollution monitoring was carried out by the Chief Inspectorate for Environmental Protection (*Główny Inspektorat Ochrony Środowiska*). This revealed, *inter alia*, that the annual average concentration of sulphur dioxide and nitrogen dioxide (pollutants which contribute to acid deposition and eutrophication respectively, which in turn can lead to changes in soil and water quality) on Warszawska Street was 8.9 $\mu g/m^3$ and

33.1 μg/m^3 (micrograms per cubic metre) respectively. On a scale of I-V, the river waters in that area were rated IV, "unsatisfactory". The water in the Stryków well was rated II, "good quality".

44. In October 2006 the surface of Warszawska Street in Stryków was renovated.

45. In December 2006 the roads and motorways authority reorganised the A2 motorway in order to alleviate the nuisance posed by the increased traffic in Stryków. In particular, alternative roads to Warsaw were indicated to motorway users by means of traffic signs.

46. According to one of the experts appointed by the Warsaw Regional Court (*Sąd Okręgowy*), the above-described measure brought the traffic levels on the N14 road back down to those from before 2006, but did not eliminate the noise emitted by the trucks, especially at night (see also paragraph 78 below). Measurements taken by the expert in September 2008 revealed that the N14 road was still affected by heavy and fluid traffic which included a significant number of trucks. In the Government's submission, that could be partly caused by the development of industrial zones and service areas in Stryków.

47. The court-appointed expert further observed that on 31 August 2006 the project concerning the *ad hoc* traffic restrictions and reorganisation (see paragraph 45 above) had been approved (by the authority in charge of road and bridge management, *Biuro Zarzadzania Drogami i Mostami*), despite its various shortcomings. In particular, contrary to the applicable law, the project had not contained certain maps, a technical description (including the specifications of the road and the traffic), a timeline for its implementation, or the name of the project designer. On 15 September 2006 the project had been registered with the Office of Motorway Construction (*Biuro Zarządzania Budową Autostrady*) so that it could be implemented, with the implementation date set for 1 October 2006. In view of the great number of custom-made traffic signs which had had to be prepared, the reorganisation of traffic had taken place in December 2006.

48. The roads and motorways authority decided not to opt for anti-noise screens along the N14 road, because the space along Warszawska Street was insufficient and access to multiple individual plots along the street could not be blocked or visually obstructed.

49. The operation of the motorway resulted in the creation of various logistics centres and large warehouses in the Smolice and Stryków areas. A general increase in traffic was thus recorded on the streets of these towns.

50. According to a report drawn up on 30 November 2010 by another expert appointed by the Warsaw Regional Court, the roads and motorways authority could not have predicted what level of traffic in Stryków would result from the operation of that section of the A2 motorway. Truck traffic was generated by

not only the operation of the motorway, but also the operation of other national and regional roads in the vicinity of Stryków.

B. Comparative environmental impact assessment drawn up for the A2 motorway in the area of the Stryków II junction

51. In January 2008 a post-construction environmental impact assessment report was issued in respect of the part of the A2 motorway between Dąbie and Stryków (57 km before Stryków).

52. The following relevant information pertaining to the area of the Stryków II junction featured in that document.

53. The measurements carried out in various directions on the motorway revealed the following traffic statistics.

54. On 21 August 2007 the number of light vehicles per hour ranged from 282 to 475 between 6 a.m. and 10 p.m., and from 114 to 206 between 10 p.m. and 6 a.m. The number of heavy vehicles (such as trucks or buses) per hour ranged from 191 to 296 between 6 a.m. and 10 p.m., and from 162 to 234 between 10 p.m. and 6 a.m. The percentage of heavy vehicles in the traffic peaked at 47.5% between 6 a.m. and 10 p.m., and at 64.4% between 10 p.m. and 6 a.m. The total number of vehicles counted in the twenty-four hours was 12,499.

55. On 23 August 2007 the number of light vehicles per hour ranged from 220 to 416 between 6 a.m. and 10 p.m., and from 94 to 190 from 10 p.m. to 6 a.m. The number of heavy vehicles (such as trucks or buses) per hour ranged from 195 to 302 between 6 a.m. and 10 p.m., and from 175 to 230 between 10 p.m. and 6 a.m. The percentage of heavy vehicles in the traffic peaked at 48.8% between 6 a.m. and 10 p.m., and 66.9% between 10 p.m. and 6 a.m. The total number of vehicles counted in the twenty-four hours was 11,587.

56. Overall, the average number of vehicles in the area of the Stryków II junction was 11,244 between 6 a.m. and 10 p.m., and 3,006 between 10 p.m. and 6 a.m., with a total number of 14,250 vehicles every twenty-four hours. Nearly 52% of that traffic consisted of heavy vehicles.

57. The measurements carried out specifically in respect of the junction between the A2 motorway and the N14 road revealed the following numbers of vehicles: 14,552 light vehicles every twenty-four hours; 5,934 heavy vehicles every twenty-four hours; 12,718 light vehicles between 6 a.m. and 10 p.m.; 4,320 heavy vehicles between 6 a.m. and 10 p.m.; a total of 17,038 vehicles between 6 a.m. and 10 p.m.; 1,834 light vehicles between 10 p.m. and 6 a.m.; 1,614 heavy vehicles between 10 p.m. and 6 a.m.; and a total of 3,448 vehicles between 10 p.m. and 6 a.m.

58. The average speed was 105 km/h for light vehicles and 75 km/h for heavy vehicles.

59. The measurements of noise levels which were carried out mainly on sunny days in August 2007, at a distance of 25 to 800 metres from the edge of the road and at a height of 4 metres, revealed that the noise ranged from 49.3 to 61.8 dB during the day, and from 47.7 to 59.6 dB at night. The statutory noise levels were exceeded during the day at three out of eighteen measuring stations (by up to 1.8 dB) and at night at fifteen out of eighteen stations (by up to 9.6 dB). During the monitoring, it was impossible to separate the noise coming from the A2 motorway from that produced by other sources, such as local activities or local roads.

60. Average annual levels of air pollutants for 2006 were as follows: 16-20 μg/m^3 of nitrogen dioxide (the statutory limit of 40 μg/m^3 was not exceeded); 9–15 μg/m^3 of sulphur dioxide (the statutory limit of 20 μg/m^3 was not exceeded); 16–18 μg/m^3 of PM_{10} (the statutory limit of 40 μg/m^3 was not exceeded); 1.5–2.5 μg/m^3 of benzo(a)pyrene (the statutory limit of 5 μg/m^3 was not exceeded); and 0.05 μg/m^3 of lead (the statutory limit of 0.5 μg/m^3 was not exceeded).

61. The 2008 environmental impact assessment report also stated that thirty-four anti-noise screens, the height of which varied from 2.5 to 4.5 metres, and five two-metre-high anti-noise ramparts had been put in place along the section of the A2 motorway between Konin and Stryków.

62. The section of the motorway in question was equipped with watertight ditches and devices which partly cleaned road sludge before it was drained away.

63. To reduce the nitrogen dioxide pollution which was expected to be emitted by the motorway traffic, trees and bushes had been planted along the motorway. The report's authors concluded that because that greenery had been planted only recently, it was not yet fulfilling its filtering function.

C. Development of the A2 motorway's extension between Stryków II and Stryków I junctions.

64. As the section of the motorway between Konin and the Stryków II junction was being developed, the authorities were developing the project concerning the 1.7-km extension of the motorway through the southern outskirts of Stryków, between the Stryków II and Stryków I junctions.

65. The environmental impact assessment for that part of the A2 motorway was completed in September 2003. Following the issuance of a number of permits, works began in late 2006. They were to be completed in the autumn of 2008. The works then slowed down because of either a lack of government funding or, in the applicants' submission, the roads and motorways authority's persistent failure to make use of the State and European Union funds allocated to the project.

66. On 22 December 2008 the above-mentioned extension to the A2 motorway was opened for use.

67. The extension proved to effectively reduce the traffic made up of heavy vehicles on the N14 road, especially in the area where the applicants' house was located. The applicants confirmed that the traffic had dropped to an acceptable level.

D. Health impact of the operation of the section of the A2 motorway

68. A privately commissioned report drawn up by psychologists on 15 September 2008 stated that the life of people living on Warszawska Street and on nearby streets had been very badly affected by the increased traffic on the N14 road.

69. Firstly, Warszawska Street was very difficult to cross.

70. Secondly, vehicles emitted a great deal of noise and exhaust fumes and caused vibrations and other disturbance. That nuisance persisted practically twenty-four hours a day. As a result, the residents could not open windows, and damage was caused to their houses. The residents lived with serious stress caused by the audible noise and (even more harmful) infrasound coming from trucks and other vehicles with large engines. This was compounded by the high concentration of exhaust fumes and vibrations.

71. The experts considered that severe and persistent noise could constitute a biological stress factor causing physiological changes in humans. Such biological stress would initially cause an alert reaction of the human body and, in the event of a strong stimulus (noise over 60 dB), could lead to death. Longer exposure to the stimulus caused insomnia, irreversible exhaustion, and also led to death. It was widely accepted among scientists that, because of the particularly strong neural pathways between the hearing apparatus and the brain, persistent audible noise caused not only hearing loss but also mental discomfort, and nervous breakdowns and disorders in internal organs and brain functions, such as cardiological ailments, strokes, breathlessness, dizziness, high blood pressure and the risk of ulcers. Exposing children to noise could cause attention deficit disorders and hyperactivity, learning difficulties, aggression, withdrawal, apathy, insomnia, bed-wetting and night-time fears. Children living in a noisy environment were also very susceptible to drops in their overall immunity, allergies, arthrosis, skin disease, ulcers, nausea, panic attacks, constipation or diarrhoea. The symptoms among adults included problems with blood circulation and digestion, back pain, asthma, allergies, hair loss, depression, tobacco and alcohol addiction, aggression, depression and infertility.

72. Ultrasound, which mostly affected women and young people, caused, among other things, earache, hearing and speech impairments, stomach and heart pain, and breathing and hormone production disorders.

73. Vibrations could lead to the development of a so-called "vibrations syndrome", which seriously affected various bodily functions.

74. The experts concluded that life for the residents of Warszawska Street in Stryków was dreadful, and they risked severe psychophysiological ailments, illnesses and perhaps even a decrease in their life expectancy. All residents complained of interrupted sleep because of unbearable noise, infrasound and vibrations. Some of them had developed autoimmune diseases linked to stress.

E. Civil proceedings against the national roads and motorways authority

75. On 1 April 2009 the applicants brought a civil action against the State Treasury and the national roads and motorways authority, seeking compensation for damage to their physical and mental health and the infringement of their right to a peaceful and undisturbed private and family life, home and feeling of security (case no. XXV C 408/09). They sought 15,000 Polish zlotys (PLN — approximately EUR 3,750) per person in compensation.

76. On 7 April 2009 the Warsaw Regional Court joined the applicants' case to an action which had been lodged one year earlier by a certain B. W., whose house was located in the vicinity of the applicants' plot, along the N14 road. That claimant sought compensation in the amount of PLN 60,000 (approximately EUR 15,000). B. W. also applied for the respondent to be ordered to reorganise the traffic by barring 25-tonne vehicles from entering the town of Stryków. He withdrew that claim on 20 February 2009.

77. On 22 November 2011 the Warsaw Regional Court dismissed the claimants' action for compensation. In view of the unprecedented nature of the action, the applicants were not ordered to bear any costs of the proceedings.

78. The regional court based its rulings on the following pieces of evidence: various reports from experts in traffic engineering and acoustics, including the report of 30 November 2010 (described in paragraphs 79–87 below) and submissions made by the claimants and by specialists employed at the relevant time by the roads and motorways authority. The court rejected the report prepared by the Chief Inspectorate for Environmental Protection based on the results of the monitoring of air pollution in the area (see paragraph 43 above). The court considered that, even though it was common knowledge that increased traffic led to increased emissions of exhaust fumes, the exact cause of the air pollution in the area in question was unknown. The court also considered it unnecessary to examine the results of the noise monitoring report commissioned by the claimants (see paragraph 39 above), or to obtain expert evidence on the effects of the noise on the applicants' mental health.

79. The report drawn up on 30 November 2010 by the court-appointed expert in road traffic engineering was produced to answer the question of whether the roads and motorways authority had taken adequate and sufficient measures in the way that they had organised traffic in Stryków. The report contained the following observations and conclusions, in so far as relevant.

80. The A2 motorway and the N14 road were, at the material time, a preferred route for drivers. That section of the roads was toll-free and the technical specifications of these roads were better than those on the alternative roads, the N2 and N72.

81. Intensified traffic on the N14 road was likely to persist until: (i) the opening of the next part of the road, between the Stryków II and Stryków I junctions (the part which was to link the A2 motorway with the A1 motorway passing from the South to the North, just east of Stryków); (ii) the putting in place of *ad hoc* traffic restrictions; or (iii) the charging of tolls for use of the section of the A2 motorway between Konin and Stryków.

82. The traffic on the N14 road, after the A2 motorway had been connected to it, was estimated to have increased by 35% in comparison with 2005. Truck traffic on the N14 road had peaked in 2006 at 23% of the total traffic that year. That represented a 13% increase compared with previous years.

83. In line with the local master plan, the expansion of buildings with a commercial function (namely warehouses) had been noted in and around Stryków. That had, in all likelihood, generated the increased traffic made up of trucks and other delivery vehicles on the N14 road.

84. The extension to the motorway that had opened on 22 December 2008 was a temporary construction which did not meet the technical specifications of a motorway. It was also not equivalent to the ring road which had initially been planned to take the traffic out of the centre of Stryków. The court-appointed expert concluded that there was a high probability that, despite the operation of that extension, Warszawska Street had remained the main transit route for traffic diverging from the A2 motorway, including trucks. That road was the shortest connection from the South to the North, and also the only road leading to the warehouses and large commercial buildings in Stryków. Moreover, the 2008 extension had had a tendency to become congested. Overall, however, the operation of that temporary extension had contributed to the decrease in traffic on Warszawska Street after December 2008.

85. Because of intensified traffic between 2006 and December 2008, Stryków residents had been likely to experience difficulties in crossing Warszawska Street on foot and driving onto that street from their individual plots. When traffic on that road congested, the local population had been exposed to high levels of noise and emissions from the exhaust fumes of vehicles immobilised in traffic jams. Local traffic had been greatly disturbed on such occasions, and aggression among road users had frequently been recorded.

86. The expert's overall conclusion was as follows.

The intensity of the traffic which had driven down Warszawska Street in Stryków after 26 July 2006 could not have been fully predicted prior to the opening of the section of the A2 motorway from Konin.

With the exception of the shortcomings in the 2006 project concerning *ad hoc* traffic restrictions (see paragraph 44 above), the roads and motorways authority had been diligent in responding to the problem of the increase in traffic. In particular, the authority had engaged in (i) regular traffic monitoring; (ii) the *ad hoc* reorganisation of traffic in December 2006, with the idea for that measure being presented two weeks after the section of the motorway had begun to operate; and (iii) the planning and construction of the motorway's extension through the Stryków I junction in December 2008.

87. The shortage of funds had made it impossible for the roads and motorways authority to construct a ring road around Stryków, as featured in the local master plan. In the light of that fact, the expert concluded that extending the motorway through the Stryków I junction offered an effective solution to the problem in the shortest possible time.

88. The regional court considered that the applicants' right to health and the peaceful enjoyment of their home had been infringed because the noise in their places of residence caused by traffic had gone above the statutory norms. The court held, however, that the authorities had been quick to acknowledge the problem brought to their attention by the area's residents and to implement an *ad hoc* measure whereby a portion of the traffic had been diverted to the capital *via* other roads. The authorities had also been swift to prepare and start implementing the plan for a long-term solution, namely the construction of a road extension outside of Stryków. As of December 2008 those measures had significantly reduced the traffic in the town. In view of these considerations, the court concluded that the authorities had acted in accordance with the law, namely section 20 of the Act of 21 March 1985 on public roads (see below), and thus could not be held liable for the infringement of the applicants' personal rights. That element distinguished the case from the judgment of the Supreme Court (*Sąd Najwyższy*) of 23 February 2001 (II CKN 394/00, see below), in which it had been held that a local government's tolerance of noise levels which exceeded the national norms was unlawful and could constitute an infringement of personal rights. Lastly, the court observed that compensation could not be awarded under Article 417 of the Civil Code, because the applicants had not proved that the harm resulting from the increased traffic between 2006 and December 2008 had made them unfit for work.

89. On 19 December 2012 the Warsaw Court of Appeal (*Sąd Apelacyjny*) dismissed an appeal by the applicants without charging them any court fees.

90. The appellate court employed the following reasoning.

91. The construction of the A2 motorway had pursued a legitimate general interest of society and had received media attention. Because of that, it was understandable that the motorway could not simply have been cut off before reaching Stryków, and that traffic had had to be directed through the town.

The increased traffic had indeed caused nuisance to the residents of the area, but it had been the only available solution which had been technically sound. The N14 road had been in operation prior to the motorway, and "nobody had promised ... that [the motorway's] construction [would] eliminate or reduce traffic on that road". The fact that traffic, especially truck traffic, had increased had been as a result of matters beyond the power of the roads and motorways authority. In particular, that authority had not been responsible for drivers' choices and could not predict which type of vehicles would use the N14 road instead of the alternative roads indicated from the city of Konin. It had also been impossible to predict the cars' impact on air pollution, namely how many cars driving down Warszawska Street would not be equipped with a catalytic converter or would have non-functioning exhaust pipes, and what their speed would be and how often they would use their brakes. The roads and motorways authority had acted in compliance with the law, in that it had taken firstly *ad hoc* and then long-term measures to alleviate the nuisance caused by the traffic.

92. The appellate judgment was served on the applicants on 24 May 2013. No cassation appeal was available to the applicants because the value of their claim was lower than the statutory threshold of PLN 50,000 (see paragraph 105 below). It appears that a cassation appeal lodged by B. W., with whom they had been joint claimants, was rejected on procedural grounds.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. LIABILITY IN TORT

93. Article 23 of the Civil Code, which entered into force in 1964, contains a non-exhaustive list of so-called "personal rights" (*prawa osobiste*). This provision states:

> "The personal rights of an individual, in particular health, liberty, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, the inviolability of the home, scientific or artistic work, [as well as] inventions and improvements, shall be protected by the civil law, regardless of the protection laid down in other legal provisions."

94. Article 24 paragraph 1 of the Civil Code provides:

> "A person whose personal rights are at risk [of infringement] by a third party may seek an injunction, unless the activity [complained of] is not unlawful. In the event of an infringement, [the person concerned] may also require the party responsible for the infringement to take the necessary steps to remove [the infringement's] consequences ... In compliance with the principles of this Code, [the person concerned] may also seek pecuniary compensation or may ask the court to award an adequate sum for the benefit of a specific public interest."

95. Article 144 of the Civil Code provides as follows:

"In the exercise of his or her rights, an owner of immovable property shall refrain from actions which would infringe the enjoyment of adjacent immovable property beyond an average degree as defined by the socio-economic purpose of the immovable property and the local conditions."

96. Under Article 222 § 2 of the Civil Code:

"The owner shall have the right to claim restitution of his lawful position and the cessation of infringements of the law against a person who infringes his ownership other than by depriving the owner of actual control of the property in question."

97. There is no limitation period for claims under Article 222 of the Civil Code if they relate to immovable property (Article 223 of the Civil Code).

98. Under Article 415 of the Civil Code, which provides for liability in tort, anyone who through his or her fault causes damage to another is required to repair that damage.

99. Under Article 448 of the Civil Code, a person whose personal rights have been infringed may seek compensation. The relevant part of that provision reads:

"The court may award an adequate sum as pecuniary compensation for non-pecuniary damage (*krzywda*) suffered by anyone whose personal rights have been infringed. Alternatively, the person concerned, regardless of seeking any other relief that may be necessary to remove the consequences of the infringement sustained, may ask the court to award an adequate sum for the benefit of a specific public interest ..."

100. Furthermore, Article 77 § 1 of the 1997 Polish Constitution (*Konstytucja*), which entered into force on 17 October 1997, and Article 417 of the Polish Civil Code provide for the State's liability in tort. The latter provision reads as follows:

"The State Treasury, or [as the case may be] a local-government entity or other legal person responsible for exercising public authority, shall be liable for any damage (*szkoda*) caused by an unlawful act or omission connected to the exercise of public authority."

101. Article 417^1 § 2 of the Civil Code reads as follows:

"Where damage has been caused by the delivery of a final ruling or a final decision, redress for such damage may be sought after the unlawfulness [of the ruling or decision] has been established in relevant proceedings, except where otherwise provided for by law."

102. Article 417^2 of the Civil Code provides as follows:

"If any damage has been caused to a person through the lawful exercise of public authority, the victim shall claim full or partial redress and compensa-

tion, provided that the circumstances, in particular the victim's being unfit for work or his or her difficult financial situation, call for [a ruling on] an equitable basis."

103. Article 445 § 1 of the Civil Code, which is applicable in the event that a person suffers a physical injury or health disorder as a result of an unlawful act or omission of a State agent, reads as follows:

"... [T]he court may award the injured person an adequate sum in pecuniary compensation for the damage suffered."

104. On 23 February 2001 the Supreme Court ruled in a case concerning noise nuisance stemming from traffic on a high-speed road managed by a municipality (II CKN 394/00). The court held firstly that the obligations of local government, in the context of protecting the environment, came directly from the Act of 31 January 1980 on protecting and shaping the environment (*Ustawa o ochronie i kształtowaniu środowiska*), which was repealed on 26 October 2001. The provisions of that Act, in conjunction with the relevant civil-law provisions, therefore formed a sufficient basis for claims of a civil nature. Secondly, a local government's tolerance of noise levels which exceeded the national norms was unlawful and could constitute an infringement of personal rights. Moreover, seeking to remove the consequences of an infringement of those rights, by constructing anti-noise screens, fell within the scope of Article 24 § 1 of the Civil Code.

II. CASSATION APPEAL IN CIVIL PROCEEDINGS

105. Under Article 398^2 § 1 of the Civil Code, a cassation appeal is not available in respect of cases which concern pecuniary rights and in which the value of a claim is less than PLN 50,000.

III. ENVIRONMENTAL REGULATIONS

A. Constitutional protection of the environment

106. Article 5 of the Polish Constitution provides that Poland shall ensure the protection of the environment, being guided by the principle of sustainable development. Other relevant constitutional provisions read as follows:

Article 74

"1. Public authorities shall pursue policies ensuring the ecological security of current and future generations.

2. Protection of the environment shall be the duty of public authorities.

3. Everyone shall have the right to be informed of the quality of the environment and its protection.

4. Public authorities shall support the activities of citizens to protect and improve the quality of the environment."

Article 68 (4)

"Public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment."

B. Noise

107. The duty to protect the environment from noise is set out, defined and further regulated in, *inter alia*, section 112, section 2.2(a), section 3.5 and section 3.26(a) of the Act of 27 April 2001 on the protection of the environment (*Prawo ochrony środowiska*, hereinafter "the Protection of the Environment Act"), which has been in force since 1 January 2002, and in the Minister for the Environment's Ordinance on acceptable levels of noise in the environment (*Rozporządzenie w sprawie dopuszczalnych poziomów hałasu w środowisku*) in its version of: 13 May 1998, 29 July 2004 (in force from 13 August 2004 until 20 July 2007) and 14 June 2007 (in force since 20 July 2007), with further amendments.

108. The 1998 and 2004 versions of the above ordinance provided that in areas where multiple families lived, such as the one where the applicants live, the acceptable level of noise from roads was 60 dB(A) during the day and 50 dB(A) at night. The most recent version of the ordinance in question changed these parameters to 65 dB (L_{Aeq}) and 56 dB (L_{Aeq}) respectively.

109. Under the Act of 21 March 1985 on public roads (*Ustawa o drogach publicznych*), which has been in force since 1 October 1985, the administration of public roads and motorways is the responsibility of the Minister for Transport and the roads and motorways authority. This Act imposes various obligations on the latter authority, including an obligation to prevent adverse transformations of the environment which may be caused by the construction or maintenance of roads (section 20(13)), and an obligation to limit or stop road traffic in the event of a direct threat to people's security (section 20(14)). Moreover, when planning a road, the authorities are duty-bound to assess the impact of the project on road security, including, *inter alia*, the impact on existing road networks and on the type and amount of traffic (section 24(i)(2)).

110. Poland is also bound by the European Parliament and the European Council's Directive 2002/49/EC relating to the assessment and management of environmental noise of 25 June 2002 ("the Noise Directive", transposed by Poland by means of an amendment to the Protection of the Environment Act dated 18 May 2005). The directive sets out noise indicators for reporting purposes which otherwise do not constitute legally binding EU-wide values or targets as regards noise limits.

111. On 17 May 2017 the European Commission sent a formal notice to Poland under Article 258 of the Treaty on the Functioning of the EU, urging it to adopt measures on environmental noise, namely to establish strategic noise

maps and action plans as required under the EU rules to decrease noise pollution in the EU (no. 20172068). On 18 February 2021 the European Commission referred Poland to the European Court of Justice over the country's failure to comply with its obligations under the Noise Directive. The referral was accompanied by the following observations, in so far as relevant:

> "... adopting action plans was necessary to combat noise that is detrimental to human health.
>
> The Polish national law does not guarantee the establishment of action plans, which are required under the Directive regardless of whether noise limit values in the area are exceeded. Action plans for 20 major railway sections and for 290 major road sections are still missing, despite the deadline for adopting such action plans having passed.
>
> Moreover, the national law does not require action plans to include all necessary elements that are provided for in the Directive, in particular a record of public consultations, measures to preserve quiet areas and long-term strategy. Through the public consultations over the action plans the public can verify and have their say on whether authorities take adequate measures to reduce noise levels where they may be harmful, or to prevent existing levels from becoming harmful. This is why, not only action plans need to be adopted, but the national law must require all elements to be included in those action plans..."

The infringement proceedings are currently ongoing.

C. Air pollution

112. The obligation to ensure the highest air quality is set out and further regulated in, *inter alia*, section 85 of the Protection of the Environment Act and in the Minister for the Environment's Ordinance on acceptable levels of certain substances in the air ... (*Rozporządzenie w sprawie dopuszczalnych poziomów niektórych substancji w powietrzu, alarmowych poziomów niektórych substancji w powietrzu oraz marginesów tolerancji dla dopuszczalnych poziomów niektórych substancji*) in its version of 6 June 2002 (in force from 12 July 2002 until 3 April 2008) and 3 March 2008 (in force from 3 April 2008 until 3 October 2012).

113. The ordinance provided that at the material time, from August 2006 until December 2008, the absolute norm for the annual average concentration of sulphur dioxide in the air was 20 μg/m^3, and the norm for nitrogen dioxide was 40 μg/m^3, subject to a margin of tolerance. The margin of tolerance was fixed at 8–20% for 2006, at 6–15% for 2007, and at 4–10 % for 2008. Under the law, such levels of nitrogen dioxide were acceptable, taking into account the need to protect human health.

114. Poland is also bound by Directive 2008/50/EC of the European Parliament and the European Council of 21 May 2008 on ambient air quality and cleaner air for Europe (which entered into force on 11 June 2008 and was transposed by Poland by means of two Acts in 2009 and 2012 and seven ordinances in 2012). This directive establishes air quality objectives, including cost-effective targets for improving human health and environmental quality up to 2020. Limit values for the protection of human health are as follows: for sulphur dioxide, 125 μg/m^3 in twenty-four hours, not to be exceeded more than three times a calendar year; and for nitrogen dioxide, 40 μg/m^3 in a calendar year, as of 1 January 2010 (with a 50% margin of tolerance on 19 July 1999, decreasing on 1 January 2001 and every twelve months thereafter by equal annual percentages to reach 0% by 1 January 2010; see Annex XI). Alert and information thresholds are as follows: 500 μg/m^3 for sulphur dioxide, and 400 μg/m^3 for nitrogen dioxide (Annex XII).

115. The earlier Council Directive 1999/30/EC relating to limit values for, *inter alia*, sulphur dioxide and nitrogen dioxide in ambient air ("the First Daughter Directive", in force from 19 July 1999 until 10 June 2010, transposed by Poland by means of, *inter alia*, the 2001 Act on Environmental Protection and the 2002 Ordinance on acceptable levels of certain substances in the air) set out the same daily limit values and alerts thresholds for both pollutants in question (Annexes I and II). In accordance with the directive, the daily limit value for sulphur dioxide for the protection of human health (125 μg/m^3) was to be applicable as of 1 January 2005.

116. Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants (which entered into force on 27 November 2001 and which was transposed by Poland by means of a series of Acts and ordinances) sets national emission ceilings on, *inter alia*, annual sulphur dioxide and nitrogen oxide emissions to be attained by 2010 at the latest and to be maintained from that year (Article 4). These ceilings, per calendar year, are 1397 kilotons for sulphur dioxide and 879 kilotons for nitrogen oxide (Annex I).

117. On 25 February 2016 the European Commission sent a formal notice to Poland under Article 258 of the Treaty on the Functioning of the EU, urging it to take action to ensure good air quality and safeguard public health in relation to breaches of air pollution limits for nitrogen dioxide under the EU legislation on ambient air quality (Directive 2008/50/EC) (no. 20162010). The infringement proceedings are currently ongoing.

THE LAW

I. JOINDER OF THE APPLICATIONS

118. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

119. The applicants complained under Article 8 of the Convention that by routing heavy traffic from the A2 motorway *via* the N14 road, the authorities had breached their right to the peaceful enjoyment of their private and family life and their home, as their house was situated very near to the road.

120. Article 8 of the Convention 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

121. The Government raised a preliminary objection, arguing that the case was inadmissible for non-exhaustion of domestic remedies, as the applicants had not lodged a cassation appeal with the Supreme Court. In their view, the fact that B. W.'s cassation appeal had not been examined on the merits did not mean that the applicants' own cassation appeal would not have had any prospects of success.

122. The applicants submitted that a cassation appeal had not been available in their cases, because the value of each of their claims had been below the statutory threshold.

123. The Court observes that in the civil proceedings in question, each applicant sought compensation of PLN 15,000 (see paragraph 74 above). That amount was below the threshold of Article 398^2 of the Civil Code (see paragraph 104 above). It follows that a cassation appeal was clearly not available to any of these applicants. In these circumstances, the Government's argument relating to the cassation appeal lodged by B. W., who sought compensation in an amount higher than the statutory limit (see paragraph 75 above), has no relevance for the present case.

124. The Government's preliminary objection of non-exhaustion of domestic remedies must therefore be rejected.

125. The Court further notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

126. The applicants complained under Article 8 of the Convention that by routing heavy traffic from the A2 motorway *via* the N14 road, which was not equipped for that purpose, the authorities had breached their right to the peaceful enjoyment of their private and family life and their home, as their house was situated very near to the road.

127. The applicants did not call into question the policy of expanding the road network in Poland. They argued, however, that any such development should be balanced, in that it should not put an excessive burden on the residents concerned. The increased traffic on the N14 road, especially at night, had, for a number of years, hampered the applicants' quiet enjoyment of their homes and disturbed their sleep. The vibrations from the road traffic had also caused cracks to appear in the walls of many Stryków buildings.

128. The applicants argued that the infringement of their Article 8 rights had been caused, firstly, by the authorities' negligent planning of the construction of the motorway, which had disregarded the obligation to ensure the protection of nearby residential areas.

129. In that regard, the applicants submitted that the authorities had already faced a similar situation when they had opened another section of the A2 motorway. They also argued that the lack of adequate planning had been deliberate, with the authorities wishing to curb expenditure. That said, the initial savings as regards investment had not been justified, because the State had not been facing any financial crisis, and because the State had ultimately incurred higher costs as a result of the subsequent *ex post facto* studies and reorganisation of the traffic.

130. In the applicants' opinion, the fact that the problem had resulted from the shortcomings in the original planning of the project was proven by the authorities' ultimate success in greatly reducing truck traffic on the N14 road.

131. Secondly, the applicants argued that the infringement of their rights had been caused by the inadequate response to the resulting situation. The applicants essentially complained that the authorities had failed to take timely, adequate and sufficient traffic mitigation measures. In particular, they had not created good-quality alternative roads, and they had not effectively eliminated the heavy night-time traffic on the N14 road.

(b) The Government

132. The Government acknowledged that, in the circumstances of the case, the nuisance caused to the applicants by the operation of the motorway had reached the minimum level of seriousness and thus fell within the ambit of Article 8 of the Convention.

133. That said, the domestic authorities had complied with their positive obligations stemming from that provision.

134. In respect of the planning of the motorway, the Government submitted that the authorities had struck a fair balance between the competing interests of the individual applicants and the community as a whole.

135. The operation of the A2 motorway was legal and pursued an important public interest, namely the facilitation and acceleration of domestic road transport, as well as the bringing of economic and social development to the country.

136. Long before the opening of the A2 motorway, the N14 had been a public national road connecting major cities. Its so-called design speed limits, which in built-up areas had been 60 and 70 km, had remained the same when the motorway traffic had been redirected down it.

137. The traffic on the N14 after the motorway had been linked to it had been largely unpredictable. The authorities had only been able to monitor the situation and react to it *ex post facto*, which was what they had done.

138. The nuisance which the applicants had had to endure had only been temporary, lasting only two and a half years. In addition, the levels of noise disturbance had been reduced six months into the operation of the motorway, when the road traffic to Warsaw had been reorganised. As a result of those measures, the inconvenience caused by the traffic had been alleviated by December 2008. The authorities had thus reacted promptly and adequately to the situation in Stryków, of which they had become aware not only through the complaints of the population concerned, but also through their own monitoring. The authorities' reaction to the traffic problem had been positively assessed by the expert appointed by the court in the course of the applicants' civil proceedings.

139. In respect of the response to the traffic nuisance, the Government argued that the local authorities had taken all necessary measures aimed at eliminating the inconvenience caused by heavy traffic in Stryków.

140. As early as August 2006, the authorities had come up with a plan to connect the A2 and A1 motorways outside of Stryków. The connecting road (the 1.7-km extension) had become operational on 22 December 2008 and the traffic made up of heavy vehicles had dropped significantly.

141. Also in August 2006, the roads and motorways authority had drawn up a plan aimed at encouraging motorway users to make a detour around Stryków by taking alternative roads to Warsaw. That measure had been put in place in

stages and had become fully operational in December 2006. The measure had reduced traffic levels through Stryków almost to those which had existed before the opening of the A2 motorway.

142. In October 2006 the surface of part of the N14 (namely Warszawska Street) in Stryków had been renovated.

143. The Government also submitted that the residents in the area concerned, who had been regularly informed of the mitigation measures in question, had been free to lodge complaints and applications in respect of the operation of the motorway or the initial investment. The applicants had not made use of that opportunity.

144. The Government also commented that the increase in traffic in Stryków might well have been caused by factors other than the A2 motorway. In particular, the Stryków Municipality, which was conveniently situated in Central Poland, had been developing rapidly. A number of warehouses and logistics centres had been erected in the area of Stryków and nearby Smolice. In 2017 Stryków had been ranked as the third-best developing district in a local sustainable development programme. In that regard, the Government relied on the observations made by the expert who had been appointed by the court in the course of the applicants' civil proceedings.

145. The Government noted that all the mitigation measures taken by the authorities had been assessed as adequate, reasonable and prompt. The applicants had not shown that the authorities had at some point refused to put in place any particular measures which might have been suggested by the population concerned.

146. The Government observed that the applicants had not documented the consequences of the impugned nuisance by medical certificates or independent reports. The psychological opinion submitted to the Court had been commissioned by the applicants, and as such was not impartial and credible.

147. Lastly, the Government submitted that the decision-making process had complied with the Convention requirements. In particular, the applicants had received a fair and fully adversarial examination of their civil case.

2. The Court's assessment

(a) General principles

148. The Court reiterates that Article 8 of the Convention protects the individual's right to respect for his private and family life, his home and his correspondence. A home will usually be a place, a physically defined area, where private and family life goes on. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect for the home are not confined to concrete or physical breaches, such as unauthorised entry into

a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home (see *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 96, ECHR 2003-VIII).

149. The Court further reiterates that although there is no explicit right in the Convention to a clean and quiet environment, where an individual is directly and seriously affected by severe environmental harm such as noise or other pollution, an issue may arise under Article 8 of the Convention (see *Hatton and Others*, cited above, § 96; *López Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C; *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, Series A no. 172, p. 18, § 40; and *Furlepa v. Poland* (dec.), no. 62101/00, 18 March 2008).

150. Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, this may involve those authorities adopting measures designed to secure respect for private life even in the sphere of relations between individuals (see, among other authorities, *Stubbings and Others v. the United Kingdom*, 22 October 1996, § 62, *Reports of Judgments and Decisions* 1996-IV, and *Surugiu v. Romania*, no. 48995/99, § 59, 20 April 2004). Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8, or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance, the aims mentioned in the second paragraph may be of a certain relevance (see *Hatton and Others*, cited above, § 98).

151. Where noise disturbances or other nuisances go beyond the ordinary difficulties of living with neighbours, they may affect the peaceful enjoyment of one's home, whether they be caused by private individuals, business activities or public agencies (see *Apanasewicz v. Poland*, no. 6854/07, § 98, 3 May 2011; *Mileva and Others v. Bulgaria*, nos. 43449/02 and 21475/04, § 97, 25 November 2010; and *Udovičić v. Croatia*, no. 27310/09, § 148–149, 159, 24 April 2014).

152. Lastly, the Court reiterates that the Convention has a fundamentally subsidiary role and the national authorities are in principle better placed than an international court to evaluate local needs and conditions (see *Hatton and Others*, cited above, § 97). While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the justification given by the State is relevant and sufficient remains subject to review by the Court (see *Fadeyeva*, cited above, § 102, with further references).

(b) Application of the above principles to the present case

153. The Court notes the finding of the domestic courts that the applicants' right to health and the peaceful enjoyment of their home had been infringed because the noise in their places of residence caused by traffic had gone beyond the statutory norms (see paragraph 88). In the light of the circumstances of the case, the adverse effects of the pollution (the noise, vibrations and exhaust fumes) emitted by the heavy traffic on Warszawska Street which affected the applicants' home have attained the necessary minimum level to bring the applicants' grievances within the scope of Article 8 of the Convention, taking into account their intensity, duration, physical and mental effects (see *Fadeyeva*, cited above, § 69).

154. The Court observes that although the applicants complained that the heavy road traffic which had followed the opening of the Konin-Stryków section of the A2 motorway had caused a nuisance, they did not argue against the national policy of road development or the local policy of commercial development of the area (see paragraphs 163 and 178 above). Incidentally, the implementation of these policies, as transposed into the local master plan, was to be accompanied by the construction of a ring road around Stryków (see paragraph 12 above).

155. The applicants complained instead that the problem in question could have been avoided if the authorities had been diligent in planning that section of the motorway (see paragraph 164 above). Moreover, the consequent nuisance could have been minimised if the authorities had employed timely, adequate and sufficient mitigation and adaptation measures (see paragraph 165 above).

156. As to the first part of the complaint, the Court rejects the applicants' argument that there was a pattern of bad planning as regards the sections of the A2 motorway, as there is no evidence to support that allegation.

157. The Court nevertheless observes that the administrative authorities, which were in charge of choosing the location and the technical specifications of the motorway, did not examine the objection about the location of the motorway's temporary end point which had been lodged in 1996 by the mayor of Stryków (see paragraphs 16 and 22 above). The mayor had formulated a clear and detailed prediction as to the risk that ending the motorway at the point later known as the Stryków II junction without any alternative road connection would cause traffic on Warszawska Street which was too heavy and too burdensome (see paragraph 17 above).

158. The Court also takes note of the fact that all the environmental impact assessment reports and administrative decisions which were produced in the course of the impugned administrative proceedings, and which are in the Court's possession, were only concerned with the motorway *per se*, and were completely silent as to the traffic rerouting *via* the N14 road (see paragraphs 23, 26, 28 and 30 above).

159. Another important element in this context is that the authorities opted for that section of the motorway to be toll-free (see paragraph 9 above), even though that was clearly going to prompt the greater circulation of traffic on that road and on the N14, which was shorter and technically better than any alternative national or regional road in the vicinity (see paragraphs 79 and 80 above).

160. Lastly, the Court accepts that Stryków residents were affected by not only the transit traffic, but also the movement of vehicles serving various warehouses and logistics centres (see paragraphs 82, 83 and 178 above). However, no data are available to distinguish between these two types of traffic. The Court thus considers it reasonable to assume that the transit traffic constituted a significantly larger portion of the traffic in question, especially the traffic which circulated at night, that is, outside of the opening hours of the commercial establishments which developed in the Stryków area.

161. In the light of all these considerations, the Court cannot agree with the Government that the traffic on Warszawska Street was unpredictable (see paragraph 172 above). The Court thus concludes that the authorities, who had been alerted to the potential problem in 1996, knowingly ignored it and continued developing the motorway project with total disregard for the well-being of Stryków residents.

162. The Court stresses that, for the purpose of this case, the peaceful enjoyment of Stryków residents' homes was threatened and ultimately affected not by the development of the motorway as such, but rather the project rerouting the motorway's traffic through the middle of their town. In that regard, the general interest in having the motorway developed or constructed in sections (see paragraphs 22 and 170 above) must be distinguished from the general interest in having that particular section of the motorway end at the Stryków II junction, with the only option being to divert the motorway's uncontrolled traffic down the unadapted Warszawska Street.

163. The Court accepts that minimising investment expenses is a valid general interest for any State budget. It also takes note of the information indicating that the ring road around Stryków could not be constructed owing to the shortage of funds (see paragraph 86 above). However, the Court has serious doubts as to whether this is a sufficient counterbalancing factor.

164. The Court will now move on to the second part of the applicants' complaint and examine whether the authorities reacted promptly and adequately to the problem of heavy traffic which started affecting Stryków residents after the opening of the section of the motorway on 26 July 2006.

165. The authorities, who, on the one hand, carried out their own monitoring, and other the other hand, were alerted to the problem by the population concerned (see paragraphs 34, 35 and 38 above), did not adopt a passive attitude.

166. The very first plan to mitigate the situation was presented in August 2006. The plan featured two options: the ring road, and the 1.7-km extension to what later became known as the Stryków I junction (see paragraph 37 above).

167. The implementation of that plan, however, was marked by serious complications and delays. As already explained, the ring road option was abandoned (see paragraph 200 above). The second-best solution, that is, the opening of an extension to the motorway up to the new junction, took place only two and a half years later, on 22 December 2008 (see para 65 above).

168. It appears that the delay in question was not attributable to the administrative proceedings (the environmental impact assessment having been delivered in 2003, and the permits having been granted in 2006), but rather the works (see paragraph 64 above).

169. Extending the motorway to the Stryków I junction offered a direct connection to the A1 motorway and effectively reduced the traffic on the N14 road to an acceptable level (see paragraph 66, above)

170. While awaiting the above-described long-term solution, the authorities made serious, albeit hasty, attempts to reorganise the traffic by installing custom-made signs indicating that drivers should make possible detours *via* nearby national and regional roads (see paragraphs 44 and 46 above). To judge the effects of that measure, the Court can only rely on the expert report of 30 November 2010, which appears to contradict itself, as well as on the parties' submissions. It is thus the Court's understanding that the measure which was implemented in December 2006, even though it had some positive effect, did not eliminate the heavy and continuous traffic from a significant number of trucks (see paragraphs 45, 84 and 165 above).

171. In October 2006 the authorities also took the adaptation measure of renovating the surface of Warszawska Street (see paragraph 43 above). That apparently did not bring about any positive change (see paragraphs 44, 59 and 70 above). It appears that no other adaptation measures (like anti-noise screens) could be taken in Stryków.

172. The Court observes that the authorities faced a difficult task of mitigating the problem of very heavy traffic resulting from the rerouting of the A2 motorway down Warszawska Street. They also had a very limited choice of possible adaptation measures. The Court therefore accepts that the authorities made considerable efforts to respond to the problem. This, however, does not change the fact that these efforts remained largely inconsequential, because the combination of the A2 motorway and the N14 road was, for many reasons, the preferred route for drivers. As a result, the State put vehicle users in a privileged position compared with the residents affected by the traffic.

173. Even though the civil proceedings through which the applicants tried to seek *ex post facto* compensation for the nuisance suffered cannot be said

to have been marked by unfairness, all the foregoing considerations are sufficient to enable the Court to conclude that a fair balance was not struck in the present case.

174. In sum, the rerouting of heavy traffic *via* the N14 road, a road which was unequipped for that purpose and very near to the applicants' homes, and the lack of a timely and adequate response by the domestic authorities to the problem affecting the inhabitants of Warszawska Street, enables the Court to conclude that the applicants' right to the peaceful enjoyment of their homes was breached in a way which affected their rights protected by Article 8.

175. There has accordingly been a violation of Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

176. 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

177. Each applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

178. The Government considered that amount excessive.

179. Regard being had to the reasons why the Court has found a violation of Article 8 of the Convention in the present case, it considers that the applicants must have suffered non-pecuniary damage which cannot be redressed by the mere finding of a violation. Ruling on an equitable basis, it awards each applicant EUR 10,000 in respect of non-pecuniary damage and dismisses the remainder of their claim.

B. Costs and expenses

180. The applicants also claimed EUR 5,000 for the costs and expenses incurred before the Court. No invoice to that effect was provided.

181. The Government argued that the applicants had not complied with the conditions required by the Court's case-law.

182. 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 were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the above criteria and the lack of any documents proving that the applicants incurred expenses, the Court considers it reasonable to award the sum of EUR 750 for the proceedings before the Court, plus any tax that may be chargeable.

C. Default interest

183. 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. *Decides* to join the applications;

2. *Declares* the applications admissible;

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

4. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Polish zlotys (PLN) at the rate applicable at the date of settlement:
  (i) EUR 10,000 (ten thousand euros) to each applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;
  (ii) EUR 750 (seven hundred and fifty euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

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

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 14 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar

Ksenija Turković
President

APPENDIX

List of cases

No.	Application no.	Case name	Lodged on	Applicant Year of Birth	Represented by
1.	75031/13	Kapa v. Poland	22/11/2013	**Katarzyna KAPA** 1984	Łukasz BRYDAK
2.	75282/13	Jacek Juszczyk v. Poland	22/11/2013	**Jacek JUSZCZYK** 1958	Łukasz BRYDAK
3.	75286/13	Mateusz Juszczyk v. Poland	22/11/2013	**Mateusz JUSZCZYK** 1991	Łukasz BRYDAK
4.	75292/13	Barbara H. Juszczyk v. Poland	22/11/2013	**Barbara Halina JUSZCZYK** 1959	Łukasz BRYDAK

ANNEX 29

FIRST SECTION

CASE OF LOCASCIA AND OTHERS v. ITALY

(Application no. 35648/10)

JUDGMENT

Art 8 • Positive obligations • Domestic authorities' protracted inability to ensure proper functioning of waste collection, treatment and disposal services during a state of emergency, in place for over fifteen years, due to waste management crisis affecting the Campania region where the applicants lived • Applicants more vulnerable to illness due to living in area marked by extensive exposure to waste in breach of applicable safety standards • Environmental nuisance affected, adversely and to a sufficient extent, applicants' private life during entire period • Failure to take all necessary measures to ensure effective protection of applicants' right to respect for their home and private life • Applicants' failure to show they personally suffered a severe impact of waste pollution following the end of the state of emergency due to shortcomings in management of waste treatment and disposal services

Art 8 • Positive obligations • Domestic authorities' failure to take all necessary measures to ensure effective protection of applicants' right to respect for their private life in respect of environmental pollution caused by landfill site located between the municipalities where they lived • Situation of environmental pollution continuing and endangering applicants' health • Fair balance between competing interests upset • Authorities discharged their duty to inform people concerned, including the applicants, of potential risks to which they exposed themselves by continuing to live in affected area

Art 13 (+ Art 1 P1) • Effective remedy • Inability to obtain full restitution of taxes paid for waste collection, treatment and disposal services within wide margin of appreciation of Contracting State in framing and implementing policy in area of taxation • Manifestly ill-founded

STRASBOURG

19 October 2023

FINAL

19/01/2024

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Locascia and Others v. Italy,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Marko Bošnjak, *President*,
Alena Poláčková,
Lətif Hüseynov,
Péter Paczolay,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato, *judges*,
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 35648/10) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by nineteen Italian nationals ("the applicants" — see appendix), on 23 June 2010;

the decision to give notice to the Italian Government ("the Government") of the complaints concerning Articles 2 and 8 of the Convention;

the decision to give priority to the application (Rule 41 of the Rules of Court);

the parties' observations;

Having deliberated in private on 26 September 2023,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The main issues in the present case are whether (i) the authorities' poor management of the waste collection, treatment and disposal services in the Campania region and (ii) their failure to take protective measures to minimise or eliminate the effects of pollution from a landfill site located between the municipalities of Caserta and San Nicola La Strada violated the applicants' rights under Articles 2 and 8 of the Convention.

THE FACTS

2. The applicants, whose personal details are set out in the appendix, live in the municipalities of Caserta and San Nicola La Strada (Campania). They were represented by Mr A. Imparato, a lawyer practising in San Prisco.

3. The Government were initially represented by their former co-Agent, Ms P. Accardo, and later by their Agent, Mr L. D'Ascia, *Avvocato dello Stato*.

4. The facts of the case may be summarised as follows.

I. WASTE MANAGEMENT IN CAMPANIA AND IN THE MUNICIPALITIES OF CASERTA AND SAN NICOLA LA STRADA

A. From 1994 to 2009

5. From 11 February 1994 to 31 December 2009 a state of emergency (*stato di emergenza*) was in place in the Campania region, by decision of the Prime Minister, because of serious problems with municipal solid waste disposal.

6. From 11 February 1994 to 23 May 2008 the management of the crisis was entrusted to deputy commissioners appointed by the Prime Minister, who were assisted by assistant commissioners. Nine senior officials — including the four presidents of the Campania region in office during that time and the head of the civil emergency planning department of the Prime Minister's Office — were appointed deputy commissioners.

7. From 23 May 2008 to 31 December 2009 the management of the crisis was entrusted to an under-secretariat in the Prime Minister's Office under the head of the civil emergency planning department.

8. The main circumstances concerning waste management in Campania from 1994 to 2009 are described in the judgment of *Di Sarno and Others v. Italy* (no. 30765/08, §§ 10–18, 20–34 and 36–51, 10 January 2012).

9. With specific regard to the effects of the waste crisis on the municipalities of Caserta and San Nicola La Strada, several orders of the mayor of Caserta issued between 2 and 9 January 2008 referred to the "serious situation" caused by "huge heaps of waste piling up in the streets" following an interruption in waste collection that had started more than twenty days earlier. They reported that fires had been lit to burn waste, resulting in the release of dioxin. They also stated that the accumulation of a "shocking quantity" (*mole impressionante*) of waste in the streets had impaired pedestrian and vehicular traffic and produced unbearable miasmas spreading throughout the entire municipality. They reported that this situation had led to a public health emergency and resulted in considerable distress and potential danger to citizens' safety. To safeguard public health, the mayor postponed the resumption of all educational activities, including kindergartens, schools and universities, suspended several local markets and ordered the removal of waste from the streets to temporary storage areas.

10. As to the municipality of San Nicola La Strada, in several orders issued between 6 April 2007 and 12 May 2008 its mayor referred to the "interruption in waste collection caused by the closure of disposal sites" and the subsequent accumulation of waste "on all public roads" constituting a danger to public health. He ordered the temporary closure of a kindergarten and primary school, suspended the municipality's weekly fair and ordered the removal of waste from the streets to temporary storage areas.

B. From 2010 to 2020

11. Decree-Law no. 195 of 30 December 2009, converted with amendments into Law no. 26 of 26 February 2010, set out urgent measures in relation to the end of the state of emergency. From 1 January 2010 waste management was entrusted to the presidents of the provinces. Moreover, the Decree-Law set out measures aimed at speeding up the construction of power plants fuelled by refuse-derived fuel (*combustibile derivato da rifiuti* — "RDF") and ensuring the operation of other waste treatment and disposal facilities.

12. Decree-Law no. 2 of 25 January 2012, converted with amendments into Law no. 28 of 24 March 2012, set out additional measures concerning the construction and authorisation of new waste treatment and disposal facilities. It provided that the Ministry of the Environment was to submit an annual report to inform Parliament on waste management results and issues.

13. Decree-Law no. 136 of 10 December 2013, converted with amendments into Law no. 6 of 6 February 2014, set out urgent measures aimed at, *inter alia*, ensuring food safety, as well as enhancing environmental protection and transparency in tender procedures concerning monitoring and land remediation activities in Campania. It provided that investigations were to be carried out in the Campania region in order to map the areas affected by severe environmental pollution owing to illegal spillages and waste disposal, including by combustion (the so-called "*Terra dei Fuochi*" ("Land of Fires") area).

14. The Ministerial Directive of 23 December 2013 defined the extent of the "*Terra dei Fuochi*" area, listing fifty-seven municipalities in the provinces of Naples and Caserta affected by the phenomenon. This list included the municipality of Caserta.

15. The Interministerial Directive of 16 April 2014 listed other municipalities placed "under observation", including the municipality of San Nicola La Strada.

16. By Resolution of 16 December 2016 the Campania Regional Council approved an update to the Regional Municipal Waste Management Plan (*Piano Regionale per la Gestione dei Rifiuti Urbani della Regione Campania* — "PRGRU"), which was published in regional Official Gazette (*Bollettino Ufficiale della Regione Campania* — "BURC") no. 88/2016. The PRGRU set out targets for separate collection and for treatment and disposal capacity in Campania. It also established an emergency action plan for the disposal of baled waste (so-called "ecobales" — *ecoballe*) stored in the region.

17. According to a statement by the Campania Regional Council of 6 July 2020, on 24 June 2019 there were still more than 4 million tonnes of "ecobales" in the region. The Regional Council planned to transfer part of that waste to treatment facilities located in other Italian regions or abroad (approximately a third of the total), with the remainder being processed in two new waste treatment plants in Caivano and Giugliano in Campania (province of Naples).

C. Judgments of the Court of Justice of the European Union

18. A summary of the judgments of 26 April 2007 and 4 March 2010 of the Court of Justice of the European Union ("CJEU") is provided in the judgment of *Di Sarno and Others* (cited above, §§ 52–56).

19. On 16 April and 10 December 2013 the Commission brought two cases before the CJEU under Article 260(2) of the Treaty on the Functioning of the European Union (TFEU), contending that Italy had not taken the necessary measures to comply with the aforementioned judgments.

20. By a judgment of 2 December 2014 (case C-196/13) the CJEU assessed the measures taken by Italy to fulfil the obligations arising from its judgment of 26 April 2007 concerning the existence of numerous illegal landfills in the country. It observed as follows:

> "It is common ground that, on expiry of the ... deadline [30 September 2009], cleaning-up works for certain sites were still in progress or had not been started. In respect of other sites, the Italian Republic has not provided any information that would make it possible to establish the date on which the cleaning-up operations, if any, were implemented."

It also noted that the merely closing down the landfills in question was insufficient for compliance with the obligation to ensure that waste was recovered or disposed of without endangering human health and using processes or methods which could harm the environment.

21. By a judgment of 16 July 2015 (case C-653/13) the CJEU assessed the measures taken by Italy to fulfil the obligations arising from its judgment of 4 March 2010 concerning the national authorities' failure to establish an integrated and adequate network of waste disposal facilities in the Campania region. The CJEU found that on 15 January 2012, the reference date for assessing whether there had been a failure to fulfil obligations, the authorities had not yet characterised and disposed of approximately 6 million tonnes of "ecobales", and that this would take about fifteen years from the date on which the necessary infrastructure was built. Moreover, it observed that on the same date, the number of facilities with the necessary capacity to treat municipal waste in Campania was insufficient. In fact, according to the Commission, in 2012 22% of unsorted municipal waste produced in Campania (40% when including organic waste) was sent outside the region for treatment and recovery. It concluded that Italy had not fulfilled the obligations arising from the judgment of 4 March 2010 as it had failed to take the necessary measures to comply with Articles 4 and 5 of Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste.

D. Parliamentary commission of inquiry into illegal activities related to the waste cycle

22. A brief description of the findings of reports by the parliamentary commission of inquiry into illegal activities related to the waste cycle is provided in the judgment *Di Sarno and Others* (cited above, §§ 57–59).

23. In its report of 5 February 2013, the parliamentary commission stated as follows:

> "[I]n this precise historical moment, the problem of waste in Campania is not a regional problem anymore ... it is a national problem that exposes Italy to very serious sanctions by the European Union institutions ... The issue of ecobales, which refers to 6 million of tonnes of waste in storage sites that should have been temporary and that ended up being open-air dumps, is emblematic of the extent to which waste issues in the Region are unmanageable. It is not possible to estimate the exact extent to which pollution has moved into the soil, from the soil to food and from food to people. This is an incalculable damage that will affect future generations. The environmental damage is unfortunately destined to produce its effects in an amplified and progressive way in the next years and will reach its peak ... in fifty years."

E. Scientific studies

24. On an unspecified date the Italian Government (Civil Protection Department) requested the World Health Organisation (WHO) to conduct a study on the health impact of the waste cycle in the provinces of Naples and Caserta. The results of the first phase of the study (*Studio pilota*), carried out in cooperation with the Italian Health Institute (ISS), the Italian National Research Council (CNR), the Regional Environmental Protection Agency (hereinafter "ARPAC") and the Campania Regional Epidemiological Observatory (OER), were presented publicly in Naples in 2005 and Rome in 2007. They revealed that the mortality risk associated with tumours of the stomach, liver, kidney, trachea, bronchi and lungs, pleura and bladder, as well as the risk of congenital malformations of the cardiovascular system, urogenital system and limbs, were higher in an area spanning the provinces of Naples and Caserta than in the rest of Campania. This area contained most of the waste disposal sites, but also many other environmental stressors, such as intensive agriculture, widespread industrial activities and a very high population density.

25. In 2007 the results of the second phase of the study (*Correlazione tra rischio ambientale da rifiuti, mortalità e malformazioni congenite*) were published on the website of the Civil Protection Department. They showed that the area with the highest cancer mortality and malformations was the one most affected by the illegal disposal of hazardous waste and the uncontrolled burning of municipal solid waste. This correlation suggested, according to the study, that

exposure to waste treatment affected the mortality risk observed in Campania, but that other factors, including family history, nutrition and smoking habits in the area might also influence the mortality rate.

II. THE "LO UTTARO" LANDFILL SITE

A. The "Lo Uttaro" area before the reopening of the landfill site

26. In 1994 the deputy commissioner ordered its technical department to carry out inspections on privately owned waste disposal plants located in the province of Caserta in order to assess, *inter alia*, the possibility of using them to alleviate the effects of the waste management crisis.

27. The head of the technical department inspected the "Lo Uttaro" area, where, pursuant to decision no. 1366 of 4 March 1989 of the Campania Regional Council, from the late 1980s until the early 1990s a limited liability company, Ecologica Meridionale S.r.l. (hereinafter "Ecologica Meridionale"), had operated a waste disposal plant.

28. On 31 December 2001 the head of the technical department filed a report with the ecological operations unit of the Caserta *carabinieri* stating that the "Lo Uttaro" area was absolutely unsuitable (*assoluta inidoneità*) for a new waste disposal plant. According to the report, the landfill operated by Ecologica Meridionale differed substantially from the project that had been authorised in the late 1980s and did not comply with the precautionary regulations on environment protection set out in the authorisation. Moreover, during its operation it had received significantly larger quantities of waste than had been authorised. According to the expert, the area had been affected by "extremely serious environmental pollution" leading to a "predictable environmental disaster".

29. On 1 April 2005 the deputy commissioner for emergency land remediation and water protection in the Campania region (*Commissario di Governo per l'Emergenza Bonifiche e Tutela delle Acque nella Regione Campania delegato*) approved the Regional Plan for remediation of the contaminated sites in Campania (*Piano di Bonifica della Regione Campania*, hereinafter "PRB") (Ordinance no. 49 of 1 April 2005), which included permanent safety measures (*messa in sicurezza permanente*) of the Ecologica Meridionale landfill in the "Lo Uttaro" area.

B. Reopening of the landfill site

30. On 11 November 2006, the deputy commissioner and representatives of the province of Caserta and the municipality of Caserta signed a memorandum of understanding agreeing to open a new waste disposal plant in the "Lo Uttaro" area.

31. On 12 January 2007 the deputy commissioner ordered the temporary occupation of the land concerned and approved the preliminary draft of the work to adapt it to the disposal of non-hazardous waste (Ordinance no. 3 of 12 January 2007).

32. On 19 April 2007 the deputy commissioner authorised the ACSA CE 3 consortium to carry out the disposal of non-hazardous waste at the "Lo Uttaro" landfill site (Ordinance no. 103 of 19 April 2007).

33. On 22 April 2007 the ACSA CE 3 consortium began operating the landfill site.

C. Civil proceedings before the Naples District Court

34. On 20 June 2007 a group of residents of a neighbourhood in Caserta (Villaggio Saint Gobain) lodged an urgent application under Article 700 of the Code of Civil Procedure with the Naples District Court, seeking an injunction to suspend the operation of the waste disposal plant, which they claimed posed an imminent and irreparable danger to their health.

35. On 19 July 2007 a judge of the Naples District Court allowed the application and ordered the deputy commissioner and the ACSA CE 3 consortium to cease operations at the waste disposal plant. The District Court considered that the authorities had failed to put in place all the necessary measures to ensure that the operation of the landfill did not damage public health. No proper environmental impact assessment had been undertaken. Moreover, at that time the "Lo Uttaro" area was already polluted, as reported by the documents available to the deputy commissioner and also demonstrated by the fact that it was included in the PRB. According to the District Court, the decision to create a new landfill in the "Lo Uttaro" area had been driven by the urgent need to find a site for the disposal of solid waste in the Caserta province, to the detriment of people's health.

36. On 3 August 2007 the deputy commissioner and the ACSA CE 3 consortium challenged the order of 19 July 2007 before a full bench of the Naples District Court.

37. The court, pending the outcome of the appeal (*reclamo*), allowed the landfill site to operate and appointed an expert to assess, *inter alia*, whether its operation caused harm to human health.

38. In a report filed on 15 October 2007 the expert found that the "Lo Uttaro" area had been a risk to public health since the 1990s, particularly as regards groundwater, which was already contaminated.

The report concluded that the decision to transfer new quantities of waste there was inappropriate as, among other things:

– the choice of site was in violation of the applicable regulations and contrary to the factual findings contained in the documents available to the deputy commissioner;
– any additional waste released into the plant would exacerbate the current risk of damage to the environment and public health, and make any future remediation work more difficult.

39. On 7 November 2007 the mayor of Caserta, having taken note of the expert report and the potential danger to the environment and public health which operation of the plant entailed, ordered its temporary closure until the conclusion of the civil proceedings pending before the Naples District Court.

40. On 13 November 2007 the Naples District Court, sitting in a full bench, dismissed the appeal.

41. According to the information provided by the Government, which has not been disputed by the applicants, following the above-mentioned interim measure no further sets of proceedings were commenced before the civil courts.

D. Criminal proceedings before the Santa Maria Capua Vetere District Court and the seizure of the "Lo Uttaro" landfill

42. On an unspecified date in 2005 the public prosecutor at the Santa Maria Capua Vetere District Court began an investigation into the management of the "Lo Uttaro" waste disposal plant (RGNR 15618/05) on suspicion that they had, *inter alia*, abusively disposed of hazardous waste and caused an environmental disaster.

43. On 13 November 2007 the preliminary investigations judge (*giudice per le indagini preliminari* — "the GIP") of the same court allowed the public prosecutor's request for the preventive seizure of the landfill (GIP Santa Maria Capua Vetere, decree no. 12033/05).

44. The GIP found that the landfill had been operated for the disposal of hazardous waste, in breach of the relevant legislative provisions and the authorisation to operate the waste disposal plant. Certifications had been forged to make hazardous waste appear non-hazardous.

45. Moreover, the decision noted that although the laboratory tests carried out on the groundwater had shown that it was contaminated, the necessary safety measures had not been put in place, in breach of the relevant environmental regulations and the surveillance and control plan set out in the authorisation to operate the waste disposal plant.

46. The GIP found that, according to the inspection reports of the head of the technical department reporting to the deputy commissioner, the "Lo Uttaro" area was absolutely unsuitable for a new waste disposal plant (see paragraph 28 above). The information concerning the size and conditions of the area provided in support of its reopening was false. Furthermore, the current plant had already been used for the disposal of a quantity of waste equal to 4.5 times the volume originally authorised.

47. The GIP also found that the work to adapt the area to the operation of the new plant did not guarantee the securing of the site and was insufficient to repair the current environmental damage.

48. He concluded that "there [was] no doubt that from the overt environmental insecurity of the plant derive[d] its substantial and objective illicitness even in a situation of emergency" and ordered its seizure to prevent the continuation of its abusive operation to the detriment of the environment and public health.

49. Following its transfer to the Naples District Court (RG 26655/08) for reasons of jurisdiction, the part of the case concerning the operation in 2007 of the "Lo Uttaro" landfill site was transferred back to the Santa Maria Capua Vetere District Court (RGNR 58582/08).

50. On 14 March 2016 the court convicted the managing director of the ACSA CE 3 consortium and a deputy commissioner who had been in charge of transferring waste to the "Lo Uttaro" landfill site of illegal trade in waste pursuant to section 260 of Legislative Decree no. 152 of 3 April 2006 ("the Environment Act"). The managing director was also convicted of environmental disaster under Article 434 of the Criminal Code, while the proceedings in relation to the other charges brought against him (unauthorised waste management, forgery and failure to perform his duties of office) were declared time-barred. Forgery charges brought against an officer of ARPAC were also declared time-barred.

51. The judgment held that the groundwater contamination posed a serious danger to public health, regardless of whether it had been exclusively caused by the waste disposal plant. The laboratory carrying out tests on the area had already found in May 2007 that the groundwater was contaminated. According to the operational management plan (*piano gestione operativa*), the managing director should have then suspended the operation of the landfill and implemented safety measures, while ARPAC should have monitored the operation of the waste disposal plant.

52. The Santa Maria Capua Vetere District Court sentenced the managing director to one and a half year's imprisonment and the deputy commissioner to eight months' imprisonment imposing on both a temporary ban on holding public office and additional penalties under sections 30, 32 *bis* and 32 *ter* of the Criminal Code, which were all suspended. It awarded damages to the civil parties and ordered remediation of the area.

53. On 9 February 2017 the Naples Court of Appeal acquitted the managing director and the deputy commissioner of all offences because the limitation period had expired, but upheld the remainder of the lower court's judgment, including the orders awarding damages to the civil parties and for remediation of the area.

54. By a judgment of 2 July 2018 the Court of Cassation quashed the Naples Court of Appeal's judgment and referred the case to it. It stated that, notwithstanding the expiry of the limitation period, the Court of Appeal should have provided adequate reasons for not acquitting defendants on the merits on the basis that they had clearly not committed the offence in question, the facts had

never occurred, or the facts did not constitute an offence or did not come under criminal law, under the terms of Article 129 § 2 of the Code of Criminal Procedure. Moreover, the Court of Appeal had not provided reasons for upholding the orders to compensate the civil parties and clean up the area.

55. The parties did not provide information concerning the outcome of referral proceedings before the Naples Court of Appeal.

E. Administrative measures for securing and cleaning up the "Lo Uttaro" landfill site

56. On 19 May, 9 December and 11 December 2008 ARPAC carried out inspections of the landfill site. It reported that the amount of leachate collected and disposed of was still low compared to the quantity of waste stored at the plant and put considerable pressure on the whole landfill site with the risk of compromising the waterproofing system. According to ARPAC, the landfill had an environmental impact as it caused uncontrolled gaseous emissions and an accumulation and overproduction of leachate. Biogas emissions were estimated at millions of cubic metres per year, which, in the absence of a capture plant, went directly into the atmosphere. It was considered essential to install, even temporarily, a system for capturing and utilising the biogas produced by the landfill.

57. Pursuant to Article 11 of Decree-Law no. 90 of 23 May 2008, converted with amendments into Law no. 123 of 14 July 2008, the Ministry of the Environment was required to support the conclusion of agreements with public or private entities to implement environmental compensation measures aimed at overcoming the waste disposal crisis in Campania. Under this legislative framework, on 18 July 2008 the Ministry of the Environment and the Campania Regional Council agreed on a "Strategic Programme for Environmental Compensation in the Campania Region", which included remediation of the "Lo Uttaro" landfill site.

58. On 4 August 2009 the municipality of Caserta and the Ministry of the Environment signed an operational agreement concerning the measures to be taken to clean up the "Lo Uttaro" area.

59. PRB no. 777 of 25 October 2013, which was approved by the Regional Council and published in BURC no. 30/2013, provided for the determination of an area in the municipality of Caserta, San Marco Evangelista and San Nicola La Strada (known as *Area Vasta "Lo Uttaro"*) where the environmental conditions were particularly compromised owing to the number of contaminated sites, including landfills and waste transfer and temporary waste storage facilities.

60. Between June 2013 and December 2014 Sogesid S.p.A., an in-house company of the Ministry of the Environment (hereinafter "Sogesid"), carried out a first phase of environmental characterisation of the area.

61. According to the test results validated by ARPAC (report no. 22/TF/14), the area was found to be contaminated. In particular, the groundwater was largely contaminated, mainly by manganese, nitrites, iron, arsenic and fluorides. The soil did not have a high enough level of concentration of elements to consider the industrial area contaminated, with the exception of a temporary storage facility where two samples indicated a concentration of arsenic higher than the legal limit.

62. On 11 April 2014 ARPAC recommended, *inter alia*:

(i) carrying out a second phase of environmental characterisation of the area, including by testing a wider surface area in order to determine the extent of the contamination;

(ii) refraining from using the groundwater sourced from the "Lo Uttaro" area for human, agricultural and breeding consumption; and limiting the use of the groundwater sourced within 500 metres from that perimeter, allowing its usage only after analytical tests of the relevant wells;

(iii) adopting urgent safety measures in respect of the groundwater contamination;

(iv) urgently removing and disposing of the hazardous waste found in the "Lo Uttaro" landfill site containing asbestos, and immediately adopting measures to avoid any possible airborne release of that substance.

63. On the basis of the results of these investigations, on 8 November 2013 and 3 June 2014 the mayors of Caserta and San Nicola La Strada prohibited the usage of groundwater from wells located in the "Lo Uttaro" area.

64. During a technical meeting on 21 May 2014, Sogesid declared that it did not have the power to carry out the emergency safety measures recommended by ARPAC, particularly as regards the groundwater contamination and the removal and disposal of hazardous waste. The province of Caserta declared that it would request the company Gisec S.p.A. (hereinafter "Gisec"), which was in charge of the managing the waste disposal plant, to carry out the removal and disposal of the hazardous waste. The municipality of Caserta undertook to send a request to the competent authority (*Comitato di Indirizzo e Controllo per la gestione dell'Accordo di Programma*) to have Sogesid authorised to draw up, in cooperation with ARPAC, a feasibility study on the safety measures to be carried out in relation to the groundwater contamination. Sogesid agreed to produce the feasibility study at the end of the second phase of the environmental characterisation.

65. On 6 June 2014 Sogesid filed a project concerning the second phase of the environmental characterisation of the area, which was approved by decree no. 45 of the Campania Regional Council of 13 June 2014. It stated that the

work had to begin urgently and be completed within ninety days, excluding the time strictly necessary for tender procedures.

66. On 14 January 2015 Sogesid sent the Campania Regional Council a timetable of further operations, informing it that the activities related to the second phase of the environmental characterisation would begin by the end of January 2015 and that, once these activities had been concluded, the project concerning permanent safety and remediation would be finalised.

67. On 10 March 2016 ARPAC validated the results of the investigations carried out as part of the second phase of the environmental characterisation of the area (report no.7/TF/16). It confirmed that the groundwater was contaminated by, among other things, arsenic, nickel, antimony, iron, manganese, mercury and fluorides.

68. On 16 June 2016 an article in the *Il Mattino* newspaper reported that Gisec had not yet removed the hazardous waste containing asbestos found in the "Lo Uttaro" area in 2014.

69. On 22 July 2016 the same newspaper reported that, although the capping of the landfill was to be completed by 13 March 2017, further investigations were currently suspended.

70. On 24 April 2016 the Campania Regional Council and the Prime Minister's Office entered into the Agreement for Development of the Campania Region (*Patto per lo sviluppo della regione Campania*), which stipulated that the measures set out in the PRB were to be implemented, including the safety measures concerning the groundwater in the *Area Vasta "Lo Uttaro"*.

71. In Resolution n. 510 of 1 August 2017 the Campania Regional Council named the securing of the groundwater in the "Lo Uttaro" area as one of the actions to be carried out with the National Agency for Investment and Business Development (*Agenzia Nazionale per l'attrazione degli Investimenti e lo Sviluppo di Impresa S.p.A.* — "Invitalia"). The Resolution described the level of progress of the securing activities in the "Lo Uttaro" area as "Planning not carried out. Characterisation results available for some sites of the area".

72. On 12 February 2019, following a request by the public prosecutor at the Santa Maria Capua Vetere District Court, twelve wells were seized within the *Area Vasta "Lo Uttaro"* owing to heavy metal contamination. Information on the preventive measure was made public in a press release by the public prosecutor's office.

73. By order no 57 of 28 June 2019, the mayor of Caserta prohibited the owners of wells located in the "Lo Uttaro" area to use the groundwater for human consumption, irrigation, livestock watering and industrial use and imposed a ban on cultivation in the area. Wells located within 500 metres of the area were to be used subject to validation by the competent authorities of test results proving that the water was safe.

74. According to the applicants, up until March 2020 no remediation work had been carried out in the "Lo Uttaro" area. Sogesid had drafted a project for its permanent securing, which had not been implemented, nor had its timing been set.

75. According to the information provided by the Government in the latest observations received by the Court (on 6 July 2020), on 18 March 2019 Invitalia launched a tender procedure concerning the securing of the groundwater in the *Area Vasta "Lo Uttaro"* which was still ongoing. Moreover, according to the Government, on that date the securing of the area by Sogesid was underway.

F. Findings on the "Lo Uttaro" landfill site of the parliamentary commission of inquiry into illegal activities related to the waste cycle

76. In its report of 19 December 2007, the parliamentary commission observed that the decision to authorise the reopening of the landfill site notwithstanding the fact that the documents held by the deputy commissioner showed that the area was environmentally inadequate demonstrated that the offices of the deputy commissioner were incapable of reading their own documents (*incapacità della struttura commissariale a leggere le proprie stesse carte*). Moreover, ARPAC had reported the environmental criticalities connected to the operation of the plan with an inexcusable delay. The authorities in charge of monitoring functions had proved to be unable to provide truthful information on which legislative and administrative policies could be based.

77. In its report of 5 February 2013, the parliamentary commission reported that during the operation of the landfill in 2007, hazardous waste had been disposed of at the plant, in breach of the relevant authorisation and environmental regulations. It confirmed that the site pollution and illegal management had been established on the basis of the documents available to the offices of the deputy commissioner and other competent authorities, who had therefore failed to monitor the situation and had even certified false information in order to justify the continued operation of the landfill.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

78. A summary of the relevant domestic law governing waste treatment is contained in *Di Sarno and Others* (cited above, §§ 65–67).

79. Article 844 of the Civil Code establishes that the owner of a plot of land cannot prevent nuisances from a neighbouring plot of land if they do not exceed a tolerable threshold.

80. Article 2043 of the Civil Code provides that any unlawful act which causes damage to another will render the perpetrator liable in damages under civil law.

81. Under Article 700 of the Code of Civil Procedure, anyone who has cause to fear that their rights may suffer imminent and irreparable damage may file an urgent application for a court order affording them instant protection of their rights.

82. Under Article 133 § 1 (p) and (s) of the Code of Administrative Procedure, the following matters fall within the exclusive jurisdiction of the administrative courts:

– disputes relating to any measure taken by the commissioner in all emergency situations and disputes concerning the waste management cycle; the jurisdiction of the administrative courts extends to constitutional rights;
– disputes relating to any measure taken contrary to the provisions on environmental damage, as well as failure by the Ministry of the Environment to respond to a request for precautionary, preventive or containment measures against environmental damage, and for compensation for damage suffered as a result of the delay in issuing such measures.

II. EUROPEAN UNION AND INTERNATIONAL LAW

83. A summary of the relevant European Union and international law is contained in *Di Sarno and Others* (cited above, §§ 71–76).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

84. Relying on Articles 2 and 8 of the Convention, the applicants submitted that in failing to take the requisite measures (i) to guarantee the proper functioning of the waste collection, treatment and disposal services and (ii) to minimise or eliminate the effects of the pollution from the "Lo Uttaro" landfill, the State had caused serious damage to the environment and endangered their lives and their health and that of the local population in general. They further maintained that the accumulation of large quantities of waste along public roads constituted an illegitimate interference with their right to respect for their home and private and family life. Moreover, they complained that the authorities had neglected to inform the people concerned of the risks of living in the area surrounding the "Lo Uttaro" landfill.

85. The Government disagreed.

86. Since it is master of the characterisation to be given in law to the facts of the case (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I), the Court considers, regard being had to its case-law on the matter (see *López Ostra v. Spain*, 9 December 1994, § 51, Series A no. 303-C; *Guerra and Others*, cited above, § 57; *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 96, ECHR 2003-VIII; *Di Sarno and*

Others, cited above, § 96; and *Cordella and Others v. Italy,* nos. 54414/13 and 54264/15, §§ 93–94, 24 January 2019), that the applicants' complaints should be examined from the standpoint of the right to respect for one's home and private life enshrined in Article 8 of the Convention, the relevant provisions of which read 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

87. The Government raised two pleas of inadmissibility, arguing that the applicants lacked victim status and that domestic remedies had not been exhausted.

1. The applicants' victim status

88. In their additional observations, the Government submitted that several applicants lacked victim status as they did not reside in the municipalities surrounding the landfill.

89. The applicants contested this, referring to the residence certificates they had filed with the Court.

90. The Court sees no need to examine whether the Government are estopped from making the above objection since it finds in any event that it concerns a matter which goes to the Court's jurisdiction and which it is not prevented from examining of its own motion (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 70, 5 July 2016, and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 93, 27 June 2017).

91. The Court points out that the Convention does not confer on individuals any right to an *actio popularis* (see *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I). According to its established case-law, the crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded by Article 8 § 1 is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment (see *Di Sarno and Others*, cited above, § 80, and *Cordella and Others*, cited above, § 101). The Court further notes that in a number of cases where it found that Article 8 was applicable, the proximity of the applicants' homes to the sources of pollution was one of the factors taken into account by the Court (see *Pavlov and Others v. Russia*, no. 31612/09, §§ 63–71, 11 October 2022).

92. The Court notes that the applicants complained of a situation affecting the entire population of Campania, in so far as they complained of the environmental damage caused by the authorities' poor management of the waste collection, treatment and disposal services and, more specifically, the population living in the municipalities of Caserta and San Nicola La Strada, with regard to the pollution from the nearby "Lo Uttaro" landfill site.

93. The Court observes that the documents provided by the applicants show that Caserta and San Nicola La Strada were both affected by the waste management crisis (*crisi dei rifiuti*) lasting from 11 February 1994 to 31 December 2009. In particular, several orders of the mayor of Caserta issued between 2 and 9 January 2008 referred to the "serious situation" caused by "huge heaps of waste piling up in the streets" following an interruption in waste collection that had started more than twenty days earlier. They stated that this situation had led to a public health emergency and resulted in considerable distress and potential danger to citizens' safety. Similarly, in several orders issued between 6 April 2007 and 12 May 2008 the mayor of San Nicola La Strada referred to the "interruption in waste collection caused by the closure of disposal sites" and the subsequent accumulation of waste "on all public roads" constituting a danger to public health (see paragraphs 9 and 10 above).

94. As to the "Lo Uttaro" landfill site, the documents provided by the parties show, *inter alia*, that in order to protect public health, the local authorities had to repeatedly impose on the population living in Caserta and San Nicola La Strada a ban on the use of groundwater drawn from wells located in the areas surrounding the landfill site (see paragraphs 63, 72 and 73 above). In these circumstances, the Court considers that the environmental damage complained of by the applicants living in those municipalities is likely to have directly affected their personal well-being (see *Di Sarno and Others*, cited above, § 81).

95. The Court notes however that the applicants listed under numbers 2-4, 7 and 15–18 in the appendix did not submit evidence proving that they resided in the affected area. It thus considers that they failed to show that they had been directly affected by the situation complained of (see *Cordella and Others*, cited above, § 108).

96. The Court therefore accepts the Government's objection in respect of the applicants listed under numbers 2–4, 7 and 15–18 in the appendix and rejects it in respect of the other applicants. Any mention of "the applicants" in the remainder of this judgment must be understood as referring to the remaining applicants.

97. Accordingly, in respect of applicants listed under numbers 2-4, 7 and 15–18 this complaint is incompatible ratione personae with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

2. Non-exhaustion of domestic remedies

98. The Government also argued that the applicants had not exhausted domestic remedies.

99. Firstly, the Government submitted that it had been possible for the applicants to make an urgent application under Article 700 of the Code of Civil Procedure (see paragraph 81 above). They noted that other residents had sought and obtained a court order under this provision to immediately suspend the operation of the "Lo Uttaro" landfill.

100. The Government also argued that, under Article 133 § 1 (p) of the Code of Administrative Procedure (see paragraph 82 above), the applicants could have challenged the orders issued by the authorities during the state of emergency and, more generally, any decision taken in relation to the management of the waste collection, treatment and disposal services. In this regard, the applicants could have got the administrative courts to annul these decisions, issue orders for the protection of their health and private life and award them compensation.

101. Moreover, under Article 133 § 1 (s) of the Code of Administrative Procedure (see paragraph 82 above), the applicants could have challenged the decisions taken by the authorities in breach of the provisions on environmental damage, as well as the failure of the Minister for the Environment and Land and Sea Protection to respond to their request for precautionary, preventive or containment measures against environmental damage.

102. The applicants could have also brought a claim for damages in the civil courts (see paragraph 80 above).

103. In their additional observations, the Government also relied on Article 844 of the Civil Code (see paragraph 79 above).

104. The applicants contended that the domestic remedies at their disposal had not been adequate and effective as required by Article 35 § 1 of the Convention, since none had been capable of addressing the substance of the relevant Convention complaints and of awarding appropriate relief, especially considering the prolonged and systematic shortcomings of the administrative authorities in managing the waste collection, treatment and disposal services in Campania, and the substantial and unjustified delay in putting in place the permanent securing and remediation of the "Lo Uttaro" landfill site.

105. The Court reiterates that it is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. It is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of

domestic remedies is based on the assumption — reflected in Article 13 of the Convention, with which it has close affinity — that there is an effective remedy available in respect of the alleged violation. The rule is therefore an indispensable part of the functioning of this system of protection (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 69, 25 March 2014).

106. The Court further reiterates that, under Article 35 § 1 of the Convention, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged, while it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see, among other authorities, *Akdivar and Others v. Turkey*, 16 September 1996, §§ 66–68, *Reports* 1996-IV).

107. With regard to compensatory remedies, the Court notes that, on the one hand, they could theoretically have resulted in compensation for the people concerned but not in removal of the waste from public roads or remediation of the "Lo Uttaro" landfill site. Therefore, they could have provided only partial redress for the environmental damage complained of by the applicants. On the other hand, even assuming that compensation constituted an adequate remedy for the alleged violations of the Convention, the Government have not shown that the applicants would have had any chance of success by pursuing that remedy. The domestic decisions relied on by the Government (Court of Cassation judgments nos. 27187/2007 and 22116/14, and Constitutional Court judgments nos. 140/2007 and 167/2011) concerned the issue of the distribution of jurisdiction between the ordinary and administrative courts in matters of environmental damage. The Government did not provide any examples of civil or administrative court decisions actually awarding compensation to inhabitants of areas affected by an accumulation of waste or pollution from a landfill site (see *Di Sarno and Others*, cited above, § 87).

108. In so far as the Government referred to the possibility for the applicants to have requested the administrative courts to annul specific decisions and the civil and administrative courts to order the authorities to put in place measures for the protection of their health and private life, even admitting that these remedies could in theory have been effective, they failed to show that they would in practice have been capable of providing redress in respect of the applicants' complaints.

109. With regard to remedies before the civil courts, the Court notes that, pursuant to Article 700 of the Code of Civil Procedure, the Naples District Court ordered (in a single-judge decision) and confirmed (in a full bench) the

suspension of the operation of the waste disposal plant. However, this measure did not prevent the waste already stored in the landfill from continuing to release emissions into the atmosphere and leachate into the groundwater, nor was it capable of securing and cleaning up the area concerned.

110. As to remedies before the administrative courts, the Court observes that the Government relied on two judgments of the Campania Regional Administrative Court. The first (no. 676/2012) ordered the Minister for the Environment and Land and Sea Protection to respond to the applicants' request for precautionary, preventive or containment measures against the environmental damage allegedly caused by a landfill site, it being understood that the authorities were only required to give a substantiated reply and remained free to choose whether to accept or deny the request. The second (no. 3373/2013) rejected the claim filed against the authorities' follow-up decision to deny the request. Therefore, neither of these judgments ordered the authorities to put in place measures for the protection of the applicants' health and private life (see, *mutatis mutandis*, *Di Sarno and Others*, cited above, § 87).

111. Furthermore, the Court notes that, in the specific circumstances of this case, (i) a state of emergency was declared in Campania to tackle a structural crisis that for more than fifteen years affected the entire regional waste management (see paragraphs 5 and 8 above); and (ii) the pollution from the "Lo Uttaro" landfill site had been known to the authorities since at least 2001 and, several years after they had decided to carry out works to secure the area, implementation of those works was still ongoing without a clear time frame for their end (see paragraphs 28 and 56–75 above).

112. Having regard to the material submitted by the parties, the Government have failed to persuade the Court that in the present case a civil or administrative remedy could have offered reasonable prospects of success.

113. It follows that the Government's preliminary objection as to the non-exhaustion of domestic remedies must be rejected.

114. The Court further notes that these complaints are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

(i) Management of the waste collection, treatment and disposal services

115. The applicants submitted that from 1994 to 2009 the municipalities of Caserta and San Nicola La Strada had been hit by the effects of the regional waste management crisis. Waste had periodically piled up in the streets, producing unbearable smells and attracting stray dogs, rats and insects. Uncontrolled fires

had been lit to burn waste and had released dioxin. The applicants also relied on several studies on the environmental situation in the provinces of Naples and Caserta (see paragraphs 24 and 25 above) to prove that the authorities' failings in the management of the crisis had caused damage to the environment and put their lives in danger. Moreover, the accumulation of large quantities of waste along public roads had constituted an illegitimate interference with their right to respect for their home and private life, impairing free movement and resulting in the temporary closure of schools and local markets.

116. They claimed that the alleged violation had continued in the period following the end of the state of emergency. They relied, *inter alia*, on the findings of the CJEU (see judgment C-653/13, cited in paragraph 21 above).

(ii) The "Lo Uttaro" landfill site

117. The applicants argued that, even though the authorities had been aware since 2001 that the "Lo Uttaro" landfill had posed a serious environmental hazard, in 2007 the deputy commissioner authorised the reopening of the waste disposal plant. Moreover, still in March 2020 (when the applicants' latest observations were received by the Court) the securing and remediation of the area had not yet been carried out. Relying on the findings of the criminal courts and the parliamentary commission, they maintained that the prolonged illegal management of the waste disposal plant and the authorities' failure to take protective measures to minimise or eliminate the effects of pollution stemming from the area had caused damage to the environment and endangered their health. According to them, the respondent State had also failed to discharge its obligation to inform the people concerned of the risks of living in the area surrounding the landfill.

(b) The Government

(i) Management of the waste collection, treatment and disposal services

118. The Government acknowledged that the Court had already assessed the situation complained of by the applicants in the judgment of *Di Sarno and Others* (cited above), but contended that, following that judgment, the management of the waste collection, treatment and disposal services in Campania had significantly improved. They relied on several legislative and administrative measures aimed at achieving more efficient management of the waste life cycle, the development of selective waste collection and the rationalisation and upgrading of the existing structure (see paragraphs 11, 12, 16 and 17 above). With regard to the effects of the waste management crisis on health, the Government submitted that they had taken appropriate legislative and administrative measures to safeguard the environment and the healthiness of food and agricultural products and to clean up contaminated sites (see paragraphs 13–15 above).

(ii) The "Lo Uttaro" landfill site

119. The Government submitted that the authorities had taken adequate measures to minimise the effects on the environment caused by the "Lo Uttaro" landfill site. First of all, since the waste disposal plant had ceased to operate in 2007, any environmental damage was limited to low levels of biogas emissions. Moreover, the environmental situation of the area was constantly monitored by ARPAC and other competent authorities. Permanent securing operations were ongoing. Meanwhile, the orders issued by the judicial and local authorities to prohibit the use of groundwater from wells located in the "Lo Uttaro" area guaranteed effective protection of residents' health.

2. The Court's assessment

(a) General principles

120. The Court reiterates that severe 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 (see *López Ostra*, § 51; *Guerra and Others*, § 60; and *Di Sarno and Others*, § 104, all cited above).

121. The Court further points out that the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8. The assessment of that minimum 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 (see *Cordella and Others*, cited above, § 157).

122. It is often impossible to quantify the effects of serious industrial pollution in each individual case and to distinguish them from the influence of other relevant factors such as age, profession or personal lifestyle. The same concerns possible worsening of the quality of life caused by industrial pollution. "Quality of life" is a subjective characteristic which hardly lends itself to a precise definition (see *Kotov and Others v. Russia*, nos. 6142/18 and 12 others, § 101, 11 October 2022). It follows that, taking into consideration the evidentiary difficulties involved, the Court will have regard primarily, although not exclusively, to the findings of the domestic courts and other competent authorities in establishing the factual circumstances of the case (see *Jugheli and Others v. Georgia*, no. 38342/05, § 63, 13 July 2017; *Cordella and Others*, cited above, § 160; and *Pavlov and Others*, cited above §§ 66–71).

123. Furthermore, Article 8 does not merely compel the State to abstain from arbitrary interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life. In any event, whether the question is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under Article 8 § 1 or in terms of an "interference by a public authority" to be justified in accordance with Article 8 § 2, the applicable principles are

broadly similar (see *López Ostra*, § 51; *Guerra and Others*, § 58; and *Cordella and Others*, § 158, all cited above).

124. In the context of dangerous activities in particular, States have an obligation to set in place regulations geared to the special features of the activity in question, particularly with regard to the level of risk potentially involved. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks (see, *mutatis mutandis*, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 90, ECHR 2004-XII; *Di Sarno and Others*, cited above, § 106; and *Cordella and Others*, cited above, § 159).

125. As to the procedural obligations under Article 8, the Court reiterates that it attaches particular importance to access to information by the public that enables them to assess the risks to which they are exposed (see *Guerra and Others*, § 60, and *Di Sarno and Others*, § 107, both cited above). In assessing compliance with the right to access to information under Article 8 the Court may take into consideration the obligations stemming from other relevant international instruments, such as the Aarhus Convention, which Italy has ratified. Its Article 5 § 1 (c) in particular requires each Party to ensure that "in the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected" (see paragraph 83 above and *Di Sarno and Others*, cited above, §§ 76 and 107).

(b) Application of the above principles to the instant case

(i) Management of the waste collection, treatment and disposal services

(α) From 11 February 1994 to 31 December 2009, the end of the state of emergency

126. The Court has already noted (see paragraph 93 above) that the municipalities of Caserta and San Nicola La Strada, where the applicants live, were affected by the waste management crisis. The applicants complained that this situation had endangered their lives and health and constituted an illegitimate interference with their right to respect for their home and private life.

127. The applicants have not alleged that they were affected by any pathologies linked to exposure to waste. However, they relied on several studies on the environmental situation in the provinces of Naples and Caserta (see paragraphs 24 and 25). According to these studies, whose findings the Government did not contest, the mortality risk associated with a number of tumours and other health conditions was higher in an area of those provinces — which includes

the municipalities of Caserta and San Nicola La Strada — than in the rest of Campania. The Court sees no reason to question that, as suggested by the above-mentioned studies, a causal link existed between exposure to waste treatment and an increased risk of developing pathologies such as cancer or congenital malformations, even though other factors such as family history, nutrition and smoking habits in the area might also have influenced the mortality rate.

128. The existence of a risk to human health as a consequence of the waste management crisis was recognised by the CJEU. When examining the waste disposal situation in Campania, it considered that the accumulation of large quantities of waste along public roads and in temporary storage areas exposed the health of the local inhabitants to certain danger (see judgment C-297/08, cited in *Di Sarno and Others*, cited above, §§ 55–56).

129. Moreover, in its report of 5 February 2013 the parliamentary commission considered that, although it was impossible to estimate the exact extent to which the pollution from the waste management crisis had affected human health, such incalculable damage did exist and would affect future generations, reaching its peak in fifty years from then (see paragraph 23 above).

130. The Court considers that even though it cannot be said, owing to the lack of medical evidence, that the pollution from the waste management crisis necessarily caused damage to the applicants' health, it is possible to establish, taking into account the official reports and available evidence, that living in the area marked by extensive exposure to waste in breach of the applicable safety standards made the applicants more vulnerable to various illnesses (see, for similar reasoning, *Kotov and Others*, cited above, § 107).

131. Moreover, the Court also reiterates that severe environmental pollution may affect individuals' well-being in such a way as to adversely affect their private life, without, however, seriously endangering their health (see *López Ostra*, cited above, § 51). In the present case, the applicants were forced to live for several months in an environment polluted by waste left in the streets and by waste disposed of in temporary storage sites urgently created to cope with the prolonged unavailability of sufficient waste treatment and disposal facilities. The waste collection services in the municipalities of Caserta and San Nicola La Strada were repeatedly interrupted from the end of 2007 to May 2008. The accumulation of large quantities of waste along public roads led the local authorities to issue emergency measures including the temporary closure of kindergartens, schools, universities and local markets and the creation of temporary storage areas in the municipalities.

132. Even assuming that the acute phase of the crisis lasted only five months — from the end of 2007 to May 2008 — (see paragraphs 9 and 10 above), the Court considers that the environmental nuisance that the applicants experienced in the course of their everyday life affected, adversely and to a sufficient extent,

their private life during the entire period under consideration (see *Hardy and Maile v. the United Kingdom*, no. 31965/07, § 188, 14 February 2012, and, for a similar reasoning, *Kotov and Others*, cited above, § 109, with further references).

133. The Court also finds that, given the protracted inability of the Italian authorities to ensure the proper functioning of the waste collection, treatment and disposal services, and in spite of the margin of appreciation left to the respondent State, the authorities failed in their positive obligation to take all the necessary measures to ensure the effective protection of the applicants' right to respect for their home and private life (see *Cordella and Others*, cited above, § 173; and *Di Sarno and Others*, cited above, § 112).

134. There has therefore been a violation of Article 8 of the Convention in this regard for the period from 11 February 1994 to 31 December 2009.

(β) From 1 January 2010, after the end of the state of emergency

135. As to the period from 1 January 2010, following the end of the state of emergency, the Court observes that the documents filed by the parties shed light on several shortcomings in the management of waste treatment and disposal services in Campania. Notwithstanding the legislative and policy measures put in place since May 2008, the CJEU (see judgment C-653/13, cited in paragraph 21 above) found that on 15 January 2012 the authorities still had to examine and dispose of approximately 6 million tonnes of "ecobales", and that this would take about fifteen years from the date when the necessary infrastructure was built. A statement of the Campania Regional Council of 6 July 2020 reported that on 24 June 2019 there were still more than 4 million tonnes of "ecobales" in the region (paragraph 17 above).

136. The Court reiterates that it is not for it to rule *in abstracto* on the quality of the Campania waste collection, treatment and disposal services or on the adequacy of its waste treatment and disposal infrastructure, but to ascertain *in concreto* what effect these activities had on the applicants' right to respect for their home and private life under Article 8 of the Convention. In this regard, it observes that the applicants have not demonstrated whether and to what extent the shortcomings in the management of waste treatment and disposal services in Campania in the period following the end of the state of emergency had a direct impact on their home and private life. Although the presence of large quantities of "ecobales" shows the persistence of a general deterioration of the environment in Campania, this is not in itself sufficient to establish that the situation specifically affected the population of the municipalities of Caserta and San Nicola La Strada and, if so, the extent of the interference with the applicants' right to respect for their home and private life.

137. In reaching this conclusion, the Court points out that the applicants' claim specifically concerns the poor management by the national authorities of the waste collection, treatment and disposal services and does not include dif-

ferent — although related — phenomena such as the general situation of illegal dumping and disposal of waste known as "*Terra dei fuochi*" (see paragraphs 14 and 15 above), which therefore falls outside the scope of the present case.

138. In view of the scope of the claim as established above, the Court cannot conclude that the applicants showed to have personally suffered a severe impact of the waste pollution from 1 January 2010 following the end of the state of emergency. Accordingly, there has been no violation of Article 8 in this regard.

(ii) The "Lo Uttaro" landfill site

139. The applicants complained that the authorities had failed to take the requisite measures to protect their health and the environment and neglected to inform the people concerned of the risks of living in the area surrounding the "Lo Uttaro" landfill.

(α) Substantive aspect of Article 8

140. The Court notes that it is not its task to determine what exactly should have been done in the present case to address and possibly reduce the pollution in a more efficient way. However, it is certainly within its jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests. In this regard, the Court reiterates that 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. Looking at the present case from this perspective, the Court notes the following points (see *Fadeyeva v. Russia*, no. 55723/00, § 128, ECHR 2005-IV, and *Cordella and Others*, cited above, § 161).

141. The documents provided by the parties show the existence of serious environmental pollution from the "Lo Uttaro" landfill site as a result of approximately twenty years of illegal waste disposal. From the late 1980s until the plant definitively ceased to operate in 2007, the landfill site was operated — in breach of the relevant legislative provisions and administrative authorisations — beyond the boundaries of the quarry, beyond the limits of its capacity and for the illegal disposal of hazardous waste. Since at least 2001 the authorities had been aware that the landfill posed a serious environmental hazard. Despite the environmental situation of the area and its inclusion in the PBR since 2005, the deputy commissioner authorised the reopening of the waste disposal plant, creating the conditions for worsening the environmental damage. The reports of the parliamentary commission and the findings of national courts from 2007 onwards describe a long pattern of problems in managerial and monitoring activities and considered the "Lo Uttaro" area a risk to public health, particularly as regards groundwater (see paragraphs 34–40 and 76–77 above).

142. Following its seizure by the criminal courts in November 2007, the inspections carried out by ARPAC in 2008 showed that the "Lo Uttaro" landfill

site, by then no longer in operation, continued to cause environmental damage to the groundwater and atmosphere.

143. The Court notes that, despite the authorities' attempts to secure the area concerned, on the date of the latest observations received by the Court (6 July 2020) the projects put in place were not fully implemented yet, nor had the related works being carried out according to a clear time frame. First of all, the Court observes that, despite the securing and remediation of the area being proposed in the framework agreement between the Ministry of the Environment and the Campania Regional Council dated 18 July 2008 and in the subsequent operational agreement between the Ministry of the Environment and the municipality of Caserta of 4 August 2009, implementation of the first phase of the environmental characterisation of the area only took place in the years 2013 to 2014.

144. Moreover, although on 11 April 2014, on the basis of the data collected, ARPAC recommended taking several actions including (i) urgent safety measures in respect of the groundwater contamination and (ii) the immediate removal and disposal of the hazardous waste containing asbestos, these urgent measures were not put in place (see paragraphs 64–75 above).

145. The Court further notes that the second phase of the environmental characterisation, which was approved in June 2014 and whose activities were expected to begin immediately after and to last no more than ninety days, had not yet started on 14 January 2015. Its results were only validated by ARPAC on 10 March 2016.

146. As to the permanent securing of the area, the Resolution of the Campania Regional Council of 1 August 2017 reported that the necessary measures had not yet been planned. According to the information provided by the Government in the latest observations received by the Court (on 6 July 2020), the securing of the groundwater in the *Area Vasta "Lo Uttaro"* were still ongoing on that date with no clear time-limits for their conclusion.

147. On the basis of the above information, the Court observes that the mere closure of the landfill site did not prevent the waste from continuing to harm the environment and endanger human health (see the judgment of the CJEU, C-196/13, cited in paragraph 21 above). Moreover, the procedure aimed at securing and cleaning up the area appears to have been rather inconclusive (see, *mutatis mutandis*, *Cordella and Others*, cited above, § 168). Meanwhile, the concentration of a number of toxic substances in the groundwater near the landfill site led the judicial and administrative authorities — repeatedly from 2013 to 2019 — to prohibit the use of groundwater and impose a ban on cultivation in the area, also by means of seizure orders on the wells (see paragraphs 63, 72 and 73 above).

148. While the Court cannot conclude to what extent the applicants' lives or health were specifically threatened by the pollution from the "Lo Uttaro" landfill site, the Court considers that the documents filed by the parties demonstrate that a situation of environmental pollution in the municipalities of Caserta and San Nicola La Strada was continuing and endangering their health.

149. In the light of the foregoing, the Court finds that the national authorities failed to take all the measures necessary to ensure the effective protection of the right of the people concerned to respect for their private life.

150. Thus, the fair balance to be struck between, on the one hand, the applicants' interest in not suffering serious environmental harm which might affect their well-being and private life and, on the other, the interest of society as a whole, was upset in the present case.

151. Therefore, there has been a violation of Article 8 of the Convention in its substantive aspect.

(β) Procedural aspect of Article 8

152. As to the procedural aspect of Article 8 and the complaint concerning the alleged failure to provide information that would have enabled the applicants to assess the risk they ran, the Court notes that the Civil Protection Department published studies on the health impact of the waste cycle in the provinces of Naples and Caserta in 2005 and 2008. Moreover, the environmental situation of the "Lo Uttaro" landfill site was made public by the parliamentary commission in 2007 and 2013. Information on the test results carried out as part of the characterisation of the "Lo Uttaro" area was contained in the orders by the mayors of Caserta and San Nicola La Strada and in the press release by the public prosecutor at the Santa Maria Capua a Vetere District Court in the years 2013 to 2019. The Court accordingly considers that the Italian authorities discharged their duty to inform the people concerned, including the applicants, of the potential risks to which they exposed themselves by continuing to live in Caserta and San Nicola La Strada (see *Di Sarno and Others*, § 113, and *Guerra and Others*, § 60, both cited above). There has therefore been no violation of Article 8 of the Convention in this regard.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

A. Article 6 § 1 and Article 1 of Protocol No. 1 to the Convention in conjunction with Article 13 of the Convention

153. The applicants further complained of a lack of effective remedies to obtain full restitution of the taxes they had paid for the collection and disposal of their municipal solid waste. According to them, the State's failure to guarantee adequate waste collection, treatment and disposal services in Campania made them entitled to full restitution of the taxes they had paid in relation to those

services. They relied on Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention, which, in so far as relevant, read as follows:

Article 6 § 1

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Article 1 of Protocol No. 1

"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."

Article 13

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

154. As regards Article 6 § 1, the Court reiterates that merely showing that a dispute is pecuniary in nature is not in itself sufficient to attract the applicability of this provision under its civil head. Tax matters still form part of the hard core of public authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant. Thus, tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer (see *Ferrazzini v. Italy* [GC], no. 44759/98, § 29, ECHR 2001 – VII, and, more recently, *Vegotex International S. A. v. Belgium* [GC], no. 49812/09, § 66, 3 November 2022).

155. Accordingly, the complaint under Article 6 § 1 is incompatible *ratione materiae* with the provisions of the Convention.

156. As to the claim under Article 1 of Protocol No. 1, the Court reiterates that the rule contained in the second paragraph explicitly reserves the right of Contracting States to pass such laws as they may deem necessary to secure the payment of taxes.

157. Having regard to the applicants' submission that under domestic law they could have requested restitution of up to 60% of the amounts they had paid even though, according to them, they should have been entitled to full restitution of those amounts, the Court observes that a property interest in

obtaining full restitution of those amounts did not exist as such under national law. Therefore, this complaint would in principle be incompatible *ratione materiae* with Article 1 of Protocol No. 1 (*Zhigalev v. Russia*, no. 54891/00, § 131, 6 July 2006). However, even assuming that this provision would apply, the complaint is in any event inadmissible as being manifestly ill-founded, on the grounds that the matter falls within the wide margin of appreciation that Contracting States enjoy when it comes to framing and implementing policy in the area of taxation (see *Stere and Others v. Romania*, no. 25632/02, § 51, 23 February 2006, and "*Bulves*" *AD v. Bulgaria*, no. 3991/03, § 63, 22 January 2009; see also the case-law cited in paragraph 154 above).

158. The complaint under Article 1 of Protocol No. 1 is therefore inadmissible under Article 35 § 3 (a) of the Convention and must be rejected pursuant to Article 35 § 4 thereof.

159. Lastly, the Court reiterates that Article 13 does not apply if there is no arguable claim (see *Balsamo v. San Marino*, nos. 20319/17 and 21414/17, § 77, 8 October 2019 and the case-law cited therein). As it has found above, the complaints under Article 6 § 1 and Article 1 of Protocol No. 1 were inadmissible *ratione materiae* and manifestly ill-founded respectively. Consequently, the applicants have no arguable claim under the Convention. and in the present case Article 13 is not applicable in conjunction with the above-mentioned provisions.

160. Accordingly, the complaint under Article 13 is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

B. Remaining complaints

161. Relying on Article 14 together with Articles 2 and 8 of the Convention, the applicants complained that as residents in the Campania region, they had been afforded a lower level of protection of the aforementioned Convention rights than people residing elsewhere.

162. The Court notes that the complaint is unsubstantiated and not supported by any evidence and is therefore manifestly ill-founded.

C. Conclusion

163. Consequently, the remainder of the application must be rejected as being inadmissible, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

164. 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

165. The applicants claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

166. The Government objected.

167. In the circumstances of the present case, the Court considers that the violations of the Convention it has found constitute sufficient just satisfaction for any non-pecuniary damage.

B. Costs and expenses

168. The applicants also claimed EUR 28,492.95 for the costs and expenses incurred before the Court.

169. The Government contested the claim.

170. 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 were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicants, jointly, the sum of EUR 5,000 for the proceedings before the Court, plus any tax that may be chargeable to the applicants.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application inadmissible in respect of the applicants listed under numbers 2–4, 7 and 15–18 in the appendix;

2. *Declares* the remaining applicants' complaints concerning Article 8 of the Convention admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 8 of the Convention as regards management of the waste collection, treatment and disposal services in the period from 11 February 1994 to 31 December 2009;

4. *Holds* that there has been no violation of Article 8 of the Convention as regards management of the waste collection, treatment and disposal services in the period from 1 January 2010;

5. *Holds* that there has been a violation of Article 8 of the Convention in its substantive aspect as regards the Italian authorities' failure to take the requisite measures to protect the applicants' right to private life in connection with the environmental pollution caused by "Lo Uttaro" landfill site;

6. *Holds* that there has been no violation of Article 8 of the Convention in its procedural aspect as regards the Italian authorities' alleged failure to provide the applicants with information as to the environmental pollution caused by "Lo Uttaro" landfill site;

7. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;

8. *Holds*

(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) to the applicants, jointly, plus any tax that may be chargeable to them, in respect of costs and expenses;

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

9. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 19 October 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar

Marko Bošnjak
President

APPENDIX

List of applicants:

No.	Applicant's Name	Year of birth	Place of residence
1.	Loredana LOCASCIA	1972	San Nicola La Strada
2.	Guido ANTUONO	1951	Caserta
3.	Tiziana ANTUONO	1949	Caserta
4.	Laura BALDELLI	1945	Caserta
5.	Mariano DE MATTEIS	1947	San Nicola La Strada
6.	Anna Maria DI LILLO	1947	San Nicola La Strada
7.	Rosa GUERRIERO	1947	Caserta
8.	Alfredo IMPARATO	1971	San Nicola La Strada
9.	Vincenzo LAVORETANO	1953	San Nicola La Strada
10.	Renato LOCASCIA	1947	Caserta
11.	Daniele ORLANDO	1982	San Nicola La Strada
12.	Francesco Antonio ORLANDO	1943	San Nicola La Strada
13.	Michele ORLANDO	1972	San Nicola La Strada
14.	Vincenzo ORLANDO	1982	San Nicola La Strada
15.	Cinzia PANARO	1955	Caserta
16.	Giuseppe PETRELLA	1943	Caserta
17.	Pasquale PETRELLA	1941	Caserta
18.	Francesco SCOLASTICO	1948	Caserta
19.	Domenico TAGLIAFIERRO	1970	Caserta

ANNEX 30

THIRD SECTION

CASE OF SOLYANIK v. RUSSIA

(Application no. 47987/15)

JUDGMENT

Art 8 • Private life and home • Authorities' ongoing illegal use of cemetery near applicant's property, exposing him to an environmental nuisance • Blatant breach of domestic health regulations and unexplained delay in enforcement proceedings, thereby prolonging the illegality

STRASBOURG
10 May 2022

FINAL

10/08/2022

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Solyanik v. Russia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Georges Ravarani, *President,*
María Elósegui,
Darian Pavli,
Anja Seibert-Fohr,
Peeter Roosma,
Andreas Zünd,
Mikhail Lobov, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 47987/15) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Vladimir Vladislavovich Solyanik ("the applicant"), on 22 September 2015;

the decision to give notice to the Russian Government ("the Government") of the complaint concerning the use of cemetery allegedly in breach of the health regulations and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 5 April 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The main issue in the present case is whether the ongoing use of a cemetery that has not been surrounded by a sanitary protection zone (*санитарно-защитная зона)* and is located in the close vicinity of the applicant's property interferes with his right to respect for private life and home in breach of Article 8 of the Convention.

THE FACTS

2. The applicant, Mr Vladimir Vladislavovich Solyanik, is a Russian national who was born in 1967 and lives in Vladivostok. He is represented before the Court by Ms Tamara Gavrilovna Akulibaba, a lawyer practising in Vladivostok.

3. The Government were initially represented by Mr M. Galperin, former Representative of the Russian Federation to the European Court of Human Rights, and later by Mr M. Vinogradov, his successor in that office.

4. The facts of the case may be summarised as follows.

I. BACKGROUND TO THE CASE

5. The applicant is the owner of a private house and an adjacent plot of land; half of the house and half of the plot of land he inherited in 1983 — the remainder was bestowed on him in 2007. The house and the plot of land are located near a cemetery ("the Lesnoye cemetery") in Vladivostok, which has been in operation since 1946. The applicant draws water (for drinking and other household needs) from a well located on his property, and that well is his only source of drinking water.

6. On 2 July 1991 a plot of land measuring 89 hectares was allotted by the authorities for the expansion of the Lesnoye cemetery. Burials at the cemetery at that time were conducted by the municipality's "specialised services" unit, which was in 2010 merged with the city's crematorium; in 2010 these two undertakings were officially reorganised to form the city's burial service ("the municipal burial service").

7. On 1 November 1995, having received complaints from local residents, the head of the municipal administration of Vladivostok ("the city administration") issued Decree no. 1206 ordering the closure of the Lesnoye cemetery and

a halt to the conducting of burials there because it had been determined that the cemetery's burial capacity had been reached and that any further burials within its boundaries as they then stood would contravene health regulations.

8. On 24 November 2009 the Regional Consumer Protection Authority (*Управление Роспотребнадзора по Приморсокму Краю* — "the Regional CPA") ordered that samples be taken of the well water and of the soil on the applicant's land for the purposes of preparing an expert hygiene and epidemiology report. The resulting expert report of 8 December 2009 indicated that (i) the quality of water in the well fell short of the required standards for drinking water owing to the abnormal levels of pathogenic bacteria in it, and (ii) the concentration of chlorides in the soil was 25% above the legal limit. The report named the cemetery as a possible source of pollution.

9. On 23 April 2010 the applicant and other persons living in the same street (which ran along the cemetery's boundary) complained to the Regional CPA that, despite the issuance of Decree no. 1206, the carrying out of burials had resumed; they requested that measures be taken in respect of these illegal actions on the part of the municipal burial service. They pointed out that burials had been carried out at the cemetery between at least May 2009 and April 2010 and submitted photographs of the most recent graves.

10. On 23 July 2010 the city administration issued Ruling no. 830, by which Decree no. 1206 closing the cemetery (see paragraph 7 above) was quashed as invalid.

11. On 13 June 2012 fresh samples of soil and underground water taken from the applicant's land were examined by forensic experts by order of the Leninskiy District Court of Vladivostok. The experts established that the soil's chemical, bacteriological and parasitological markers exceeded the safety standards to an "extremely dangerous extent" and that the activities of the municipal burial service could contaminate the soil and endanger the lives and health of people residing on the land. The testing of water from the well had not revealed any abnormalities.

12. By letters dated 13 August 2013, 10 February 2014 and 31 March 2015 the Regional CPA informed the applicant and one of his neighbours that the municipal burial service had been reprimanded for its failure to produce a proposal for the demarcation of a sanitary protection zone around the Lesnoye cemetery and that proceedings under the Code of Administrative Offences had been brought in that respect by the Regional CPA.

II. DOMESTIC PROCEEDINGS

13. The applicant lodged a complaint with the Leninskiy District Court of Vladivostok, requesting that it order the municipal burial service and the city administration to discontinue the carrying out of burials at the cemetery. On

22 April 2013, the court dismissed the applicant's complaint, having found that the relevant provisions of the domestic law had not been breached.

14. On 25 April 2013, the Primorsk Bureau of Forensic Expertise (*ООО Приморское бюро судебных экспертиз*) — a private company — conducted a survey of the applicant's land, at his request. According to the results of the survey, the outer border of the cemetery (which had shifted after the area of the cemetery had started to expand in 2009) was located (according to the standards set out by the relevant regulations) too close to the applicant's house (77.1 metres) and to the applicant's plot of land (67.7 metres), which meant that they were both located within the presumed sanitary protection zone, in violation of the applicable health regulations. It was determined that graves had contaminated underground water and soil adjacent to the cemetery, which could cause mass the outbreaks of infectious diseases. The experts furthermore established that the cemetery's layout sloped downwards, towards the well on the applicant's plot of land, and thus posed a threat to the life and health of the applicant and the individuals sharing the house with him.

15. Following an appeal lodged by the applicant, on 16 October 2013 the Primorsk Regional Court quashed the 22 April 2013 judgment of the Leninskiy District Court of Vladivostok and ordered the defendants to cease carrying out (in violation of regulations regarding sanitary protection zones) burials at the Lesnoye cemetery. It held, in particular, that the expert reports of 13 June 2012 and 25 April 2013 (see paragraphs 11 and 14 above) had shown that burials were being carried out in breach of the relevant health regulations, endangering the lives and the health of the applicant and other people living in the house with him. The municipal burial service and the city administration appealed.

16. On 30 July 2014 the Primorsk Regional Court (sitting as an appellate court) re-examined the applicant's case. It found that when the cemetery had been expanded, a 500-metre sanitary protection zone should have been created around it, as required by the 2007 Health Regulations (see paragraph 23 below), but this had never been done. It also held that the size of the sanitary protection zone could be reduced under certain conditions. It furthermore quashed the judgment of 22 April 2013 and ordered the city administration and the municipal burial service to prepare, by 31 December 2014, plans illustrating and substantiating the proposed demarcation of a sanitary protection zone around the cemetery. It refused the applicant's request to discontinue burials.

17. Following an appeal by the applicant, the judgment of the Primorsk Regional Court of 30 July 2014 was upheld on 2 October 2014 by the same court and on 25 March 2015 by the Supreme Court of Russia.

18. On 5 July 2017 the applicant informed the Court that a sanitary protection zone around the cemetery had not been established.

RELEVANT LEGAL FRAMEWORK

I. NATIONAL REGULATIONS

A. Federal Law no. 8-FZ of 12 January 1996 on burials and funeral services

19. The legislation governing burials and funeral services consists of (i) Federal Law no. 8-FZ and (ii) other laws and regulations adopted in accordance with it (Article 2 § 1).

20. The size of plot of land allocated for use as a cemetery is calculated according to the number of residents of the city (or other population centre) in question, but in any event it cannot exceed 40 hectares (Article 16 § 5).

21. The administration of cemeteries is regulated by the health and environmental regulations enacted by the municipal authorities (Article 17 § 1).

B. Federal Law no. 52-FZ of 30 March 1999 on health and epidemiological safety

22. Water drawn from sources within urban or suburban residential areas and used for drinking and other private purposes should not have a negative chemical, biological and physical effect on humans (Article 18). The quality of drinking water should be free from epidemiological and radioactive markers and the chemicals contained in it should be at safe levels. It should have acceptable organoleptic characteristics (Article 19).

23. The concentration in urban and suburban soils of chemicals, biological substances, and biological and microbiological organisms that are potentially dangerous for humans should not exceed the maximum permissible levels set out in the relevant health regulations (Article 21).

C. Health regulations concerning sanitary protection zones enacted by Decree no. 74 of 25 September 2007 of the Chief Environmental Health Officer ("the 2007 Health Regulations")

24. Every polluting undertaking (*объекты, являющиеся источниками воздействия на среду обитания и здоровье человека*) must create a "sanitary protection zone" around its premises — a buffer area separating sources of pollution from residential areas — which serves to minimise the negative effects of pollution and to ensure the safety of the neighbouring population during the normal operations of the polluting undertaking in question (Rules 1.2. and 2.1.)

25. The actual size of the sanitary protection zone in question will be determined by a proposal that must contain, *inter alia*, substantiation of its size with data regarding the levels of atmospheric pollution measured on and around the site in question, together with other relevant data (Rule 4.1.).

26. The size of the sanitary protection zone around a cemetery is determined or changed by order of the Russia's Chief Environmental Health Officer (*Главный санитарный врач*) on the basis of (i) the preliminary conclusions reached

by the regional branch of the Consumer Protection Authority; (ii) the relevant health and epidemiological rules; (iii) an expert environmental report provided by an accredited organisation qualified to undertake such work; and (iv) an assessment of health risks (*оценки риска здоровью населения*) (Rule 4.2.).

27. The Chief Environmental Health Officer may reduce the size of the sanitary protection zone under certain conditions (Rule 4.5.).

28. No residential buildings, including private houses, may be located within the boundaries of a sanitary protection zone (Rule 5.1.).

29. A 500-metre sanitary protection zone should be created around a cemetery whose total area amounts to 20–40 hectares. The total area of a cemetery should not exceed 40 hectares (Rule 7.1.12. § 5, "Class II. Sanitary protection zone — 500 metres").

D. Rules (no. 2.1.2882-11) governing cemeteries and places of burial, which took force under Decree no. 84 of 28 June 2011 issued by the Chief Environmental Health Officer (as in force at the material time and until 1 March 2021)

30. The requirements set out by municipal authorities for the construction, maintenance, and administration of cemeteries should be in compliance with the standards set out in the Rules governing cemeteries and places of burial (Rule 1.3.).

31. Land on which a cemetery is located should slope away from any nearby residential area and any surface and underground sources of water used by local residents for household purposes (Rule 2.4.).

32. The distance between cemeteries where human remains are placed in graves or mausolea and residential buildings is determined by the relevant rules concerning sanitary protection zones (Rule 2.5.).

33. A cemetery's sanitary protection zone should first be conceived and officially demarcated, and then planted with vegetation; it should have a thoroughfare allowing access for transportation and other relevant purposes (Rule 2.9.).

E. Report dated 17 January 2013 prepared by the Ministry for Economic Development concerning the difficulties encountered by business owners and other organisations in complying with the 2007 Health Regulations

34. The Report stated that according to the data received by the Ministry for Economic Development during public consultations with business owners and other organisations, the process of creating a sanitary protection zone — that is to say preparing plans illustrating and substantiating the proposed demarcation of the zone, assessing any health risks, having experts examine the project, taking the necessary measurements, finalising the project, and securing final approval for the project from the Chief Environmental Health Officer — lasted an average of three years (Paragraph 1.4.).

35. The report also noted that it had been determined by the Ministry for Economic Development that since October 2010, the 2007 Health Regulations, had been deemed (when strictly interpreted) to be applicable only to newly-created polluting undertakings. However, some of its provisions had nevertheless been applied to already-existing undertakings, and judicial practice in this respect had been contradictory: some courts had held that no sanitary protection zone had to be created around existing polluting undertakings, whereas other courts had ruled otherwise.

II. MUNICIPAL REGULATIONS

36. Rule 14.4 of the 2011 City Planning Rules of Vladivostok (*Нормативы градостроительного проектирования Владивостокского городского округа, утвержденного постановлением главы г. Владивостока от 10 февраля 2011 № 111*) — as in force at the material time and before 8 April 2020 (when they were repealed after new rules were adopted on 30 January 2020) — provided, *inter alia*, that the expansion of cemeteries had had to be carried out in accordance with the relevant regulations and technical requirements, references to which were made in Appendix 5 of the City Planning Rules (including a reference to the 2007 Health Regulations). The new rules, adopted in 2020 (*Местные нормативы градостроительного проектирования Владивостокского городского округа, утверждённые 30 января 2020 Правительством Приморского Края*) limit the size of a cemetery to 40 hectares and make a reference to 2017 Urban Construction Rules that provide that the distance between buildings and cemeteries is set at 500, 300 or 100 meters, depending on the size of a cemetery.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

37. The applicant complained that the continued use of the cemetery near his home had led to the contamination of the soil on his plot of land and the pollution of his only source of drinking water, thus preventing him from making normal use of his home and its amenities and negatively affecting his and his family's physical and mental health, in breach of 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

38. The Government objected to the admissibility of the complaint in general, asserting that it should be rejected under Article 35 § 3 (a) of the Convention, but they provided no specific arguments in that respect, except to assert that no interference with the applicant's rights had taken place. The applicant made no submissions in respect of either the Government's objection or the admissibility of his complaint.

39. In so far as the Government can be understood as alleging that the applicant's complaint was incompatible *ratione materiae* with the provisions of Article 8, the Court has first to establish whether Article 8 is applicable in the present case and whether the Court has jurisdiction *ratione materiae* to examine the respective complaint on the merits (see *Denisov v. Ukraine* [GC], no. 76639/11, § 93, 25 September 2018).

40. The Court has held in previous cases concerning environmental nuisances that in order for an applicant to be able to raise an issue under Article 8, the interference of which the applicant complains must directly affect his home or family or private life and must attain a certain minimum level. The assessment of that minimum is relative and depends on all the circumstances of the case (such as the intensity and duration of the nuisance in question) and its physical or mental effects. The general context of the environment should also be taken into account. There will be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent in life in every modern city (see *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 40, Series A no. 172; *Guerra and Others v. Italy*, 19 February 1998, § 57, *Reports of Judgments and Decisions* 1998-I; and *Fadeyeva v. Russia*, no. 55723/00, §§ 69–70, ECHR 2005-IV). The Court reiterates that the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers, *inter alia*, the physical and psychological integrity of a person (see *Otgon v. the Republic of Moldova*, no. 22743/07, § 15, 25 October 2016, with further references).

41. In the present case there is no direct evidence of any actual damage having been caused to the applicant's health. However, the Court reiterates that severe 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 (see *López Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C, p. 54, § 51). The Court must therefore establish whether the potential risks to the applicant caused by the use of cemetery in close proximity to his house established a sufficiently close link with the applicant's private life and home as to affect his "quality of life" and to trigger the application of the requirements of Article 8 of the Convention (see *Dzemyuk v. Ukraine*, no. 42488/02, § 82, 4 September 2014).

42. The Court notes, firstly, that the cemetery has been gradually expanding in the direction of the applicant's house. In particular, in April 2013, when a forensic expert formally measured, presumably for the first time, the distance between the applicant's property and the cemetery's closest point, it was about 70 metres (see paragraph 14 above); by 2019 that gap had reportedly shrunk to 34 metres (see paragraph 46 below), having thus reduced by almost a half in six years. Therefore, since at least 2013, the applicant's house has been situated in the cemetery's presumed sanitary protection zone — a state of affairs that is directly prohibited by the relevant regulations (see paragraphs 14, 28 and 29 above).

43. Secondly, the Court notes that the expert reports submitted by the applicant confirm the existence of dangerous environmental risks to the applicant's property. Thus, according to the above-mentioned 2009 expert report prepared by the Regional CPA, the water in the well on the applicant's property had been contaminated by high levels of pathogenic bacteria, and the concentration of chlorides in the soil was above the maximum levels of harmful substances permitted by law (see paragraphs 8, 22 and 23 above). It is relevant in this regard that the well is the only nearby source of water for the applicant (see paragraph 2 above). Furthermore, the above-mentioned report of 13 June 2012 indicated that the soil on the plot of land belonging to the applicant had been polluted to an "extremely dangerous degree" (owing to the presence in it of excessive levels of chemicals, pathogenic bacteria and parasites) and that the cemetery could have been the source of that contamination and that it could have had a harmful impact on the life and health of people residing on the applicant's plot of land (see paragraph 11 above). The above-mentioned report of 25 April 2013 indicated that the applicant's house was located too close to the cemetery, in breach of the relevant regulations, and that the cemetery could have been a source of contamination in respect of the applicant's property. The Court notes that the reports dated 13 June 2012 and 25 April 2013 were both accepted by the Primorsk Regional Court as evidence of the applicant having been exposed to an environmental nuisance (see paragraph 15 above).

44. Therefore, similarly to the case of *Dzemyuk* (cited above, §§ 80–83), where the Court found that there had been interference with the applicant's rights under Article 8 of the Convention on account of pollution of his plot of land and water well caused by operation of the cemetery in the vicinity of his home, evidence has been presented in the present case to support the view that the applicant's property where his house is located has been contaminated, and the Lesnoye cemetery located nearby has been named by the domestic authorities and forensic experts as a possible source of that contamination (see paragraphs 8, 11, 14, 15 and 43 above).

45. Considering that the border of the cemetery has gradually shifted close to the applicant's property in breach of the domestic regulations and that the

domestic authorities and forensic experts determined that the soil on the applicant's plot of land was contaminated to an "extremely dangerous degree" (see paragraphs 11, 14, 42 and 43 above) and taking into account other above-noted factors (see paragraph 44 above), the Court finds that the prolonged use of the Lesnoye cemetery by the municipal burial service in clear violation of applicable environmental health safety regulations so close to the applicant's house and its consequent impact on the applicant's "quality of life" reached the minimum level required by Article 8. The Court considers that there has been an interference with the applicant's right to respect for his home and private and family life and that that interference attained a sufficient degree of seriousness to trigger the application of Article 8 of the Convention (see *Dzemyuk*, cited above, §§ 83–84). The Court therefore holds that Article 8 is applicable in the present case and that it has jurisdiction *ratione materiae* to examine the applicant's complaint under Article 8 regarding the alleged environmental nuisance. It furthermore holds that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant's submissions

46. The applicant submitted that, under the judgment of the appellate court, plans substantiating the creation of a sanitary protection zone should have been finalised by 31 December 2014, yet the enforcement proceedings (that is to say the proceedings to enforce the judgment ordering the preparation of such a zone) had only actually started on 27 May 2019, after the Government had been given notice of his application by the Court. He furthermore submitted that burials continued to be conducted in the cemetery, that the distance between the cemetery and his house was 34 metres and that no recent monitoring of soil pollution had been carried out, owing to the fact that a sanitary protection zone (within the boundaries of which those measurements should have been taken) had not been demarcated.

47. The applicant furthermore submitted that the relevant health regulations prohibited the siting of houses within the limits of sanitary protection zones, yet his house had been located within thirty-four metres of the cemetery, which was well within the boundaries of the presumed sanitary protection zone around the cemetery. He was not able either to use his plot of land for gardening or to draw water from his well for drinking and other purposes because he feared being poisoned.

48. The applicant also submitted that he and his wife suffered from insomnia and headaches and had experienced emotional distress caused by the carrying

out of burials near their house. Trees that had stood between the cemetery and the applicant's house had been cut down, meaning that the cemetery was in plain view of the applicant's house. His grandchildren were afraid to visit him because he had "in essence started living in the cemetery". In the applicant's opinion, the Government had not submitted any legitimate argument to justify the use of the cemetery in a manner contravening existing rules.

(b) The Government's submissions

49. The Government submitted that (i) the terms of reference containing the technical specifications and requirements for the creation of an sanitary protection zone had been prepared; (ii) the municipal burial service (together with urban planning engineers) had been ordered to inspect, by 1 December 2019, the grounds of the Lesnoye cemetery and to establish whether any residential buildings were located within the boundaries of the presumed sanitary protection zone around the cemetery and (iii) the city administration's department for roads and urban development had been instructed to announce, by the end of 2019, an online tender in respect of the task of determining the size of the sanitary protection zone around the cemetery. The Government accordingly contended that since enforcement proceedings were pending, no violation of the applicant's rights under Article 8 had taken place.

2. The Court's assessment

50. In the present case the applicant alleged that the State was directly responsible for the ongoing unlawful use of the Lesnoye cemetery close to his home and for the resulting environmental nuisance to which he was exposed. Having regard to its conclusion concerning the applicability of Article 8 of the Convention (see paragraph 45 above) and given the fact that it is not disputed that the acts or omissions of a municipal undertaking are attributed to the State (see *Yershova v. Russia*, no. 1387/04, §§ 54–62, 8 April 2010), the Court considers that the use of the cemetery by the municipal burial service has directly interfered with the applicant's rights under Article 8 of the Convention (see *Dzemyuk*, cited above, § 90). It must therefore be determined whether that interference has been justified in accordance with paragraph 2 of Article 8, that is to say whether it has been in accordance with law, has pursued a legitimate aim and whether it has been necessary in a democratic society.

51. As regards compliance with domestic law the Court notes the following. In 1995 the Lesnoye cemetery was closed, under Decree no. 1206 of the head of the city administration, as having reached its full burial capacity (see paragraph 7 above). In 1996 a federal law was enacted that limited the area occupied by cemeteries to a maximum size of 40 hectares — a standard that was also laid down in the 2007 Health Regulations (see paragraphs 20 and 29 above). It nonetheless appears from the case-file material (and is not disputed

by the Government) that burials at the Lesnoye cemetery resumed in 2009, in breach of Decree no. 1206 (which banned any further burials at the cemetery and which was still in force at that time (see paragraphs 7, 9 and 10 above). Furthermore, no explanation was provided by the Government as to how the expansion of the cemetery (which began, illegally, in 2009 and continued after Decree no. 1206 was quashed in July 2010) conformed to the 40-hectare maximum for cemeteries provided by the 1996 Federal Law on Burials and by the 2007 Health Regulations (see paragraphs 20, 21, 29, 30 and 36 above). According to the above-mentioned expert's report, the Lesnoye cemetery sloped downwards towards the well on the applicant's property and was named as a possible source of contamination of his property, in contravention of the relevant regulations (see paragraphs 14, 22, 23 and 31 above).

52. Furthermore, under the relevant domestic law, cemeteries are considered to be "polluting undertakings" and as such, they should be surrounded by a sanitary protection zone (see paragraphs 24 and 29 above). In 2013–2015 the Regional CPA issued at least three reprimands to the municipal burial service for its failure to create a 500-metre sanitary protection zone around the cemetery, pursuant to the 2007 Health Regulations (see paragraph 12 above); however, it appears that those reprimands were disregarded. It may well have been that the municipal burial service and the city administration considered themselves exempt from the 2007 Health Regulations owing to ambiguous language contained in those regulations and resulting difficulties in interpreting them (see paragraph 35 above). The Court notes, however, that in 2014 the Primorsk Regional Court ordered the municipal burial service and the city administration to prepare a proposal that would determine and substantiate the size of the sanitary protection zone around the Lesnoye cemetery, in order to ensure the compliance of their activities with the 2007 Health Regulations, thus making those Regulations directly applicable to the activities of the municipal administration and its burial service at the Lesnoye cemetery (see paragraph 16 above). The Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 149, 20 March 2018), and the Court has no particular reason to question the findings of the Primorsk Regional Court in the present case in respect of the applicability of the 2007 Health Regulations.

53. Even though the task of demarcating the proposed sanitary protection zone and substantiating its size around the cemetery should have been completed by the end of 2014, by 5 July 2017 no progress had been made in that regard (see paragraph 18 above), and the proposal process had only entered its very early stages by the end of 2019 (see paragraph 49 above); no reasonable explanation was provided to the Court for that delay in the enforcement proceedings. By contrast, according to a survey conducted by the Russian Ministry for Economic

Development, it takes companies an average of three years to comply with all the steps set out by the 2007 Health Regulations as necessary for the determination of the final size of a sanitary protection zone around a polluting undertaking (see paragraphs 25, 26 and 34 above). In the present case, however, for no apparent or cogent reason, the authorities made no efforts to enforce the above-mentioned judgment, and it took them almost five years following the delivery of that judgment merely to start the process of developing said project. In the meantime, burials continued to be conducted, in contravention of the domestic health regulations, and the applicant had to live on his polluted plot of land. The Court also notes that no information was provided by the Government as to whether it might have been feasible to take other measures while the enforcement proceedings were pending, such as temporarily relocating the applicant or carrying out decontamination work on his property by way of offsetting the effects of the absence of a sanitary protection zone. The Court reiterates that it is mindful of the difficulties and delays that are typically encountered by the authorities in finding and allocating relevant technical and logistical resources and securing the necessary funding for public works projects such as the one in the present case (see *Yevgeniy Dmitriyev v. Russia*, no. 17840/06, § 55, 1 December 2020). However, it considers that the use of the Lesnoye cemetery in blatant breach of the relevant domestic health regulations — together with the unexplained delay in the enforcement proceedings, which prolonged the illegality of the authorities' actions — deprived the applicant of the effective protection of his rights under Article 8.

54. It therefore follows that the interference at issue was not "in accordance with the law"; this finding alone is sufficient for the Court to hold that there has been a violation of Article 8 of the Convention, without examining whether it also pursued a "legitimate aim" or was "necessary in a democratic society" (see *Fadeyeva*, cited above, § 95, and *M. M. v. the Netherlands*, no. 39339/98, §§ 45–46, 8 April 2003).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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

56. The applicant claimed 1,500,000 Russian roubles (RUB — about 17,000 euros (EUR)) in respect of non-pecuniary damage.

57. The Government found that claim excessive and unreasonable.

58. The Court considers that the effects that the environmental nuisance had on the applicant's right to respect for his private life and his home cannot be compensated for by the mere finding of a violation; however, the sum claimed by him appears to be excessive. Making its assessment on an equitable basis and having regard to the serious impact that the unlawful and prolonged use of the cemetery by the municipal authorities had on the applicant's rights under Article 8, the Court awards the applicant EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

59. The applicant also claimed RUB 1,400,000 (about EUR 16,000) for legal representation before the domestic courts and the Court, to be paid into his representative's bank account, and RUB 115,103 (about EUR 1,300) in experts' fees (see paragraph 14 above) and postal expenses, to be paid into his own bank account.

60. The Government submitted that the costs and expenses incurred by the applicant in the domestic proceedings were irrelevant for examination of his complaint before the Court, his claim for expert fees was not substantiated with relevant documents and his sending his application and case material by international courier service was unnecessary expense.

61. 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 were actually and necessarily incurred and are reasonable as to quantum (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 370, 28 November 2017). In the present case, regard being had to the documents in its possession and the above-noted criteria, the Court considers it reasonable to award the sum of EUR 6,000 in respect of the costs of the applicant's legal representation in the domestic proceedings and before the Court, plus any tax that may be chargeable to the applicant, to be paid directly into the bank account of the applicant's representative, and EUR 1,300 in respect of expert's fees and postal expenses, plus any tax that may be chargeable, to be paid into the applicant's account.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 8 concerning the use of cemetery in breach of the health regulations admissible;

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

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
   (i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (ii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable to the applicant, for legal representation in the domestic proceedings and before the Court, to be paid directly into the account of the applicant's representative Ms Tamara Gavrilovna Akulibaba; and EUR 1,300 (one thousand three hundred euros) in respect of expert's fees and postal expenses, plus any tax that may be chargeable, to be paid into the applicant's account;

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

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

Done in English, and notified in writing on 10 May 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Georges Ravarani
President

ANNEX 31

FOURTH SECTION

CASE OF STICHTING LANDGOED STEENBERGEN AND OTHERS v. THE NETHERLANDS

(Application no. 19732/17)

JUDGMENT

Art 6 § 1 (civil) • Access to court • Adequate notification solely by electronic means of (draft) administrative decision potentially directly affecting third parties • Coherent system striking fair balance between interests at stake • High numbers of domestic Internet users • Pre-existing practice codified in domestic law advertised to public • Clear, practical and effective opportunity to comment and challenge the (draft) decision • Margin of appreciation not exceeded

STRASBOURG
16 February 2021

FINAL
31/05/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Stichting Landgoed Steenbergen and Others v. the Netherlands,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Yonko Grozev, *President,*
Faris Vehabović,
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Jolien Schukking,
Ana Maria Guerra Martins, *judges,*
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 19732/17) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the foundation Stichting Landgoed Steenbergen and by three Dutch nationals, Ms Hermine Sofia Maria van Veen, Mr Walter Henricus Franciscus Vendel and Mr Andreas Bottema ("the applicants"), on 2 March 2017;

the decision to give notice to the Dutch Government ("the Government") of the complaints under Articles 6, 8 and 13 of the Convention and to declare inadmissible the remainder of the application;

the observations submitted by the respondent Government and the observations in reply submitted by the applicants;

the comments submitted by third-party intervener *Asociación para la Prevención y Estudios de Delitos, Abusos y Negligencias en Informática y Comunicaciones Avanzadas* (APEDANICA), who was granted leave to intervene by the President of the Section;

Having deliberated in private on 19 January 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The application concerns the publication, solely by electronic means, of the notification of a decision to extend the opening hours of a motocross track located in close proximity to the applicants' premises and land. The applicants, who rely on Articles 6, 8 and 13 of the Convention, did not see the notification and lodged their appeal against the decision when the time-limit fixed for that purpose had already expired. The appeal was declared inadmissible for having been lodged out of time. The main issue is whether the applicants' right of access to a court under Article 6 § 1 of the Convention was disproportionately restricted.

THE FACTS

2. The individual applicants were born in 1963, 1962 and 1961 respectively and live in Wapenveld. The applicant foundation has its registered address in Wapenveld and is the owner of an estate situated at that address, where it runs a study centre. The applicants were represented by Mr R. S. Wertheim, a lawyer practising in Zwolle.

3. The Government were represented by their Agent, Ms B. Koopman, of the Ministry of Foreign Affairs.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The village of Wapenveld, where the individual applicants live and which also houses the application foundation's estate, is part of the municipality of Heerde, which is located in the Province of Gelderland.

6. A motocross track, which is operated by a motocross association ("the association"), is located in Heerde, in close proximity to the applicants' premises and land. Since 19 May 1987 the association has been operating under a permit granted by the Provincial Executive (*Gedeputeerde Staten*) of the Province of Gelderland which allows the motocross track to operate from 1 p.m. to 7 p.m. on Wednesdays and Saturdays and, from April to October, on a further two weekdays from 2 p.m. to 7 p.m.

7. The association and the applicants' premises are (partially) located within the so-called Natura 2000 area (a Special Area of Conservation, designated under the EU Habitats Directive). The applicants claim that they can hear the motocross bikes from their premises and land.

8. On 27 September 2013, the association asked the Province of Gelderland to issue it with a new permit under the 1998 Nature Conservation Act (*Natuurbeschermingswet* 1998) that would allow it to expand its activities, with a larger number of motocross bikes and extended opening hours.

9. On 4 December 2013, the Provincial Executive published a notice on its website to the effect that it intended to grant the requested permit and that the draft decision and the relevant documents could be viewed from 9 December 2013 until 20 January 2014 at the provincial government building and on its website. Interested parties (*belanghebbenden*) within the meaning of section 1:2(1) of the General Administrative Law Act (*Algemene wet bestuursrecht*; see paragraph 17 below) were given an opportunity to submit their views on the draft decision, either in writing or orally, before 20 January 2014, and more information on that matter could be found at the end of the draft decision itself.

The text of the draft decision mentioned that it would only be possible to appeal against the actual decision if the appellant had already submitted his or her views on the draft decision and he or she was an interested party.

10. No views having been received, the Provincial Executive issued the permit on 27 January 2014. It published notification of its decision on the provincial website, saying that the decision and the relevant documents could be viewed from 30 January until 13 March 2014 at the provincial government building and on the aforementioned website. Interested parties could appeal against the decision before 13 March 2014, and more information on that matter could be found at the end of the decision itself. The text of the decision also mentioned that Chapter 3.4 of the General Administrative Law Act (see paragraph 18 below) had been declared applicable to the association's request for a new permit.

11. The applicants first became aware of the decision granting the new permit on 4 November 2014. On 12 November 2014 they appealed to the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State* — "the Administrative Jurisdiction Division") against the decision. They stated that it was unclear whether the notifications of the draft decision and the decision had ever actually been published. In addition, they submitted that the fact that they had lodged their appeal outside the legal time-limit and that they had not submitted any views on the draft decision was excusable because publishing the notification on a provincial government website could not be regarded as publishing in "some other suitable manner" as required by section 3:12(1) of the General Administrative Law Act (see paragraph 19 below). Citizens of the Netherlands could not be expected, or might not be able, to monitor all the websites of all local and regional administrative authorities. On those grounds, the applicants argued that their right of access to a court under Article 6 of the Convention had been breached.

12. In the appeal proceedings it was argued on behalf of the Provincial Executive that the notifications of both the draft decision and the decision had been published correctly. Two screenshots were submitted, taken from an archiving website which showed the notifications of the draft decision and the decision. The Provincial Executive also argued that the electronic publication of the notifications complied with the provisions of the General Administrative Law Act and the 2012 Gelderland Province Electronic Notification Ordinance (*Verordening elektronische bekendmaking Gelderland 2012*, "the Electronic Notification Ordinance" — see paragraphs 23–25 below) which specifically provided for electronic publication. Given the accessibility of the Internet, moreover, the Provincial Executive was of the view that there had been no violation of Article 6 of the Convention.

13. The Administrative Jurisdiction Division decided on the appeal in a judgment of 7 September 2016 (ECLI:NL:RVS:2016:2421). In it, it referred to a previous judgment in which it had held that notification of a draft decision via the Internet could constitute a suitable manner of notification, but that the applicable provisions of the General Administrative Law Act required that notification of a draft decision also be given in at least one non-electronic manner, unless a statutory provision provided otherwise (see paragraph 22 below). The applicants' argument that electronic notification was not a suitable manner of notification did not give the Administrative Jurisdiction Division cause to reconsider this case-law.

14. Furthermore, it considered that its case-law was not at odds with Article 6 of the Convention. Referring to the Court's case-law (see *Ashingdane v. the United Kingdom*, 28 May 1985, Series A no. 93), it stated that Article 6 did not entail an absolute right of access to a court and that States had a certain

margin of appreciation when laying down regulations limiting access to a court, as long as such limitations did not impair the very essence of the right of access to a court, pursued a legitimate aim, and complied with the requirement of proportionality. The Administrative Jurisdiction Division acknowledged that the manner of notification of a decision could in certain circumstances restrict access to a court to an extent incompatible with Article 6; for example if notice of a decision was given in a completely inadequate manner and as a result an interested party was unable to apply to a court within the period allowed, or at all. The Administrative Jurisdiction Division held that such a situation did not arise when notification of a decision was given solely by electronic means, and it could therefore not be said that the essence of the right to a court was impaired. By allowing notification of a decision solely by electronic means, the legislator had attempted to facilitate easier and faster communication between citizens and the administrative authorities. The underlying thought behind this was that such electronic communication could significantly contribute to the objective of achieving a more accessible and better functioning administration, which was a legitimate aim.

15. The Administrative Jurisdiction Division found that the applicants' argument offered no grounds for holding that the requirement of proportionality had not been complied with when notification of a decision was given solely by electronic means. It therefore perceived no cause to hold that the possibility of giving notification of decisions solely by electronic means was, as such, contrary to Article 6.

16. Lastly, the Administrative Jurisdiction Division noted that the Electronic Notification Ordinance (see paragraphs 12 above and 23–25 below) had entered into force before the impugned decision had been taken. There had therefore existed a statutory provision providing for notification of decisions solely by electronic means. For that reason it considered that it was in principle not unacceptable that notification of the decision had been published solely on the Gelderland provincial website. Moreover, the applicants had not made a plausible case for believing that the archiving website used by the Provincial Executive and other administrative authorities was unreliable or that it did not provide a proper overview of notifications that had previously been published on the provincial website. The Administrative Jurisdiction Division considered it sufficiently established that the notifications of both the draft decision and the decision had been published on the latter website. The applicants could therefore reasonably be considered to have been at fault for not having submitted any views on the draft decision and for having lodged their appeal too late. That appeal was accordingly inadmissible.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

17. Section 1:2(1) of the General Administrative Law Act defines "interested parties" as persons (including legal entities) whose interest is directly affected by a decision (*besluit*). That interest should be the person concerned's own, rather than an idealistic or general interest; it should also be objectively determinable, current and personal. A "decision" as referred to above is a decision in writing taken by an administrative authority (*bestuursorgaan*) constituting a legal act governed by public law (*publiekrechtelijke rechtshandeling*; section 1:3(1) of the General Administrative Law Act).

18. The rules governing the publication of draft decisions and decisions are set out in chapter 3 of the General Administrative Law Act. Sub-chapter 3.4 of that Act, which provides for public participation in decision-making by administrative authorities, applies to the preparation of decisions if this is determined by law or decided by the administrative authority concerned.

19. Section 3:11(1) of the General Administrative Law Act, which is set out in sub-chapter 3.4, provides that the administrative authority must deposit a draft decision for public inspection (*terinzagelegging*), together with the relevant documents which are reasonably necessary to assess the draft. Section 3:12(1) of sub-chapter 3.4 lays down the manner in which a deposition for inspection is to be notified to the public. It provides that, prior to such deposition, the administrative authority must give notice of the draft decision in one or more daily or weekly newspapers or free local papers or in some other suitable manner. Only the substance of the draft decision need be stated. Under section 3:15(1) of sub-chapter 3.4, interested parties within the meaning of section 1:2(1) (see paragraph 17 above) may submit their views on the draft decision to the administrative authority, either orally or in writing. An interested party who has not submitted his or her views on the draft decision, for which failure he or she can reasonably be reproached, cannot appeal to a court against the actual decision (section 6:13 of the General Administrative Law Act).

20. Section 42(3) of the 1998 Nature Conservation Act, which concerns the manner in which a decision taken under that Act is to be notified to the public, reads as follows:

> "The authority authorised to grant a permit in accordance with sections 16 and 19 shall publish the notification of a decision to grant, modify or withdraw a permit in one or more daily or weekly newspapers or free local papers or in some other suitable manner. Only the substance of the draft decision need be stated."

21. A notification of a (draft) decision is a communication within the meaning of section 2:14 of the General Administrative Law Act, according to the drafting history of this provision. The first paragraph of the provision

provides that an administrative authority may send a communication which is addressed to one or more specific individual(s) by electronic means to those addressees who have indicated that they can be properly contacted in that manner. As regards communications not addressed to one or more specific persons, section 2:14(2) provides that, unless otherwise provided by law, they should not be sent solely by electronic means.

22. In a judgment of 15 August 2012 (ECLI:NL:RVS:2012:BX4676), the Administrative Jurisdiction Division held that notifying a draft decision via the Internet constituted a suitable manner of notification within the meaning of section 3:12(1) of the General Administrative Law Act. However, it followed from section 2:14(2) of that Act that draft decisions had also to be notified in at least one non-electronic manner, unless a statutory provision providing otherwise was in force.

23. On a proposal from the Provincial Executive, the Electronic Notification Ordinance was adopted by the Gelderland Provincial Council (*Provinciale Staten*) on 26 September 2012 in order to provide a statutory basis for the practice, which had been in existence since 1 October 2011, of publishing notifications of decisions taken by an administrative authority of Gelderland Province solely by electronic means. The explanatory notes (*toelichting*) to the proposal stated, *inter alia*, that this new method of publication of notifications had been brought to the attention of the public through various advertisements in local newspapers in the second half of 2011. In view of the level of computer ownership in the Netherlands, the explanatory notes concluded that the reach of electronic publication was likely to be larger than that of traditional publication on paper in free local newspapers. Notification by electronic means would, in practice, mean that notifications not addressed to one or more specific individuals would be made available for consultation on the Internet, for example via the website of Gelderland Province.

24. Notification of the adoption of the Electronic Notification Ordinance, as well as the text of the Ordinance, was published in the Gelderland Provincial Bulletin (*Provinciaal blad van Gelderland*) of 27 September 2012. Notification of that adoption was also published in the Official Gazette (*Staatscourant*) of 10 October 2012. That publication pointed out that the text of the Ordinance could be found on the Gelderland provincial website and that the Ordinance provided a legal basis for the practice, in force since 1 October 2011, of publishing notifications relating to provincial decision-making solely by electronic means and no longer in local newspapers.

25. Section 2(1) of the Electronic Notification Ordinance provides that it is permissible for notifications of announcements (*meldingen*), applications (*aanvragen*), draft decisions (*ontwerpbesluiten*) and decisions (*besluiten*) to be published solely by electronic means.

26. Pursuant to section 6:11 of the General Administrative Law Act an objection (*bezwaar*) or appeal which is lodged after the expiry of the time-limit set for that purpose will not be declared inadmissible for that reason if it cannot reasonably be held that the person who lodged it was at fault.

THE LAW

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

27. The applicants complained that the publication of the notifications of both the draft decision and the decision of the Provincial Executive solely by electronic means had breached their right of access to a court as provided in Article 6 § 1 of the Convention, the relevant parts of which provide:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

28. In their submissions, the Government accepted the applicability of Article 6 of the Convention, as the outcome of the domestic proceedings had affected the applicants' civil rights, notably their rights deriving from the right to property.

29. The applicants maintained that their civil rights had been at issue, as the decision had disrupted their quality of life, *inter alia* as a result of the noise pollution. It had also reduced the value of their properties and had thus had pecuniary consequences for them. Lastly, they submitted that their right to a healthy environment had been affected.

30. The Court considers that the applicants' claims relating to general environmental harm do not concern their "civil rights" within the meaning of Article 6 of the Convention. However, other issues raised by the applicants, in particular the effects of the expansion of the activities at the motocross track on their properties and land, do relate to their "civil rights". Furthermore, the domestic proceedings initiated by the applicants concerned the authorities' decision to permit the expansion of those activities and were decisive for those rights (see *Karin Andersson and Others v. Sweden*, no. 29878/09, § 46, 25 September 2014). The Government did not dispute this. Moreover, it cannot be said that the aforementioned effects on their property and land were mere remote consequences (see, *a contrario*, *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, §§ 43 and 46–55, 6 April 2000).

31. Having regard to the above considerations, the Court finds that Article 6 applies to the present case under its civil limb.

32. The Court further notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

33. The applicants submitted that, as they had been unaware of the decision to extend the opening hours of the motocross track, they had been deprived of the possibility to appeal in time to the domestic courts. They argued that the publication of the notification solely by electronic means had impaired the essence of the right to appeal, because not all citizens had access to a computer or the Internet. Electronic publication did not have the same reach as printed publication. Citizens who did have access to the Internet could not be expected to monitor all governmental websites on a regular basis. The applicants pointed out that citizens had to search actively for electronic notifications, which was not the case for notifications published in local and national newspapers.

34. In addition, they submitted that the Dutch system of electronic publication of notifications was highly opaque and arbitrary and that there was an insufficiently clear basis in law for electronic publication. In that regard, they pointed out that the Electronic Notification Ordinance (see paragraphs 23–25 above) did not determine where electronic notifications were to be published and did not clarify whether or not the Provincial Executive would opt for this method of publication for all their (draft) decisions. The applicants also submitted that they had provided screenshots showing that the notifications of the draft decision and the actual decision had been published not on the Gelderland provincial website, as indicated by the Government, but on an entirely different website.

35. The applicants submitted, furthermore, that the restriction of their right of access to a court had not served a legitimate aim. Electronic publication of notifications made the Government less accessible for citizens and thus had the opposite effect to that aimed for.

36. Lastly, the applicants argued that in general there was no proportionality between the complete abandonment of publication of notifications on paper and the aim pursued by the Government. Instead of completely abandoning notifications in local or national newspapers, less far-reaching measures were conceivable to facilitate easier and faster communication between citizens and the administrative authorities. In the specific circumstances of the present case, the restriction had thus also been disproportionate.

(b) The Government

37. The Government argued that the right of access to a court had not been limited, because the rules governing the procedure that applied to legal remedies were intended to ensure the proper administration of justice and compliance with the principle of legal certainty. Pursuant to the legal framework in force,

the notification of both the draft and the final decision had been published on the provincial website and had provided relevant information relating, *inter alia*, to the possibilities for submitting views and lodging an appeal. Given the high level of computer ownership and Internet penetration in the Netherlands — in 2013, according to the national statistical office, Statistics Netherlands (*Centraal Bureau voor de Statistiek*), 92.8% of citizens over the age of 12 had had access to the Internet — electronic publication could reach a far larger audience than publication in a local or national newspaper or on official notice boards. While it was true that the Internet did not provide 100% coverage, the same held true for local newspapers or notices posted at provincial offices.

38. Even if publishing notifications exclusively on the Internet were to be considered as a limitation of the right of access to a court, this means of publication did not impair the very essence of the right, for the reasons set out in the previous paragraph. It also pursued a legitimate aim in that it ensured easier and faster communication between citizens and administrative authorities. In that context the Government were of the opinion that electronic communication between citizens and administrative authorities could contribute substantially to ensuring more accessible and more effective governance. Furthermore, electronic publication complied with the requirement of proportionality, both in general and in the instant case. While it did not differ from other means of publication in that there was always a risk of information not being seen by everyone or not being seen in time, electronic publication actually offered particular advantages, as it allowed citizens to access notifications at any time and from almost anywhere. People who did not have an Internet connection at home could access the Internet in public spaces, such as provincial or municipal offices or libraries.

39. As regards the present case, the Government submitted that it had been foreseeable for the applicants that notifications of decisions of the Gelderland Provincial Executive would be published solely on the Internet. Since 2011 the Province of Gelderland had exclusively used electronic publication to notify decisions, and this new method of publication had been made public. The notification of the adoption of the Electronic Notification Ordinance had been published in the Official Gazette and the Gelderland Provincial Bulletin (see paragraph 24 above). The Government further explained that until 2016 all publications had appeared on the Gelderland provincial website. As regards the applicant foundation, the Government noted that it could not be considered a vulnerable party without access to the Internet and that, in order to be informed of decisions affecting its living area, it only needed to monitor the electronic publication of notifications by the municipality of Heerde, the Province of Gelderland and the District Water Board (*waterschap*).

40. Finally, the Government described a number of subsequent developments in the Netherlands. Since 2016 all notifications had been published on

the national governmental website, which provided information on services for persons and businesses, official publications and national, local and regional legislation. It also offered an alert service for notifications of administrative authorities' activities to which citizens could subscribe.

(c) The third-party intervener

41. The third-party intervener APEDANICA — an NGO set up in Madrid in 1992 which strives to improve citizens' lives across Europe and the Americas as regards their relationship with information and communication technology and to safeguard them against dangers brought about by misuse of such technologies — submitted that digitalisation, in principle, improved the participation of citizens in decision-making. However, according to this NGO, the results concerning e-participation in the Netherlands were unsatisfactory. In that context APEDANICA drew attention to the fact that although not all citizens in the Netherlands had Internet access, nor were they legally obliged to have such access, the Government published legally binding decisions on the Internet without also using other non-electronic means.

2. The Court's assessment

(a) General principles

42. The relevant principles concerning the right of access to a court — that is, the right to institute proceedings before the courts in civil matters — were summarised in the case of *Naït-Liman v. Switzerland* ([GC], no. 51357/07, §§ 112–16, 15 March 2018).

43. The Court has held that the right of access to court under Article 6 § 1 of the Convention entails the entitlement to receive adequate notification of administrative and judicial decisions, which is of particular importance in cases where an appeal may be sought within a specified time-limit (see, *mutatis mutandis*, *Šild v. Slovenia* (dec.), no. 59284/08, § 30, 17 September 2013).

44. According to the Court's established case-law, however, the right of access to a court may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. However, those limitations must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 of the Convention if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Naït-Liman*, cited above, §§ 114–15). The Court has further held that the right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on

the merits by the competent court (see *Zubac v. Croatia* [GC], no. 40160/12, § 98, 5 April 2018).

45. The task of the Court is not to review the relevant law and practice *in abstracto*, but to determine whether the manner in which the law and practice were applied to or affected an applicant amounted to a denial of access to a court in the circumstances of the case (see, amongst other authorities, *Zavodnik v. Slovenia*, no. 53723/13, § 74, 21 May 2015). Its role in cases such as the present is to determine whether the applicants were able to count on a coherent system that struck a fair balance between the authorities' interests and their own. The Court must ascertain whether the applicants had a clear, practical and effective opportunity to challenge the administrative act concerned (see *Geffre v. France* (dec.), no. 51307/99, ECHR 2003-I (extracts), and *Lay Lay Company Limited v. Malta*, no. 30633/11, § 56, 23 July 2013).

(b) Application of those principles in the present case

46. The Court notes that notification of both the intention of the Provincial Executive to issue a new permit to the motocross association and of its decision to that effect was given solely by electronic means. It was possible for interested parties within the meaning of Section 1:2(1) of the General Administrative Law Act (see paragraph 17 above) to lodge an appeal against that decision, provided they had first submitted their views on the draft decision (see paragraph 19 above). Both the submission of views and the lodging of an appeal were subject to a time-limit (see paragraphs 9–10 above).

47. While it is not for the Court to determine the manner in which notifications of the type at issue are to be published, it follows from the abovementioned principles that where an appeal lies against a decision by an administrative authority which may be to the detriment of directly affected third parties, a system needs to be in place enabling those parties to take cognisance of such a decision in a timely fashion. This requires that the decision, or relevant information about it, be made available in a pre-determined and publicised manner that is easily accessible to all potentially directly affected third parties. Provided sufficient safeguards are in place to achieve such accessibility, it falls in principle within the State's margin of appreciation to opt for a system of publication solely by electronic means.

48. Turning to the facts of the present case, the Court finds, firstly, that the Provincial Executive's use of electronic means for publishing notifications was sufficiently coherent and clear for the purpose of allowing third parties to become aware of decisions that could potentially directly affect them. Thus, at the relevant time, a statutory provision — section 2(1) of the Electronic Notification Ordinance — provided for the possibility of notifying the Provincial Executive's (draft) decisions solely by electronic means (see paragraph 25

above). The notification of the adoption of the Ordinance had been published in the Official Gazette, and the text of the Ordinance had been published in the Gelderland Provincial Bulletin as well as on the provincial website (see paragraph 24 above). Moreover, the Electronic Notification Ordinance codified a practice which had been in place since 1 October 2011, and to which the attention of the public had been drawn by means of advertisements in local newspapers at the time (see paragraph 23 above).

49. It is further noted that the text of the Electronic Notification Ordinance did not explicitly indicate where notifications were to be published online; however, the explanatory notes to the Ordinance stated that notifications could be published on the Gelderland provincial website (see paragraph 23 above) and, as submitted by the Government (see paragraph 39 above), notifications of the type at issue had indeed been published on that website until 2016. Although the applicants disputed, both at the domestic level and before this Court, whether the notifications of the draft decision and of the actual decision had been published on the provincial website (see paragraphs 11 and 34 above), the Court notes that the Administrative Judicial Division had found it sufficiently established, in the light of the arguments and evidence submitted to it, that the notifications had been published on that website (see paragraph 16 above). In this connection the Court reiterates that, in accordance with Article 19 of the Convention, its sole duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact allegedly committed by a national court or to substitute its own assessment for that of the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention. Accordingly, the Court cannot question the assessment of the domestic courts on this issue unless there is clear evidence of arbitrariness, of which there is no appearance in the instant case (see, among many other authorities, *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 89, ECHR 2007-I, and *Kononov v. Latvia* [GC], no. 36376/04, § 189, ECHR 2010).

50. The Court accepts the Government's submission that electronic communication between the administrative authorities and citizens may contribute to the aim of a more accessible and better functioning administration (see paragraph 38 above). It must ascertain whether, given the facts of the case, a fair balance was struck between, on the one hand, the interest of the community as a whole in having a more modern and efficient administration and, on the other hand, the interests of the applicants.

51. The Court observes that, under Dutch law, notifications that are addressed to specific individuals may only be published solely by electronic means when the individuals concerned have indicated that they can be adequately reached in that manner (see section 2 (14)(1), quoted in paragraph 21 above). Given

that decisions of administrative authorities may, in addition, potentially concern a large number of interested parties who it may not be possible to identify in advance, the Court agrees with the Government that electronic notification of administrative authorities' decisions by electronic means may enable a large proportion of the general public to become acquainted with those decisions. In that regard, the Court observes that Dutch law specifies that restricting the publication of notifications that are not addressed to specific individuals exclusively by electronic means is only permitted when a statutory basis exists for it (see section 2 (14)(2), also quoted paragraph 21 above).

52. The Court considers that it must nevertheless be borne in mind that a practice of notifying the public solely by electronic means of decisions that may potentially affect them and against which they may wish to object or appeal runs the risk of not reaching citizens who do not have access to the Internet or who are computer illiterate. It can, however, not be overlooked that in 2013 the Internet penetration rate in the Netherlands was high, with more than 92 percent of citizens over the age of 12 having access to it (see paragraph 37 above). Moreover, the applicants in the present case have not argued that they themselves did not have access to a computer or to the Internet or that they were computer illiterate and that they were, for that or those reasons, unable to find the (draft) decisions online (see, in contrast, *Zavodnik*, cited above, § 79). In those circumstances, the Court is not persuaded by the applicants' argument to the effect that publishing the notifications of the draft decision and the decision in a free local newspaper would have provided better safeguards of reaching potentially affected parties than publishing on the Gelderland provincial website (see paragraph 33 above). In that context it notes once more that notifications of this type have already been published solely by electronic means since 1 October 2011, and that this practice was publicised in local newspapers at the time of its introduction (see paragraph 23 above). The fact that this announcement had apparently escaped the applicants' attention supports the Government's contention that publications in local newspapers also do not constitute an infallible method of reaching every potentially affected party (see paragraph 37 above). The Court considers that it was not unrealistic to expect the applicants to consult the provincial website regularly for notifications of (draft) decisions that might affect them (see, *mutatis mutandis* and to converse effect, *Zavodnik*, cited above, § 80).

53. In the present case, the Court is therefore satisfied that the system of electronic publication used by the Gelderland Provincial Executive constituted a coherent system that struck a fair balance between the interests of the community as a whole and the applicants. The applicants have not put forward any arguments that would allow the Court to conclude that they were not afforded a clear, practical and effective opportunity to comment on the draft decision and to challenge the decision given by the Provincial Executive. In the light

of all the circumstances of the case and the safeguards identified, the Court finds that the national authorities did not exceed the margin of appreciation afforded to the State under the Convention (see paragraph 47 above) and that the applicants have not suffered a disproportionate restriction of their right of access to a court.

54. There has accordingly been no violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

55. The applicants complained that publishing the notifications exclusively by electronic means had been in breach of 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."

56. The Government submitted that the applicants had not complied with the requirement of exhaustion of domestic remedies as they had failed to submit any views on the draft decision and had lodged their appeal against the decision out of time. They argued that in order to meet the requirements of Article 35 § 1 of the Convention, an applicant must comply with the applicable rules and procedures of domestic law.

57. The applicants argued that in the national proceedings they had implicitly relied on the protection of Article 8 and had thus exhausted domestic remedies.

58. The Court considers that it is not necessary to examine whether Article 8 of the Convention applies to the present case as this complaint is in any event inadmissible for the following reasons.

59. The Court reiterates that under Article 35 of the Convention, it may only deal with applications after all domestic remedies have been exhausted (see, for a recollection of the general principles in this respect, *Vučković and Others v. Serbia* [GC] (preliminary objection), nos. 17153/11 and 29 others, §§ 69–77, 25 March 2014). According to its consistent case-law, that condition is not satisfied if a remedy has been declared inadmissible for failure to comply with a formal requirement (see *Barbara Wiśniewska v. Poland*, no. 9072/02, § 76, 29 November 2011, and *Ben Salah Adraqui and Dhaime v. Spain* (dec.), no. 45023/98, 27 April 2000).

60. The Court observes that the applicants' appeal to the Administrative Jurisdiction Division was declared inadmissible for having been lodged

out of time (see paragraph 16 above). The applicants thus failed to comply with the formal requirements for introducing a relevant remedy concerning their complaint under Article 8, which they then brought before this Court. Accordingly, the Government's objection of failure to exhaust domestic remedies must be upheld.

61. It follows that this part of the application must be rejected as inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

62. Lastly, the applicants complained that, as regards their complaint under Article 6, they had not had an effective remedy within the meaning of Article 13 of the Convention, which provides:

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

63. The Court reiterates that where the right claimed is a civil right, the role of Article 6 § 1 in relation to Article 13 is that of a *lex specialis*, the requirements of Article 13 being absorbed by those of Article 6 § 1 (see, among other authorities, *British-American Tobacco Company Ltd v. the Netherlands*, 20 November 1995, § 89, Series A no. 331, and *Berger-Krall and Others v. Slovenia*, no. 14717/04, § 327, 12 June 2014). Consequently, it is not necessary to examine separately the admissibility and merits of the complaint under Article 13.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the right of access to a court admissible and the complaint under Article 8 of the Convention inadmissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention;

3. *Holds* that it is not necessary to examine separately the admissibility and merits of the applicants' complaint under Article 13 of the Convention.

Done in English, and notified in writing on 16 February 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti
Registrar

Yonko Grozev
President

ANNEX 32

SECOND SECTION

DECISION

Application no. 44837/07

Erol ÇİÇEK and Others against Turkey

The European Court of Human Rights (Second Section), sitting on 4 February 2020 as a Chamber composed of:

Robert Spano, *President,*
Marko Bošnjak,
Valeriu Griţco,
Ivana Jelić,
Arnfinn Bårdsen,
Saadet Yüksel,
Peeter Roosma, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having regard to the above application lodged on 14 September 2007,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

A list of the applicants is set out in the appendix. They were represented by the first applicant and Ö. Bildik, lawyers practising in Bursa.

The Turkish Government ("the Government") were represented by their Agent.

A. The circumstances of the case

1. The facts of the case, as submitted by the parties and as can be seen from the documents in the file, may be summarised as follows.

2. The applicants live in the Province of Bursa, in the town of Orhangazi. At the time of the events in question, a lime production plant with a quarry ("the Plant") was operational in the vicinity of their town. According to the applicants, the distance of the Plant from their homes was 500 metres, whereas according to the Government the distance was 980 metres.

3. On 28 July 2006 the applicants Erol Çiçek and Serdar Ata ("the first two applicants") and their representative, Ms Ö. Bildik, signed a petition addressed

to the Bursa Governor's office, calling for the closure of the Plant on account of toxic emissions being released into the air which, according to the applicants, were conveyed in the wind towards their town, thus causing air pollution. They further submitted that the Plant was operating without the necessary permits and licences, that it had not undergone an environmental impact assessment and that it lacked a sanitary buffer zone. They further submitted that the Plant, on account of its toxic activity, should have been classified as a first category unhygienic facility (*birinci sınıf gayri-sıhhi müessese*) and as such should be shut down pursuant to the regulations on unhygienic facilities. In that respect they quoted section 22 of those regulations, which provided that first category unhygienic facilities operating without a trial period or ordinary permit would be shut down.

4. On 11 September 2006 the Bursa Governor's office replied to the applicants, stating that steps had been taken to test the air quality in the vicinity of the Plant pursuant to the Regulation on the Control of Air Pollution emanating from Industrial Facilities ("Air Pollution Regulations") and that they would evaluate the situation after receiving the results of those tests.

5. On 20 October 2006 the first two applicants lodged a case with the Bursa Administrative Court, requesting that the reply from the Bursa Governor's office of 11 September 2006 — which they considered to be an implicit refusal to shut down the Plant — be set aside.

6. During the proceedings, the Bursa Administrative Court asked the Bursa Governor's office to clarify and substantiate with official documents whether the Plant possessed the necessary permits, licences and assessment reports for it to operate legally. It further added that if the Plant had no operating licence, the administration would have to explain why it had decided to consider the applicants' petition as contingent only upon the results of the air pollution test. Finally, it asked the administration to state whether the Plant had been classified as an unhygienic facility and if so under which category.

7. On 22 January 2007 the Bursa Administrative Court found that the steps taken by the Bursa Governor's office with regard to the applicants' complaints had not been in accordance with the law principally because the Bursa Governor's office had not verified whether the Plant operated with the required permits and licences but had limited itself to asking from the Plant to produce an air quality report and carried out no further inspection. The Bursa Administrative Court therefore decided to set aside the Bursa Governor's reply of 11 September 2006. No finding was made by that court regarding the applicants' request for the closure of the Plant. The Bursa Administrative Court's decision shows that the Plant had started to operate in 1989, producing lime and aggregates, and that on 14 May 2003 the Bursa Governor's office had decided that the Plant need not be subject to an environmental impact assessment for its planned calcite

quarry operations. On 17 February 2006 the Plant had made an application to the Ministry of the Environment with a view to obtaining an emissions permit by submitting a technical emissions report which had been prepared pursuant to the Air Pollution Regulations. The Bursa Administrative Court added that the administration had failed to demonstrate that this permit had been obtained. It then noted that the Plant had an operating permit for lime production and the running of a limestone quarry but that the administration had failed to state whether it had also been classified as an unhygienic facility. Finally, it was noted by the court that subsequent to the applicants' petition, on 8 September 2006 the administration had asked the Plant to submit an updated air quality report in accordance with the Air Pollution Regulations. In response, the Plant had only provided the administration with an air quality test report dated 22 November 2005, replying that it was not required to undergo an updated test.

8. In finding for the applicants, the Bursa Administrative Court gave its reasons as follows:

> "In accordance with the Regulation on the Control of Air Pollution emanating from Industrial Facilities, in order to establish whether a facility — irrespective of whether its operations are subject to a permit or not — causes harm to the environment, the relevant administrative authorities must require the facility to obtain an emissions report from an expert designated by the relevant administrative authority in order to assess the emission levels emanating from the facility or the effects of such emissions on air quality. Furthermore the relevant administration authority must verify, through a designated expert, whether the facilities whose operations are subject to a permit carry on their operations in accordance with the rules and regulations set out in that regulation. Such facilities must have an emissions permit and operate within the limits of emissions regulations. The activities of those facilities which do not have an emissions permit or which do have a permit but carry on their operations in violation of their specific emissions commitments must be halted so that necessary precautions can be put in place.
>
> In the present case, the course of action that had to be followed by the Bursa Governor's office pursuant to the plaintiffs' request was to establish first whether the impugned Plant had in place the necessary permits and operating licence. If those were found to be lacking, the Bursa Governor's office would need to contact the relevant ministry of the administrative department so that they could take the necessary action against the Plant. On the other hand, if the Plant had the necessary permits and operating licence, the Bursa Governor's office would need to establish by a designated expert whether its operations caused harm to the environment and health of

the citizens. In this case, if harm were to be established, the Plant's operation would need to be suspended so that the company could bring it into line with environmental protection regulations. In other words, the Bursa Governor's office should first have established whether the Plant was operating legally with all the necessary permits and operating licence; and if so and only then, the Governor's office could move on to determine whether the Plant caused environmental harm and take the necessary administrative steps. That being so, the Bursa Governor's office confined itself to only asking from the Plant to obtain an air quality report and replied to the plaintiffs that it would evaluate its course of action based on the outcome of that report. Having regard to the foregoing, and further to the fact that the Plant did not even submit a recent air quality report and no other inspections other than a discharge permit verification was carried out, the Bursa Governor's office's reply of 11 September 2006 was not in accordance with the law."

9. The Bursa Administrative Court's decision, which was amenable to appeal, was only appealed by the Bursa Governor's office. On 19 January 2009 the Supreme Administrative Court dismissed their appeal by holding that the Bursa Administrative Court's decision had been in accordance with the law and procedure.

B. Developments after the introduction of the application

10. The Plant stopped its lime production and quarry operations on an unspecified date in 2010 and moved to the town of Gedelek, which is approximately 11 kilometres from its previous location. It was issued with a decision that an environmental impact assessment was not necessary with respect to its planned operations in the new location. In their observations the Government submitted an environmental permit given to the new Plant valid from 22 November 2016 to 22 November 2021 subject to the emissions limits established in the Air Pollution Regulations as updated on 3 July 2009.

C. Relevant domestic law

11. A description of the relevant law with respect to the right to living in a healthy environment and the duty of the domestic authorities to enforce court judgments can be found in *Okyay and Others v. Turkey* (no. 36220/97, §§ 46, 50 and 57–59, ECHR 2005-VII).

COMPLAINTS

The applicants complained that their health had suffered and their houses and living environment had been damaged as a result of the Plant operating near their houses and that the administrative authorities had failed to enforce the Bursa Administrative Court's judgment of 22 January 2007. They alleged

that the Plant should have been shut down subsequent to the judicial decision. They relied on Articles 6, 8 and 13 of the Convention.

THE LAW

A. Preliminary issues

12. The Court notes that at the time when notice of the application was given to the Government, the annex setting out the list of applicants was not sent to the parties due to a clerical error. It appears that only the first and the second applicants were mentioned by their full names and that the applicants' representative was mentioned both as an applicant and as the representative of applicants. Nevertheless the application form with the forms of authority of the remaining applicants was forwarded to the Government.

13. In their observations, the Government raised this issue and objected to the applicant status of anyone other than the first applicant.

14. The applicants in their reply to the Government maintained that all the applicants, including their representative, had lodged their application as applicants, as was evident from the application form as well as from the authority forms they had enclosed with their application.

15. The Court notes that when the applicants lodged their application with the Court, they submitted a single application form where only the first applicant was indicated as applicant. By contrast, reference was made to "all the applicants" in several places in the statement of facts part of the application. The application form itself was signed by the first applicant, and by Ms Ö. Bildik who was indicated as representative. The Court further notes that the remaining twenty-one applicants' forms of authority were annexed to the application in which each applicant authorised the first applicant and Ms Ö. Bildik to represent them in respect of the application made to the Court on 14 September 2007. However, nowhere in the application form, or in the annexes attached to it, was Ms Ö. Bildik mentioned as an applicant. On the contrary, she signed the form and the annexes as representative only.

16. Having regard to the reference to "all the applicants" in the application form and the clear reference to the application date, to which the remaining twenty-one applicants referred in their forms of authority to be represented by the first applicant and Ms Ö. Bildik, the Court considers that the application was lodged by all twenty-two applicants. While the Court regrets the clerical error on its part, the copy of the application form and the annexes that were forwarded to the Government made it sufficiently evident that the application was lodged by twenty-two applicants. The Government's objection to their status as applicants must therefore be rejected. As to whether Ms Ö. Bildik could be considered to have lodged the application with the intention of being an applicant herself, the Court notes that there is no implicit or explicit indication

of her intention to be an applicant in the application form or in the annexes that had been attached to it. Therefore it considers that she had not lodged the application with the intention of being an applicant herself.

B. The complaint under Article 8 of the Convention

1. The parties' arguments

17. The Government raised a number of objections to the admissibility of the complaint. They submitted that the applicants' complaints were incompatible *ratione materiae* with the Convention, noting in particular that in order for pollution or nuisance to raise an issue under Article 8 of the Convention, it would have to attain a minimum level of severity that was more serious than environmental hazards inherent in urban life. They noted that there had been no findings at the domestic level about the alleged pollution resulting from the Plant's operations. In that connection, they maintained that the decision of 14 May 2003 that the Plant did not require an environmental impact assessment (see paragraph 7 above) had not been annulled or even challenged. Secondly, referring to the conclusions of the Bursa Administrative Court's decision of 22 January 2007, they contended that the domestic court had not made any finding as to any interference with the applicants' right to respect for their family or private lives or their homes.

The Government further contested the victim status of the applicants having regard to the closure of the Plant shortly after the Bursa Administrative Court's decision became final.

Finally, the Government submitted that the applicants other than the first two applicants had not signed the initial petition addressed to the Bursa Governor's office and neither had they been parties to the proceedings before the Bursa Administrative Court (see paragraphs 3 and 5 above). The Government contended that those applicants had raised their grievances for the first time before the Court without giving an opportunity to the national authorities to put matters right.

18. The applicants maintained that the emissions from the Plant had exposed them to dangerous and toxic fumes for seven years, endangering their health. They further maintained that their quality of life had suffered from the pungent smell as a result of the lime plant's operations. The applicants, without referring to a specific expert report or any other evidence that had been available at the time of the events, referred in general to scientific studies that had been published on the Internet with respect to the hazardous effects of petroleum coke, lignite and the burning of waste automobile tyres in lime production. Finally the applicants did not contest the Government's objection as to the non-exhaustion of domestic remedies concerning the applicants other than the first two applicants.

2. The Court's assessment

(a) As regards the admissibility of the complaint raised by the applicants other than the first two applicants

19. The Court reiterates that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system (see *Chiragov and Others v. Armenia* [GC], no. 13216/05, § 115, ECHR 2015). The rule of exhaustion of domestic remedies requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 72, 25 March 2014). If the complaint presented before the Court has not been put, either explicitly or in substance, to the national courts when it could have been raised in the exercise of a remedy available to the applicant, the national legal order has been denied the opportunity to address the Convention issue which the rule on exhaustion of domestic remedies is intended to give it (see *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III).

20. The Court observes that the relevant applicants did not argue that, at the material time, they could not intervene in the administrative proceedings before the Bursa Administrative Court or lodge a separate complaint in respect of their Convention complaints. Neither did they contend that the domestic legal framework provided no effective remedies in respect of their complaints. It follows that the Government's objection that the applicants other than the first two applicants did not exhaust domestic remedies must be upheld.

Consequently the Court holds that this complaint, in so far as it has been brought by the applicants other than the first two applicants, must be declared inadmissible.

(b) As regards the admissibility of the complaint raised by the first two applicants

21. The Court does not consider it necessary to deal with all the inadmissibility grounds raised by the Government because it notes that the application in so far as it is brought by the first two applicants is inadmissible on the following grounds.

22. The Court reiterates at the outset that Article 8 is not engaged every time environmental pollution occurs. There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly

and seriously affected by noise or other pollution, an issue may arise under Article 8 (see *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 96, ECHR 2003-VIII; *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI; and *Fadeyeva v. Russia*, no. 55723/00, § 68, ECHR 2005-IV). Furthermore, the adverse effects of the environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8 (see, among other authorities, *López Ostra v. Spain*, 9 December 1994, § 51, Series A no. 303-C). The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or psychological effects. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent in life in every modern city (see *Fadeyeva,* cited above, § 69). Conversely, severe 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 (see *López Ostra*, cited above, § 51, and *Tătar v. Romania*, no. 67021/01, § 85, 27 January 2009).

23. Thus the Court has found Article 8 to be applicable in the following circumstances, among others. In *López Ostra v. Spain* (cited above) the applicant lived for many years only 12 metres from a waste-treatment plant which emitted smells, noise and fumes, including hydrogen sulphide emissions which exceeded the permitted limit and which could have endangered the health of those living nearby. In *Guerra and Others v. Italy* (19 February 1998, *Reports of Judgments and Decisions* 1998-I) all the applicants lived in a village approximately 1 km from a plant which was classified as being high-risk; in the course of its production cycle it released large quantities of inflammable gas and other toxic substances, and an incident had occurred in which several tonnes of toxic gases had escaped, leading to the acute arsenic poisoning of one hundred and fifty persons, and local experts had said that owing to the plant's geographical position, emissions from it into the atmosphere were often channelled towards the town where the applicants lived. In a case concerning a mine where gold was extracted by sodium cyanide leaching, and which was located at distances ranging from 300 to 900 metres from the homes of most of the applicants, the Court held Article 8 to be applicable, having regard to the findings of the domestic courts, which had been based on an environmental impact assessment, that the operation of the mine had caused widespread environmental degradation and had affected the applicants (see *Taşkın and Others v. Turkey*, no. 46117/99, § 112, ECHR 2004-X).

24. Similarly in *Fadeyeva v. Russia* (cited above) the applicant lived 450 metres from the site of a steel plant (the largest iron smelter in Russia), within a delimited area in which the toxic pollution caused by steel production was

excessive and where the maximum concentrations of pollutants registered near the applicant's home were often ten times higher than the average annual concentrations, which were already above safe levels.

Likewise, in *Giacomelli v. Italy* (no. 59909/00, 2 November 2006) the applicant lived 30 metres from a plant used for the storage and treatment of "special waste", including the "detoxification" of hazardous waste, a process involving treatment of special industrial waste using chemicals. The operation of the plant had been found to be incompatible with environmental regulations by the Ministry of the Environment and had posed a specific risk to the health of the local residents.

25. Again in the same vein, in *Băcilă v. Romania* (no. 19234/04, 30 March 2010) the applicant lived in Copşa Mică, near a plant operated by the Sometra company, one of Europe's biggest producers of lead and zinc and at the time the biggest employer in the town. The plant discharged into the atmosphere significant amounts of sulphur dioxide and dust containing heavy metals, mainly lead and cadmium. Analyses carried out by public and private bodies established that heavy metals could be found in the town's waterways, in the air, in the soil and in vegetation, at levels of up to twenty times the maximum permitted. The rate of illness, particularly respiratory conditions, was seven times higher in Copşa Mică than in the rest of the country. The Court found that the authorities had failed to strike a fair balance between the public interest in maintaining the economic activity of the biggest employer in a town and the applicant's effective enjoyment of the right to respect for her home and for her private and family life.

26. Recently in a case involving a thermal power plant which had operated in the immediate vicinity of the applicants' homes, the Court found Article 8 to be applicable, despite the fact that the domestic courts had not found a causal link between air pollution emanating from the thermal power plant and the applicants' health problems (see *Jugheli and Others v. Georgia*, no. 38342/05, 13 July 2017). The Court noted in that respect that proof of quantifiable harm to the applicants' health was not required for them to make a case under Article 8 as it had been evident that exposure to air pollution would at least have made them more vulnerable to various illnesses and had no doubt adversely affected their quality of life. In reaching that conclusion, the Court took into account the expert opinions commissioned by the domestic judicial authorities and produced by the competent State entities which confirmed in unambiguous terms that the absence of a buffer zone between the plant and the building, coupled with the absence of filters or other purification equipment over the plant's chimneys to minimise the potential negative impact of the hazardous substances emitted into the air, had created a real risk for the residents of the building.

27. By contrast, in a number of cases, the Court found Article 8 not to be engaged because the environmental degradation alleged by the applicants was

not serious enough to reach the threshold established in cases dealing with environmental issues. For instance, in a case concerning the destruction of a swamp adjacent to the applicants' property, the Court found that the applicants had not put forward convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their rights under Article 8. The Court noted that the crucial element which must be present in determining whether, in a given case, environmental pollution has adversely affected one of the rights safeguarded by that provision was the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment (see *Kyrtatos*, cited above, §§ 52 and 53).

28. In a case concerning pollution from a reclamation scheme of a tailings pond of a former copper mine and its potential consequences for the environment and the health of the applicant and his family, the Court found Article 8 to be inapplicable, having regard, among other things, to the fact that the applicant could not demonstrate that the degree of disturbance in and around his home had been such as to considerably affect the quality of his private or family life (see *Ivan Atanasov v. Bulgaria*, no. 12853/03, 2 December 2010). While the existence of health risks linked to the implementation of the reclamation scheme was corroborated by some of the expert reports at the domestic level, the Court was not persuaded in that case that there had been a harmful effect touching on the private or family sphere protected by Article 8 of the Convention, given that there had been no proof of any direct impact of the impugned pollution on the applicant or his family (ibid., §§ 76–78).

29. The above-mentioned cases make it plain that the question whether pollution can be regarded as adversely affecting an applicant's rights under Article 8 of the Convention depends on the particular circumstances and on the available evidence. The salient question is whether the applicant has been able to show to the Court's satisfaction that there has been actual interference with his private sphere, and, secondly, that a minimum level of severity has been attained (ibid., § 70). The mere allegation that an industrial activity was not carried on legally because it lacked one or more of the necessary permits or licences is not sufficient to ground the assertion that the applicants' rights under Article 8 have been interfered with (see, *mutatis mutandis*, *Ivan Atanasov*, cited above, § 75, and the cases cited therein).

30. Turning to the present case, the Court must therefore determine whether the alleged pollution was serious enough to affect adversely, to a sufficient extent, the family and private lives of the first two applicants and their enjoyment of their homes. The Court notes at the outset that on the basis of the material in the case file, it cannot establish the extent of air pollution allegedly caused by the Plant during the relevant time-frame. The Court also notes that the applicants

did not provide any specific information concerning the Plant's operations but referred in general to scientific studies that had been published on the Internet with respect to the hazardous effects of petroleum coke, lignite and the burning of waste automobile tyres in lime production (see paragraph 18 above). The Court further observes that the applicants did not provide medical or environmental expert reports relevant to their situation or any other evidence of air pollution or nuisance allegedly caused by the operation of the Plant. Furthermore, none of the parties provided the Court with reliable data on the subject, such as the nature of emissions emitted from the Plant, whether it exceeded the safe levels set by the applicable regulations or air pollution levels in the applicants' town. It is true that the applicants' misgivings about the operation of the Plant were brought to the attention of the domestic authorities and their subsequent reply was found by the Bursa Administrative Court to be inadequate with respect to the steps and the procedure that needed to be followed; however, that finding was made strictly on the basis of the domestic environmental legislation and contained no assessment as to whether the applicants had been affected by the alleged pollution and nuisance caused by the Plant.

31. The Court is mindful of the ruling given by the Bursa Administrative Court, especially of the fact that it did not determine the substantive issue brought before it by the applicants, that is, the applicants' request for the Plant to be shut down due to air pollution and nuisance caused by pungent smells. In that connection, the Court notes that the Bursa Administrative Court did not make a finding as to whether the Plant caused pollution, or whether its operations caused any nuisance to the quality of the applicants' lives. Neither did it establish itself whether the Plant was operating in breach of the statutory regulations. No expert reports, discovery hearings or other procedural means to determine adequately the facts of the dispute were employed by that court. The domestic court instead shifted that responsibility back to the administration without making a determination as regards the applicants' request for the closure of the Plant. That being so, the applicants failed to clarify the matter by lodging an appeal before the Supreme Administrative Court against the Bursa Administrative Court's decision on the grounds that their claims with respect to the closure of the Plant had not been decided by the administrative court. In fact, the applicants have claimed that the decision of the Bursa Administrative Court should be interpreted as an obligation on the part of the administration to shut down the Plant. The Court is, however, unable to agree with the applicants on that point in the light of the reasoning of the Bursa Administrative Court and the lack of any such order in the operative part of the domestic court's decision.

32. In sum, in the absence of proof of any direct impact on the applicants or their quality of life, the Court is not persuaded that the nuisance complained of amounted to an interference with the applicants' private lives (see, for a similar

conclusion, *Marchiş and Others v. Romania* (dec.), no. 38197/03, §§ 38–39, 28 June 2011).

33. Therefore, the Court is not persuaded that Article 8 of the Convention is applicable to the circumstances of the present case. Accordingly, this complaint in so far as it has been brought by the first two applicants is manifestly ill-founded and must be rejected, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. Complaint about the non-enforcement of domestic court decisions

34. The applicants complained under Articles 6 and 13 of the Convention that the Bursa Administrative Court's decision of 22 January 2007 had not been enforced owing to the domestic authorities' failure to shut down the Plant immediately. They argued that non-enforcement of domestic court decisions in respect of environmental claims was a systemic issue in Turkey.

35. The Government argued that pursuant to Law no. 6384 a Compensation Commission had been established to deal with applications concerning, *inter alia*, the non-enforcement of judgments. They maintained that the applicants had not exhausted domestic remedies, as they had not made any application to that Commission requesting compensation. They further maintained that the Bursa Administrative Court's decision could not be read as requiring the authorities to shut down the Plant. It only required the authorities to take the necessary steps with respect to inspection of the Plant; however, owing to the relocation of the Plant shortly after the decision had become final, it had proved *de facto* impossible to implement the decision.

36. The applicants contested the Government's arguments noting, among other things, that the remedy established in Law no. 6384 had not been available at the time they lodged their application with the Court. They further disagreed with the Government's interpretation of the domestic court decision. While they did not contest the closure of the Plant in 2010, they maintained that for three years the Bursa Administrative Court's decision had not been enforced by the authorities.

37. The Court reiterates that a person cannot complain about a violation of his or her rights in proceedings to which he or she was not a party. It follows that this complaint, in so far as it was brought by the applicants other than the first two applicants, is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

38. As regards the first two applicants, the Court notes that they complained that the Plant continued to operate until 2010 despite the Bursa Administrative Court's decision of 22 January 2007 requiring it to be closed. The Court refers to its findings under Article 8 of the Convention in the present case that the domestic court decision could not be taken to mean that the administration had

to shut down the Plant (see paragraph 30 above). To that extent, the applicants' complaint about the non-enforcement of the domestic court's decision is manifestly ill-founded. Be that as it may, the applicants obtained a favourable judgment in their case, which required the administration to take certain steps to inspect the Plant and carry out the necessary tests in accordance with the Bursa Administrative Court's decision. It also appears that the administration did not act on that obligation within the prescribed time-limits (see *Okyay and Others,* cited above, § 50). Therefore, to the extent that the applicants' complaint relates to the alleged overall failure of the authorities to implement the Bursa Administrative Court's decision, the Court will now examine whether the applicants could be expected to use the domestic remedy invoked by the Government.

39. The Court observes that, as pointed out by the Government, a new domestic remedy has been established in Turkey following the application of the pilot judgment procedure in the case of *Ümmühan Kaplan v. Turkey* (no. 24240/07, 20 March 2012). Subsequently, in its decision in the case of *Demiroğlu v. Turkey* ((dec.), no. 56125/10, 4 June 2013), the Court declared an application inadmissible on the ground that the applicants had failed to exhaust domestic remedies, that is to say to use the new remedy. In so doing, the Court considered in particular that this new remedy was *a priori* accessible and capable of offering a reasonable prospect of redress for complaints concerning the failure of the authorities to enforce judicial decisions.

40. The Court further notes that in its decision in the case of *Ümmühan Kaplan* (cited above, § 77), it stressed that it could nevertheless examine applications of that type, under its normal procedure, where notice thereof had already been given to the Government. The Court has thus done so in a case where it was not persuaded that the remedy in the form of compensation would offer redress for a continuing situation (see *Genç and Demirgan v. Turkey* [Committee], nos. 34327/06 and 45165/06, § 41, 10 October 2017, with respect to the non-enforcement of a final and binding domestic judgment ordering the administration to stop the operation of a gold mine). In the particular circumstances of the present case, however, the Court notes that the implementation of the Bursa Administrative Court's decision is objectively impossible having regard to the fact that the Plant ceased its operations in 2010 and moved elsewhere. For this reason, the Court considers that the Compensation Commission can provide redress in response to the applicants' complaints and therefore the Government's objection of non-exhaustion of domestic remedies must be upheld.

41. In view of the foregoing, the Court concludes that this part of the application, in so far as it was brought by the first two applicants, should be rejected under Article 35 §§ 1 and 4 of the Convention for failure to exhaust domestic remedies.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

Declares the application inadmissible.

Done in English and notified in writing on 27 February 2020.

Hasan Bakırcı
Deputy Registrar

Robert Spano
President

APPENDIX

No.	Applicant's Name	Birth date	Place of residence
1.	Erol ÇİÇEK	02/01/1963	Bursa
2.	Sedat ATA	10/12/1964	Bursa
3.	Yakup BAŞARAN	30/05/1957	Bursa
4.	Ayhan BİLDİK	08/01/1955	Bursa
5.	Fevzi ÇAVUŞ	10/02/1966	Bursa
6.	Mehmet ÇETİN	27/05/1961	Bursa
7.	Ergül ÇİÇEK	19/07/1964	Bursa
8.	Fikret GÜNAY	01/05/1957	Bursa
9.	İbrahim GÜNAY	09/03/1976	Bursa
10.	Kenan KAYA	10/03/1982	Bursa
11.	Kubilay KÜÇÜKPEHLİVAN	28/09/1982	Bursa
12.	Bahtiyar ONGUN	08/04/1981	Bursa
13.	Mehmet ONGUN	12/11/1978	Bursa
14.	Reyhan ÖZKAN	28/01/1977	Bursa
15.	Sedat SEVİNÇ	07/03/1981	Bursa
16.	Mustafa SIR	01/03/1966	Bursa
17.	Hasan TALAN	12/07/1978	Bursa
18.	Metin USLU	10/05/1966	Bursa
19.	Emel UYSAL	10/05/1984	Bursa
20.	Erdinç YALAMAOĞLU	28/02/1956	Bursa
21.	Halil YALAMAOĞLU	17/09/1957	Bursa
22.	Mehmet YALAMAOĞLU	03/08/1965	Bursa

ANNEX 33

FIFTH SECTION

DECISION

Application no. 52499/11

Inita VECBAŠTIKA and Others against Latvia

The European Court of Human Rights (Fifth Section), sitting on 19 November 2019 as a Committee composed of:

Gabriele Kucsko-Stadlmayer, *President,*
Yonko Grozev,
Lado Chanturia, *judges*,
and Milan Blaško, *Deputy Section Registrar,*

Having regard to the above application lodged on 18 August 2011,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The applicants' names, years of birth, places of residence and property names may be found in the appendix. All applicants are Latvian nationals, save for Ms Vadeiķīte, who is a Lithuanian national. They were represented before the Court by Ms I. Nikuļceva, a lawyer practising in Riga. The Latvian Government ("the Government") were represented by their Agent, Ms K. Līce.

2. On 7 January 2013 the applicants' complaints under Article 6 § 1 and Article 8 of the Convention were communicated to the Government. Further to the notification under Article 36 § 1 of the Convention and Rule 44 § 1 (a), the Lithuanian Government did not wish to exercise their right to intervene in the present case.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. The applicants are or were either land or house owners (the first, third, fourth, fifth, seventh, eighth, tenth, twelfth, fifteenth, sixteenth, seventeenth and eighteenth applicants) or residents (the second, sixth, ninth, eleventh, thirteenth, fourteenth and nineteenth) in Dunika parish, now within the territory of Rucava

municipality. Dunika parish is located in the west of Latvia, in an area some 12 to 30 km from the Baltic coast; it borders with Lithuania.

5. On 5 July 2013 the applicants' representative informed the Court of the death of the fourth, ninth and twelfth applicants in 2013, 2013 and 2011 respectively. She also informed the Court that their legal heirs (the fifth and sixth, tenth and eleventh applicants respectively) wished to pursue the proceedings on their deceased relatives' behalf.

1. General spatial planning

6. Between 28 July 2004 and 10 November 2006 Dunika Parish Council adopted several decisions with a view to general spatial planning of Dunika parish. On 9 November 2005 the State Environment Bureau (*Vides pārraudzības valsts birojs*) decided not to carry out a strategic environmental impact assessment as the general spatial plan had been drafted in compliance with the general spatial plan for Liepāja District. On 10 November 2006 the general spatial plan was approved and the relevant municipal by-laws were issued. None of the above provided for any wind-energy related zoning in Dunika parish.

7. On 22 March 2007 Dunika Parish Council approved a new general spatial plan. A wind-energy zone (*vēja enerģijas ieguves zona*) was established in Dunika parish for the first time; it encroached on the applicants' real property and the neighbouring properties.

8. On 21 June 2007 Dunika Parish Council approved the final general spatial plan and issued municipal by-law no. 3 (*Liepājas rajona Dunikas pagasta teritoriālais plānojums)*. A wind-energy zone comprising about 35% of the parish territory was included in the spatial plan. The applicants' property and the neighbouring properties were included in that zone, which was deemed suitable for the development of wind farms. The construction of wind farms was allowed in that zone on condition that it complied with domestic law; all project-related documents had to be approved by the relevant environmental authorities.

9. Following an administrative territorial reform in 2009, Dunika parish was included in the territory of the Rucava municipality; the newly established municipality was governed by Rucava Municipal Council, which on 3 November 2009 issued municipal by-law no. 27 and approved the general spatial plan for the Rucava municipality (*Rucavas novada teritorijas plānojums*), which also included Dunika parish.

2. Detailed spatial planning

(a) In relation to the first applicant's property

10. On 22 December 2008 Dunika Parish Council commenced detailed spatial planning for the properties named "Šuķi" and "Skrandas", which were adjacent to the first applicant's property "Kalvaiti" and where a specific number

of wind turbines would be located. Around each wind turbine there was to be a protection zone (*aizsargjosla*) to prevent any damage which might be caused in that area. It appears that the protection zone extended into the land owned by the first applicant.

11. On 9 March 2009 the first draft of the detailed spatial plan for those properties was opened for public consultation.

12. The first applicant approached the municipal authority on several occasions in summer and autumn of 2009 with various queries in relation to the specific location of the wind turbines, the protection zones around them, the public consultation process and other domestic procedures. Her submissions were examined: some were taken into account (in relation to the protection zones around the wind turbines) and others were rejected.

13. On 1 July 2009 Rucava Municipal Council convened for the first time. In accordance with domestic law, newly established municipal councils had to re-issue general and detailed spatial plans for their territories within three months. Until then, the general and detailed spatial plans issued previously were applicable.

14. On 17 December 2009 Rucava Municipal Council approved the final detailed spatial plan for the properties "Šuķi" and "Skrandas" and issued municipal by-law no. 41. It was planned to erect three wind turbines, each with a total height of 149 metres and with a power capacity of 2 MW.

(b) In relation to the other properties (entirety of wind farms)

15. On an unspecified date in 2009 the process for drawing up detailed spatial plans for forty-one wind turbines each with a maximum height of 149 metres was started in Dunika parish. According to the applicants, it was only at that point that they learned about the wind-energy related plans in their municipality.

16. On 19 March 2009 the first public consultation took place in connection with the detailed spatial plan for wind farms in Dunika parish. Another meeting was held one month later. Some of the applicants in the present case attended those meetings.

17. On 3 September 2009 the State Environment Bureau decided not to carry out an environmental impact assessment in respect of the siting of forty-one wind turbines in Dunika parish. It was noted that the turbines would be erected in a relatively wide area on twenty-nine properties; they would not be sited in specially protected areas (the closest Natura 2000 areas were one to three kilometres away). The nearest individual homes would be some 400 to 600 metres away from the wind turbines.

18. There is no information concerning the approval of or any litigation pertaining to the detailed spatial plans in respect of other properties adjacent to the applicants' homes or properties.

3. Proceedings before the Constitutional Court

19. The present applicants lodged two individual constitutional complaints with the Constitutional Court (*Satversmes tiesa*). The first applicant submitted in her individual complaint that municipal by-law no. 41 (see paragraph 14 above) was not compatible with the Constitution; all applicants submitted in their joint individual constitutional complaint that municipal by-law no. 27 (see paragraph 9 above) was not compatible with the Constitution (*Satversme*). In particular, they relied on the rights enshrined in the Constitution: "the right to property" (Article 105) and "the right to an adequate environment" (Article 115) (see paragraphs 46–47 below).

20. On 1 and 16 July 2010 respectively the Constitutional Court initiated proceedings with reference to section 16(1)(3) of the Law on the Constitutional Court (see paragraph 49 below). Under that provision the Constitutional Court had competence to examine whether the municipal by-laws were in compliance with the Constitution. On 23 September 2010 the proceedings concerning both individual constitutional complaints were joined.

21. On an unspecified date the applicants were informed that the case would be examined by means of a written procedure.

22. On 24 February 2011 the Constitutional Court delivered its judgment in case no. 2010-48-03.

23. The Constitutional Court's analysis under Article 115 of the Constitution can be summarised as follows.

24. The State had to ensure the right of everyone, including future generations, to live in an adequate environment by providing information, and preserving and improving the state of the environment. The plan to develop wind energy had been aimed at fulfilling the State's positive obligation under Article 115 of the Constitution, namely, to ensure social welfare and an adequate environment. The municipal authority had the discretion to determine the necessity of establishing a wind farm on its territory.

25. As to the compliance with the precautionary principle, the Constitutional Court found that the municipal authority had at its disposal information about the impact of wind turbines on human health and the environment. It had been able to take that information into account when planning the specific locations for wind turbines so that they would not pose a threat to human health and the environment. It had not been disputed before the Constitutional Court that wind turbines had an impact on birds and bats, that their presence had an aesthetic impact on the landscape, and that their operation caused noise, shade and shadow flicker. The parties to the proceedings had different views about the degree of this impact and, specifically, about the impact on human health.

26. The Constitutional Court went on to examine various aspects of the impact of wind farms. It held that: (i) the impact on birds and bats was not such as to

breach the principle of sustainable development; (ii) a negative impact on flora and fauna had not been established; and (iii) the impact on the landscape had been taken into account by the municipal authority as it had not been planned to locate wind turbines closer than 500 metres from residential homes.

27. As regards the much-debated issue of the impact on human life and health, the Constitutional Court noted that the operation of wind turbines did not generally relate to hazardous emissions, penetration of sewage or chemical substances into the soil, or to other waste. The risks and potential adverse effects existed only in the vicinity of wind turbines. It was therefore important to clearly establish their location. The contested general spatial plan had not provided any specific information as to the location, total number, height or power of the wind turbines. Consequently, such information had to be provided in the detailed spatial plan. The Constitutional Court concluded that the contested general spatial plan did not breach the State's obligation to protect human life and health on condition that the location of each specific wind turbine was established in the detailed spatial plan in accordance with the applicable legal requirements. In addition, the first applicant's argument that the location of the wind turbines, as established by the detailed spatial plan, posed a threat to human life and health was dismissed as unsubstantiated.

28. Furthermore, noise was accepted as being one of the most adverse impacts of wind turbines. However, the Constitutional Court did not analyse the permissible noise levels in the case before it because that issue had to be examined with reference to the Law on Pollution (*Piesārņojuma likums*) and its underlying regulations. Reference was made to section 14 of that Law, which stipulated that a polluting activity could not be started if the relevant limits relating to environmental quality had been or could be exceeded. In any event, the operation of wind turbines would not be allowed if the noise levels exceeded those limits. At the same time, the Constitutional Court referred to the permissible limit of 40dB for night-time noise and noted that the detailed spatial plan had been adopted on the basis of an estimate that the noise generated by the wind turbines at a wind speed of 10m/s would not exceed 39 dB in the first applicant's home. The Constitutional Court concluded that the general and detailed spatial plans were compatible with a person's right to rely on the premise that "the permissible noise levels would not be exceeded".

29. It had not been disputed before the Constitutional Court that one of the negative impacts of wind turbines was also the shade and shadow flicker created by them. The Constitutional Court referred to domestic case-law of other countries to conclude that those effects were insignificant if wind turbines were located at a distance of at least three times the height of a wind turbine from a residential home. In accordance with the detailed spatial plan, the first applicant's home was located at a permissible distance.

30. The State had a positive obligation to create a regulatory framework to prevent the risks associated with the operation of wind turbines (falling ice formations, collision with flying objects such as birds, hot-air balloons, parachutists or small aircraft, and other accidents). In Latvia such a framework had been laid down in the Law on Protection Zones (*Aizsargjoslu likums*). Under section 32^1(2) of that Law a protection zone around a wind farm had to be 1.5 times larger than the maximum height of a wind turbine. Various domestic authorities had provided different interpretations of the manner in which the breadth of a protection zone was to be calculated. The main aim of the protection zone was to guarantee the safety of people and the environment, and the security of the relevant infrastructure. It was forbidden, among other things, to build a residential house, create a leisure centre or organise a public event in such an area. In so far as protection zones were concerned, the contested plans complied with the Law on Protection Zones and Article 115 of the Constitution.

31. The impact of wind turbines on personal welfare had to be assessed under Article 105 of the Constitution, but also taking into account the procedural aspect of Article 115, namely, the right to participate in the environmental decision-making process. The Constitutional Court examined only alleged interference with the property rights of those applicants who were owners of real property in Dunika parish. It accepted that the construction of wind turbines might have an impact on the applicants' property rights. In particular, to enjoy their possession in the most beneficial way — without changes to the landscape, shade and noise caused by wind turbines. Thus, wind turbines located on neighbouring properties might cause an interference with the applicants' property rights.

32. The Constitutional Court held that the failure to carry out a strategic environmental impact assessment may be considered a significant procedural violation rendering the whole spatial plan unlawful.

33. As regards the general spatial plan, the Constitutional Court went on to examine whether in 2007 the municipal authority: (i) had had the right to include a wind-energy zone in the new plan (see paragraph 7 above), and (ii) had examined the necessity of carrying out a strategic environmental impact assessment. The Constitutional Court held that the municipal authority could include that zone, but that it had to request an opinion from the State Environment Bureau about the necessity of carrying out a strategic assessment. Whilst from the point of view of substantive law, the municipal authority could adopt the general spatial plan without a strategic environmental assessment, from the point of view of procedural law it had to receive the opinion of the State Environment Bureau in that respect. The latter argued, before the Constitutional Court, that it would have insisted on carrying out a strategic assessment, had the municipal authority informed them in 2007. Be that as it may, in 2009-10 the State Environment Bureau had carried out a number of initial environmental

impact assessments in respect of some of the twenty-three detailed spatial plans; its conclusion had been not to carry out an environmental impact assessment (one such decision has been cited in paragraph 17 above). Moreover, although the municipal authority had informed the relevant authorities about the newly adopted general spatial plan, the relevant ministry had not seen any procedural violations. At the time when the Constitutional Court adopted its judgment, some of the issues had already been examined during the initial assessment procedure and the relevant authorities had not seen any serious issues which might pose a threat to the environment. Therefore, the Constitutional Court concluded that the said procedural violation could no longer be considered as serious enough to affect the lawfulness of the general spatial plan.

34. The Constitutional Court found no breaches of the public consultation process as regards the general spatial plan. In an ideal situation, the municipal authority could have avoided unnecessary tension by providing the owners with objective information about positive and negative aspects of wind turbines in the early stages of the public consultation process. However, the fact that it had not performed its function in the best possible way could not be considered as a significant procedural violation. The Constitutional Court held that the general spatial plan had been lawful.

35. As regards the detailed spatial plan, the Constitutional Court noted that an initial environmental impact assessment had been carried out. There had been no need for a strategic assessment. Examining the material before it, the Constitutional Court found no breaches of the public consultation process. There was no indication that the first applicant would not have been heard or that her opinion would not have been assessed. The Constitutional Court also noted that the protection zone around the wind turbine in the detailed plan did not encumber the first applicant's property. The purpose of her constitutional complaint was to prevent a possible breach of her fundamental rights. The subject matter of the proceedings before the Constitutional Court was not to determine the breadth of the protection zone and, consequently, the alleged interference with the first applicant's property rights.

36. The Constitutional Court concluded that the contested general and detailed spatial plans had been adopted in accordance with the law. It established that the restriction of the fundamental right to property had a legitimate aim, that is, to protect the rights of others and ensure social welfare. As to proportionality, the Constitutional Court dismissed the applicants' argument that an alternative option could have been to locate the wind turbines not closer than 2 km from their properties. Such a solution would generally prevent all other owners from using their properties for the production of wind energy, and consequently, it would not achieve the legitimate aim as effectively as the contested spatial plans.

37. The Constitutional Court took into account the fact that more precise details of the contested general spatial plan were given in the detailed spatial plans, which could envisage the siting of the wind turbines at an adequate distance from existing residential houses, as well as the fact that the contested detailed spatial plan envisaged the siting of the wind turbines at an adequate distance from the first applicant's home. It thus held that the restrictions of the applicants' property rights were less significant than the public benefit to be gained from the achievement of the legitimate aim and the development of the wind farm within the framework of the specific project. Therefore, those restrictions were proportionate.

38. To conclude, the Constitutional Court ruled that the general and detailed spatial plans for Dunika parish, in so far as they related to wind-energy zoning, were compatible with Articles 105 and 115 of the Constitution.

4. Subsequent events

39. On 31 March 2010 the relevant authority issued building permit (*būvatļauja*) no. 47-2010 to erect three wind turbines on "Skrandas", which was adjacent to the first applicant's property "Kalvaiti", and approved the corresponding technical plan (*tehniskais projekts*).

40. The first applicant contested the permit. Firstly, she applied to Rucava Muncipal Council. Then she lodged an application with the Administrative District Court (*Administratīvā rajona tiesa*).

41. On 9 May 2011 the Administrative District Court terminated the proceedings on the grounds that the technological plan and the permit had already been declared null and void by the planning authority on 14 March 2011 because they were not in compliance with the protection zones included in the detailed spatial plan.

42. On 8 June 2011 the planning authority issued another building permit no. 103-11 to construct one wind turbine on "Skrandas"; it was valid for two years. The first applicant contested the permit before Rucava Municipal Council. Then she lodged an application with the Administrative District Court. Subsequently, the domestic courts at three instances examined and dismissed her claim.

43. On 24 August 2011 the Public Utilities Commission (*Sabiedrisko pakalpojmu regulēšanas komisija*) modified and extended the licence granted for production of energy to the company that was developing the project. The company was given until 13 July 2016 to commence energy production.

44. On an unspecified date the company that was developing the project submitted a new proposal to build fewer but more powerful wind turbines (with a power capacity for each turbine of up to 3 MW). The environmental impact assessment procedure was started in relation to thirty-one wind turbines. Eventually, on 21 November 2014 the State Environment Bureau issued its conclusions to the effect that the proposed activity was not permissible. Their

conclusions were valid until 21 November 2017. Accordingly, the proposal for more powerful wind turbines was not accepted.

45. At the time of the last exchange of observations between the parties, no wind turbines had been erected near the applicants' homes or properties. It appears that in 2013 a new general spatial plan for Rucava municipality was issued covering the planning period from 2013 to 2025. The new plan envisaged stricter conditions for the development of wind farms and allowed them to be sited only in areas where detailed spatial plans had been approved and the relevant building permits had been issued.

B. Relevant domestic law and practice

1. The Constitution

46. Article 105 of the Constitution (*Satversme*) provides:

"Everyone has the right to property. Property may not be used for purposes contrary to the interests of society. Property rights may be restricted only as provided for by law. Forced deprivation of property in the interests of society shall be authorised only in exceptional cases, on the basis of a special law, and in return for fair compensation."

47. Article 115 of the Constitution provides:

"The State shall protect the right of everyone to live in an adequate environment (*labvēlīga vide*) by providing information about the state of the environment and by taking care of the preservation and improvement of the environment."

2. Spatial planning

48. The legal framework for spatial planning in Latvia was laid down in the Spatial Planning Law (*Teritorijas plānošanas likums*), effective from 26 June 2002 to 1 December 2011. Since then, a new law — the Spatial Development Planning Law (*Teritorijas attīstības plānošanas likums*) — has taken effect. By contrast to the old law, the new Spatial Development Planning Law provides that detailed spatial plans are amenable to judicial review by the administrative courts (section 30). General spatial plans, however, remain to be examined by the Constitutional Court. Prior to lodging an individual constitutional complaint, a person must lodge an application with the relevant ministry (section 27).

3. Law on the Constitutional Court

49. Section 16(1)(3) of the Law on the Constitutional Court (*Satversmes tiesas likums*) provides that the Constitutional Court is competent to examine cases concerning compliance of other legal instruments with legal norms (instruments) of superior legal force. With effect from 1 January 2010 a new section was inserted in the Law on the Constitutional Court. It provides that an application to institute constitutional proceedings may be lodged in relation to spatial planning

at the municipal level (including detailed spatial plans) within six months of the day on which the relevant municipal by-law comes into force and in accordance with the procedure laid down in the new Spatial Development Planning Law (section 19³(2)).

4. The Constitutional Court's practice

50. On 24 February 2011 the Constitutional Court delivered a judgment in case no. 2010-48-03, which had been brought by the present applicants (see paragraphs 19 et seq. above).

COMPLAINTS

51. All applicants complained under Article 6 § 1 of the Convention of a breach of their right of access to a court to contest the general and detailed spatial plans, which allowed the construction of wind farms in Dunika parish.

52. The applicants also complained of a breach of their rights under Article 8 of the Convention on account of the fact that the State had authorised the construction of wind farms near their homes in Dunika parish (which the first group of applicants owned and where the second group of applicants resided).

53. The first group of applicants invoked Article 1 of Protocol No. 1 to the Convention and alleged that the commercial activities of wind farms, which had been allowed by the general spatial plan, as well as the erection of wind turbines on neighbouring land, which had been allowed by the detailed spatial plans, breached their property rights.

54. Lastly, the first group of applicants argued that they did not have an effective remedy, as guaranteed by Article 13 of the Convention in conjunction with Article 1 of Protocol No. 1, to complain of a breach of their property rights.

THE LAW

A. Preliminary issues

55. The Government contested the standing of the deceased applicants' relatives to continue the proceedings on behalf of the fourth, ninth and twelfth applicants.

56. The Court considers that it does not need to rule on the issue of *locus standi* of the deceased applicants' relatives, as the application is inadmissible in any event for the following reasons.

B. Alleged violation of Article 6 § 1 of the Convention

57. The applicants complained of a breach of their right of access to a court to contest the general and detailed spatial plans, which had allowed the construction of wind farms in Dunika parish. The only venue had been the

Constitutional Court, but it could not be considered a "tribunal" within the meaning of Article 6 § 1 of the Convention. They had been unable to participate in person; there had been no public hearing before the Constitutional Court. Their case had been decided by means of a written procedure. Most importantly, the Constitutional Court was a subsidiary mechanism for protection of human rights and its jurisdiction was limited to reviewing the constitutionality of legal provisions. It could not decide on other issues such as, for instance, the awarding of compensation for human rights' breaches.

58. The applicants relied on Article 6 § 1 of the Convention, which in its relevant part reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

59. The Government contested that argument.

1. The parties' submissions

60. The Government contested the applicability of Article 6 § 1 to the proceedings before the Constitutional Court (they referred to *Benthem v. the Netherlands*, 23 October 1985, §§ 32–36, Series A no. 97; *Roche v. the United Kingdom* [GC], no. 32555/96, §§ 116–26, ECHR 2005-X; and *Ringeisen v. Austria*, 16 July 1971, § 94, Series A no. 13).

61. More specifically, as to the applicants' opposition to the general and detailed spatial plans allowing the construction of wind farms in Dunika parish, the Government submitted that neither the Constitution nor the Convention provided a substantive right to object to their construction. The right at issue therefore had no basis in domestic law. As to the applicants' criticism of the decision-making process, it was related not to the exercise of their substantive "civil rights" but rather to their procedural rights; thus, there was no basis for such rights under national law either. As to the allegedly adverse effects of the wind turbines on the applicants' health and well-being, the Government drew an analogy with the case of *Balmer-Schafroth and Others v. Switzerland* (26 August 1997, *Reports of Judgments and Decisions* 1997-IV). In this connection, they submitted that the outcome of the proceedings before the Constitutional Court was not directly decisive for the applicants and the rights asserted by them were too tenuous and remote.

62. The Government also considered that the applicants could not be considered as victims in the present case because they had not requested an oral hearing before the Constitutional Court.

63. The applicants, for their part, argued that the dispute in the present case related to their civil rights — right to respect for private life and home and also their right to peaceful enjoyment of possessions. The interference with their rights had stemmed directly from the disputed general spatial plan. They

submitted that the dispute in question was serious and genuine, and that it was directly decisive for their civil rights. Given that the Constitutional Court's judgment and its interpretation of the law provided therein were binding on all domestic authorities, including the courts, any decisions taken by the domestic authorities could not contradict the Constitutional Court's judgment. In the applicants' view, their rights had a legal basis in national law (they referred to the Spatial Planning Law and the Law on the Constitutional Court, see paragraphs 48–49 above) and international law (they referred to, among other things, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters).

64. The applicants conceded that they had not requested the Constitutional Court to hold a hearing but pointed out that domestic law did not provide for such a possibility.

2. The Court's assessment

65. The Court reiterates that proceedings come within the scope of Article 6 § 1, even if they are conducted before a Constitutional Court, where their outcome is decisive for civil rights and obligations. More generally, for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute ("*contestation*" in the French text) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner in which it is exercised; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see *Meimanis v. Latvia*, no. 70597/11, §§ 42–43, 21 July 2015, with further references). And finally, the right at stake has to have a "civil" character.

66. The Court notes that the constitutional complaints brought by the present applicants related to the general and detailed spatial plans, which had allowed for the construction of wind farms in Dunika parish. In the proceedings before the Constitutional Court, the applicants relied on "the right to property" and "the right to an adequate environment" (see paragraph 19 above). The Constitutional Court examined the compatibility of the general and detailed spatial plans with precisely those human rights as enshrined in Articles 105 and 115 of the Constitution (see paragraphs 23–38 above).

67. In the present case the Court does not consider it necessary to determine whether the rights as invoked by the applicants had a "civil" character or whether there was a genuine and serious "dispute" because, in any event, the third criterion for Article 6 § 1 of the Convention to be applicable is not fulfilled. In that respect, the Court reiterates that it must be satisfied that the proceedings

before the Constitutional Court were directly decisive for the applicants' rights in question.

68. In this connection, the Government placed particular emphasis on the case of *Balmer-Schafroth and Others*, in which the applicants had challenged the extension of a nuclear power station's licence. The Court found that Article 6 § 1 did not apply to the proceedings in that case because the applicants had not "establish[ed] a direct link between the operating conditions of the power station which were contested by them and their right to protection of their physical integrity, as they [had] failed to show that the operation of [the] power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent" (see *Balmer-Schafroth and Others*, cited above, § 40). Later, in *Athanassoglou and Others v. Switzerland* ([GC], no. 27644/95, §§ 46-55, ECHR 2000-IV), the Court fully confirmed that position.

69. The Court finds this objection to be well founded. The Constitutional Court in the present case held that, in general, the operation of wind turbines was not associated with the emission of any hazardous substances or harmful effects on human health. Possible adverse effects were found to exist only at a certain, relatively short, distance from wind turbines. However, the general spatial plan did not lay down specific locations for wind turbines in Dunika parish; therefore, such locations had to be specified in detailed spatial plans taking into account the applicable legal requirements (see paragraphs 27 and 37 above). Only the first applicant contested before the Constitutional Court the detailed spatial plan for the properties which were adjacent to her property (see paragraph 19 above). In this respect, the Constitutional Court found that the first applicant's property fell outside the protection zone as established around the planned wind turbine and thus it was not established that the first applicant will suffer from a breach of her human rights (see paragraph 35 above). In so far as the noise emanating from wind turbines was concerned, the Constitutional Court established that the operation of a wind turbine would not, in any event, be allowed if the noise levels where to exceed the permissible limits laid down in law (see paragraph 28 above). Nothing in the evidence, presented in the proceedings before the Court, would allow it to put in doubt those findings of the Constitutional Court of Latvia.

70. The Court concludes that the applicants in the present case have failed to show that the adoption of the general and detailed spatial plans, allowing the construction of wind turbines at an adequate distance from their properties or homes as held by the Constitutional Court (see paragraph 37 above), exposed them personally to a serious and specific harm and that there existed a direct link between the proceedings before the Constitutional Court and the rights relied on by the present applicants (contrast with *Bursa Barosu Başkanliği and Others v. Turkey*, no. 25680/05, §§ 75 and 127, 19 June 2018). Consequently, the

effects on their rights have not been established with a degree of probability that would make the outcome of the proceedings before the Constitutional Court directly decisive within the meaning of the Court's case-law.

71. Accordingly, Article 6 § 1 is not applicable to the proceedings before the Constitutional Court in the present case. The applicants' complaint is therefore incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) of the Convention and must be rejected in accordance with Article 35 § 4.

C. Alleged violation of Article 8 of the Convention

72. The applicants also complained of a breach of their rights under Article 8 of the Convention on account of the fact that the State had authorised the construction of wind-energy farms near their homes in Dunika parish, which the first group of applicants owned and where the second group of applicants resided (see paragraph 4 above). In this regard the applicants stated that wind turbines generated high noise levels and caused other nuisance (vibrations, low-frequency sound, shade and shadow flicker) affecting their health and well-being. They also argued that the Contracting States had positive obligations inherent in an effective respect for private life under the Convention. The applicants relied on the Aarhus Convention, and the right to live in an environment adequate to one's health and well-being.

73. Article 8 provides:

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

74. The Government contested that argument.

1. The parties' submissions

75. The Government considered that the applicants could not claim to be "victims" of a violation of their rights under Article 8 of the Convention because not a single wind turbine had been erected. There had been no impact on the applicants' health and well-being, or on their right to respect for their private life and home. The Government considered their complaint purely theoretical. It only concerned the possible impact of wind turbines (they referred to *Monnat v. Switzerland*, no. 73604/01, §§ 31–32, ECHR 2006-X). The Government also argued that there were no activities of the State that had a causal link with the allegedly negative impact on the applicants. There had been no detriment at all

that the applicants might complain of and no adverse effects of environmental pollution attaining a minimum level of severity regarding the applicants' homes, and, therefore, no arguable claim under Article 8 of the Convention (they referred to *López Ostra v. Spain*, 9 December 1994, § 51, Series A no. 303-C; *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI (extracts); *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 118, ECHR 2003-VIII; and *Fadeyeva v. Russia*, no. 55723/00, § 69, ECHR 2005-IV).

76. The applicants submitted that, in accordance with the Court's case-law, even if they had not been actually affected, they had standing as "victims" if they produced reasonable and convincing evidence of the likelihood that a violation affecting them personally would occur (they referred to *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom* (dec.), no. 56672/00, ECHR 2004-IV; *Segi and Gestoras Pro-Amnistía v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom* (dec.), nos. 6422/02 and 9916/02, ECHR 2002-V; *Fédération chrétienne des témoins de Jéhovah de France v. France* (dec.), no. 53430/99, ECHR 2001-XI; and *Tauira and Others v. France*, no. 28204/95, Commission decision of 4 December 1995, Decisions and Reports (DR) 83-B, p. 112). They pointed out that the general and detailed spatial plans allowed construction of wind farms in Dunika parish and that there were no legal grounds to prohibit their construction later on (for example, by refusing to issue a building permit); the relevant permits had already been issued and the company had obtained a licence to produce electricity. They disagreed with the Government that the impact in the present case was "purely theoretical" and "possible"; they considered it to be direct and serious.

2. The Court's assessment

77. The Court reiterates that there is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8 (see *Hatton and Others*, cited above, § 96). Specifically, Article 8 of the Convention applies to severe environmental pollution which 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, even without seriously endangering their health (see *Taşkın and Others v. Turkey*, no. 46117/99, § 113, ECHR 2004-X).

78. However, Article 8 does not merely compel the State to abstain from arbitrary interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or

family life and home. In any event, whether the question is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 or in terms of an "interference by a public authority" to be justified in accordance with paragraph 2, the applicable principles are broadly similar (see *Di Sarno and Others v. Italy*, no. 30765/08, § 105, 10 January 2012).

79. In contrast to the vast majority of the cases decided by the Court in relation to environmental matters which concern actual and existing nuisances, the Court notes that the applicants' complaint in the present case relates to an alleged nuisance arising from the operation of wind turbines which have not yet been erected (see paragraph 45 above). The applicants' main argument in this respect was that their participation in the decision-making process as regards the general and detailed spatial plans was crucial because otherwise they would not be able to effectively oppose any subsequent construction (see paragraph 76 above). The Court, however, cannot accept this argument for the following reasons.

80. All of the applicants in the present case lodged a joint constitutional complaint, which was directed against the general spatial plan allowing the construction of wind farms in Dunika parish. Only the first applicant contested before the Constitutional Court the detailed spatial plan for the properties which were adjacent to her property (see paragraph 19 above). She then instituted further proceedings before the administrative courts to challenge the building permit issued for a specific wind turbine to be erected (see paragraphs 40–42 above).

81. It was established by the Constitutional Court that the location of wind turbines had to be specified in detailed spatial plans, that the first applicant's property fell outside the protection zone set around the planned wind turbine and that the operation of a wind turbine would not, in any event, be allowed if the noise levels where to exceed the permissible limits laid down in law (see paragraph 69 above, with further references). While the necessary building permits for certain wind farms have been issued (see paragraphs 42 and 76 above), there is no information in the case material as to whether all of the permits are still valid to date — at least one of them has been annulled (see paragraph 41 above). It is not clear whether the construction of the wind park in Dunika parish has been delayed because of pending litigation (see paragraph 42 above), annulled or expired building permits (see paragraph 41 above) or because the project to develop wind farms in Dunika parish has been abandoned, modified or otherwise thwarted (see paragraph 44 above).

82. The applicants have not been able to produce any evidence showing that the operation of wind turbines near their properties or homes in Dunika parish would directly and seriously affect them with the necessary degree of

probability. The Court considers that the mere mention of certain adverse effects arising from the operation of wind turbines in general is not enough in that regard.

83. In such circumstances, the Court does not have reasonable and convincing evidence that there would be a risk of endangering the applicants' private and family life as a result of the adoption of the general and detailed spatial plans, which allowed the construction of wind farms in Dunika parish.

84. The Court, therefore, accepts the Government's objection that it has not been established that the applicants would be directly and seriously affected in the circumstances of the present case. Accordingly, the applicants' complaint under Article 8 of the Convention is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

D. Alleged violation of Article 1 of Protocol No. 1 to the Convention

85. The first group of applicants (see paragraph 4 above) also alleged a breach of their property rights on account of the fact that the commercial activities of wind farms and the siting of wind turbines on the neighbouring properties had been allowed. They argued that the value of their properties had been significantly reduced and that they could not easily sell or rent them. Their existing or future business plans (for example countryside tourism, livestock farming, agriculture or apiculture) had been ruined.

86. The Court reiterates that Article 1 of Protocol No. 1 does not guarantee the right to enjoy one's possessions in a pleasant environment. That being said, a severe nuisance may seriously affect the value of real property and thus amount to a partial expropriation (see *Galev and Others v. Bulgaria* (dec.), no. 18324/04, 29 September 2009 with further references).

87. However, the applicants in the instant case have not submitted any evidence that house prices in general or the value of their properties in particular have been adversely affected by the general and detailed spatial plans allowing the construction of wind farms in Dunika parish (see *Galev and Others*, cited above; *Ashworth and Others v. the United Kingdom* (dec.), no. 39561/98, 20 January 2004; and *Ivan Atanasov v. Bulgaria*, no. 12853/03, § 83, 2 December 2010). Nor have they produced any evidence to show the extent of the losses allegedly suffered by their businesses as a result of the general and detailed spatial plans allowing the construction of wind farms in Dunika parish (see *Ivan Atanasov*, ibid.).

88. The Court thus considers that the applicants' complaint under Article 1 of Protocol No. 1 to the Convention is not substantiated. Accordingly, it is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

E. Alleged violation of Article 13 of the Convention in conjunction with Article 1 of Protocol No. 1 to the Convention

89. Lastly, the first group of applicants (see paragraph 4 above) argued under Article 13 of the Convention in conjunction with Article 1 of Protocol No. 1 to the Convention that they did not have an effective remedy to complain of a breach of their property rights.

90. The Court reiterates that a complaint may only be made under Article 13 in connection with a substantive claim which is "arguable" (see *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131). The Court has found that the applicants' complaint under Article 1 of Protocol No. 1 is manifestly ill-founded. It finds that that claim cannot be said to be "arguable" within the meaning of the Convention case-law.

91. It follows that this part of the application is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

Declares the application inadmissible.

Done in English and notified in writing on 12 December 2019.

Milan Blaško
Deputy Section Registrar

Gabriele Kucsko-Stadlmayer
President

	Name	Birth year	Residence	Property
1.	Inita VECBAŠTIKA	1964	Dunika	Kalvaiti
2.	Vilma DOBELE	1944	Dunika	Mežāres
3.	Kristīne PREISA	1981	Liepāja	Preisi, Mežāres
4.	Vilma VARNA	1952	Dunika	Saulstari, Kretuli
5.	Ilmars VARNA	1955	Dunika	Saulstari, Cinkusi
6.	Armands VARNA	1979	Dunika	Saulstari
7.	Anna SEDOLA	1929	Dunika	Sedoli
8.	Sandra BEŅUŠE	1965	Dunika	Dzirkaļi
9.	Miķelis SĪKLIS	1926	Dunika	Jurķi
10.	Ilgvars SĪKLIS	1963	Dunika	Jurķi, Kaijas
11.	Spodra Mudīte KUNDZIŅA	1943	Dunika	Iesalnieki
12.	Jānis KUNDZIŅŠ	1922	Dunika	Iesalnieki
13.	Indra VADEIĶĪTE	1982	Dunika	Iesalnieki
14.	Mareks MIHAILOVS	1972	Dunika	Iesalnieki
15.	Ausma Līna BALODE	1940	Dunika	Brīvkalni
16.	Irma Alvīne KAPILINSKA	1942	Dunika	Gauri
17.	Jānis KŪMA	1951	Dunika	Mazarāji
18.	Marta MAME	1949	Dunika	Skalbes
19.	Gatis MAMIS	1975	Dunika	Skalbes

ANNEX 34

FIFTH SECTION

CASE OF DIMITAR YORDANOV v. BULGARIA

(Application no. 3401/09)

JUDGMENT

STRASBOURG
6 September 2018

FINAL

06/12/2018

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Dimitar Yordanov v. Bulgaria,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Angelika Nußberger, *President,*
Erik Møse,
André Potocki,
Yonko Grozev,
Síofra O'Leary,
Gabriele Kucsko-Stadlmayer,
Lətif Hüseynov, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 10 July 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 3401/09) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, Mr Dimitar Pavlov Yordanov ("the applicant"), on 17 December 2008.

2. The applicant was represented by Ms N. Sedefova, a lawyer practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agents, Ms M. Kotseva and Ms M. Dimitrova, of the Ministry of Justice.

3. The applicant alleged, in particular, that the State had been responsible for damage to property of his, due in his view to unlawful mining activities in close proximity, and that the domestic courts had wrongly dismissed his tort claim related to that damage.

4. On 15 September 2016 the above complaints were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1939 and lives in Sofia.

6. The applicant owns one half of a plot of land in the village of Golyamo Buchino, close to the city of Pernik. He also owned one half of a house standing on the plot, in which he lived until 1997, and one half of two smaller buildings, a barn and a pen. Those buildings no longer exist.

7. On an unspecified date towards the end of the 1980s or the beginning of the 1990s the State took a decision to create an opencast coalmine near the village. In a decision of 8 May 1990 the local mayor expropriated about ninety properties in the area for that purpose, including the applicant's land and buildings.

8. The expropriation decision stated that the applicant should receive in compensation another plot of land in the village. The applicant received additionally a sum of money (the parties have not presented the decision of the mayor on the additional compensation). The majority of the remaining owners received either monetary compensation or flats in the city of Pernik. As another plot was not provided to the applicant within the statutory time-limit of one year, on 21 August 1992 he requested that the expropriation be cancelled, as he was entitled to under section 102 of the Property Act (see paragraph 24 below). Another person who was due a plot of land in compensation also applied to have the expropriation of her property cancelled. In a decision of 2 October 1992 the Pernik regional governor cancelled the two expropriations, noting that the plots of land due in compensation had not been provided "owing to the impossibility for the municipality to ensure such plots". The decision stated furthermore that the owners had to pay back the monetary compensation they had additionally received. On 22 December 1993 the applicant paid back that compensation.

9. The applicant remained in his house. In the years which followed the mine approached the house, due to its gradual enlargement. Coal was extracted from it by means of detonations, which, according to the applicant, shook the

house on a daily basis. On unspecified dates cracks appeared on the walls of the house, and the barn and the pen collapsed. Towards the beginning of 1997 the applicant's family moved out of the house, judging it too dangerous to stay.

10. Subsequently, the applicant contacted the mine, seeking to obtain compensation, but the negotiations failed. At the time, the mine was managed by a company which was wholly State-owned. In 2005 it was privatised.

11. In 2001 the applicant brought a tort action against the company operating the mine, seeking compensation for the damage caused to his property.

12. The Pernik Regional Court ("the Regional Court"), which examined the case at first instance, heard a witness, a neighbour of the applicant, who stated during a court hearing of 13 December 2001 that the walls of the applicant's house were cracked, that its state continued to deteriorate, and that the barn had collapsed three or four years earlier. He thought that the house had been well constructed, and explained that after the initial damage the applicant had attempted to repair it. On 7 March 2002 the Regional Court heard another witness, who stated that most of the damage to the applicant's house had been caused three or four years earlier.

13. The Regional Court appointed an expert, who established that the house had been constructed between 1948 and 1950, when there had been no requirements as to seismic resistance. At the time of drawing up the expert report the house was uninhabitable, as its walls were bent and cracked, with the cracks sometimes reaching 20–35 cm in width. The distance between the house and the mine's periphery was about 160-180 metres. This meant that the house was situated well inside the so-called "sanitation zone" consisting of land within 500 metres of the mine's edge, inside which the law prohibited any dwellings. The "security zone" for the mine, within which no unauthorised person was to be present during detonation works, had a radius of 600 metres. The expert confirmed his conclusions at a court meeting on 24 January 2002.

14. In a judgment of 27 June 2003 the Regional Court dismissed the applicant's action. It considered it established that the applicant's property had been seriously damaged and that the damage had coincided in time with the beginning of detonation works in the mine. Still, it concluded that the applicant had not proven that a causal link existed between the damage and the detonations. He had relied in that regard on the witness testimony provided by two neighbours, but according to the Regional Court it was impossible to establish what had caused the damage to the property by way of witness testimony. The burden of proof to establish such a circumstance lay on the applicant and the other party had argued that the damage had been due to the manner of construction of his house.

15. The applicant lodged an appeal. Before the Sofia Court of Appeal ("the Court of Appeal") he called an additional witness, who stated during a hearing

on 2 February 2004 that many houses in the area had already collapsed, and that all the other houses in the applicant's neighbourhood had cracks.

16. On 25 June 2004 the Court of Appeal upheld the Regional Court's judgment, confirming its reasoning. It held that while witness testimony could establish the extent and the timing of the damage to the applicant's property, it could not prove the causal link between that damage and the detonation works at the mine.

17. The applicant lodged an appeal on points of law. In a judgment of 5 April 2006 the Supreme Court of Cassation quashed the Court of Appeal's judgment and remitted the case for fresh examination. It was of the view that the lower courts had not duly accounted for the fact that the mine operated in a prohibited area close to the applicant's house, the house being situated within both the "sanitation zone" and the "security zone" around the mine. The lower courts had had to examine this fact in light of the statements of the witnesses, which had "established the circumstance" that the damage to the applicant's property had been the result of the detonation works. It was also necessary to assess compliance by the company operating the mine with other statutory requirements, such as those concerning environmental protection.

18. After the case was remitted, the Court of Appeal commissioned a new expert report. The expert noted that, owing to the passage of time and the destruction of some documents, it was impossible to determine the exact distance between the applicant's house and the area where the detonations had been carried out in 1997. Nevertheless, it was clear that the house had been well inside the "sanitation zone" around the mine. The expert additionally noted that the detonations had been carried out by qualified workers, in accordance with the mine's internal rules.

19. The Court of Appeal heard an additional witness for the applicant, who stated during a court hearing of 23 November 2006 that many houses in the village had collapsed, and that he thought that this was due to the detonations at the mine. He added that the detonations took place on a daily basis, that they caused "earthquakes", and that the houses shattered as a result. The first cracks on the applicant's house had appeared even before the time when the mine had operated closest to it. The witness was not aware of any landslides in the area.

20. In a judgment of 2 April 2007 the Court of Appeal once again upheld the Regional Court's judgment of 27 June 2003, dismissing the applicant's claim. It found it "indisputable" that employees of the mine had acted in breach of law, by carrying out detonations in a prohibited area close to residential buildings, including at the time when, according to the applicant, the damage to his property had started. Nevertheless, on the basis of the material submitted, the applicant had not proved the causal link between the mine's work and the damage to his property. The Court of Appeal reasoned in that regard:

"The causal link ... cannot be assumed — it is to be fully proven by the claimant. It has not been shown in the case that the claimant's building, constructed in the 1950s, has been damaged precisely because of the detonation works at the mine. The claimant has not shown that the residential building and the auxiliary buildings, given [their] manner of construction, the materials [used] and the time of [their] construction, would not have been damaged, or would not have been damaged to such an extent, had it not been for the detonation works at the mine. It has not been shown whether and to what degree the buildings' state described by the expert [heard by the Regional Court] was due to normal wear and tear, taking into account the year [they were built] and the manner of [their] construction, and any lack of maintenance by the owner after the 1990 expropriation."

21. Upon a further appeal by the applicant, in a final judgment of 3 July 2008 the Supreme Court of Cassation upheld the Court of Appeal's judgment, affirming its conclusions. It pointed out in particular that the expert report presented to the Court of Appeal (see paragraph 18 above) had only established that the applicant's property had been situated within the "sanitation zone" around the mine, but "was insufficient to prove the existence of a causal link between the damage ... and the unlawful behaviour of employees of the respondent company".

22. In the meantime, the applicant's house has collapsed and no longer exists. The property has been abandoned.

II. RELEVANT DOMESTIC LAW

A. Expropriations for public needs under the Property Act

23. Section 101 of the Property Act (*Закон за собствеността*), as worded at the relevant time, allowed the expropriation of private property for "especially important State needs", which could not be met otherwise.

24. Section 102 stated in addition that the owner would receive compensation through other property or in cash, and that the authorities could take possession of the expropriated property only after the provision of the compensation due. If such compensation was not provided within one year of the entry into force of the expropriation decision, the owner could seek the cancellation of the expropriation. In 1996 section 102 of the Property Act was superseded by other legislation.

B. Health and safety requirements with regard to industrial installations

25. Ordinance No. 7 of 25 May 1992 concerning the health and safety requirements for the protection of health in residential areas (*Наредба № 7 от 25.05.1992 г. за хигиенните изисквания за здравна защита на селищната среда*), adopted by the Minister of Health in implementation of the Public Health Act (see paragraph 27 below), provided for the creation of "sanitation zones"

around industrial installations which represented an environmental hazard. The width of such zones was to be between 50 and 3,000 metres, depending on the specific characteristics of each installation, and the construction of non-industrial buildings was not permitted inside the zones. If such buildings already existed, the owners of installations concerned by the "sanitation zone" requirement were obliged to limit any harmful activities "to the statutory levels" by the end of 1997; otherwise, they were obliged to close down the respective installation or move it to another area. This ordinance remained in force until 2011.

26. In addition, "security zones" around detonation sites, within which no person is allowed during any detonation works, are provided for in a document entitled Security Rules During Detonation Works (*Правилник по безопасността на труда при взривните работи*), adopted on 28 December 1996 by the Minister for Work and Social Assistance.

27. The 1973 Public Health Act (*Закон за народното здраве*), in force until 2005, and after that the Health Act (*Закон за здравето*), regulate the functioning and powers of health protection bodies. Among other things, those bodies are entitled to conduct checks and inspections, and if necessary suspend the functioning of industrial objects or installations operating in breach of health protection rules, and impose administrative punishments.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 AND ARTICLE 8 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1

28. The applicant complained under Article 6 § 1 of the Convention of the manner in which the national court had decided on his claim against the company operating the mine. He complained furthermore under Article 8 of the Convention of an infringement of his right to a home. Lastly, he complained under Article 1 of Protocol No. 1 that he had been deprived of the possibility to "use freely" his property.

29. Article 6 § 1, in so far as relevant, reads:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

Article 8 of the Convention and Article 1 of Protocol No. 1 read:

> ***Article 8***
>
> "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."

Article 1 of Protocol No. 1

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. The parties' arguments

1. The Government

30. The Government pointed out that the complaint under Article 6 § 1 of the Convention was related to the outcome of the civil proceedings, and argued that it was of a fourth-instance character.

31. Under Article 8 of the Convention, the Government contested the applicant's claim that the house in Golyamo Buchino had been his "home", pointing out that after 1997 he had not lived there.

32. As concerns the complaint under Article 1 of Protocol No. 1, the Government pointed out that if the applicant had considered that employees of the mine had handled explosives in breach of the relevant rules, he could have requested that criminal proceedings be initiated against them on that account.

33. The Government contended that the State could not be held responsible for the damage caused to the applicant's property, as he had not shown that it was due to any action of the public authorities. Nor had the applicant shown that the damage at issue was indeed the result of the operation of the mine, and, this being so, the State could not have been expected to take measures to prevent "events the cause of which is unknown or cannot be reasonably predicted". Moreover, the State could not be required to close down the mine, an enterprise of "crucial economic importance", for the sole reason that "an individual upon his free will chose to continue living in its vicinity".

34. The Government submitted that the State's responsibility was limited to guaranteeing the effectiveness of judicial proceedings between private parties. In such proceedings, the applicant had failed to substantiate his claim, and the claim had thus been dismissed "due to the objective facts of the case". In any event, at the beginning of the 1990s the State had expropriated the applicant's property and had offered him compensation.

2. The applicant

35. The applicant reiterated that his rights had been breached. He pointed out that the Government had not contested the fact that the mine had operated in a prohibited area close to his property, which had also been acknowledged by the domestic courts.

36. Under Article 6 of the Convention, the applicant argued that the national courts had reached the wrong conclusion in the tort proceedings initiated by him in finding that he had not proved the causal link between the mine's work and the damage to his property. In his view, that causal link had been clearly established by the witnesses and the experts heard by the courts. The applicant added that, prior to being obliged to leave the house, he had repaired and maintained it, and that it had been well constructed.

37. As regards his complaint under Article 8 of the Convention and the question as to whether the case concerned his "home", the applicant pointed out that he had a "strong emotional connection" with the house in Golyamo Buchino, where he had grown up and where he had lived predominantly with his family until 1997. He had not left the house of his own free will, but had been forced to do so after it had become dangerous to live there. The unlawful damage to the house rendering it uninhabitable meant that Article 8 of the Convention had been breached.

38. Under Article 1 of Protocol No. 1, as to the Government's argument that he could have sought the criminal prosecution of employees of the mine (see paragraph 32 above), the applicant considered that such prosecution could not have provided the redress he sought, and in any event he had pursued another remedy, claiming damages.

39. The applicant pointed out that detonation works were inherently dangerous, and that the State had therefore established safety rules. In the event of a mine operating near to a house, the State required a protective "sanitation zone", but even though his house had remained well inside such a zone, the mine had been allowed to continue to operate. The applicant argued that after the cancellation of the expropriation of his property the State had had to step in to exercise control and ban the unlawful activity. The applicant additionally pointed out that his request that the 1990 expropriation of his properties be cancelled had been motivated by the State's failure to provide the compensation due to him within the statutory time limit. He had not been obliged to await this compensation indefinitely.

B. The Court's assessment

1. Admissibility

(a) Article 8 of the Convention

40. The applicant complained of a breach of his right to respect for his home (see paragraph 28 above).

41. Under Article 35 § 1 of the Convention, the Court may examine a matter only where it has been submitted to it within six months of the date on which a final decision was taken. The primary purpose of this rule is to maintain legal certainty by ensuring in particular that cases raising issues under the Convention are examined within a reasonable time. Furthermore, the rule facilitates the establishment of facts in a case, since with the passage of time any fair examination of the issues raised is rendered problematic (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 39, 29 June 2012).

42. As was also pointed out by the Government (see paragraph 31 above), the house in Golyamo Buchino, which is the subject of this complaint, ceased to be the applicant's home in 1997 when he moved out of it, judging it too dangerous to stay (see paragraph 9 above). The tort proceedings the applicant brought subsequently were not aimed at recovering the house or enabling him to return there, and there were no other developments in relation to his right to respect for his home. For these reasons the Court is of the view that as concerns the applicant's complaint under Article 8 the six-month time-limit under Article 35 § 1 of the Convention started running in 1997 when he moved out of his house.

43. That complaint, lodged in December 2008 (see paragraph 1 above), has thus been lodged out of time, and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

(b) Remainder of the application

44. Concerning the complaint under Article 1 of Protocol No. 1, the Government appeared to raise an objection of non-exhaustion of domestic remedies, since they stated that the applicant had failed to seek the criminal prosecution of employees of the mine who might have handled explosives in breach of the relevant rules (see paragraph 32 above). However, the Government have not shown that the remedy at issue could have provided any adequate redress to the applicant, enabling him to return to his house or to obtain compensation, and the Court thus dismisses the objection.

45. It finds in addition that the complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, or inadmissible on any other ground. They must therefore be declared admissible.

2. Merits

(a) Article 6 § 1 of the Convention

46. The applicant argued that the national courts had wrongly decided in the tort proceedings brought by him against the company operating the mine, in particular in concluding that no causal link had been shown to exist between the detonations at the mine and the damage to his property (see paragraph 36 above).

47. The Court has said on numerous occasions that it is not called upon to deal with errors of fact or law allegedly committed by the national courts, as it is not a court of fourth instance, and that it is not called upon to reassess the national courts' findings, provided that they are based on a reasonable assessment of the evidence (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 197, ECHR 2012). Thus, issues such as the weight attached by the national courts to given items of evidence or to findings or assessments submitted to them for consideration are not normally for the Court to review (see *Bochan v. Ukraine (no. 2)* ([GC], no. 22251/08, § 61, ECHR 2015, and *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 83, ECHR 2017 (extracts)).

48. Nevertheless, the Court may entertain a fresh assessment of evidence where the decisions reached by the national courts can be regarded as arbitrary or manifestly unreasonable (see *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, §§ 803-4, 25 July 2013, and *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 90, ECHR 2016 (extracts)). Thus, for instance, in the case of *Dulaurans v. France* (no. 34553/97, §§ 36–38, 21 March 2000), the Court found a violation of the right to a fair trial because the sole reason why the French Court of Cassation had arrived at its contested decision rejecting the applicant's appeal on points of law as inadmissible was the result of "a manifest error of assessment". In *Anđelković v. Serbia* (no. 1401/08, § 27, 9 April 2013), the Court also found that the domestic court's decision, which principally had had no legal basis in domestic law and had not established any connection between the facts, the applicable law and the outcome of the proceedings, was arbitrary. In *Bochan (no. 2)* (cited above, §§ 63–65), the Supreme Court had so "grossly misinterpreted" a legal text (an earlier judgment of the Court) that its reasoning could not be seen merely as a different reading of that text, but was "grossly arbitrary" or entailing a "denial of justice". In *Carmel Saliba v. Malta* (no. 24221/13, §§ 69–79, 29 November 2016), the Court criticised the domestic courts for having relied on the inconsistent testimony of one witness and having failed to adequately comment on the remaining evidence; combined with other less significant shortcomings of the civil proceedings, this meant that those proceedings had not been fair.

49. In the present case the domestic courts appointed experts and heard witnesses, former neighbours of the applicant, and found on the basis of this evidence that the applicant's house and the other buildings in his yard were seriously damaged and had become unusable. They found furthermore that the detonations in the nearby mine had been carried out in breach of law (even though by qualified workers and in accordance with the mine's own internal rules), including at the time when, according to the applicant, the damage to his property had started (see paragraphs 14 and 20 above).

50. It was also established that, when the detonations were carried out closest to the applicant's property, they were within 160–180 metres of it (see paragraph 13 above). However, while the applicant has not at any stage specified when the mining activity of which he complained commenced, it would appear that this occurred sometime in the early 1990s (see paragraph 7 above). In contrast, the expert reports on which the domestic courts relied were only drawn up in 2001-02 and 2006-07 as the applicant waited until 2001 to initiate his tort action. Those expert reports found that it was impossible to say whether the distance just referred to had been the distance in 1997 when the damage to the applicant's house had become so significant that he had had to leave (see paragraphs 13 and 18 above).

51. The Court is of the view that, unlike the cases referred to in paragraph 48 above, the present case does not concern "a manifest error of assessment" on the part of the national courts, or a "gross misinterpretation" of the relevant circumstances, or reasoning disregarding the bulk of the evidence presented or failing to connect the established facts, the applicable law and the outcome of the proceedings. The present case concerns the national courts' assessment of the applicant's claim as argued by him and in light of the evidence presented. The courts discussed and took into account the findings of the experts which they had appointed and the testimony of the witnesses put forward by the applicant, and made their own assessment as to their evidentiary value, stating in particular that the witness evidence was insufficient to prove the causal link alleged by the applicant (see paragraphs 14, 16 and 20–21 above).

52. After the case was remitted by the Supreme Court of Cassation (see paragraph 17 above), the Court of Appeal complied with its instructions to take into account the unlawfulness of the detonation works carried out at the mine, and expressly discussed that aspect, but still, on the balance, considered that the causal link between those detonations and the damage to the applicant's house had remained unproven (see paragraph 20 above). As already noted, due to the passage of time and the destruction of some documents, it had proved impossible to determine the distance between the applicant's house and the area where the detonations had been carried out in 1997 — the year in which he had abandoned his property. While it had been established that damage to the property had occurred, the cause or causes of that damage or the extent to which the mining activities had caused the damage and when could not be established.

53. The above conclusion was upheld when the case reached the Supreme Court of Cassation for the second time (see paragraph 21 above).

54. The applicant's complaint under Article 6 § 1 of the Convention concerns thus the weight attached by the national courts to the evidence presented, in particular the witness testimony, and their assessments of the issues raised

before them. As mentioned above (see paragraph 47), it is not normally for the Court to review such matters.

55. In view of the above, the Court cannot conclude that the decisions of the national courts, in particular their conclusion contested by the applicant as to the existence of a causal link between the detonation works at the mine and the damage to his property, reached the threshold of arbitrariness and manifest unreasonableness described in paragraph 48 above, or amounted to a "denial of justice". Accordingly, the applicant did have a "fair hearing" of his case, as required by Article 6 § 1 of the Convention.

56. Hence, there has been no violation of that provision.

(b) Article 1 of Protocol No. 1

57. The applicant owned one half of the plot of land and the buildings located in the village of Golyamo Buchino (see paragraph 6 above). Accordingly, the Court finds that he had "possessions", within the meaning of Article 1 of Protocol No. 1.

58. On an unspecified date towards the end of the 1980s or the beginning of the 1990s the State took a decision to create an opencast coalmine close to the applicant's village. An expropriation procedure concerning numerous properties in the area of the future mine, including the applicant's house and land, was commenced in 1990 (see paragraph 7 above). However, as regards the applicant's property the procedure failed, as the expropriation was quashed at the request of the applicant after part of the compensation designated for him, namely another plot of land in the village, was never provided to him (see paragraph 8 above). While, as mentioned, it was the applicant himself who sought the quashing of the expropriation (ibid.), the Court is of the view that he cannot be blamed for the expropriation procedure's failure. He had waited to receive another plot of land in the village for more than two years, from May 1990 to August 1992, and the Government have not shown that the authorities intended to honour their legal obligations under the expropriation procedure and that such a plot could have indeed been provided to the applicant.

59. The applicant and his family remained in the house, whereas the mine started operating close to it (see paragraph 9 above). It has not been disputed — and it was confirmed by the domestic courts in the tort proceedings initiated by the applicant — that the mine, where coal was extracted by means of detonations, represented an environmental hazard, and that the health-and-safety requirements contained in the Minister of Health's Ordinance No. 7 of 25 May 1992, in particular the maintenance of "sanitation zones" around non-industrial buildings such as dwellings (see paragraph 25 above), applied to it. The "sanitation zone" required in the case was 500-metre wide. However, the mine gradually expanded, and at the closest operated within 160–180 metres from the applicant's house.

60. At the relevant time the mine was managed by a company which was entirely State-owned (see paragraph 10 above). For the Court, the fact that that company was a separate legal entity under domestic law (see, for example, *Ilieva and Others v. Bulgaria*, no. 17705/05, § 36, 3 February 2015) cannot be decisive to rule out the State's direct responsibility under the Convention (see *Liseytseva and Maslov v. Russia*, nos. 39483/05 and 40527/10, § 188, 9 October 2014, and *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, § 114, ECHR 2014). The parties have provided no information on the extent of State supervision and control of the company at the relevant time. Of relevance is that it was not engaged in ordinary commercial business, operating instead in a heavily regulated field subject to environmental and health-and-safety requirements (see, *mutatis mutandis*, *Mykhaylenky and Others v. Ukraine*, nos. 35091/02 and 9 others, § 45, ECHR 2004-XII). It is also significant that the decision to create the mine was taken by the State, which also expropriated numerous privately-owned properties in the area to allow for its functioning, under legislation concerning "especially important State needs" (see paragraphs 7 and 24 above). All of the above factors demonstrate that the company was the means of conducting a State activity and that, accordingly, the State must be held responsible for its acts or omissions raising issues under the Convention.

61. In view of the considerations above, the Court is of the view that the authorities, through the failed expropriation of the applicant's property and the work of the mine under what was effectively State control, were responsible for the applicant's property remaining in an area of environmental hazard, namely daily detonations in close proximity to the applicant's house. That situation, which led to the applicant abandoning his property in 1997 (see paragraph 9 above), amounted to State interference with his "possessions" within the meaning of Article 1 of Protocol No. 1.

62. Such an interference cannot be regarded as either a deprivation of property or a control of use within the meaning of the first and second paragraphs of Article 1 of Protocol No. 1. However, it falls within the meaning of the first sentence of that provision as an interference with the peaceful enjoyment of possessions (see, *mutatis mutandis*, *Loizidou v. Turkey* (merits), 18 December 1996, § 63, *Reports of Judgments and Decisions* 1996-VI).

63. The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful (see, for example, *Beyeler v. Italy* [GC], no. 33202/96, § 108, ECHR 2000-I). This means, in the first place, compliance with the requirements of national law (see *Iatridis v. Greece* [GC], no. 31107/96, §§ 58–62, ECHR 1999-II).

64. In the present case, domestic law required the maintenance of protective "sanitation zones" around industrial installations representing environmental hazard, on the territory of which there could be no residential buildings (see paragraph 25 above). As regards in particular the mine in the vicinity of the applicant's village, the required buffer area was 500-metre wide. Despite that, the mine operated, conducting daily detonations much closer, at the closest within 160–180 metres (see paragraphs 13 and 19 above).

65. In the tort proceedings initiated by the applicant, the Court of Appeal stated that the carrying out of detonations by the mine in such vicinity to the residential buildings was "indisputably" in breach of the domestic legislation (see paragraph 20 above). This means that the interference with the peaceful enjoyment of the applicant's possessions as defined above, manifestly in breach of Bulgarian law, was not lawful either for the purposes of the analysis under Article 1 of Protocol No. 1. This conclusion makes it unnecessary to ascertain whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the applicant's rights (see *Iatridis*, cited above, § 62).

66. There has therefore been a violation of Article 1 of Protocol No. 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. Article 41 of the Convention provides:

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

A. Damage

68. In respect of pecuniary damage, the applicant claimed 9,040.70 Bulgarian levs (BGN — the equivalent of 4,622.51 euros (EUR)) for the value of his share of the property in Golyamo Buchino, plus default interest. He presented valuation reports prepared by experts. He pointed out that, as a result of the conduct of the State complained of, his house and the auxiliary buildings had collapsed and had become unusable. In respect of non-pecuniary damage, the applicant claimed EUR 9,000.

69. The Government contested the claims.

70. The Court finds that it is justified to award the applicant compensation for the breach of his property rights as a result of the exposure of his property to environmental hazard. It considers in addition that it is appropriate to award a lump sum, covering any pecuniary and non-pecuniary damage. In view of all the circumstances of the case, including the value of the applicant's property as indicated by him (see paragraph 68 above), the Court fixes that sum at EUR 8,000.

B. Costs and expenses

71. For the proceedings before the Court, the applicant claimed BGN 2,800 (the equivalent of EUR 1,431) for the fee charged by his legal representative, the expert valuations submitted in support of his claim for pecuniary damage (see paragraph 68 above) and translation. In support of the claim he submitted the relevant receipts and a contract with a translator.

72. The applicant also claimed expenses incurred by him in the domestic tort proceedings, amounting to BGN 961.30 in total (the equivalent of EUR 491). These included court fees and the cost of an expert report. In support of this claim the applicant submitted the relevant receipts.

73. The Government contested the claims.

74. In accordance with the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court allows the claim in respect of costs and expenses in full. As to the claim concerning the expenses incurred in the domestic tort proceedings, it notes that, in bringing those proceedings, the applicant sought to obtain compensation for the violation of his property rights. The total amount awarded under this head is thus EUR 1,922.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 8 of the Convention inadmissible and the remainder of the application admissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention;

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

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, the following amounts, to be converted into Bulgarian levs at the rate applicable at the date of settlement:
   (i) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage;

(ii) EUR 1,922 (one thousand nine hundred and twenty-two euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

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

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

Done in English, and notified in writing on 6 September 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President

ANNEX 35

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[1], 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

[1] 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[2]... 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*

[2] Rectified on 2 May 2011: the text was "70 square meters".

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 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[3] resettlement was not necessary 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

[3] Rectified on 2 May 2011: the text was "Gavrylyuk-Nayda family's".

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 particular 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 communications (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 36

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 organoleptic 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)[1] in compensation for non-pecuniary damage and UAH 609.45[2] 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[3].

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.

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1 EUR 3,869

2 EUR 94

3 EUR 24

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.

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 Tatariv 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 37

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.

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 иcompensation 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

Навчальне видання

Ye. Aleksyeyeva
O. Melen-Zabramna

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

MANUAL

The second edition

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