IN THE HIGH COURT OF JUSTICE (QBD) **Claim no.: QB-2022-BHM-000044**

BIRMINGHAM DISTRICT REGISTRY

Between

(1) HIGH SPEED TWO (HS2) LIMITED

(2) THE SECRETARY OF STATE FOR TRANSPORT **Claimants**

and

(1) PERSONS UNKNOWN

(2) MR ROSS MONAGHAN AND 58 OTHER NAMED DEFENDANTS

Defendants

DEFENDANTS AUTHORITIES: A1P1

DOMESTIC CASELAW

1. *Aston Cantlow v Wallbank* [2003] UKHL 37; [2003] 3 W.L.R. 283
2. *YL v Birmingham City Council and others* [2007] EWCA Civ 26; [2007] EWCA Civ 27 [2008] Q.B. 1

ECHR CASELAW

3. *Islamic Republic of Iran Shipping Lines v Turkey* (Application no. 40998/98)
4. *JKP Vodovod Kraljevo v. Serbia* (applications nos. 57691/09 and 19719/10)

FURTHER MATERIALS

5. Framework Document Between the Secretary of State for Transport and High Speed 2 Limited (2018)
6. ECHR Practical Guide on Admissibility Criteria (01.02.22)

House of Lords

Aston Cantlow and Wilmcote with Billesley Parochial Church Council *v* Wallbank and another

[2003] UKHL 37

2003 March 3, 4, 5; June 26

Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Rodger of Earlsferry

Ecclesiastical law — Lay rector — Repairs to chancel — Obligation at common law to repair chancel — Parochial church council's statutory power to recover cost of repairs from lay rector — Whether infringing lay rector's Convention right to peaceful enjoyment of possessions — Whether unlawful discrimination in enjoyment of Convention right — Whether parochial church council "public authority" — Whether entitled to enforce liability against lay rector — Chancel Repairs Act 1932 (22 Geo 5, c 20), ss 1, 2 — Human Rights Act 1998 (c 42), s 6, Sch 1, Pt I, art 14, Pt II, art 1

The defendants were the freehold owners of former rectorial land and consequently, as lay rectors or lay impropriators, they were liable at common law to repair the chancel of their parish church. In September 1994 the plaintiff, the parochial church council, served the first defendant with a notice under section 2(1) of the Chancel Repairs Act 1932[1] calling upon her to repair the chancel. She disputed the liability, and the plaintiff subsequently brought proceedings against the defendants, pursuant to section 2(2) of the 1932 Act, to recover the cost of chancel repairs. On a preliminary issue the judge held that the defendants were liable for the cost of the repairs. The Court of Appeal allowed the defendants' appeal and held that the plaintiff could not recover the cost of chancel repairs from the defendants on the grounds that a parochial church council was a public authority for the purposes of section 6 of the Human Rights Act 1998[2] since it had powers unavailable to private individuals to determine how others should act, that therefore it could not act in a manner which was incompatible with the defendants' rights under the Convention for the Protection of Human Rights and Fundamental Freedoms, and that the defendants' liability to defray the cost of chancel repairs was an indiscriminate form of taxation and amounted to an infringement of their right to peaceful enjoyment of

[1] Chancel Repairs Act 1932, s 2: "(1) Where a chancel is in need of repair, the responsible authority may serve upon any person, who appears to them to be liable to repair the chancel, a notice in the prescribed form . . . stating in general terms the grounds on which that person is alleged to be liable as aforesaid, and the extent of the disrepair, and calling upon him to put the chancel in proper repair. (2) At any time after the expiration of a period of one month from the date when the notice to repair was served, the responsible authority may, if the chancel has not been put in proper repair, bring proceedings against the person on whom the notice was served to recover the sum required to put the chancel in proper repair . . ."

[2] Human Rights Act 1998, s 6: "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right. (2) Subsection (1) does not apply to an act if (a) as a result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions. (3) In this section 'public authority' includes . . . (b) any person certain of whose functions are functions of a public nature . . . (5) In relation to a particular act, a person is not a public authority by virtue only of subsection 3(b) if the nature of the act is private."

Sch 1, Pt I, art 14: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Sch 1, Pt II, art 1: see post, para 66.

A their possessions guaranteed by article 1 of the First Protocol to the Convention and unlawful discrimination as between landowners contrary to article 14.

On appeal by the plaintiff—

Held, allowing the appeal, (1) that a "public authority" for the purposes of section 6 of the 1998 Act could be either a core public authority which exercised functions which were broadly governmental so that they were all functions of a public nature, or a hybrid public authority some of whose functions were of a public
B nature; that although the Church of England, as the established church, had special links with central government and performed certain public functions, it was essentially a religious organisation and not a governmental organisation, and parochial church councils were part of the means whereby the Church promoted its religious mission and discharged financial responsibilities in respect of parish churches; that the functions of parochial church councils were primarily concerned with pastoral and administrative matters within the parish and were not wholly of a
C public nature, and therefore they were not core public authorities under section 6(1); that (Lord Scott of Foscote dissenting) the fact that the public had certain rights in relation to their parish church was not sufficient to characterise the actions of a parochial church council in maintaining the fabric of the parish church as being of a public nature, so that when the plaintiff took steps to enforce the defendants' liability for the repair of the chancel, it was not performing a function of a public nature, which rendered it a hybrid public authority under section 6(3)(b); that the
D defendants' chancel repair liability was a private law liability arising out of the ownership of land, and the enforcement of that liability by the plaintiffs was an act of a private nature and therefore excluded by section 6(5) from coming within the ambit of section 6(3)(b); that (per Lord Nicholls of Birkenhead, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Rodger of Earlsferry) in seeking to enforce the defendants' chancel repair liability the plaintiff was acting under primary legislation, namely section 2 of the 1932 Act, and was consequently within the exception in section 6(2)(b) of the 1998 Act; that therefore, there were no grounds
E upon which the plaintiff could be regarded as a public authority within section 6 of the 1998 Act; and that, accordingly, it had no obligation to act compatibly with Convention rights (post, paras 7, 9, 12–14, 16, 17, 19, 58–64, 86–89, 93, 129, 137, 153, 154, 156–166, 169–173).

(2) That (per Lord Hope of Craighead, Lord Hobhouse of Woodborough and Lord Scott of Foscote) a person's right to peaceful enjoyment of his possessions did not extend to the grant of relief from liabilities incurred under the civil law; that the
F defendants had acquired the rectorial property with full knowledge of the potential liability for chancel repair that the acquisition would carry with it; that it was a burden which ran with rectorial land and was similar to any other burden which ran with the land; and that the defendants were not therefore being discriminated against as compared with other owners of rectorial land, nor were they being subjected to an arbitrary form of taxation or being interfered with in the peaceful enjoyment of their possessions contrary to article 14 of, and article 1 of the First Protocol to, the
G Convention (post paras 71–75, 91, 92, 133–136).

Decision of the Court of Appeal [2001] EWCA Civ 713; [2002] Ch 51; [2001] 3 WLR 1323; [2001] 3 All ER 393 reversed.

The following cases are referred to in the opinions of their Lordships:

Ayuntamiento de Mula v Spain Reports of Judgments and Decisions 2001-I, p 531

Barnes, In re; Simpson v Barnes (Note) [1930] 2 Ch 80

H *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585; [1955] 3 WLR 154; [1955] 2 All ER 607

Doughty v Rolls-Royce plc [1992] 1 CMLR 1045, CA

Ely (Bishop of) v Gibbons (1833) 4 Hagg Ecc 156

European Coal and Steel Community v Acciaierie e ferriere Busseni SpA (Case C-221/88) [1990] ECR I-495, ECJ

Foster v British Gas plc (Case C-188/89) [1991] 1 QB 405; [1991] 2 WLR 258; [1990] 3 All ER 897; [1990] ECR I-3313, ECJ; [1991] 2 AC 306; [1991] 2 WLR 1075; [1991] 2 All ER 705, HL(E)
General Assembly of the Free Church of Scotland v Lord Overtoun [1904] AC 515, HL(Sc)
Gilbert v Corpn of Trinity House (1886) 17 QBD 795, DC
Hautanemi v Sweden (1996) 22 EHRR CD 155
Holy Monasteries v Greece (1994) 20 EHRR 1
Hong Kong Polytechnic University v Next Magazine Publishing Ltd [1996] 2 HKLR 260
James v United Kingdom (1986) 8 EHRR 123
Johnston v Chief Constable of the Royal Ulster Constabulary (Case 222/84) [1987] QB 129; [1986] 3 WLR 1038; [1986] 3 All ER 135; [1986] ECR 1651, ECJ
Marckx v Belgium (1979) 2 EHRR 330
Marshall v Graham [1907] 2 KB 112, DC
Pepper v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] 1 All ER 42, HL(E)
R v Benjafield [2002] UKHL 2; [2003] 1 AC 1099; [2002] 2 WLR 235; [2002] 1 All ER 815, HL(E)
R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex p Wachmann [1992] 1 WLR 1036; [1993] 2 All ER 249
R v Kansal (No 2) [2001] UKHL 62; [2002] 2 AC 69; [2001] 3 WLR 1562; [2002] 1 All ER 257, HL(E)
R v Lambert [2001] UKHL 37; [2002] 2 AC 545; [2001] 3 WLR 206; [2001] 3 All ER 577, HL(E)
Representative Body of the Church in Wales v Tithe Redemption Commission [1944] AC 228, HL(E)
Rothenthurm Commune v Switzerland (1988) 59 DR 251
Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35
Wainwright v Home Office [2001] EWCA Civ 2081; [2002] QB 1334; [2002] 3 WLR 405, CA
Walwyn v Awberry (1677) 2 Mod 254
Wickhambrook Parochial Church Council v Croxford [1935] 2 KB 417, CA
Young, James and Webster v United Kingdom (1981) 4 EHRR 38

The following additional cases were cited in argument:

Håkansson and Sturesson v Sweden (1990) 13 EHRR 1
Hentrich v France (1994) 18 EHRR 440
Kjeldsen v Denmark (1976) 1 EHRR 711
Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48; [2001] 3 WLR 183; [2001 4 All ER 604, CA
R v Bolsover District Council, Ex p Pepper [2001] LGR 43
R (Heather) v Leonard Cheshire Foundation [2002] EWCA Civ 366; [2002] 2 All ER 936, CA
R (Molinaro) v Kensington and Chelsea Royal London Borough Council [2001] EWHC Admin 896; [2002] LGR 336
Sunday Times v United Kingdom (1979) 2 EHRR 245
Wandsworth London Borough Council v Michalak [2002] EWCA Civ 271; [2003] 1 WLR 617; [2002] 4 All ER 1136, CA

APPEAL from the Court of Appeal

By leave of the House of Lords granted on 11 February 2002 (Lord Hutton, Lord Hobhouse of Woodborough and Lord Millett) the plaintiff, the Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire, appealed from a decision of the Court of Appeal (Sir Andrew Morritt V-C, Robert Walker and Sedley LJJ) on 17 May 2001 allowing an appeal by the defendants, Gail Wallbank and Andrew

A David Wallbank, from a decision of Ferris J who on 28 March 2000 ruled on a preliminary issue that by virtue of being freehold owners of Glebe Farm, Aston Cantlow, the defendants were lay rectors of the church of St John the Baptist, Aston Cantlow, and were therefore personally liable for the repair of the chancel of the church as set out in a notice served by the plaintiff on the first defendant on 12 September 1994, to recover the sum of £95,260·84, the estimated cost of the repair.

B The facts are stated in the opinions of their Lordships.

Charles George QC and *Mark Hill* for the plaintiff. The lay rector's duty to repair the chancel is the corollary of his right to receive the tithes of the parish. It is the quid pro quo for the grant to him or his predecessor by the Crown, usually at the time of the Reformation, of the tithes, with or without C glebe land. Where, as in the present case, land has been allotted to him under an inclosure award in lieu of his right to the tithes, the duty to repair becomes the corollary of the right to the land so allotted. The fact that the tithe has ceased to be payable is irrelevant. [Reference was made to *Representative Body of the Church in Wales v Tithe Redemption Commission* [1944] AC 228.]

The Court of Appeal's decision constituted a windfall for the defendants D in that it let them off their liability and led to their unjust enrichment. That was not the intention of the Human Rights Act 1998.

The parochial church council ("PCC") was not a core public authority for the purpose of section 6 of the 1998 Act. Core authorities are those bodies, whether national or local, through which the state performs its function of administering and protecting its citizens. All the acts of a core E authority must be compatible with Convention rights. If the PCC is a core authority it will never be possible for it to bring a complaint under the Act because it cannot be a victim. [Reference was made to *Rothenthurm Commune v Switzerland* (1988) 59 DR 251; *Ayuntamiento de Mula v Spain* Reports of Judgments and Decisions 2001-I, p 531; *Hautanemi v Sweden* (1996) 22 EHRR CD 155 and *Holy Monasteries v Greece* (1994) 20 EHRR 1.]

F The mere fact that the Church of England is the established church cannot be enough to make a PCC a core public authority. The Church of England is not a department of state and it has no juridical personality. Its ecclesiastical courts are the only parts of the Church of England which are core authorities.

Unlike other public authorities a PCC receives no public funding. The G majority of the funding for the Church comes from its worshipping communities. The members of the PCC are volunteers and there is no provision for payment of attendance allowances to which members of public authorities are normally entitled. The functions of the PCC are essentially private, pastoral and spiritual and include co-operation with the minister in promoting the pastoral, evangelistic, social and ecumenical mission of the Church. Its functions clearly show that a PCC is not a core H public authority.

Section 6 of the 1998 Act draws a distinction between core public authorities and hybrid authorities whose acts must be compatible with Convention rights unless the nature of the act is private. The dividing line between hybrid public authorities and bodies which are not public

authorities at all is a fine one. [Reference was made to *Poplar Housing and Regeneration Community Association v Donoghue* [2002] QB 48; *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936; *R v Bolsover District Council, Ex p Pepper* [2001] LGR 43 and *R (Molinaro) v Kensington and Chelsea London Borough Council* [2002] LGR 336.]

Although there are occasions when church representatives stand in the place of the state in the exercise of public functions such as marriage, education, care of churchyards and the issue of burial certificates, a PCC's functions relate exclusively to pastoral matters. The functions and powers of PCCs when properly analysed fall short of what is required to constitute all PCCs as hybrid authorities if they have no churchyards and the benefit of chancel repair liability. It is improbable that Parliament intended that some PCCs but not others should be hybrid public authorities. There is no indication that Parliament intended that PCCs should be public authorities at all.

If it is held that the PCC is not a core public authority but is a hybrid authority, then the taking of proceedings by the PCC against a lay impropriator for recovery of the costs of chancel repairs is a private act for the purposes of section 6(5) of the 1998 Act. The primary duty of the lay rector is to maintain the chancel in repair. That is not a function of a public nature within the meaning of section 6(3)(b) of the 1998 Act. One of the functions of the PCC is the maintenance of the fabric of the parish church. That is not a function of a public nature within the meaning of section 6(3)(b) and in exercising it the PCC is not acting as a public authority.

Where the lay rector has not effected the necessary chancel repairs himself the PCC may effect them and recover the costs of doing so by the statutory procedure introduced by the Chancel Repairs Act 1932. In recovering the cost by that procedure the PCC is enforcing a private law obligation which rests on the owner of rectorial land. The liability to repair the chancel runs with the land and is enforceable against the owner for the time being of the land personally. The PCC's act in serving a repair notice was a private act whereby it was performing the private function of having the church repaired. The fact that liability attaches to the ownership of particular land and is unrelated to church membership confirms that enforcement is a private act.

There was no interference with the defendants' property under article 1 of the First Protocol to the Convention The defendants came knowingly into ownership of land which they knew was subject to a certain liability, namely, the liability to repair the chancel of the parish church. In using a mechanism that was open to it to enforce that liability the PCC was not imposing a tax as the Court of Appeal concluded. It is necessary to look at the particular case and not at the generality of the situation. [Reference was made to *James v United Kingdom* (1986) 8 EHRR 123; *Håkansson and Sturesson v Sweden* (1990) 13 EHRR 1 and *Sunday Times v United Kingdom* (1979) 2 EHRR 245.]

A landowner who has an obligation cannot, when called upon to honour the obligation, rely upon the prohibition of discrimination in article 14 of the Convention. [Reference was made to *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617.] The defendants' land already had a burden and the defendants never had unencumbered land when they became lay rectors. The relevant class of comparator would not be landowners

A generally but other landowners subject to incumbrances including chancel repair liabilities. In such a case there would be no discrimination or different treatment of the defendants from the chosen comparator. There was no discrimination which related to a personal characteristic and the fact of being a lay rector is not such a characteristic. [Reference was made to *Kjeldsen v Denmark* (1976) 1 EHRR 711.]

B Even if the PCC was a public authority for the purposes of the 1998 Act, section 6(1) of the 1998 Act does not apply because the PCC was acting under the compulsion of primary legislation. As a result of the provisions of the 1932 Act the PCC could not have acted differently and is entitled to rely on section 6(2)(a) and/or (b) of the 1998 Act.

Proceedings under the 1932 Act are not discretionary and there are two requirements: to serve a notice of repair and, in default, to sue for the new C statutory debt. A PCC is a charity. It has a duty and not a discretion to bring in outstanding funds. It has no power to waive debts. If the PCC did not follow the procedures set out in the 1932 Act it would be in breach of its statutory duty, and its members would be in breach of their duties as charity trustees and liable to be held to account by the Charity Commissioners.

D *Michael Beloff QC* and *Ian Partridge* for the defendants. The PCC is a core public authority for the purposes of section 6(1) of the 1998 Act. A public authority is not defined in the Act but is left to the courts to define. "Public" in its ordinary and natural meaning is the antithesis of private. It is to be assumed at least that the legislature wished to impose domestic law obligations upon certain bodies so that if those bodies complied with their E obligations the United Kingdom would not be liable to suit before the European Court of Human Rights. [Reference was made to *Foster v British Gas plc* [1991] 1 QB 405; [1991] 2 AC 306.]

Consideration of whether or not a PCC is a public authority requires consideration of its nature, the source of its existence, powers and duties and the nature of the functions which it carries out. The approach adopted by the Court of Appeal was correct.

F The Church of England, as the church by law established, is a public authority. It enjoys a unique position and is regulated by Acts of Parliament. The sovereign appoints its bishops and deans. Archbishops and certain bishops sit ex officio in the House of Lords. The Church of England's status as the established church distinguishes it from other religious bodies. The public have rights in regard to the Church of England in matters such as G baptism, marriage and burial.

The PCC is an integral part of the Church of England. It is the administrative organ of the parish, which is the basic building block of the church. The PCC is a body corporate with perpetual succession and in effect created by statute. It has powers outside those concerning purely religious matters and beyond those which result from the normal rules applicable between individuals, including statutory power to enforce the chancel repair H liability. When the PCC exercises its functions in promoting the mission of the established church, it is acting in the public interest and is performing a public function. The PCC is therefore part of the fabric of the state and satisfies the public authority test. *Hautanemi v Sweden* 22 EHRR CD 155 and *Holy Monasteries v Greece* 20 EHRR 1 are not decisions which assist

the plaintiff and the latter case suggests that an established church is a public authority.

If it is held that the PCC is not a core public authority but is a hybrid authority, then the taking of proceedings against a lay impropriator, pursuant to the 1932 Act, for the recovery of the cost of chancel repairs is not a "private" act for the purposes of section 6(5) of the 1998 Act. There is no element of mutuality or mutual governance between impropriator and the church in relation to modern repair liability. The enforcement is a function of the PCC supported by statute. The relationship between the plaintiff and defendants arises independently of the volition of either of them. There is a public interest in the repair of historic churches and enforcement of the liability is thus a public function.

The rule of common law which established the liability of the defendants to repair applies to individuals whether or not they are members of the church. It lacks any juridical basis and is wholly capricious. The liability is enforced by a body established by the state by statute, and empowered by the state by statute to enforce the liability. Such an act of enforcement is a public act.

The PCC's action in serving a notice under the 1932 Act on the defendants was unlawful under the 1998 Act by reason of article 1 of the First Protocol to the Convention, read either alone or in conjunction with article 14.

The word "possessions" in article 1 of the First Protocol is to be broadly construed and includes money, which is the possession the defendants have been deprived of. The assumption inherent in Article 1 is that the payment of taxes or other contributions is a deprivation of possessions. Therefore the defendants have been deprived of the peaceful enjoyment of their possessions.

Although it is proper and in the public interest to repair ancient churches, the burden of chancel repairs falls disproportionately on the defendants. It is objectionable that liability can be imposed on those, inter alias, who are not churchgoers, who are not Christians and who do not live in the parish. The chancel repair liability is personal and unlimited and can easily be disproportionate to the value of the land. Therefore the enforcement of the liability to defray the cost of chancel repairs is an unlawful interference with the defendants' personal property rights. [Reference was made to *Håkansson and Sturesson v Sweden* 13 EHRR 1 and *Hentrich v France* (1994) 18 EHRR 440.)

The enforcement of the liability also amounts to discrimination in the enjoyment of a Convention right under article 14. The appropriate class of comparator is that of landowners in England at large or in the parish, and there is no objective or reasonable justification for treating the defendants differently. [Reference was made to *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417.]

There was no compulsion of primary legislation which obliged the PCC to act as it did so as to bring it within section 6(2) of the 1998 Act. The liability of the lay rector exists only at common law. The 1932 Act imposes no duty to serve notice or commence proceedings against the defendants or anyone who appears to be liable to repair the chancel.

George QC replied.

A Their Lordships took time for consideration.

26 June. **LORD NICHOLLS OF BIRKENHEAD**

1 My Lords, I have had the advantage of reading in draft the speeches of all your Lordships. I too would allow this appeal. On some of the issues your Lordships have expressed different views. I shall state my own views without repeating the facts.

B **2** This case concerns one of the more arcane and unsatisfactory areas of property law: the liability of a lay rector, or lay impropriator, for the repair of the chancel of a church. The very language is redolent of a society long disappeared. The anachronistic, even capricious, nature of this ancient liability was recognised some years ago by the Law Commission in its report on Property Law: Liability for Chancel Repairs (1985) Law Com No 152.
C The commission said "this relic of the past" is "no longer acceptable". The commission recommended its phased abolition.

3 In these proceedings Mr and Mrs Wallbank admitted that, apart from the Human Rights Act 1998, they have no defence to the claim made against them by the Parochial Church Council of the parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire. The House was not asked to consider whether *Wickhambrook Parochial Church Council v Croxford*
D [1935] 2 KB 417 was correctly decided.

4 At first sight the Human Rights Act 1998 might seem to have nothing to do with the present case. The events giving rise to the litigation occurred, and the decision of Ferris J was given, before the Act came into force. But the decision of the Court of Appeal [2002] Ch 51 was based on the provisions of the Human Rights Act, and this decision has wide
E financial implications for the Church of England, going far beyond the outcome of this particular case. The decision affects numerous parochial church councils and perhaps as many as one third of all parish churches. The Church of England needs to know whether, as the Court of Appeal held, it is unlawful now for a parochial church council to enforce a lay rector's obligation to meet the cost of chancel repairs. Accordingly, in order to obtain the decision of the House on this point, the plaintiff
F parochial church council conceded that the Human Rights Act 1998 applies in this case. This concession having been made by the plaintiff, no argument was addressed to your Lordships' House on the question of law thus conceded. I express no view on this question.

5 Assuming the Human Rights Act 1998 is applicable in this case, the overall question is whether the plaintiff's prosecution of proceedings against
G Mr and Mrs Wallbank is rendered unlawful by section 6 of the Act as an act by a public authority which is incompatible with a Convention right. In answering this question the initial step is to consider whether the plaintiff is "a public authority".

6 The expression "public authority" is not defined in the Act, nor is it a recognised term of art in English law, that is, an expression with a specific recognised meaning. The word "public" is a term of uncertain import, used
H with many different shades of meaning: public policy, public rights of way, public property, public authority (in the Public Authorities Protection Act 1893 (56 & 57 Vict c 61)), public nuisance, public house, public school, public company. So in the present case the statutory context is all important. As to that, the broad purpose sought to be achieved by section 6(1) is not in

doubt. The purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with Convention rights. If they act in breach of this legal obligation victims may henceforth obtain redress from the courts of this country. In future victims should not need to travel to Strasbourg.

7 Conformably with this purpose, the phrase "a public authority" in section 6(1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression. It is in respect of organisations of this nature that the government is answerable under the European Convention on Human Rights. Hence, under the Human Rights Act 1998 a body of this nature is required to act compatibly with Convention rights in everything it does. The most obvious examples are government departments, local authorities, the police and the armed forces. Behind the instinctive classification of these organisations as bodies whose nature is governmental lie factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution: see the valuable article by Professor Dawn Oliver, "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act": [2000] PL 476.

8 A further, general point should be noted. One consequence of being a "core" public authority, namely, an authority falling within section 6 without reference to section 6(3), is that the body in question does not itself enjoy Convention rights. It is difficult to see how a core public authority could ever claim to be a victim of an infringement of a Convention rights. A core public authority seems inherently incapable of satisfying the Convention description of a victim: "any person, *non-governmental organisation* or group of individuals" (article 34, with emphasis added). Only victims of an unlawful act may bring proceedings under section 7 of the Human Rights Act 1998, and the Convention description of a victim has been incorporated into the Act, by section 7(7). This feature, that a core public authority is incapable of having Convention rights of its own, is a matter to be borne in mind when considering whether or not a particular body is a core public authority. In itself this feature throws some light on how the expression "public authority" should be understood and applied. It must always be relevant to consider whether Parliament can have been intended that the body in question should have no Convention rights.

9 In a modern developed state governmental functions extend far beyond maintenance of law and order and defence of the realm. Further, the manner in which wide ranging governmental functions are discharged varies considerably. In the interests of efficiency and economy, and for other reasons, functions of a governmental nature are frequently discharged by non-governmental bodies. Sometimes this will be a consequence of privatisation, sometimes not. One obvious example is the running of prisons by commercial organisations. Another is the discharge of regulatory functions by organisations in the private sector, for instance, the Law Society. Section 6(3)(b) gathers this type of case into the embrace of section 6 by including within the phrase "public authority" any person whose functions include "functions of a public nature". This extension of the expression "public authority" does not apply to a person if the nature of the act in question is "private".

A **10** Again, the statute does not amplify what the expression "public" and its counterpart "private" mean in this context. But, here also, given the statutory context already mentioned and the repetition of the description "public", essentially the contrast being drawn is between functions of a governmental nature and functions, or acts, which are not of that nature. I stress, however, that this is no more than a useful guide. The phrase used in the Act is public function, not governmental function.

B **11** Unlike a core public authority, a "hybrid" public authority, exercising both public functions and non-public functions, is not absolutely disabled from having Convention rights. A hybrid public authority is not a public authority in respect of an act of a private nature. Here again, as with section 6(1), this feature throws some light on the approach to be adopted when interpreting section 6(3)(b). Giving a generously wide scope to the C expression "public function" in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when necessary.

12 What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental D functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.

13 Turning to the facts in the present case, I do not think parochial E church councils are "core" public authorities. Historically the Church of England has discharged an important and influential role in the life of this country. As the established church it still has special links with central government. But the Church of England remains essentially a religious organisation. This is so even though some of the emanations of the church discharge functions which may qualify as governmental. Church schools and the conduct of marriage services are two instances. The legislative F powers of the General Synod of the Church of England are another. This should not be regarded as infecting the Church of England as a whole, or its emanations in general, with the character of a governmental organisation.

14 As to parochial church councils, their constitution and functions lend no support to the view that they should be characterised as G governmental organisations or, more precisely, in the language of the statute, public authorities. Parochial church councils are established as corporate bodies under a church measure, now the Parochial Church Councils (Powers) Measure 1956. For historical reasons this unique form of legislation, having the same force as a statute, is the way the Church of England governs its affairs. But the essential role of a parochial church council is to provide a formal means, prescribed by the Church of England, H whereby ex officio and elected members of the local church promote the mission of the Church and discharge financial responsibilities in respect of their own parish church, including responsibilities regarding maintenance of the fabric of the building. This smacks of a church body engaged in self-governance and promotion of its affairs. This is far removed from the type

of body whose acts engage the responsibility of the state under the European Convention. A

15 The contrary conclusion, that the church authorities in general and parochial church councils in particular are "core" public authorities, would mean these bodies are not capable of being victims within the meaning of the Human Rights Act 1998. Accordingly they are not able to complain of infringements of Convention rights. That would be an extraordinary conclusion. The Human Rights Act goes out of its way, in section 13, to single out for express mention the exercise by religious organisations of the Convention right of freedom of thought, conscience and religion. One would expect that these and other Convention rights would be enjoyed by the Church of England as much as other religious bodies. B

16 I turn next to consider whether a parochial church council is a hybrid public authority. For this purpose it is not necessary to analyse each of the functions of a parochial church council and see if any of them is a public function. What matters is whether the particular act done by the plaintiff council of which complaint is made is a private act as contrasted with the discharge of a public function. The impugned act is enforcement of Mr and Mrs Wallbank's liability, as lay rectors, for the repair of the chancel of the church of St John the Baptist at Aston Cantlow. As I see it, the only respect in which there is any "public" involvement is that parishioners have certain rights to attend church services and in respect of marriage and burial services. To that extent the state of repair of the church building may be said to affect rights of the public. But I do not think this suffices to characterise actions taken by the parochial church council for the repair of the church as "public". If a parochial church council enters into a contract with a builder for the repair of the chancel arch, that could be hardly be described as a public act. Likewise when a parochial church council enforces, in accordance with the provisions of the Chancel Repairs Act 1932, a burdensome incident attached to the ownership of certain pieces of land: there is nothing particularly "public" about this. This is no more a public act than is the enforcement of a restrictive covenant of which church land has the benefit. C D E F

17 For these reasons this appeal succeeds. A parochial church council is not a core public authority, nor does it become such by virtue of section 6(3)(b) when enforcing a lay rector's liability for chancel repairs. Accordingly the Human Rights Act 1998 affords lay rectors no relief from their liabilities. This conclusion should not be allowed to detract from the force of the recommendations, already mentioned, of the Law Commission. The need for reform has not lessened with the passage of time. G

18 On this footing the other issues raised in this case do not call for decision. I prefer to express no view on the application of article 1 of the First Protocol to the Convention or, more specifically, on the compatibility of the Chancel Repairs Act 1932 with Mr and Mrs Wallbank's Convention right under that article. The latter was not the subject of discrete argument.

19 I add only that even if section 6(1) is applicable in this type of case, and even if the provisions of the 1932 Act are incompatible with Mr and Mrs Wallbank's Convention rights under article 1 of the First Protocol, even so the plaintiff council would not be acting unlawfully in enforcing Mr and Mrs Wallbank's liability as lay rectors. Like sections 3(2) H

A and 4(6), section 6(2) of the Human Rights Act 1998 is concerned to preserve the primacy, and legitimacy, of primary legislation. This is one of the basic principles of the Human Rights Act. As noted in *Grosz, Beatson & Duffy, Human Rights: The 1998 Act and the European Convention* (2000), p 72, a public authority is not obliged to neutralise primary legislation by treating it as a dead letter. If a statutory provision cannot be rendered
B Convention compliant by application of section 3(1), it remains lawful for a public authority, despite the incompatibility, to act so as to "give effect to" that provision: section 6(2)(b). Here, section 2 of the Chancel Repairs Act 1932 provides that if the defendant would have been liable to be admonished to repair the chancel by the appropriate ecclesiastical court, the court shall give judgment for the cost of putting the chancel in repair. When a parochial church council acts pursuant to that provision it is acting within
C the scope of the exception set out in section 6(2)(b).

LORD HOPE OF CRAIGHEAD

20 My Lords, the village of Aston Cantlow lies about three miles to the north west of Stratford-upon-Avon. It has a long history. The parish church, St John the Baptist, stands on an ancient Saxon site. Two images of its exterior can be seen on the website Pictorial Images of Warwickshire,
D www.genuki.org.uk/big/eng/WAR/images. It is the church where Shakespeare's mother, Mary Arden, who lived at Wilmcote within the parish, married John Shakespeare. The earliest part of the present structure is the chancel which has been there since the late 13th century. It was built in the decorated style and contains a fine example of the use of flowing tracery: *Pevsner & Wedgewood*, *The Buildings of England: Warwickshire* (1965),
E pp 19, 75. As time went on the condition of the structure began to deteriorate, and it is now in need of repair. It has been in that state since at least 1990.

21 In January 1995, when this action began, it was estimated that the cost of the repairs to the chancel was £95,260·84. By that date the Parochial Church Council ("the PCC") had served a notice under the Chancel Repairs Act 1932 in the prescribed form on Mrs Wallbank in her capacity as lay
F rector calling upon her to repair the chancel. She disputed liability, so the PCC brought proceedings against her under section 2(2) of the Act. When the notice was served on 12 September 1994 it was thought that Mrs Wallbank was the sole freehold owner of Glebe Farm. In fact, as a result of her conveyance of the farm into their joint names in 1990, she is its joint owner together with Mr Wallbank. So a further notice was served on
G 23 January 1996 on both Mr and Mrs Wallbank and an application was made for Mr Wallbank to be joined as a defendant in the proceedings. Several years have gone by. The dispute between the parties has still not been resolved. The cost of the repairs must now greatly exceed the amount of the original estimate.

22 On 17 February 2000 Ferris J heard argument on the question whether the liability of the lay rector to repair the chancel or otherwise to
H meet the cost of the repairs was unenforceable by reason of the Human Rights Act 1998 or otherwise. He had been asked to determine this question as a preliminary issue. On 28 March 2000 he answered the question in the negative. At the end of his judgment he observed that it had been posed in terms which would only be appropriate if the Act was already in force. The

only provisions which were in force then were sections 18, 20 and 21(5): section 22(2). By the time of the hearing in the Court of Appeal on 19 March 2001 the position had changed. The remaining provisions of the Act were brought into force on 2 October 2000: the Human Rights Act 1998 (Commencement No 2) Order 2000 (SI 2000/1851). Mr and Mrs Wallbank were allowed to amend their notice of appeal so that the issues which they wished to raise could be properly pleaded. On 17 May 2001, the Court of Appeal [2002] Ch 51 held that the PCC was a public authority for the purposes of section 6 of the Act. The court also held that the PCC's action in serving the notice on Mr and Mrs Wallbank was unlawful by reason of article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, read either alone or with article 14 of the Convention.

23 The circumstances in which Mr and Mrs Wallbank are said to be liable for the cost of the repair have been helpfully described by my noble and learned friend, Lord Scott of Foscote. I gratefully adopt what he has said about them. It is clear from his account that the liability of the lay impropriator to pay the cost of repairing the chancel has been part of ecclesiastical law for many centuries. As Wynn-Parry J explained in *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, 593, it rests on the maxim, which has long been recognised, that he who has the profits of the benefice should bear the burden. But the questions about the scope and effect of the Human Rights Act 1998 which your Lordships have been asked to decide in this appeal, and on which I wish to concentrate, are of current interest and very considerable public importance. They raise issues whose significance extends far beyond the boundaries of the parish of Aston Cantlow.

24 The principal human rights issues which arise are (a) whether Mr and Mrs Wallbank can rely upon an alleged violation of their Convention rights as a ground of appeal when both the act complained of and the decision which went against them at first instance took place before 2 October 2000 ("the retrospectivity issue"), (b) whether the PCC is a public authority for the purposes of section 6(1) of the Act ("the public authority issue") and (c) whether the act of the PCC in serving the notice under the Chancel Repairs Act 1932 on Mr and Mrs Wallbank was incompatible with their rights under article 1 of the First Protocol read either alone or in conjunction with article 14 of the Convention ("the incompatibility issue").

The retrospectivity issue

25 When the case came before the Court of Appeal the PCC conceded that it was open to Mr and Mrs Wallbank to raise the question whether its act in serving the notice was unlawful under section 6(1) of the Human Rights Act 1998 by virtue of sections 7(1)(b) and 22(4) of the Act, notwithstanding that service of the notice predated the coming into force of those sections. The Court of Appeal accepted this concession, which they considered it to have been rightly made: [2002] Ch 51, 56, para 7. Those were, of course, early days in the life of the Act. *R v Lambert* [2002] 2 AC 545, *R v Kansal (No 2)* [2002] 2 AC 69 and *R v Benjafield* [2003] 1 AC 1099 had yet to come before your Lordships' House. In the light of what was said in those cases about the issue of retrospectivity the PCC gave notice in the Statement of Facts and Issues of its intention to apply for leave to dispute the

A issue in the course of the hearing of this appeal. But in the PCC's written case it is stated that this contention is no longer being pursued. In the result, although the parties were told at the outset of the hearing that it should not be assumed that the House would necessarily proceed on the basis of this concession, the issue was not the subject of argument.

26 I have, nevertheless, given some thought to the question whether it would be appropriate to examine the issue whether the service of the notice B was incompatible with Mr and Mrs Wallbank's Convention rights. The question whether, and if so in what circumstances, effect should be given to the Human Rights Act 1998 where relevant events occurred before it came into force is far from easy. So I should like to take a moment or two to explain why I have come to the conclusion that the concession was properly made and that in this case Mr and Mrs Wallbank are entitled to claim in C these proceedings that the PCC has acted in a way that is made unlawful by section 6(1) of the Act.

27 As Lord Woolf CJ observed in *Wainwright v Home Office* [2002] QB 1334, 1344G para 22, there has been considerable uncertainty as to whether the Human Rights Act 1998 can apply retrospectively in situations where the conduct complained of occurred before the Act came into force. The position which we have reached so far can, I think, be summarised in D this way.

28 The only provision in the Act which gives retrospective effect to any of its provisions is section 22(4). It directs attention exclusively to that part of the Act which deals with the acts of public authorities: see sections 6 to 9. It has been said that its effect is to enable the Act to be used defensively against public authorities with retrospective effect but not offensively: see E the annotations to the Act by the late Peter Duffy QC in *Current Law Statutes*, vol 3 (1998). Section 22(4) states that section 7(1)(b) applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place, but that otherwise subsection (1)(b) does not apply to an act taking place before the coming into force of section 7. Section 7(1)(b) enables a person who claims that a public authority has acted in a way which is made unlawful by section 6(1) to rely on his Convention F rights in proceedings brought by or at the instigation of the public authority. Section 6(2)(a) provides that section 6(1) does not apply if as a result of one or more provisions of primary legislation the authority could not have acted differently.

29 It has been held that acts of courts or tribunals which took place before 2 October 2000 which they were required to make by primary G legislation and were made according to the meaning which was to be given to the legislation at that time are not affected by section 22(4): see *R v Kansal (No 2)* [2002] 2 AC 69, 112, para 84; *Wainwright v Home Office* [2002] QB 1334, 1346–1347, paras 29–36. Section 3(2) states that the obligation in section 3(1) to interpret legislation in a way that is compatible with Convention rights applies to primary and secondary legislation whenever enacted. But the interpretative obligation in section 3(1) cannot be applied H to invalidate a decision which was good at the time when it was made by changing retrospectively the meaning which the court or tribunal previously gave to that legislation. The same view has been taken where the claim relates to acts of public authorities other than courts or tribunals. Here too it has been held that the Act cannot be relied upon retrospectively by

introducing a right of privacy to make unlawful conduct which was lawful at the time when it took place: *Wainwright v Home Office* [2002] QB 1334, 1347G–H, para 40.

30 In this case the act which section 6(1) is said to have made unlawful is the enforcement by the PCC of the liability for the cost of the repairs to the chancel. It is the enforcement of that liability that is said to be an unlawful interference with the personal property rights of Mr and Mrs Wallbank contrary to article 1 of the First Protocol. Service by the PCC of the notice on Mr and Mrs Wallbank under section 2(1) of the Chancel Repairs Act 1932 took place in September 1994, well before the coming into effect of the Human Rights Act 1998. But the service of the notice under that subsection was just the first step in the taking of proceedings under the 1932 Act to enforce the liability to repair. If, as has happened here, the chancel is not put in proper repair within a period of one month from the date when the notice to repair was served proceedings must be taken by the responsible authority to recover the sum required to put the chancel in proper repair by means of an order of the court: section 2(2). The final step in the process is the giving by the court of judgment for the responsible authority for such sum as appears to it to represent the cost of putting the chancel in proper repair: section 2(3). The arguments before Ferris J and in the Court of Appeal arose out a direction that there should be trial of preliminary issues. The question which is before your Lordships relates to one of those issues. The proceedings are, in that sense, still at the preliminary stage. The stage of giving judgment under section 2(3) has not yet been reached.

31 If the only act of the PCC which was in issue in this case had been the service of the notice on Mr and Mrs Wallbank it would have difficult, in the light of what was decided in *R v Lambert* [2002] 2 AC 545 and *R v Kansal (No 2)* [2002] 2 AC 69, to say that that act, which was lawful at the time when the notice was served and was still lawful when the preliminary issue was decided by Ferris J at first instance, had become unlawful following the coming into effect of the Human Rights Act 1998. But the proceedings to give effect to that notice are still on foot. In this situation there is, in my opinion, no issue of retrospectivity. Mr and Mrs Wallbank do not need to rely on section 22(4). It is sufficient for their purpose to say that they wish to rely on their Convention right in the proceedings which the PCC are still taking against them with a view to having the notice enforced. This is something that they are entitled to do under section 7(1)(b).

32 It should be emphasised that the situation which I have outlined avoids the problems which were discussed in *R v Lambert* and *R v Kansal (No 2)* about extending section 22(4) to appeals. We are, of course, dealing in this case with an appeal against the decision of a court or tribunal: see section 7(6)(a). But the fact is that the appeal relates to a preliminary issue only. This means that the court has yet to reach the stage in these proceedings when effect can be given to the notice which the PCC have served. That still lies in the future. Section 7(6)(a) states that the expression "legal proceedings" in section 7(1)(b) includes "proceedings brought by or at the instigation of a public authority." The preliminary issue has been examined as part of these proceedings.

33 The question whether the proceedings of which an examination of the preliminary issue forms part are "legal proceedings" as so defined brings

A me to the next issue, which is whether the PCC is a public authority for the purposes of section 6(1) of the Act.

The public authority issue

(a) Introduction

34 Section 6(1) provides that it is unlawful for a public authority to act
B in a way which is incompatible with a Convention right. The expression "public authority" is not fully defined anywhere in the Human Rights Act 1998. What the Act does instead is to address itself to some particular issues. In all other respects the expression has been left to bear its ordinary meaning according to the context in which it is used. Section 6(3) provides:

> "In this section 'public authority' includes—(a) a court or tribunal, and
C (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament."

Section 6(5) provides: "In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private."

D **35** It is clear from these provisions that, for the purposes of this Act, public authorities fall into two distinct types or categories. Courts and tribunals, which are expressly included in the definition, can perhaps be said to constitute a third category but they can be left on one side for present purposes. The first category comprises those persons or bodies which are obviously public or "standard" public authorities: *Clayton & Tomlinson*,
E *The Law of Human Rights* (2000), vol 1, para 5.08. They were referred to in the course of the argument as "core" public authorities. It appears to have been thought that no further description was needed as they obviously have the character of public authorities. In the Notes on Clauses which are quoted in *Clayton & Tomlinson*, para 5.06, it was explained that the legislation proceeds on the basis that some authorities are so obviously public authorities that it is not necessary to define them expressly. In other
F words, they are public authorities through and through. So section 6(5) does not apply to them. The second category comprises persons or bodies some of whose functions are of a public nature. They are described in *Clayton & Tomlinson* as "functional" public authorities and were referred to in the argument as "hybrid" public authorities. Section 6(5) applies to them, so in their case a distinction must be drawn between their public functions and the
G acts which they perform which are of a private nature.

36 Skilfully drawn though these provisions are, they leave a great deal of open ground. There is room for doubt and for argument. It has been left to the courts to resolve these issues when they arise. It is plain that the Court of Appeal were being invited to enter into largely uncharted territory. As a result of their efforts we are better equipped as we set out on the same journey. We have the benefit of their decision and of the criticisms that have
H been made of it. We must now see where all this leads us. First, it is necessary to examine what they did.

37 The Court of Appeal declined, rightly in my opinion, to look to Hansard for assistance: [2002] Ch 51, 61D, para 29. They rejected the argument that there was an ambiguity which brought this case within the

scope of the limited exception which was described in *Pepper v Hart* [1993] AC 593. It is true that various attempts were made by ministers in both Houses to explain their approach to the application of the Bill to what it described as public authorities. That was understandable, as some concern was expressed about the implications of this aspect of the legislation. But it is not the ministers' words, uttered as they were on behalf of the executive, that must be referred to in order to understand what Parliament intended. It is the words used by Parliament that must be examined in order to understand and apply the legislation that it has enacted.

38 The Court of Appeal were invited to hold that the test of what is a public authority for the purposes of section 6 was function-based. They rejected this proposition too. As Sir Andrew Morritt V-C delivering the judgment of the court pointed out, this may well be determinative as regards the "hybrid" class of public authorities as defined by section 6(3)(b). But it does not follow that it governs the principal category of "core" public authorities: [2002] Ch 51, 62B, para 33. In the following paragraph he said that for this reason the decided cases on the amenability of bodies to judicial review, while plainly relevant, will not necessarily be determinative of a body's membership either of the principal or hybrid class of public authority. He noted that the authorities on judicial review, as they now stand, draw a conceptual line between functions of public governance and functions of mutual governance. He said that there was no surviving element of mutuality or mutual governance as between the impropriator and the Church in the lay rector's modern liability for chancel repairs.

39 Sir Andrew Morritt V-C set out the conclusions of the Court of Appeal on the public authority issue, at p 63, para 35:

> "In our judgment it is inescapable, in these circumstances, that a PCC is a public authority. It is an authority in the sense that it possesses powers which private individuals do not possess to determine how others should act. Thus, in particular, its notice to repair has statutory force. It is public in the sense that it is created and empowered by law; that it forms part of the church by law established; and that its functions include the enforcement through the courts of a common law liability to maintain its chancels resting upon persons who need not be members of the church. If this were to be incorrect, the PCC would nevertheless, and for the same reasons, be a legal person whose functions, chancel repairs among them, are functions of a public nature. It follows on either basis by virtue of section 6 that its acts, to be lawful, must be compatible with the rights set out in Schedule 1 to the Human Rights Act 1998."

40 The Court of Appeal, in reaching the conclusion that the PCC is a "core" public authority, appears to have proceeded in this way: (1) the PCC is an authority because it possesses powers which private individuals do not possess to enforce the lay rector's liability; and (2) it is public because it is created and empowered by law, it forms part of the Church of England as the established church and its functions include the enforcement of the liability on persons who need not be members of the church. By a similar process of reasoning the Court of Appeal concluded that the PCC is in any event a person some of whose functions, including chancel repairs, are functions of a public nature. In their view the fact that the PCC has the power and duty to enforce the obligation on persons with whom it has no other relationship

showed that it has the character of a public authority, or at least that it is performing a function of a public nature when it is enforcing this liability: see also para 36.

41 This approach has the obvious merit of concentrating on the words of the statute. The words "public" and "authority" in section 6(1), "functions of a public nature" in section 6(3)(b) and "private" in section 6(5) are, of course, important. The word "public" suggests that there some persons which may be described as authorities that are nevertheless private and not public. The word "authority" suggests that the person has regulatory or coercive powers given to it by statute or by the common law. The combination of these two words in the single unqualified phrase "public authority" suggests that it is the nature of the person itself, not the functions which it may perform, that is determinative. Section 6(1) does not distinguish between public and private functions. It assumes that everything that a "core" public authority does is a public function. It applies to everything that a person does in that capacity. This suggests that some care needs to be taken to limit this category to cases where it is clear that this over-arching treatment is appropriate. The phrase "functions of a public nature" in section 6(3), on the other hand, does not make that assumption. It requires a distinction to be drawn between functions which are public and those which are private. It has a much wider reach, and it is sensitive to the facts of each case. It is the function that the person is performing that is determinative of the question whether it is, for the purposes of that case, a "hybrid" public authority. The question whether section 6(5) applies to a particular act depends on the nature of the act which is in question in each case.

42 The absence of a more precise definition of the expression "public authority" for the purposes of section 6(1) of the Human Rights Act 1998 may be contrasted with the way that expression is used in the devolution legislation for Scotland and Northern Ireland. Sections 88–90 of the Scotland Act 1998 deal with what that Act calls "cross-border public authorities". "Scottish public authorities" are dealt with in Part III of Schedule 5. Definitions of these expressions are provided in section 88(5), which requires "cross-border authorities" to be specified by Order in Council and in section 126(1) which states that "Scottish public authority" means any public body, public office or holder of such an office whose functions are exercisable only in or as regards Scotland. A list of public bodies was appended to the White Paper, Scotland's Parliament (1997) (Cm 3658): see also the note to section 88 of the 1998 Act in *Current Law Statutes*. It included three nationalised industries, a group of tribunals, three statutory water authorities, health bodies and a large number of miscellaneous executive and advisory bodies. Sections 75 and 76 of the Northern Ireland Act 1998 impose a duty on public authorities to promote equality of opportunity and prohibit discrimination in the carrying out of their functions. The expression "public authority" for the purposes of each of these sections is defined in a way that appears to leave no room for doubt as to which departments, corporations or other bodies are included: see sections 75(3), 76(7).

43 The Court of Appeal did not explore the significance of the distinction which is drawn in section 6 between "core" and "hybrid" public authorities. In their view the PCC, for the same reasons, fell into either

category: p 63D–E, para 35. But the width that can be given to the "hybrid" category suggests that the purpose of the legislation would not be impeded if the scope to be given to the concept of a "core" public authority were to be narrowed considerably from that indicated by the Court of Appeal.

44 There is one vital step that is missing from the Court of Appeal's analysis. It is not mentioned expressly in the Human Rights Act 1998, but it is crucial to a proper understanding of the balance which sections 6 to 9 of the Act seek to strike between the position of public authorities on the one hand and private persons on the other. The purpose of these sections is to provide a remedial structure in domestic law for the rights guaranteed by the Convention. It is the obligation of states which have ratified the Convention to secure to everyone within their jurisdiction the rights and freedoms which it protects: *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38, para 49. The source of this obligation is article 13. It was omitted from the articles mentioned in section 1(1) which defines the meaning of the expression "the Convention rights", as the purpose of sections 6 to 9 was to fulfil the obligation which it sets out. But it provides the background against which one must examine the scheme which these sections provide.

45 The principle upon which the scheme proceeds is that actions by public authorities are unlawful if they are in breach of Convention rights: section 6(1). Effect is given to that principle in section 7. It enables anyone who is a victim of an act made unlawful by section 6(1) to obtain a remedy. The extent to which the scheme derives its inspiration from the Convention is revealed by the definition of the word "victim" which is set out in section 7(7). It provides:

> "For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act."

Article 34 of the Convention is in these terms:

> "The court may receive applications from any person, non-governmental 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. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

46 The reference to non-governmental organisations in article 34 provides an important guide as to the nature of those persons who, for the purposes of section 6(1) of the Act and the remedial scheme which flows from it, are to be taken to be public authorities. Non-governmental organisations have the right of individual application to the European Court of Human Rights as victims if their Convention rights have been violated. If the scheme to give effect to article 13 is to be followed through, they must be entitled to obtain a remedy for a violation of their Convention rights under section 7 in respect of acts made unlawful by section 6.

47 The test as to whether a person or body is or is not a "core" public authority for the purposes of section 6(1) is not capable of being defined precisely. But it can at least be said that a distinction should be drawn between those persons who, in Convention terms, are governmental

A organisations on the one hand and those who are non-governmental organisations on the other. A person who would be regarded as a non-governmental organisation within the meaning of article 34 ought not to be regarded as a "core" public authority for the purposes of section 6. That would deprive it of the rights enjoyed by the victims of acts which are incompatible with Convention rights that are made unlawful by section 6(1). B Dawn Oliver, "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act" [2000] PL 476, 491–493 has observed that this would have serious implications. It would undermine the protections against state control which are the hallmarks of a liberal democracy.

48 In *Rothenthurm Commune v Switzerland* (1988) 59 DR 251 the Commission held that local government organisations such as the applicant C commune which exercise public functions are clearly "governmental organisations" as opposed to "non-governmental organisations" within the meaning of article 25 (now article 34) of the Convention, with the result that the commune which was complaining that proceedings for the expropriation of land for a military training area were in breach of their rights under article 6(1) could not bring an application under that article. In D *Ayuntamiento de Mula v Spain*, Reports of Judgments and Decisions 2000-I, p 53 the European Court held that under the settled case law of the Convention institutions local government organisations are public law bodies which perform official duties assigned to them by the Constitution and by substantive law and are therefore quite clearly governmental organisations. It added this comment:

E > "In that connection, the court reiterates that in international law the expression 'governmental organisations' cannot be held to refer only to the Government or the central organs of the State. When powers are distributed along decentralised lines, it refers to any national authority which exercises public functions."

49 The phrase "public functions" in this context is thus clearly linked to F the functions and powers, whether centralised or distributed, of government. This point was developed more fully in *Holy Monasteries v Greece* (1995) 20 EHRR 1. The Government of Greece argued that the applicant monasteries, which were challenging legislation which provided for the transfer of a large part of the monastic property to the Greek state, were not non-governmental organisations within the meaning of article 25 (now 34) of the Convention. It was pointed out that the G monasteries were hierarchically integrated into the organic structure of the Greek Orthodox Church, that legal personality was attributed to the Church and its constituent parts in public law and that the Church and its institutions, which played a direct and active part in public administration, took administrative decisions whose lawfulness was subject to judicial review by the Supreme Administrative court like those of any other public H authority. Rejecting this argument, the court said in para 49:

> "Like the Commission in its admissibility decision, the court notes at the outset that the applicant monasteries do not exercise governmental powers. Section 39(1) of the Charter of the Greek Church describes the monasteries as ascetic religious institutions. Their objectives—essentially

ecclesiastical and spiritual ones, but also cultural and social ones in some cases—are not such as to enable them to be classed with governmental organisations established for public administration purposes. From the classification as public law entities it may be inferred only that the legislature—on account of the special links between the monasteries and the State—wished to afford them the same legal protection vis-à-vis third parties as was accorded to other public law entities. Furthermore, the monastery councils' only power consists in making rules concerning the organisation and furtherance of spiritual life and the internal administration of each monastery."

50 The phrase "governmental organisations established for public administration purposes" in the third sentence of the passage which I have quoted from the *Holy Monasteries* case is significant. It indicates that test of whether a person or body is a "non-governmental organisations" within the meaning of article 34 of the Convention is whether it was established with a view to public administration as part of the process of government. That too was the approach which was taken by the Commission in *Hautanemi v Sweden* (1996) 22 EHRR CD 156. At the relevant time the Church of Sweden and its member parishes were to be regarded as corporations of public law in the domestic legal order. It was held nevertheless that the applicant parish was a victim within the meaning of what was then article 25, on the ground that the Church and its member parishes could not be considered to have been exercising governmental powers and the parish was a non-governmental organisation.

51 It can be seen from what was said in these cases that the Convention institutions have developed their own jurisprudence as to the meaning which is to be given to the expression "non-governmental organisation" in article 34. We must take that jurisprudence into account in determining any question which has arisen in connection with a Convention right: Human Rights Act 1998, section 2(1).

52 The Court of Appeal left this jurisprudence out of account. They looked instead for guidance to cases about the amenability of bodies to judicial review, although they recognised that they were not necessarily determinative: p 62D–E, para 34. But, as Professor Oliver has pointed out in her commentary on the decision of the Court of Appeal in this case, "Chancel repairs and the Human Rights Act" [2001] PL 651, the decided cases on the amenability of bodies to judicial review have been made for purposes which have nothing to do with the liability of the state in international law. They cannot be regarded as determinative of a body's membership of the class of "core" public authorities: see also *Grosz, Beatson & Duffy, Human Rights: The 1998 Act and the European Convention* (2000), p 61, para 4-04. Nor can they be regarded as determinative of the question whether a body falls within the "hybrid" class. That is not to say that the case law on judicial review may not provide some assistance as to what does, and what does not, constitute a "function of a public nature" within the meaning of section 6(3)(b). It may well be helpful. But the domestic case law must be examined in the light of the jurisprudence of the Strasbourg Court as to those bodies which engage the responsibility of the State for the purposes of the Convention.

53 At first sight there is a close link between the question whether a person is a non-governmental organisation for the purposes of article 34 and the question whether a person is a public authority against which the doctrine of the direct effect of directives operates under Community law: see article 249 EC. Both concepts lie at the heart of the obligations of the State under international law. Individual applications for a violation of Convention rights may be received under article 34 from "any person, non-governmental organisation or group of individuals". Direct effect exists only against the member state concerned "and other public authorities": *European Coal and Steel Community v Acciaierie e ferriere Busseni SpA* (Case C-221/88) [1990] ECR I-495, para 23; *Brent, Directives: Rights and Remedies in English and Community Law* (2001), para 15.11.

54 The types of organisations and bodies against whom the provisions of a directive could be relied on were discussed in *Foster v British Gas plc* (Case C-188/89) [1991] 1 QB 405. The court noted in para 18 that it had been held in a series of cases that provisions of a directive could be relied on against organisations and bodies which were subject to the authority or control of the state or had special powers beyond those which result from the normal rules applicable to relations between individuals. Reference was made to a number of its decisions to illustrate this point. Its conclusions were set out in para 20:

> "It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon."

55 This is a broad definition of the concept by which such bodies have come to be referred to as "emanations of the State": e g *Johnston v Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1987] QB 129, 154, para 56. It has been described as a starting point: *Doughty v Rolls-Royce plc* [1992] 1 CMLR 1045, 1058, per Mustill LJ. As *Brent*, para 15.11, note 101, points out, the phrase "emanation of the State" is an English legal concept derived from *Gilbert v Corpn of Trinity House* (1886) 17 QBD 795 which was later criticised by the courts as inappropriate and undefined. Whatever its value may be in the context of Community law, however, it would be neither safe nor helpful to use this concept as a shorthand way of describing the test that must be applied to determine whether a person or body is a non-governmental organisation for the purposes of article 34 of the Convention. There is no right of individual application to the European Court of Justice in EC law. The phrase "non-governmental organisation" has an autonomous meaning in Convention law.

(b) Is the PCC a public authority?

56 The general functions and powers of parochial church councils in the Church of England are set out in the Parochial Church Councils (Powers) Measure 1956. That was a measure passed by the National Assembly of the Church of England under the powers which were conferred on the National

Assembly by the Church of England Assembly (Powers) Act 1919. The National Assembly was renamed and reconstituted as the General Synod of the Church of England by the Synodical Government Measure 1969. Section 7 of the 1969 Measure provides that the rules contained in Schedule 3, which may be cited as the Church Representation Rules, are to have effect for the purpose of providing for the constitution and proceedings of diocesan and deanery synods and making further provision for the synodical government of the church. Part II of the Church Representation Rules provides for the holding of annual parochial church meetings at which parochial representatives of the laity to the parochial church council and the deanery synod are to take place. Rule 14 sets out the membership of the parochial church council. It includes the clergy, churchwardens, any persons on the roll of the parish who are members of any deanery or diocesan synod or the General Synod, elected representatives of the laity and co-opted members.

57 Section 2(1) of the Parochial Church Councils (Powers) Measure 1956 provides that it shall be the duty of the minister, as defined in rule 44(1) of the Church Representation Rules, and the parochial church council to consult together on matters of general concern and importance to the parish. Section 2(2) states that the functions of parochial church councils shall include, among other things, co-operation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical and the consideration and discussion of matters concerning the Church of England or any other matters of religious or public interest other than the declaration of the doctrine of the Church on any question. Among the powers, duties and liabilities vested in parochial church councils by section 4 are those relating to the financial affairs of the church and the care, maintenance and preservation of its fabric. Section 2 of the Chancel Repairs Act 1932 provides that, where a chancel is in need of repair, proceedings to enforce the liability to repair are to be taken by the responsible authority. Section 4(1) of the Act provides that the expression "responsible authority" in relation to a chancel means the parochial church council of the parish in which the chancel is situate.

58 There is no doubt that parochial church councils are an essential part of the administration, on the authority of the General Synod, of the affairs of the Church of England. The parish itself has been described as the basic building block of the Church and the PCC as the central forum for decision-making and discussion in relation to parish affairs: *Hill*, *Ecclesiastical Law*, 2nd ed (2001), pp 48 and 74, paras 3.11 and 3.74. It is constituted by section 3 of the Parochial Church Councils (Powers) Measure 1956 as a body corporate. It has statutory powers which it may exercise under section 2 of the Chancel Repairs Act 1932 against any person who appears to it to be liable to repair the chancel, irrespective of whether that person is resident in the parish and is a member of the Church of England. In that context, perhaps, it may be said in a very loose sense to be a public rather than a private body.

59 But none of these characteristics indicate that it is a governmental organisation, as that phrase is understood in the context of article 34 of the Convention. It plainly has nothing whatever to do with the process of either central or local government. It is not accountable to the general public for what it does. It receives no public funding, apart from occasional grants

A from English Heritage for the preservation of its historic buildings. In that respect it is in a position which is no different from that of any private individual. The statutory powers which it has been given by the Chancel Repairs Act 1932 are not exercisable against the public generally or any class or group of persons which forms part of it. The purpose of that Act, as its long title indicates, was to abolish proceedings in ecclesiastical courts for enforcing the liability to repair. The only person against whom the liability B may be enforced is the person who, in that obscure phrase, "would, but for the provisions of this Act, have been liable to be admonished to repair the chancel by the appropriate ecclesiastical court in a cause of office promoted against him in that court on the date when the notice was served": see section 2(3); *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, 429, per Lord Hanworth MR.

C **60** Then there is the fact that the PCC is part of the Church of England. The Court of Appeal said that it exemplifies the special status of the church of which it forms part: [2002] Ch 51, 61, para 32. The fact that it forms part of the church by law established showed, it was said, that the PCC is a public authority: p 63, para 35. The implication of these observations is that other bodies such as diocesan and deanery synods and the General Synod itself fall into the same category. In my opinion however the legal framework of the D Church of England as a church by law established does not lead to this conclusion.

61 The Church of England as a whole has no legal status or personality. There is no Act of Parliament that purports to establish it as the Church of England: *Sir Lewis Dibden*, *Establishment in England: Essays on Church and State* (1932), p 111. What establishment in law means is that the state E has incorporated its law into the law of the realm as a branch of its general law. In *Marshall v Graham* [1907] 2 KB 112, 126 Phillimore J said:

> "A Church which is established is not thereby made a department of the state. The process of establishment means that the state has accepted the Church as the religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position, and to its decrees, if rendered F under certain legal conditions, certain civil sanctions."

The Church of England is identified with the state in other ways, the monarch being head of each: see *Doe*, *The Legal Framework of the Church of England* (1996), p 9. It has regulatory functions within its own sphere, but it cannot be said to be part of government. The state has not surrendered or delegated any of its functions or powers to the Church. None of the G functions that the Church of England performs would have to be performed in its place by the state if the Church were to abdicate its responsibility: see *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex p Wachmann* [1992] 1 WLR 1036, 1042A, per Simon Brown J. The relationship which the state has with the Church of England is one of recognition, not of the devolution to it of any of the powers or functions of government. H

62 The decisions of the Strasbourg Court in *Holy Monasteries v Greece* 20 EHRR 1 and *Hautanemi v Sweden* 22 EHRR CD 156 support this approach. It is also worth noting that, while the two main churches in Germany (Roman Catholic and Lutheran) have public legal personality and are public authorities bound by the provisions of article 19(4) of the German

Constitution (Grundgesetz) or Basic Law which guarantees recourse to the court should any person's basic rights be violated by public authority, they are in general considered to be "non-governmental organisations" within the meaning of article 34 of the Convention. As such, they are entitled to avail themselves of, for example, the right to protection of property under article 1 of the First Protocol: *Frowein and Peukert*, *Kommentar zur Europäishen Menschenrechtskonvention*, 2nd ed (1996), art 25, para 16. *Maunz and Dürig*, *Kommentar zum Grundgesetz* (looseleaf), art 33, para 38 explain the position in this way:

> "Keine hoheitsrechtlichen Befugnisse nehmen die Amtsträger der Kirchen wahr, soweit sie nicht kraft staatlicher Ermächtigung (etwa in Kirchensteurangelegenheiten) tätig werden; die Kirchen sind, auch soweit sie öffentlich-rechtlichen Status haben, nicht Bestandteile der staatlichen Organisation."

[Church officeholders do not exercise sovereign power so long as they are not acting by virtue of state empowerment (for example, in matters concerning church taxes); the churches do not, even though they have public law status, form an integral part of the organisation of the state.] This reflects the view of the German Constitutional Court in its 1965 decision (BVerwGE 18, 385) that measures taken by a church relating to purely internal matters which do not reach out into the sphere of the state do not constitute acts of sovereign power. The churches are not, as we would put it, "core" public authorities although they may be regarded as "hybrid" public authorities for certain purposes.

63 For these reasons I would hold that the PCC is not a "core" public authority. As for the question whether it is a "hybrid" public authority, I would prefer not to deal with it in the abstract. The answer must depend on the facts of each case. The issue with which your Lordships are concerned in this case relates to the functions of the PCC in the enforcement of a liability to effect repairs to the chancel. Section 6(5) of the Human Rights Act 1998 provides that a person is not a public authority by virtue only of subsection (3) if the nature of the act which is alleged to be unlawful is private. The Court of Appeal said that the function of chancel repairs is of a public nature: [2002] Ch 51, 63, para 35. But the liability of the lay rector to repair the chancel is a burden which arises as a matter of private law from the ownership of glebe land.

64 It is true, as Wynn-Parry J observed in *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, 593, that the burden is imposed for the benefit of the parishioners. It may be said that, as the church is a historic building which is open to the public, it is in the public interest that these repairs should be carried out. It is also true that the liability to repair the chancel rests on persons who need not be members of the church and that there is, as the Court of Appeal observed, at p 63B, para 34, no surviving element of mutuality or mutual governance between the church and the impropriator. But none of these factors leads to the conclusion that the PCC's act in seeking to enforce the lay rector's liability on behalf of the parishioners is a public rather than a private act. The nature of the act is to be found in the nature of the obligation which the PCC is seeking to enforce. It is seeking to enforce a civil debt. The function which it is performing has nothing to do with the responsibilities which are owed to the public by the State. I would

A hold that section 6(5) applies, and that in relation to this act the PCC is not for the purposes of section 6(1) a public authority.

The incompatibility issue

65 This issue does not arise if, as I would hold, the PCC is not for present purposes a public authority. But I should like to offer these brief
B comments on it, as I do not agree with the Court of Appeal's finding that Mr and Mrs Wallbank's right to peaceful enjoyment of their possessions under article 1 of the First Protocol, read either alone or with article 14 of the Convention, has been violated: [2002] Ch 51, paras 38–46.

66 Article 1 of the First Protocol provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of
C 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
D or penalties."

Article 14 of the Convention prohibits discrimination in the enjoyment of the rights and freedoms which the Convention sets forth.

67 Article 1 of the First Protocol contains three distinct rules: see *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 61; *James v United Kingdom* (1986) 8 EHRR 123, para 37. The first rule is set out in the
E first sentence, which is of a general nature and enunciates the principle of the peaceful enjoyment of property. It then deals with two forms of interference with a person's possessions by the state: deprivation of possessions which it subjects to certain conditions, and control of the use of property in accordance with the general interest. In each case a balance must be struck between the rights of the individual and the public interest to determine
F whether the interference was justified. These rules are not unconnected as, before considering whether the first rule has been complied with, the court must first determine whether the last two rules are applicable. As it was put in *James*, para 37, the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property. They should be construed in the light of the general principle enunciated in
G the first rule.

68 The Court of Appeal appear to have overlooked this guidance. They did not address the question whether Mr and Mrs Wallbank were being deprived of their possessions according to the second rule, and they did not deal with the question whether there was an interference with the first rule. They held that the liability to defray the cost of chancel repairs was levy upon the personal funds of Mr and Mrs Wallbank, that this was a form of
H taxation within the third rule in the second paragraph of article 1, and that it was arbitrary and disproportionate. They rejected the PCC's argument the source of the liability was their ownership of Glebe Farm. They held that there was in this case an outside intervention by the general law which made ownership of the land a fiscal liability: para 40.

69 Ferris J said in his judgment that, if the law relating to chancel repairs was as understood it to be (which he described as "the supposed rule"), it did not involve a deprivation of possessions. As he put it, at para 23:

> "The argument for Mr and Mrs Wallbank seems to assume that the starting point is that they are to be regarded as the owners of Glebe Farm free from incumbrances or other burdensome incidents attached to the ownership of the land. But this is not in fact correct if the supposed rule represents the law. The liability to repair the chancel is, on that basis, one of the incidents of ownership of that part of Glebe Farm which consists of land allotted under the inclosure award in lieu of tithe or other rectorial property. It is, of course, an unusual incident because it does not amount to a charge on the land, is not limited to the value of the land and imposes a personal liability on the owner of the land. But in principle I do not find it possible to distinguish it from the liability which would attach to the owner of land which is purchased subject to a mortgage, restrictive covenant or other incumbrance created by a predecessor in title."

He said that the case was quite different from that in which there was some kind of outside intervention in the form of taxation, compulsory purchase or control over the way in which the property can be used.

70 I prefer Ferris J's analysis to that of the Court of Appeal. The principle which we must follow was described in *James v United Kingdom* 8 EHRR 123, para 36. We must confine our attention, as far as possible, to the concrete case which is before us. It must not be directed to the impact of the law relating the enforcement of the chancel repair liability in the abstract, but to its impact as it affects Mr and Mrs Wallbank.

71 How then does the liability arise? It cannot be considered in isolation from the obligation that gives rise to it. That is the obligation which rests on the owner of rectorial land, not as a result any outside intervention with the possession of the land by the state but as a matter of private law. The conveyance of Glebe Farm to Mrs Wallbank's parents in 1970 described the land as subject to the liability for the repair of the chancel mentioned in previous conveyances. Their deeds of gift to Mrs Wallbank in 1974 and 1986 also referred to the chancel repair liability. This is a burden on the land, just like any other burden that runs with the lands. It is, and has been at all times, within the scope of the property right which she acquired and among the various factors to be taken into account in determining its value. She could have divested herself of it at any time by disposing of the land to which it was attached. The enforcement of the liability under the general law is an incident of the property right which is now vested jointly in Mr and Mrs Wallbank. It is not, as the Court of Appeal said (para 40), an outside intervention by way of a form of taxation.

72 I recognise that Mr and Mrs Wallbank may well need to draw on their personal funds to discharge the liability. But they are not being deprived of their possessions or being controlled in the use of their property, as those expressions must be understood in the light of the general principle of peaceful enjoyment set out in the first sentence of article 1 of the First Protocol. The liability is simply an incident of the ownership of the land which gives rise to it. The peaceful enjoyment of land involves the discharge of burdens which are attached to it as well as the enjoyment of its rights and privileges. I do not think that in this case the right which article 1 of the First

Protocol guarantees, read alone or in conjunction with article 14 of the Convention, is being violated.

Conclusion

73 The law relating to the liability for chancel repairs is open to criticism on various grounds. The liability has been described by the Law Commission as anachronistic and capricious in its application and as highly anomalous: Liability for Chancel Repairs (1985) (Law Com No 152), para 3.1; Land Registration for the Twenty-first Century (1998) (Law Com No 254; Cm 407), para 5.37. The existence of the liability can be difficult to discover, as most lay rectories have become fragmented over the years as a result of the division and separate disposals of land: Transfer of Land, Liability for Chancel Repairs (1983) (Law Commission Working paper No 86), para 2.29. The fact that it is a several liability may operate unfairly in cases where there is more than one lay rector and the person who is found liable is unable to recover a contribution from others who ought to have been found liable.

74 On the other hand it was noted in the 1983 Law Commission Working Paper that there were some 5,200 chancels for which there is a chancel repair liability. Not all of these cases involve individual landowners. About 800 are the liability of the Church Commissioners, 200 the liability of cathedrals and 200 the liability of educational foundations. Charitable donations may provide relief in some cases, while in others grants may be available from English Heritage. But there is no other source of private funding that can be relied upon, and there is no right of access to public funds. Unsatisfactory though the system may appear to be, there is no obvious alternative. Ferris J recognised, in para 18 of his judgment, that the law relating to chancel repairs is capable of operating arbitrarily, harshly and unfairly. But he did not find any basis for declaring the law to be otherwise than it appeared to be on the authorities.

75 It is not open to us to resolve these problems judicially. All one can say is that the Human Rights Act 1998 does not provide a vehicle for doing so. I would allow the appeal and restore the order and determination made by Ferris J.

LORD HOBHOUSE OF WOODBOROUGH

76 My Lords, it is admitted by the defendants that, apart from the Human Rights Act 1998, they are, as the joint owners of Glebe Farm, Aston Cantlow, and have been at all material times personally responsible for the repair of the chancel of the church of St John the Baptist Aston Cantlow and that, they having failed to repair the chancel, the Parochial Church Council ("PCC") is entitled to a judgment against them under section 2(3) of the Chancel Repairs Act 1932 for such sum as represents the cost of putting the chancel into a proper state of repair. This is because the defendants, Mr and Mrs Wallbank, being liable to repair the chancel, would, but for the 1932 Act, have been liable to be admonished to repair the chancel by an ecclesiastical court. The obligation of the defendants is the obligation to repair. Under the 1932 Act the remedy of an order that the obligation be performed is no longer to be available and the monetary remedy is provided in lieu but the character of the obligation was left unchanged.

77 The obligation to repair is one which derives from the ownership of land to which the obligation is attached. The obligation runs with the land. The 15th and 16th century origins of this are helpfully explained in the opinion of my noble and learned friend, Lord Scott of Foscote. In the present case the obligation arose not from the receipt of tithes but as a result of an enclosure award of 1743 made under the private Act of Parliament of 1742 (15 Geo 2, c 42). It is a personal obligation but only exists so long as the person in question is the owner of the land. Thus he acquires it by a voluntary act—the acquisition of the title to the land of which the obligation is an incident. He can divest himself of the obligation by a further voluntary act—the disposal of the land or, under section 52 of the Ecclesiastical Dilapidations Measure 1923, by redemption. At all the times material to this case, the obligation was categorised by section 70 of the Land Registration Act 1925 as an overriding interest. The person or persons who are under such an obligation are described, using the historical terminology, as the "lay rectors" or the "lay impropriators".

78 In fact the defendants knew that ownership of the land was believed to carry with it the obligation. It was referred to in all the title deeds and, in at least one conveyance, an express indemnity had been taken by the vendor. In other cases some special consideration might arise from the fact that the relevant landowner had acquired the title to the land without any notice of the existence, or possible existence, of the obligation. But that is not this case and it need not be discussed further.

79 The only defence now raised by the defendants to the claim of the PCC under the 1932 Act is based upon the Human Rights Act 1998 and/or the Convention. The 1998 Act had not come into force at the time when the defendants failed to carry out the relevant repairs, nor when the PCC served the notice required by section 2(1) of the 1932 Act, nor at the time when Ferris J tried the case and gave judgment for the PCC. He was formally trying two preliminary issues ordered by Master Bragge but, when he decided the human rights issue against the defendants, the defendants, having abandoned their case on the other issue, admitted that they had no defence to the claim except as to quantum. He accordingly made a declaration of liability, ordered an inquiry as to quantum and ordered the defendants to pay to the claimants the sum found due on the inquiry. The question of quantum arose under section 2(3) of the 1932 Act: "[the] court . . . shall give judgment . . . for such sum as appears to the court to represent the cost of putting the chancel in proper repair". The points which the defendants were taking on quantum were pleaded in paragraph 1 of the outline defence. The judgment of Ferris J was in English procedural law a final judgment. The defendants appealed to the Court of Appeal. By the time that the defendants' appeal was heard, the 1998 Act had however come into force.

80 This timetable raises again the question of the extent to which the Act has a retrospective effect, a question on which the Court of Appeal did not express an opinion since no point was taken in that regard by the PCC. Your Lordships were not satisfied that this was necessarily correct; however it was clearly convenient and in the interest of both of the parties that the House should first hear the parties' arguments upon the points which the Court of Appeal did decide. I stress that the House have not heard any argument upon the question of the extent, if at all, to which the Act has

retrospective effect. It is not appropriate that any view should be expressed on it in the present case. Anything said will not be authoritative. The retrospectivity point will arise for decision in other unrelated appeals and will then fall to be decided after full argument and due consideration. It is in any event not correct to approach that question on the basis that the judgment of Ferris J was undeterminative or merely interlocutory. In English procedural law, it was a final judgment which, unless reversed on appeal, determined the parties' rights and liabilities, subject only to quantum. I will accordingly proceed on the basis of assuming that the Human Rights Act 1998 applies to this case in accordance with the provisions of sections 22(4), 7(1)(b) and 6.

81 The structure of the defendants' argument under the Human Rights Act 1998 is that they have to establish three propositions. If they fail on any one of these, their defence fails. They are: (a) that the PCC is a public authority, the sections 6(1), (3) and (5) point, and (b) that there has been a breach of article 1 of the First Protocol, the article 1 and article 14 point, and (c) that the exclusion in section 6(2) does not apply. Before Ferris J only point (b) arose and he decided it in favour of the claimants. In the Court of Appeal all three points were decided in favour of the defendants.

82 These were the questions of law raised on this appeal. They are questions which are of relevance not only to the present case but to many other cases or potential cases concerning the enforcement under the 1932 Act of the obligation to repair chancels. Other cases may, on their facts, raise special considerations not found in this case and, similarly, legal questions not dependent upon the Human Rights Act 1998 may arise. Your Lordships' decision on this appeal does not touch upon any of them. But I must expressly disassociate myself from any suggestion that there is a cap upon the monetary liability under section 2(3) of the 1932 Act or that any such point is presently open to the defendants upon the inquiry ordered by Ferris J as discussed in the opinion of my noble and learned friend, Lord Scott of Foscote, which I have had the privilege of reading in draft after I had prepared this opinion, together with his questioning of the correctness of the decision in *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417. The question was neither raised nor argued. There are contentious points which will arise if it ever is. Does the cap apply where the express words of the 1932 Act are applicable? How does it apply to successive or continuing and cumulative breaches of the obligation to repair? Does the cap apply where the liability is not attributable to the ownership of a tithe rentcharge but simply to the ownership of land? If so, how does one assess what the cap should be? It is by no means clear that any of these questions should be answered in a way that could assist the defendants. But they have not been argued and I will say no more about them.

Is the PCC a public authority?

83 Historically parochial church councils did not exist. They were introduced by the Parochial Church Councils (Powers) Measure 1921 as a body at parish level which would better enable the lay members of the congregation to be represented. It was agreed that at the material times the powers and functions of PCCs were defined by the Parochial Church Council (Powers) Measure 1956. Section 2 (as amended) provided:

"*General Functions of Council*

"(1) It shall be the duty of the minister and the [PCC] to consult together on matters of general concern and importance to the parish.

"(2) The functions of [PCCs] shall include—(a) cooperation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical; (b) the consideration and discussions of matters concerning the Church of England or any other matters of religious or public interest, but not the declaration of the doctrine of the Church on any question; (c) making known and putting into effect any provision made by the diocesan synod or the deanery synod, but without prejudice to the powers of the council on any particular matter; (d) giving advice to the diocesan synod and deanery synod on any matter referred to the council; (e) raising such matters as the council consider appropriate with the diocesan synod or deanery synod.

"(3) In the exercise of its functions the [PCC] shall take into consideration any expression of opinion by any parochial church meeting."

Section 3 provided that the PCC was to be a body corporate with perpetual succession. Section 4 made provision for the PCC as successor to certain other bodies to have the relevant powers of those bodies:

"(1) . . . the council of every parish shall have . . . (ii) the like powers duties and liabilities as, immediately before [1 July 1921], the churchwardens of such parish had with respect to—(a) The financial affairs of the church including the collection and administration of all moneys raised for church purposes and the keeping of accounts in relation to such affairs and moneys; (b) The care, maintenance, preservation and insurance of the fabric of the church and the goods and ornaments thereof; (c) The care and maintenance of any churchyard (open or closed) and the power of giving a certificate under the provisions of section 18 of the Burial Act 1855 with the like powers as, immediately before [1 July 1921] were possessed by the churchwardens to recover the cost of maintaining a closed churchyard . . ."

Of these powers, the most relevant to the present case are those in section 4(1)(ii)(b) but it is important to note that these are only those powers and duties which the churchwardens had and that the churchwardens did not have a duty to repair the fabric but only a duty to report its disrepair. As stated by Richard Burn Ch in his work *Burn on Ecclesiastical Law*, 9th ed (1842), edited by Robert Phillimore, vol 1, p 357,

"And although churchwardens are not charged with the repairs of the chancel, yet they are charged with the supervisal thereof, to see that it be not permitted to dilapidate and fall into decay; and when any such dilapidations shall happen, if no care be taken to repair the same, they are to make presentation thereof at the next visitation."

It was no doubt following this logic that the PCC were given the power (and correlative duty) in 1932 to bring the action to obtain a remedy for the failure of a lay rector to repair the chancel. (The changes later introduced by section 39 of the Endowments and Glebe Measure 1976 relating to incumbents of a benefice are not relevant to this case.)

A **84** The PCC is thus the creature of a statutory provision by what was then the National Assembly of the Church of England. It has only those functions, duties and powers which have been conferred on it by that or other legislation. It is part of the structure known as the Church of England but the Church of England is not itself a legal entity. The legal entities are the various office-holders and various distinct bodies set up within that structure.

B **85** The Human Rights Act 1998 and section 6 do not contain any complete or general definition of the term "a public authority". Section 6 does however contain a secondary definition in subsections (3)(b) and (5) as including, in respect of acts which are not of a private nature, persons (or bodies) certain of whose functions are functions of a public nature. This secondary category has been described as "hybrid" public authorities. It C requires a two-fold assessment, first of the body's functions, and secondly of the particular act in question. The body must be one of which at least some, but not all, of its functions are of a public nature. This leaves what by inference from subsection (3)(b) is the primary category, i e, a person or body *all* of whose functions are of a public nature. This category has conveniently been called by the commentators a "core" public authority. For this category, there is no second requirement; the section potentially applies to D everything that they do regardless of whether it is an act of a private or public nature.

86 Is a PCC a "core" public authority? The answer I would give to this question is that it is clearly not. Its functions, as identified above from the relevant statutory provisions, clearly include matters which are concerned only with the pastoral and organisational concerns of the diocese and the E congregation of believers in the parish. It acts in the sectional not the public interest. The most that can be said is that it is a creature of a church measure having the force of a statute—but that is not suggested to be conclusive—and that some aspects of the Church of England which is the "established church" are of wider general interest and not of importance to the congregation alone. Thus the priest ministering in the parish may have responsibilities that are certainly not public, such as the supervision of the F liturgies used or advising about doctrine, but may have other responsibilities which are of a public nature, such as a responsibility for marriages and burials and the keeping of registers. But the PCC itself does not have such public responsibilities nor are its functions public; it is essentially a domestic religious body. The fact that the Church of England is the established church of England may mean that various bodies within G that Church may as a result perform public functions. But it does not follow that PCCs themselves perform any such functions. Even the monasteries of the established church in Greece, which has strong legal links with the state, such as the presence of representatives of the state on its governing body and direct financial links with the state, has been held not to be an emanation of the state for the purposes of the Convention: *Holy Monasteries v Greece* 20 EHRR 1.

H **87** The Court of Appeal reached a different conclusion. I do not find their reasoning satisfactory. Neither parliamentary material nor references to the law of judicial review assist on this question. The relevant underlying principles are to be found in human rights law not in Community law nor in the administrative law of England and Wales. The Strasbourg jurisprudence

has already been deployed in the opinion of my noble and learned friend, Lord Hope of Craighead, and I need not repeat it. The relevant concept is the opposition of the "victim" and a "governmental body". The former can make a complaint; the latter can only be the object of a complaint. The difference between them is that the latter has a governmental character and discharges governmental functions. If there is a need to find additional assistance in construing section 6 of the Act, this is where it is to be found. The structure of the Act also supports the same conclusion. It is through section 7 and its reference to victims in section 7(1) and (7) that one gets from section 22(4) to section 6(1). Section 7 is drafted having regard to the Strasbourg jurisprudence; it would be inconsistent to construe section 6 in a manner opposed to that jurisprudence. The Court of Appeal's approach cannot be supported.

88 In my opinion it has not been established that PCCs in general nor this PCC in particular perform any function of a public or governmental nature. If it is to be said that they do, I am unaware what specifically it can be said is that function. The Court of Appeal (in paragraph 34) said that the recovery of money under section 2 of the 1932 Act was the function which made the PCC a public authority. This is to be contrasted with the statement in paragraph 37 that the "power and, no doubt duty" to do so is a "common law" power. The nature of the person's functions are not to be confused with the nature of the act complained of, as section 6 makes clear. But in neither case are they governmental in nature nor is the body itself inherently governmental. It follows that in my opinion the PCC was neither a "core" nor a "hybrid" public authority. On that basis the defence of Mr and Mrs Wallbank must fail.

89 But, if I am wrong, and the PCC was a "hybrid" public authority, the further question arises under section 6(5): Is the nature of the relevant act private? The act is the enforcement of a civil liability. The liability is one which arises under private law and which is enforceable by the PCC as a civil debt by virtue of the 1932 Act. The 1932 did not alter the preexisting law as to the obligations of lay impropriators. It is simply remedial (as the Court of Appeal recognised in paragraph 37). Its purpose is to enable repairs to be done which the lay rector ought to have, but has not, himself carried out. It is argued that it is akin to a power of taxation. Whether or not it was once true in the 16th century that such a power existed, it was certainly not true in the 20th century. Whatever the former obligations of lay impropriators may once have been, by the 18th century they were or had been converted into civil obligations. In the present case this occurred in 1743 as a result of an enclosure award made under a private Act of Parliament of 1742 entitled An Act for Dividing and Inclosing, Setting out and Allotting, certain Common Fields and Inclosures within the Manor and Parish of Aston Cantlow, in the County of Warwick (15 Geo 2, c 42). In return for financial and proprietorial advantages then conferred upon them, the impropriators accepted the obligation to repair the chancel as and when the need arose. That is the private law obligation which is being enforced in the present action using the remedy provided in the 1932 Act.

90 The 1932 Act is irrelevant unless and until the lay impropriator fails to perform his obligation to repair the chancel, a failure which may have occurred on a single occasion or may, as in the present case, have been a continuing and cumulative failure over a long period of time. The

responsibility for repairing the chancel was since 1743 an incident of the ownership of certain particular parcels of land. When Mr and Mrs Wallbank acquired the title to that land they assumed that responsibility to repair and the consequent liability in default if they should fail to discharge it. This was not a responsibility and liability which they shared with the public in general; it was something which they had personally assumed voluntarily by a voluntary act of acquisition which at the time they apparently thought was advantageous to them. From the point of view of both the PCC and the Wallbanks, the transaction and its incident were private law, non-governmental, non-public activities and not of a public nature. Again, this conclusion is adverse to the Wallbanks' defence.

Has there been a breach of article 1 (and article 14)?

91 Article 14 (discrimination) is not a freestanding provision but has to be read in conjunction with the recognition of the rights conferred by other articles. Therefore the material article is article 1 of the First Protocol which endorses the entitlement to the peaceful enjoyment of a person's possessions and prohibits depriving a person of his possessions, subject to certain qualifications. The word "possessions" has been considered by the European Court of Human Rights, in particular in the cases of *Marckx v Belgium* (1979) 2 EHRR 330 and *Sporrong and Lönnroth v Sweden* 5 EHRR 35. It applies to all forms of property and is the equivalent of "assets". But what is clear is that it does not extend to grant relief from liabilities incurred in accordance with the civil law. It may be that there are cases where the liability is merely a pretext or mechanism for depriving someone of their possessions by expropriation but that is not the case here. The liability is a private law liability which has arisen from the voluntary acts of the persons liable. They have no Convention right to be relieved of that liability. Nor do they have a Convention right to be relieved from the consequences of a bargain made, albeit some 200 years earlier, by their predecessors in title. They do not make any complaint under article 6 or complain about the fairness of these legal proceedings. They cannot complain that they are being discriminated against. The only reason why they are being sued is because they are the parties liable. This defence also fails. The submission that there should be a declaration of incompatibility likewise fails.

92 For the sake of completeness, it was clear that at all material times both they and their predecessors in title knew of the responsibility to repair or at least that it was asserted that they would be responsible if they acquired the title to the relevant land, an assertion which they have now admitted to be correct subject only to the Human Rights Act 1998. Further, they originally ran a case of waiver by the PCC which they have now accepted was rightly rejected. If they had had a legal defence it would have been recognised by the court and the action would have been dismissed. Their financial liability under the 1932 Act is not arbitrary. It arises from their failure to perform a civil private law obligation which they had voluntarily assumed.

The section 6(2) point

93 This point would only arise if I was wrong on all the preceding points. One therefore has to assume that the PCC is a public authority and the demand for payment is not of a private nature. In such circumstances,

subsection (2) creates an exception to the application of subsection (1). The words of exception relevant to this case are "the authority was acting so as to give effect to or enforce" provisions of primary legislation. The primary legislation is the 1932 Act. Incontrovertibly the PCC were seeking to give effect to and enforce provisions of that Act. On the above-stated assumption, the PCC's act in suing the Wallbanks comes squarely within the exception. Paragraph (b) of the subsection is to be contrasted with paragraph (a) which is manifestly intended to cover cases where the public authority did not have any alternative but to act as it did (i e it was compelled to do so). Paragraph (b), on the other hand, covers situations where the public authority was empowered by legislation to act as it did and the intention of the legislation, whilst leaving open a measure of discretion, was that it should use the power provided. For some unstated reason, the Court of Appeal treated only paragraph (a) as being relevant and this accounts for their mistaken decision on this point.

Conclusion

94 It follows that, far from making out all three of the necessary constituents in their defence, the defendants have made out none. Their defence accordingly fails and the appeal must be allowed. There is no need to consider the retrospectivity question.

LORD SCOTT OF FOSCOTE

Introduction

95 My Lords, the respondents, Mr and Mrs Wallbank, are the freehold owners of Glebe Farm, Aston Cantlow in Warwickshire. Glebe Farm, which consists of a farmhouse and about 179 acres of land, includes five fields amounting to just over 52 acres known, or formerly known, as Clanacre. The Clanacre fields, it is contended, were and remain rectorial property thereby constituting its owners for the time being lay rectors and subjecting them to the liability of paying for all and any necessary repairs to the chancel of St John the Baptist church, the parish church of Aston Cantlow.

96 The appellants, the parochial church council of Aston Cantlow are responsible for supervising the care, maintenance, preservation and insurance of the fabric of the church (see section 4(1)(ii)(b) of the Parochial Church Councils (Powers) Measure 1956) and have served notices on Mr and Mrs Wallbank requiring them to put the chancel in proper repair. The notices were served on 12 September 1994 and 23 January 1996 pursuant to section 2 of the Chancel Repairs Act 1932. The cost of the necessary repairs is put in the notices at £95,260-odd. Mr and Mrs Wallbank dispute their liability. This litigation has resulted.

The law on chancel repairs

97 A description, even a brief one, of the law on chancel repairs must, if it is to be comprehensible, start with mediaeval times when every parish had its parish priest, the "rector". The rector had, by virtue of his office, a number of valuable proprietary rights which, collectively, constituted his "rectory". These rights included the profits of glebe land and tithes, usually one-tenth of the produce of land in the parish. Responsibility for the repair

of the parish church was, absent some special custom to the contrary (see *Bishop of Ely v Gibbons* (1833) 4 Hagg Ecc 156), shared between the rector and the parishioners. The parishioners were responsible for repairing the part of the church where they sat, the western end of the church. The rector was responsible for repairing the chancel, the eastern end of the church. The rector's glebe land and tithes, the "rectory", provided both for his maintenance and a fund from which he could pay for chancel repairs.

98 The right of appointment to a rectory, the advowson, was an item of property transferable by conveyance and often in the hands of a lay person, typically the landowner who had built and endowed the church or his successors. But the appointee had to be a spiritual rector and, on appointment, would become entitled to the rectorial rights and subject to the chancel repair liability.

99 In the 300 years or so prior to the dissolution of the monasteries under Henry VIII a great number of advowsons were acquired by monasteries. A monastery, having acquired an advowson, would almost invariably appoint itself the rector and thereby appropriate to itself the valuable rectorial rights, the rectory. It would, of course, be a spiritual rector. The parish would, however, need a parish priest. So the monastery would appoint a deputy, a vicar, to fulfil that role, usually allocating to the vicar some part of the rectorial tithes or glebe. It seems, interestingly, never to have been suggested that the vicar, by virtue of the allocation to him of some part of the rectory thereby became liable for chancel repairs. Vicarial tithes or vicarial glebe did not carry that liability which remained with the rector.

100 On the dissolution of the monasteries under Henry VIII the property of religious houses, including their advowsons and the rectories they had appropriated, were compulsorily sold, impropriated, to lay institutions, such as Oxford and Cambridge colleges, and individuals. The lay institutions and individuals who acquired the rectories became lay rectors, or lay impropriators (the terms are synonymous) and, as such, subject to the chancel repair liability. The lay rector may have, and usually had, also acquired the advowson and thereby become the patron and entitled to appoint the vicar of the parish. A vicar, thus appointed, was no longer a deputy but held office in his own right. The obligation to repair the chancel lay on the lay rector in that capacity and not as owner of the advowson.

101 The proprietary rights acquired by lay rectors would have included the rectorial glebe and the rectorial tithes. These rights could be alienated and divided up. Many rectorial tithes were extinguished under Inclosure Awards made pursuant to Inclosure Acts. Under these Awards plots forming part of the common lands to be enclosed were allotted to lay rectors in lieu of their rectorial tithes. It is generally assumed that the allotted lands then took the place of the tithes as the lay rector's rectorial property (see para 2.11 of the Law Commission's Working Paper No 86 Transfer of land. Liability for Chancel Repairs (1983).

102 Tithes, other than those extinguished under Inclosure Awards, were converted into tithe rentcharges under the Tithe Act 1836 (6 & 7 Will 4, c 71). Tithe rentcharges, unlike their predecessor tithes, were charged on the land in respect of which the tithe had been payable and attracted the same chancel repair liability as had been attracted by the predecessor tithes—see

section 71 of the 1836 Act which subjected the rentcharges to "the same liabilities and incidents as the like estate in the tithes commuted". Over the next 100 years various further statutory changes were made until, finally, the Tithe Act 1936 abolished tithe rentcharges and replaced them with tithe redemption annuities. The annuities were payable to the Government and the owners of the rentcharges received Government stock in compensation for the extinction of their rights.

103 Section 31 of the 1936 Act and Schedule 7 to the Act dealt specifically with chancel repairs. As to liability for chancel repair arising from the ownership of tithe rentcharges (evidently on the footing that the tithe rentcharge had taken the place of the tithes as rectorial property) a part of the Government stock to be issued in respect of that rentcharge was to go to the diocesan authority to provide for the cost of future repairs to the chancel and the cost of insuring against damage by fire (section 31(2)). Subsections (3) and (4) of section 31 merit mention. They provided, in conjunction with section 21 of the 1936 Act and section 1 of the Tithe Act 1839 (2 & 3 Vict c 62), that where the tithe rentcharge and the land on which it was charged were in the same ownership, the rentcharge would be treated as abolished by merger but the land would be subject to the chancel repair liability "to the extent of the value of . . . the rentcharge" (section 1 of the 1839 Act). The chancel repair liability of the lay rector became thereby limited to the value of the rectorial property, the rentcharge, from which his office of lay rector was derived.

104 It is clear that a lay rectorship and liability for chancel repair could attach to a person who had become owner of a part only of the rectorial property. That that is so is implicit in the decision of this House in *Representative Body of the Church in Wales v Tithe Redemption Commission* [1944] AC 228, the "Welsh Commissioners" case. The issue, which arose out of the disestablishment in 1914 of the Welsh Church, was whether tithe rentcharges which, until abolished by the 1936 Act, had become temporally vested in the Commissioner of Church Temporalties in Wales (the Welsh Commissioners) pending their transfer to the University of Wales under provisions in the Welsh Churches Acts 1914 and 1919 had, while so vested, subjected the Welsh Commissioners to chancel repair liability. If the answer was "Yes", Government stock needed to be issued to the appropriate Welsh authority pursuant to the Tithe Act 1936. Their Lordships held that the Welsh Commissioners, so long as they held the tithe rentcharges, were lay impropriators and accordingly under a chancel repair liability. The issue, which applied to a number of parishes in Wales, was examined by reference to a particular parish, Llantwit Major in Glamorgan. Tithe rentcharges valued at £481 7s 11d, representing rectorial property of the parish, were held by the Dean and Chapter of Gloucester. Other tithe rentcharges, valued at £64 4s 2d and also representing rectorial property of the parish were held by a limited company, Plymouth Estates Ltd. Viscount Simon LC said, at p 239, that "Plymouth Estates Ltd . . . plainly and admittedly remain liable for chancel repair". He described the obligation of a rector to repair the chancel as "an obligation imposed by common law": p 240 and see also Lord Wright, at p 247. Lord Porter expressed himself to the same effect. He said, at p 249, "Prima facie, therefore, if the tithe rentcharge gets into the hands of a lay impropriator at anytime it is held

A subject to the liability to repair" and at p 250 that "impropriation exists where the property is in lay hands . . ."

105 But although it must now be regarded as settled law that an individual who becomes the owner of rectorial property of a parish becomes liable for chancel repair, there remain subsidiary issues which, in my opinion, are not settled. For example, the extent of the liability is not settled. Is the liability limited to the value of the rectorial profits the B ownership of which has attracted the office of lay rector and the consequent chancel repair liability or is it unlimited in amount? I have already referred to the effect of section 31(3) and (4) of the Tithe Act 1936 whereby, by reference to section 21 of the 1936 Act and section 1 of the Tithe Act 1839, the chancel repair liability of a lay rector attributable to his ownership of a tithe rentcharge which had merged in the land on which it C was charged was limited to the value of the rentcharge. In *Walwyn v Awberry* (1677) 2 Mod 254 a lay rector brought an action for trespass because the local bishop had sequestered his tithes on account of his failure to obey an admonition to repair the chancel of the parish church. The issue was whether sequestration was an available remedy. It was held that it was not. Atkins J, at p 258 who disagreed on the sequestration point, said that "it was agreed by all, that an impropriator is chargeable with the repairs of D the chancel; but the charge was not personal but in regard of the profits of the impropriation . . ." This suggests that the liability is limited to the amount of the profits. A similar suggestion appears in the Report of the Chancel Repairs Committee presented by the Lord Chancellor to Parliament in May 1930 (Cmd 3571). The chancel repair liability was described in para 4(a) as "an obligation imposed by the Common Law of E England, which annexes to the ownership of the rectory the duty of the rector to maintain the chancel of the church *out of the profits of the rectory*." (Emphasis added.) As to the position where the rectorial property has passed to several owners, the paragraph said "every several owner is, *to the extent of the profits derived by him from his piece of the property*, under the duty of maintaining the chancel." (Emphasis added.)

F 106 In *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, however, the Court of Appeal decided otherwise. The defendants were lay rectors of the parish of Wickhambrook by virtue of ownership of rentcharge of £39 11s 9d per year, a subdivided part of a tithe rentcharge of £120 per year. The cost of the necessary chancel repairs was estimated to be £123 12s 6d. It was this sum that the PCC sought to recover from the defendants. It was proved at trial that the total sum actually received by the G defendants from their ownership of the rentcharge was £50-odd. The trial judge, relying on passages in *Phillimore's Ecclesiastical Law* 2nd ed (1895), held that it was necessary to prove that the impropriator had received tithes or other profits belonging to the rectory sufficient to cover the cost of repair (p 423) and, accordingly, that the PCC's claim failed. He was reversed on appeal. Lord Hanworth MR after examining various reports of *Walwyn v Awberry* expressed the view that the case was an unsatisfactory authority on H which to found a limitation of a lay rector's chancel repair liability (p 437) and concluded that "the liability of a lay impropriator is personal, and is not limited to the amount of the receipts from the tithe". But he held that the defendants had a right of contribution from other owners of parts of the tithe rentcharge. Romer LJ agreed with Lord Hanworth MR, as too did

Eve J who added that "the result . . . does not appear to me to be reasonable or just". A

107 In the "Welsh Commissioners" case [1944] AC 228, 239, Viscount Simon LC, having referred to the chancel repair liability of Plymouth Estates Ltd, said that "It is not necessary for the purposes of the present appeal to discuss the difficult question of the extent of their possible responsibility, or whether *Wickhambrook Parochial Church Council v Croxford* was rightly decided." B

108 Counsel before your Lordships have not argued whether the *Wickhambrook* case was or was not rightly decided. But if Mr and Mrs Wallbank are liable as lay rectors, the question whether their liability should be limited to the profits they have received from the rectorial property may be open to them. The point is certainly still open in this House. C

109 A further point of law that cannot, in my opinion, yet be regarded as settled is whether each and every alienation by a lay rector of impropriatorial assets of the rectory necessarily makes the alienee a co lay rector and liable for chancel repairs. The point arose in *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, 594 where Wynn-Parry J held that the liability to repair the chancel "is not a charge on the rectorial property, but a personal liability imposed on the owner or owners for the time being of the rectorial property". and that "If there is more than one owner, each is severally liable". For reasons which will appear, this is not a point which can have any bearing on the present case but, none the less, the conclusion to which the judge came may be open to question. Is it really the case that on every disposition of any part of former rectorial property, no matter how small and no matter what may be the intentions of the parties, express or implied, regarding the assumption by the transferee of chancel repair liabilities, the transferee becomes willy-nilly by dint of inflexible legal principle a lay impropriator liable to chancel repairs? I doubt it. D E

The conveyancing history of Clanacre

110 At the time of the Inclosure Act 1742 and the Award of 1743, under which the common lands of Aston Cantlow were enclosed, Lord Brooke was the lay impropriator of the rectory of the parish church of Aston Cantlow. A recital to the Act so states. It appears from another recital to the Act that Lord Brooke was the owner of tithes and it appears from the terms of the Award that the impropriated property included glebe land. F

111 Under the Award Lord Brooke was allotted Clanacre. It was described as "one plot lying in Aston Cantlow . . . called Clanacre combining (containing) . . . 52 acres two roods and 21 perches". Details of its boundaries were given so that there could be no doubt as to the identity of what had been allotted. G

112 It is unclear from the extract of the Award contained in the papers before your Lordships on account of what rectorial rights Clanacre was allotted. It may have been allotted on account of Lord Brooke's tithes or it may have been allotted on account of glebe comprised in the common lands that were being enclosed. But it is not in dispute that one way or another Clanacre became, by substitution, rectorial property. Certainly all Lord Brooke's tithes over the common lands were extinguished by the Act and the Award. H

A **113** At some time between 1743 and 1875 Lord Brooke, or his successors, sold Clanacre together with the rest of what later became Glebe Farm. Whether the sale was of all Lord Brooke's impropriated property or of only part of it is not apparent from the papers in evidence in the case.

114 The first readable conveyance dealing with Clanacre is a conveyance of 21 October 1918 under which the vendor, Thomas Wood, conveyed to two purchasers, both with the surname Terry, Glebe Farm and
B its 179 odd acres including the 52-odd Clanacre acres. The habendum to the Conveyance says that the purchasers were to hold the land "in fee simple in equal shares as tenants in common subject primarily and in priority to the other hereditaments charged therewith to the repairs of the Chancel of Aston Church". The "subject to" provision indicates the strong likelihood that the vendor, Thomas Wood, who must have been a lay impropriator, was selling
C part of the rectorial property but retaining other parts. It seems to me unlikely, given the content of this provision, that Mr and Mrs Wallbank could succeed in claiming from Thomas Wood or his successors a contribution towards any chancel repairing liability that rests on them by virtue of their ownership of Clanacre.

115 In 1970 Mr and Mrs Coulton, Mrs Wallbank's parents, purchased Glebe Farm and the 179 acres from Herbert Terry & Sons Ltd, no doubt the
D successors of the 1918 Terry purchasers. Clause 2 of the Conveyance to the Coultons said that the property was conveyed "subject to the liability for the repair of the Chancel of Aston Church . . . so far as the same affects the property hereby conveyed and is still subsisting and capable of being enforced". And under two deeds of gift dated respectively 21 March 1974 and 1 May 1986 Glebe Farm and the bulk of the 179 acres, including all the
E Clanacre fields, were conveyed to Mrs Wallbank by her parents. Mrs Wallbank later placed the property in the joint names of herself and her husband.

116 It is plain from this conveyancing history that Mr and Mrs Wallbank acquired Glebe Farm, including Clanacre, with the knowledge that ownership might carry with it a liability to pay for repairs to the chancel of the parish church.

F

The Chancel Repairs Act 1932

117 The Chancel Repairs Act 1932 was passed in consequence of the inadequacies of enforcement procedure revealed by litigation between Hauxton PCC and a Mr Stevens. Pre 1932 the enforcement of chancel repair liability was primarily a matter for ecclesiastical courts. Proceedings for the
G issue of an admonition requiring the alleged lay rector to carry out the repairs had to be issued in the consistory court. It had been established by dicta in, if not by the ratio of, *Walwyn v Awberry* 2 Mod 254 that ordinary civil law enforcement procedures were not available. If the consistory court issued the admonition and it was not obeyed, the next step would be either a decree of excommunication or a transfer of the proceedings to the High Court in order for proceedings for committal for contempt of court to be
H brought, or both. The unfortunate Mr Stevens, having unsuccessfully disputed his liability, ignored the admonition issued by the consistory court. He ended up in prison for contempt under a committal order made in the King's Bench Division. He obtained his release only on undertaking to carry out the requisite repairs.

118 Such a disproportionate remedy was obviously unsatisfactory and section 2 of the 1932 Act authorised PCCs to serve notices to repair on individuals alleged to be liable for chancel repairs. If such a notice is not complied with, the PCC can commence proceedings in the ordinary courts to recover the sum required to put the chancel in proper repair. The court, if satisfied that the defendant would, but for the 1932 Act, "have been liable to be admonished to repair the chancel by the appropriate ecclesiastical court", can give judgment against the defendant for the sum representing the cost of the necessary repairs. The judgment would be enforceable like any other money judgment. Hence the notices served by the PCC on Mr and Mrs Wallbank and the litigation that followed Mr and Mrs Wallbank's denial of liability.

The litigation

119 The pleadings in the case confirmed that there was a dispute as to Mr and Mrs Wallbank's liability to bear the cost of the chancel repairs. On 29 September 1999 the case came before Master Bragge on what I take to have been a summons for directions. On this summons Master Bragge directed that two preliminary issues be tried. Each related to contentions by Mr and Mrs Wallbank as to why they were not liable. One of these contentions was abandoned at trial. The other is the issue that has found its way to your Lordships' House. But before reciting its terms it is important to notice an important concession made by Mr Wallbank, who appeared in person, and on the basis of which the master directed the trial of the preliminary issues. The concession is recorded in the order in the following terms:

> "And upon the second defendant on his own behalf and on that of the first defendant stating that he agreed and accepted that the defendants (and each of them) as the joint freeholders of Glebe Farm Aston Cantlow Warwickshire are and at all material times have been the lay rector and are personally liable for the repair of the chancel of the church of St John the Baptist Aston Cantlow Warwickshire ('the church') if and to the extent that the liability is enforceable and/or exists by reason of the preliminary issues particularised below."

This concession very greatly reduced the number of issues relating to chancel repair liability that Mr and Mrs Wallbank could raise.

120 The preliminary issue that was, and is, persisted in was subsequently amended and in its amended form is as follows:

> "Whether having regard to the provisions of the European Convention on Human Rights, a co-rector is liable to repair the chancel of the church or otherwise to meet the costs of the said repairs by reason of the provisions of the Chancel Repairs Act 1932 and the common law."

121 The preliminary issue was tried before Ferris J. It was tried after the Human Rights Act 1998 had been passed but before 2 October 2000, the date on which the Act was to come into effect. In paragraph 9 of his judgment Ferris J described the argument addressed to him by counsel for Mr and Mrs Wallbank as having two main elements, namely,

A "(i) that English law is not yet settled in deciding that a lay rector is liable for chancel repairs, at any rate where the rectorial property owned by that lay rector consists of part only of a larger parcel of land allotted under an inclosure award in lieu of tithes or other rectorial property; and (ii) that it should be decided that such a lay rector is not liable because to hold to the contrary would involve a contravention of one or more of the rights declared by the Convention."

B

122 I find some difficulty in reconciling the first argument with Mr Wallbank's concession as recited in Master Bragge's order. That, perhaps, does not matter because Ferris J, following *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417 and *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585 held that it was settled law that an
C individual who had come into ownership of part only of the rectorial property became liable to the full burden of the chancel repair liability. In the Court of Appeal [2002] Ch 51, 58, para 15, Sir Andrew Morritt V-C, relying on the same authorities, agreed and held, in addition, that the liability "is not limited or proportioned to the value or fruits of the benefice: its sole measure is the cost of necessary repairs". This was what had been held in the *Wickhambrook* case, a case by which the Court of Appeal in the
D present case was bound. This is not a point which has been argued before your Lordships in the present appeal nor, in my opinion, is it a point which arises under the preliminary issue. It is a point that may re-emerge if the quantum of the cost of repairs for which the Wallbanks are liable has to be litigated. For the present I want to say no more about it than Viscount Simon LC said in the "Welsh Commissioners" case, namely, that it is a
E difficult question and that whether the *Wickhambrook* case was rightly decided is open to debate at least in this House.

123 As to the *Chivers & Sons Ltd v Air Ministry* point (see paragraph 16 of Sir Andrew Morritt V-C's judgment) it cannot avail the Wallbanks. The 1918 Conveyance plainly intended to make the Terrys, the transferees, co-rectors. Otherwise there would have been no mention of the chancel repair liability.

F **124** As to the second argument for the Wallbanks to which Ferris J referred, the argument based on the 1998 Act, the judge held that there was no breach of article 1 of the First Protocol. The Wallbanks' liability to repair the chancel was an incident of their ownership of the Clanacre fields and the enforcement of that liability by those entitled to enforce it could not be regarded as a deprivation of their possessions. Their
G possessions, he pointed out, were always liable to such enforcement. Ferris J, therefore, answered in the negative the question posed in the preliminary issue.

125 The Court of Appeal disagreed with Ferris J on the 1998 Act point. They held, first, that the PCC was a core "public authority" within the meaning of that expression in section 6 of the Act. Section 6(1) provides that "It is unlawful for a public authority to act in a way which is incompatible
H with a Convention right." They held, alternatively, that the PCC's function in enforcing against the Wallbanks their chancel repair liability was a function "of a public nature". Section 6(3)(b) provides that the expression "public authority" includes "any person certain of whose functions are functions of a public nature" and section 6(5) says that "In relation to a

particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private". A

126 Having reached conclusions under which the PCC's attempts to enforce the chancel repair liability against the Wallbanks were acts of a public authority for section 6 purposes, the question was whether the enforcement was incompatible with a Convention right. The Court of Appeal first addressed itself to article 1 of the First Protocol and held that the liability to defray the cost of chancel repairs was "inescapably" a form of taxation. The reasoning was that "a private individual who has no necessary connection with the church [was being] required by law to pay money to a public authority for its upkeep": para 40. The Court of Appeal identified in Strasbourg jurisprudence a requirement that "the legitimate aim of taxation in the public interest must be pursued by means which are not completely arbitrary or out of all proportion to their purpose" (paragraph 44), held that the liability for chancel repair was a tax which operated entirely arbitrarily "first because the land to which it attaches, now shorn of any connection with the rectory, does not differ relevantly from any other freehold land, and secondly because the liability may arise at any time and be . . . in almost any amount" (para 45), and held that the "tax" accordingly violated article 1 of the First Protocol. B C D

127 The Court of Appeal held, also, that the way in which the chancel repair liability operated discriminated, impermissibly and in breach of article 14, between the Wallbanks, who were subject to the liability, and other landowners in the parish who were not.

128 The following issues therefore arise for decision on this appeal. (1) Is the PCC a "core" public authority for the purposes of section 6 of the 1998 Act? (2) If the PCC is not a core public authority, is its function in enforcing chancel repair liability a function "of a public nature"? (3) If the PCC's enforcement of chancel repair liability is a function of a public nature, does the enforcement infringe article 1 of the First Protocol to the Convention? (4) Or does it infringe article 14 of the Convention? E

Is the PCC a core public authority? F

129 I have had the advantage of reading in advance the opinions of my noble and learned friends, Lord Hope of Craighead and Lord Rodger of Earlsferry. Each has concluded that a PCC is not a core public authority. I am in complete agreement with their reasons for coming to that conclusion and cannot usefully add to them. I, too, would hold that a PCC is not a core public authority. G

Is the enforcement of chancel repair liability a function of a public nature?

130 On this issue my noble and learned friends have come to the conclusion that the nature of enforcement of chancel repair liability is private. I have found this a difficult question but at the end have come to the opposite conclusion. I agree with Lord Hope that the answer to the question, whether an authority, not being a "core" public authority, is, when exercising a particular function, exercising a function of a public nature, must depend upon the facts of the particular case (paragraph 63 of his opinion). The important facts and matters relevant to the question in the present case seem to me, in no particular order of importance, to be the H

following. (1) The parish church is a church of the Church of England, a church by law established. (2) It is a church to which the Anglican public are entitled to have recourse, regardless of whether they are practising members of the church, for marriage, for baptism of their children, for weddings, for funerals and burial, and perhaps for other purposes as well. (3) Members of other denominations, or even other religions, are, if parishioners, entitled to burial in the parish churchyard. (4) The church is, therefore, a public building. It is not a private building from which the public can lawfully be excluded at the whim of the owner. (5) The PCC is corporate and its functions are charitable. Its members have the status of charity trustees. Charitable trusts are public trusts, not private ones. (6) A decision by a PCC to enforce a chancel repairing liability is a decision taken in the interests of the parishioners as a whole. It is not taken in pursuit of any private interests. If it were so taken, it would I think be impeachable by judicial review.

131 Lord Hope has said that the liability of the lay rector to repair the chancel arises as a matter of private law from the ownership of glebe land: paragraph 71 of his opinion. I would respectfully question whether the adjective "private" is apt. In the *Welsh Commissioners* case [1944] AC 228 Sir Walter Monckton KC for the appellants in his submissions to their Lordships commented on the fact that the Welsh Churches Act 1914 had made no express provision for a tribunal to take the place of the consistory court in enforcing chancel repair and put to their Lordships that "Perhaps the Attorney General might have dealt with the matter as a public right": p 234. There was no recorded dissent and I respectfully suggest that Sir Walter's comment was soundly based. The liability of a lay rector is a personal liability arising from his ownership of impropriated property and is imposed by common law (see Viscount Simon LC, at p 240). But obligations imposed by common law are not necessarily private law obligations. Whether they are so or not must depend on those to whom they are owed. The chancel repair obligations are not owed to private individuals. Private individuals cannot release them. Section 52 of the Ecclesiastical Dilapidations Measure 1923 provided a procedure whereby lay rectors liable for chancel repairs could compound their liability and thereby obtain a release from it. The procedure required there to be consultation with the PCC of the parish, the obtaining of approval from the Diocesan Dilapidations Board and payment of the requisite sum to the Diocesan Authority. The sum paid becomes trust money (see subsection (5)). These provisions have an unmistakable public law flavour to them. The chancel repair obligations resting on a lay rector are not, in my opinion, private law obligations.

132 In my opinion, therefore, the question posed under this issue should be answered in the affirmative. It follows, if that is right, that in enforcing chancel repair liability, a PCC must not act in a manner incompatible with a Convention right. Is enforcement of chancel repair liability against Mr and Mrs Wallbank an infringement of their rights under article 1 of the First Protocol?

133 The terms of article 1 have been set out by Lord Hope in paragraph 66 of his opinion. I need not repeat that exercise. The question is whether the enforcement of the chancel repair liability constitutes a deprivation of the lay rector's possessions. The Court of Appeal prayed in

aid the analogy of taxation in order to justify the proposition that the relevant deprivation was of the Wallbanks' funds. It was their personal funds of which they were to be deprived, not Glebe Farm. For my part, although I disagree with the categorisation of the liability as a form of taxation (see paragraph 40 of the Court of Appeal's judgment) I would accept the analysis. The enforcement of the liability is indeed an attack on the Wallbanks' personal funds but it does not on that account infringe article 1 any more than a claim to enforce any other pecuniary liability does so. It is here, perhaps, that the taxation analogy does become relevant. Taxation is a levy imposed by a state, or perhaps by some core public authority authorized by the state to impose the levy, either on the public generally or on some identified section of the public. In *Black's Law Dictionary*, 6th ed (1990), "tax" is described as "a charge by the government", as a pecuniary burden laid upon individuals or property to support the government, and [being] a payment exacted by legislative authority" and whose "essential characteristics . . . are that it is not a voluntary payment or donation but an enforced contribution, exacted pursuant to legislative authority". It may be that the obligation imposed on parishioners by the common law to pay tithes to the rector of the parish could, although not imposed by government or by the legislature, reasonably be regarded as an obligation to pay a tax. But the obligation of the recipient of the tithes to repair the chancel of the parish church could not, in my opinion, be so described. When tithe rentcharge took the place of tithes, the obligation to pay the tithe rentcharge might similarly have been regarded as an obligation of a taxation character. But the obligation to repair the chancel of the church resting on the recipient of the tithe rentcharge could not be so described. It remained a quid pro quo for the receipt of the tithe rentcharge. The substitution under an Inclosure Award of land for tithes could no more have changed the nature of the obligation to repair the church chancel than the substitution of tithe rentcharge for tithes could have done. The taxation analogy drawn by the Court of Appeal is, in my respectful opinion, misplaced.

134 The chancel repair liability satisfies, in my opinion, the requirements of the article 1 exception: it is a liability created by the common law, it operates in the narrow public interest of the parishioners in the parish concerned and in the general public interest in the maintenance of churches. It is created by common law and is subject to the incidents attached to it by common law. And in the case of Mr and Mrs Wallbank they acquired the rectorial property and became lay rectors with full knowledge of the potential liability for chancel repair that that acquisition would carry with it. I can see no infringement of (or incompatibility with) article 1 produced by the actions of the PCC in enforcing that liability.

135 Nor, in my opinion, do Mr and Mrs Wallbank have any case of infringement of article 14. The comparators for article 14 purposes cannot possibly be persons who are not lay rectors. A person who is sued for £1,000 that he owes is not discriminated against for article 14 purposes because people who do not owe £1,000 are not similarly sued. A person who builds in breach of planning permission and has proceedings taken against him by the local planning authority is not discriminated against for article 14 purposes because a person who builds and has obtained planning permission is not sued. The comparators are not apt. The apt comparator in

the present case would be a co-lay rector who was liable for chancel repairs to the Aston Cantlow church but on whom no 1932 Act notice had been served. There is no case here of article 14 discrimination.

136 For these reasons I would allow the appeal and restore the declaration and order made by Ferris J.

137 A final point before your Lordships was whether, if the PCC's enforcement of the chancel repair liability had constituted an infringement of Mr and Mrs Wallbank's Convention rights, the PCC could have relied on section 6(2)(a) or (b) of the 1998 Act. As to (a), it was contended that, as a result of section 2 of the 1932 Act, the PCC could not have done otherwise than enforce the chancel repair liability. In my opinion, this contention could not be sustained. Section 2 confers a power. It does not impose a mandatory duty. The PCC could have decided not to enforce the repairing obligation. They could have so decided for a number of different reasons which, in particular factual situations, might have had weight. They might, for example, have recommended the deconsecration of the church and its sale for conversion into a dwelling. They might have taken into account excessive hardship to Mr and Mrs Wallbank in having to find £95,000. Trustees are not always obliged to be Scrooge. Section 2 is not, in my opinion, a provision of primary legislation capable of engaging section 6(2)(a) of the 1998 Act. As to (b), it is not section 2 of the 1932 Act that produces the alleged incompatibility with Convention rights. Section 2 merely provides enforcement machinery for the obligation created by the common law. If section 2 had never been enacted the allegedly Convention infringing obligation to pay for chancel repairs would still have been present. None the less, if the imposition by the common law of the obligation constitutes an infringement of Convention rights so, too, the use of section 2 for the purpose of enforcement would constitute an infringement. So I respectfully agree with my noble and learned friends, Lord Nicholls of Birkenhead and Lord Hobhouse of Woodborough, that the PCC would be entitled to rely on section 6(2)(b).

LORD RODGER OF EARLSFERRY

138 My Lords, in 1986 Mrs Gail Wallbank became the owner of the freehold of Glebe Farm near the village of Aston Cantlow in Warwickshire. Four years later she conveyed the property into the joint names of herself and her husband. As owners of Glebe Farm Mr and Mrs Wallbank are the lay rectors or impropriators of the parish church and, as such, potentially liable to pay the cost of repairs to the chancel. By 1990 the chancel was in disrepair. At that time the Parochial Church Council ("the PCC") did not know about the conveyance into joint names and accordingly it simply asked Mrs Wallbank to pay for the repairs. She disputed the liability. In 1994 the PCC, as the responsible authority, served notice on Mrs Wallbank under section 2(1) of the Chancel Repairs Act 1936, calling on her to repair the chancel. When she still refused to do so, the PCC began these proceedings under section 2(2) of the 1936 Act to recover over £95,000, the estimated cost of the repairs. Subsequently, the PCC joined Mr Wallbank as a defendant.

139 My noble and learned friend, Lord Scott of Foscote, has described the origins and development of the liability for chancel repairs as well as the way in which that liability attaches to the owners of Glebe Farm. The law as

it applies today can scarcely be regarded as satisfactory and may well cause real hardship to lay rectors who are called on to pay the cost of repairs to the chancel. Not surprisingly, the Law Commission have made proposals for the abolition of the liability over a period of time: Liability for Chancel Repairs (Law Com No 152, (1985)). Not altogether surprisingly either, Parliament has not yet acted on those proposals since abolition without compensation would cause significant financial harm to many ancient parish churches throughout England. This case highlights both aspects of the problem.

140 Mr and Mrs Wallbank do not now dispute that, absent the Human Rights Act 1998, they would be liable to pay the reasonable cost of the necessary repairs to the chancel. They defend the proceedings, however, on the basis that the PCC is a "public authority" which has acted unlawfully in terms of section 6(1) of the 1998 Act by requiring them to pay the sum in question and so interfering with their peaceful enjoyment of their possessions in contravention of article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms.

141 The demand for payment was made and the action begun long before the 1998 Act was even thought of. And indeed Ferris J heard argument and delivered judgment at first instance some months before the Act came into force. By the time of the hearing in the Court of Appeal the 1998 Act was in force and the PCC conceded that, by virtue of sections 7(1)(b) and 22(4), Mr and Mrs Wallbank were entitled to rely on their Convention right. In their judgment delivered by Sir Andrew Morritt V-C, the Court of Appeal accepted the concession: [2002] Ch 51, 56, para 7. In its written case in this House the PCC indicated an intention to withdraw the concession. When the appeal opened, however, Mr George indicated that he did not intend to argue the point. This may have been, in part at least, because the Church authorities are anxious to have the substantial issue resolved. In these circumstances the House heard no argument on what the cases show to be a difficult area of the law. I therefore prefer to express no view on the point.

142 Differing from the decision of Ferris J, the Court of Appeal disposed of the case by holding that the liability of Mr and Mrs Wallbank, as lay rectors, to meet the cost of the chancel repairs was unenforceable by reason of the 1998 Act. In that way the Court of Appeal lifted the burden from lay rectors like Mr and Mrs Wallbank, albeit at the expense of PCCs like the one at Aston Cantlow. The question for the House is whether the Court of Appeal were right to take this momentous step on the basis of the 1998 Act.

143 In reaching their conclusion the Court of Appeal held that the PCC was indeed a "public authority" in terms of section 6 of the 1998 Act. While a number of other issues were argued in the hearing of the appeal to your Lordships' House, none of them arises unless the PCC is indeed to be regarded as a public authority for this purpose.

144 Section 6 provides, inter alia:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right."
>
> "(3) In this section 'public authority' includes . . . (b) any person certain of whose functions are functions of a public nature . . ."
>
> "(5) In relation to a particular act, a person is not a public authority by virtue only of subsection 3(b) if the nature of the act is private."

The use of the word "includes" in subsection (3) shows that there are public authorities other than persons only certain of whose functions are of a public nature. So there must be persons who are public authorities because all their functions are of a public nature. These are sometimes referred to as "core" public authorities, as opposed to "hybrid" authorities, only certain of whose functions are public and some of whose acts may be private in nature. In view of my overall conclusion on the appeal I have not found it necessary on this occasion to explore the significance of the distinction between the two kinds of public authorities.

145 In deciding that the PCC was to be regarded as a public authority, the Court of Appeal first noted that in the area of judicial review the cases at present draw a conceptual line between functions of public governance and functions of mutual governance. But the Court of Appeal could detect no surviving element of mutuality or mutual governance as between the impropriator and the church in the modern liability for chancel repairs: the relationship in which the function arose was created by a rule of law and a state of fact which were independent of the volition of either of them: [2002] Ch 51, 62–63, para 34. In the hearing before the House Mr George did not argue the contrary. The Court of Appeal continued, at p 63, para 35:

> "In our judgment it is inescapable, in these circumstances, that a PCC is a public authority. It is an authority in the sense that it possesses powers which private individuals do not possess to determine how others should act. Thus, in particular, its notice to repair has statutory force. It is public in the sense that it is created and empowered by law; that it forms part of the church by law established; and that its functions include the enforcement through the courts of a common law liability to maintain its chancels resting upon persons who need not be members of the church. If this were to be incorrect, the PCC would nevertheless, and for the same reasons, be a legal person certain of whose functions, chancel repairs among them, are functions of a public nature. It follows on either basis by virtue of section 6 that its acts, to be lawful, must be compatible with the rights set out in Schedule 1 to the Human Rights Act 1998."

The Court of Appeal's main conclusion therefore was that the PCC was a core public authority. Alternatively, it was a hybrid authority, some of whose functions were public—among them enforcing the impropriators' obligation to pay for chancel repairs.

146 There is no doubt that, in terms of section 2(1) of the Chancel Repairs Act 1932, the PCC is an authority—more precisely, "the responsible authority". For present purposes, however, the question is whether the PCC should be regarded as a public authority in terms of section 6. Parliament has chosen to use a composite phrase "public authority". There are therefore distinct dangers in interpreting it by breaking it down and examining the two components separately. Be that as it may, the Court of Appeal considered each of the two elements in turn.

147 They first held that the PCC was an "authority" for purposes of section 6 because it had powers which private individuals do not possess to determine how others should act—the relevant example being its power to serve a notice to repair which has statutory force. That is a somewhat imprecise criterion for identifying an authority, however. When a police officer arrests an offender, his act is that of a public "authority" irrespective

of whether or not the arrest is one that a private citizen could have effected. Moreover Parliament can, if it wishes, invest private individuals with quite remarkable powers over their fellow citizens. For instance, section 391 of the Burgh Police (Scotland) Act 1892 (55 & 56 Vict c 55), now repealed, provided:

> "It shall be lawful for any householder, personally or by his servant, or by a constable of police, to require any street musician or singer to depart from the neighbourhood of the house of such householder; and every person who shall continue to sound or play any instrument, or sing in any street, at any time after being so required to depart, shall be liable to a penalty not exceeding twenty shillings."

A paterfamilias standing in evening dress at the entrance to his New Town residence could address an order to an organ-grinder to depart from the vicinity, or his butler could issue it from the top of the area steps. In either event, the organ-grinder would commit an offence under the section if he continued to play in the street. But if, instead, they had summoned a constable who had issued the same instruction with exactly the same effect, he would unquestionably have been an "authority"—and indeed a "public authority". The existence or non-existence of the equivalent statutory power in the householder and his servant would not be germane to the constable's status. So the fact that no individual possesses the power to issue a statutory repair notice with specific effects on the lay rector cannot in itself be sufficient to show that the PCC is to be regarded as an authority for the purposes of section 6.

148 The Court of Appeal drew attention to three features which they thought pointed to the PCC being a "public" authority for purposes of section 6: the PCC is created and empowered by law; it forms part of the church by law established and its functions include the enforcement through the courts of a common law liability to maintain the chancel resting upon persons who need not be members of the Church.

149 It is necessary to look a little more closely at the Court of Appeal's observation that the PCC "is created and empowered by law". The origins of PCCs can be traced back to the movement that began in the 19th century for greater self-government and better representation of the laity in the Church of England. Part of the problem was that, while the Convocations of Canterbury and York could pass canons which were binding on the clergy, any wider legislation had to be by Act of Parliament and Parliament passed only relatively few of the Acts for which the Church asked. In 1916 a special committee set up to look into the question recommended the formation of a Church Council with power to legislate on ecclesiastical matters. Eventually, after further work by another committee, the necessary scheme was approved by the Convocations of Canterbury and York. Both Convocations adopted identical addresses which were presented to King George V on 10 May 1919. The text is to be found in the Acts of the Upper and Lower Houses, Convocation of Canterbury, 6 May 1919, Upper House, *Official Year Book of the Church of England 1920*, p 193. Attached to the addresses was an appendix (*Official Year Book of the Church of England 1921*, p 16) setting out the constitution of what was now called the National Assembly of the Church of England. Paragraph 17 of the constitution provided that, before entering on any

other legislative business, the Assembly should make further provision for the self-government of the Church by passing through the Assembly two measures, the second being to confer "upon the Parochial Church Councils constituted under the Schedule to this Constitution such powers as the Assembly may determine."

150 The necessary machinery for giving Assembly measures legal effect was created later that year when Parliament passed the Church of England Assembly (Powers) Act 1919. Under section 4, measures passed by the Assembly and submitted to the Ecclesiastical Committee of Parliament would, on being approved and receiving the Royal Assent, have the force and effect of an Act of Parliament. In accordance with that procedure, the National Assembly proceeded to pass the Parochial Church Councils (Powers) Measure 1921. The Preamble duly records that the measure was passed to fulfil a requirement of the constitution of the National Assembly to

> "make further provision for the self-government of the Church by passing through the Assembly Measures inter alia for conferring on the Parochial Church Councils constituted under the Schedule to such Constitution such powers as the Assembly may determine."

151 As the Preamble shows, just like the National Assembly itself, the PCCs were actually constituted when the scheme, comprising the constitution of the National Assembly and the schedule of rules for the representation of the laity, was approved by the Convocations of Canterbury and York. The function of the 1921 Measure was, accordingly, not to constitute or "create" the PCCs but to confer powers on them. The same division survives today. The rules for the representation of the laity, including those relating to PCCs, are to be found in Schedule 3 to the Synodical Government Measure 1969, while the powers of PCCs are now in the Parochial Church Council (Powers) Measure 1956. Like section 3 of the 1921 Measure, section 3 of the 1956 Measure provides for the PCC to be a body corporate. Section 2 of the 1921 Measure made it "the primary duty of the council in every parish to co-operate with the incumbent in the initiation and development of Church work both within the parish and outside", while section 2 of the 1956 Measure, which was inserted by section 6 of the 1969 Measure, confers rather more elaborate general functions on the council. I come back to that section shortly.

152 On closer examination, therefore, the process by which the PCCs were constituted and received their powers is really very different from the way in which a public body such as the Equal Opportunities Commission is created and given its powers by statute. In a case of that kind, the fact that the body owes both its existence and its powers to statute may well indicate that it has been called into existence to carry out some function that relates to the government of the country in a broad sense. By contrast, the PCCs were not constituted by statute but by the Church. They then became bodies corporate and received their powers not by virtue of an Act of Parliament but by virtue of an Assembly Measure, having the force and effect of an Act of Parliament. These factors suggest that, in reality, PCCs were constituted by the Church to carry out functions to be determined by the National Assembly, later the General Synod, of the Church.

153 The Court of Appeal pointed next to the PCC being part of the Church by law established. In his submissions on behalf of Mr and Mrs Wallbank Mr Beloff embellished this argument. The Church of England—with Her Majesty the Queen at its head, with bishops appointed by the Queen on the recommendation of the Prime Minister, with the legislation of General Synod receiving the Royal Assent and having the force and effect of an Act of Parliament and with the civil power being available to enforce the judgments of its courts—was so woven into the fabric of the state that it should be regarded as a core public authority for purposes of section 6. Then, since "the parish is the basic building block of the church" (*Hill, Ecclesiastical Law*, 2nd ed, p 74), the PCC too should be regarded as a core public authority—whatever might be its precise functions in terms of section 2 of the 1956 Measure.

154 I would reject that argument. In this case the House is not concerned with any theological doctrine of establishment such as gave rise to one of the issues in *General Assembly of the Free Church of Scotland v Lord Overtoun* [1904] AC 515. Mr Beloff's argument centred, rather, on the general position of the Church of England in English law. The juridical nature of the Church is, notoriously, somewhat amorphous. The Church has been described as "an organised operative institution" or as "the quasi corporate institution which carries on the religious work" of the Church of England: *In re Barnes; Simpson v Barnes (Note)* [1930] 2 Ch 80, 81. Whether or not such an institution itself could ever count as a public authority in terms of section 6, I see no basis upon which a body within the Church, which would not otherwise be regarded as a public authority, could be impliedly invested with that character simply by reason of being part of the wider institution.

155 On the other hand, the 1956 Measure passed by the National Assembly of the Church casts light on the nature of the functions of a PCC. Under section 2(1) its duty is to consult with the minister on matters of general concern and importance to the parish. By section 2(2) the PCC's general functions include:

> "(a) co-operation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical; (b) the consideration and discussions of matters concerning the Church of England or any other matters of religious or public interest, but not the declaration of the doctrine of the Church on any question; (c) making known and putting into effect any provision made by the diocesan synod or the deanery synod, but without prejudice to the powers of the council on any particular matter; (d) giving advice to the diocesan synod and the deanery synod on any matter referred to the council; (e) raising such matters as the council consider appropriate with the diocesan synod or deanery synod."

In addition to these general functions, by virtue of section 4 the PCC is given powers, duties and liabilities which formerly vested in the churchwardens. These focus very much on the parish church and its affairs. In particular, under section 4(1)(b) the PCC has powers, duties and liabilities with respect to the care, maintenance, preservation and insurance of the fabric of the church and of its goods and ornaments. By section 7(ii) the PCC has power

A to levy and collect a voluntary church rate for any purpose connected with the affairs of the parish church.

156 The key to the role of the PCC lies in the first of its general functions: co-operation with the minister in promoting in the parish the whole mission of the Church. Its other more particular functions are to be seen as ways of carrying out this general function. The mission of the Church is a *religious* mission, distinct from the secular mission of B government, whether central or local. Founding on scriptural and other recognised authority, the Church seeks to serve the purposes of God, not those of the government carried on by the modern equivalents of Caesar and his proconsuls. This is true even though the Church of England has certain important links with the state. Those links, which do not include any funding of the Church by the government, give the Church a unique position C but they do not mean that it is a department of state: *Marshall v Graham* [1907] 2 KB 112, 126, per Phillimore LJ. In so far as the ties are intended to assist the Church, it is to accomplish the Church's own mission, not the aims and objectives of the Government of the United Kingdom. The PCC exists to carry forward the Church's mission at the local level.

157 Against that background the adjective "private" is not perhaps the one that springs most readily to mind to describe the functions of a PCC in D the Church of England either generally or as compared, for instance, with those of a church council in the Methodist Church. It might therefore be tempting to conclude that the PCC's functions must be "public" and that the PCC must itself be a "public" authority for the purposes of the 1998 Act. At this point it becomes necessary to look more closely at the meaning of the composite expression "public authority" in section 6. This in turn takes one E back behind the Act to the Convention itself.

158 The "High Contracting Parties" to the Convention were "the governments signatory" to the Convention, more particularly "the governments of European countries" having certain common characteristics. In the fourth recital to the Convention they reaffirmed their profound belief in those rights and freedoms which are the foundation of justice and peace in the world and which are best maintained by a common F understanding and observance of the human rights upon which they depend. The governments gave concrete expression to the beliefs and aspirations recorded in the recitals by undertaking in article 1 to secure to everyone within their jurisdiction the rights and freedoms set out in section 1 of the Convention. It can reasonably be inferred from the terms of the recitals and article 1 that the freedoms, and the rights on which they depend, relate to the G powers and responsibilities of the governments which are parties to the Convention.

159 That inference is confirmed by article 34 which provides that the European Court of Human Rights ("the European Court")

> "may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a H violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

I respectfully agree with the Court of Appeal [2002] Ch 51, 62, para 33, that, taken together, articles 1 and 34 assume the existence of a state which stands

distinct from persons, groups and non-governmental organisations. I would go further: the reference in article 1 to the rights and freedoms defined in section 1 of the Convention only makes sense if the state in question is exercising a range of functions which are, in a broad sense, governmental—and to which the rights and freedoms in section 1 can therefore relate. Long ago, the functions of government were usually confined to defending the realm and keeping the peace. Nowadays, in addition, they commonly cover such matters as education, health and the environment. The exact range of governmental power will vary, of course, from state to state, depending on the history of the particular state and the political philosophy of its government. Similarly, the distribution of governmental power will depend on the constitutional arrangements of the individual states. In some, the central government will retain most functions, in others power will be shared on some kind of federal system, while, in most at least, some functions will be allotted to local or community bodies. Irrespective of these and other possible permutations, under article 1 of the Convention the states parties are responsible for securing that all bodies exercising governmental power within their jurisdiction respect the relevant rights and freedoms. This approach underlies the admissibility decision of the Fourth Chamber of the European Court in *Ayuntamiento de Mula v Spain* Reports of Judgments and Decisions 2001-I, p 531.

160 The obligation under article 1 has bound the United Kingdom ever since the Convention came into force. Since 1966 individuals have been able to bring proceedings in Strasbourg to ensure that the United Kingdom complies with that obligation. Prima facie, therefore, when Parliament enacted the 1998 Act "to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights", the intention was to make provision in our domestic law to ensure that the bodies carrying out the functions of government in the United Kingdom observed the rights and freedoms set out in the Convention. Parliament chose to bring this about by enacting inter alia section 6(1), which makes it unlawful for "a public authority" to act in a way that is incompatible with a Convention right. A purposive construction of that section accordingly indicates that the essential characteristic of a public authority is that it carries out a function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs.

161 Mr Beloff accepted, of course, that, in order to achieve the government's declared aim of bringing rights home, in the legislation which it placed before Parliament the term "public authority" must have been intended to include all bodies that carry out a function of government that would engage the responsibility of the United Kingdom in Strasbourg. But, he said, that was simply a minimum. The government and, more particularly, Parliament could well have intended to go further and to include other public bodies, even though their acts would not engage the international responsibility of the United Kingdom. It would therefore be wrong to limit the scope of "public authority" in section 6 to bodies exercising a governmental function of the state, however loosely defined. Mr Beloff could not point to any authoritative statement showing that Parliament had intended the 1998 Act to have this wider effect. But he argued that, if Parliament had meant to limit the legislation to bodies carrying out a function of government, the natural thing would have been

to use some such term as "a governmental authority" or "a governmental organisation"—which would mirror the term "non-governmental organisation" to be found in article 34 of the Convention. That was how the draftsman of the Act had proceeded in section 7(7) when he provided that a person was to be a "victim" of an unlawful act for the purposes of the section only if he would have been a victim for the purposes of article 34 in proceedings before the European Court in respect of that act. Not only had the draftsman not adopted a similar approach in section 6(1): when an attempt had been made to amend the Bill so as to align the domestic test with the test adopted by the European Court in interpreting the Convention, the government had opposed it and the amendment had failed.

162 I see no proper basis for referring to Hansard as an aid to construing the term "public authority" in section 6. But it appears that, in advancing this particular argument, Mr Beloff had in mind the amendments moved by Mr Edward Leigh MP and discussed by the Home Secretary during the Commons committee stage of the Bill: Hansard (HC Debates), 7 June 1998, cols 400, 418–425 and 432–433. Since the Convention is concerned with the obligations of the governments of the states parties, it does not define the domestic bodies whose acts engage the liability of those governments. Moreover, the jurisprudence of the Strasbourg court on the point is not extensive. A definition of the relevant public bodies in the 1998 Act by reference to the approach of the Strasbourg court would therefore not have been particularly workable. Keith J made much the same point in relation to the Hong Kong Bill of Rights in *Hong Kong Polytechnic University v Next Magazine Publishing Ltd* [1996] 2 HKLR 260, 264B–F. According to the Home Secretary, because of these problems and in an attempt to replicate the situation under the Convention, the government chose the term "public authority" to indicate that the body concerned was to be sufficiently public to engage the responsibility of the United Kingdom. If—contrary to my view—the House could properly derive assistance from the fate of these amendments, it would lie in the confirmation that, in promoting the Bill, the government intended to give people rights in domestic law against the same bodies as would engage the liability of the United Kingdom before the Strasbourg court.

163 In the present case the question therefore comes to be whether a PCC is a public authority in the sense that it carries out, either generally or on the relevant occasion, the kind of public function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs. It so happens that there are two cases from Strasbourg dealing with the position of churches in this regard. They suggest that, in general, church authorities should not be treated as public authorities in this sense.

164 The first case is *Holy Monasteries v Greece* 20 EHRR 1. On the basis of various provisions of the Convention, including article 1 of the First Protocol, the applicant monasteries challenged a Greek statute which changed the rules of administration of their patrimony and provided for the transfer of a large part of their estate to the Greek state. The links between the Greek Orthodox Church and the Greek state were particularly close. In Greek law the Holy Monasteries were public law entities that could be founded, merged or dissolved by means of a decree of the President of

Greece. Another public law entity, under the supervision of the ministry of education and religious affairs, was responsible for managing the property belonging to the monasteries. In these circumstances the Greek Government stated, as a preliminary objection to the Holy Monasteries' application, that they were not a non-governmental organisation which could make an application as a victim in terms of article 25(1) (now article 34) of the Convention. Repelling that objection, the European Court held, at p 41, para 49:

> "Like the Commission in its admissibility decision, the court notes at the outset that the applicant monasteries do not exercise governmental powers. Section 39(1) of the Charter of the Greek Church describes the monasteries as ascetic religious institutions. Their objectives—essentially ecclesiastical and spiritual ones, but also cultural and social ones in some cases—are not such as to enable them to be classed with governmental organisations established for public administration purposes. From the classification as public law entities it may be inferred only that the legislature—on account of the special links between the monasteries and the state—wished to afford them the same legal protection vis-à-vis third parties as was accorded to other public law entities. Furthermore, the monastery councils' only power consists in making rules concerning the organisation and furtherance of spiritual life and the internal administration and furtherance of spiritual life and the internal administration of each monastery. The monasteries come under the spiritual supervision of the local archbishop, not under the supervision of the state, and they are accordingly entities distinct from the state, of which they are completely independent. The applicant monasteries are therefore to be regarded as non-governmental organisations within the meaning of article 25 of the Convention."

While the positions of the Holy Monasteries and of a PCC are scarcely comparable, the judgment of the European Court is important for its reasoning that the nature of the objectives of the monasteries was not such that they could be classed with "governmental organisations established for public administration purposes". The court also attached importance to the fact that the monasteries came under the spiritual supervision of the local archbishop rather than under the supervision of the state, as an indication that they were entities distinct from the state.

165 In *Hautanemi v Sweden* 22 EHRR CD 156 the applicants were members of a parish of the Church of Sweden who complained of a violation of article 9 of the Convention because the Assembly of the Church of Sweden had prohibited the use of the liturgy of the Finnish Evangelical-Lutheran Church in their parish. Under reference to the judgment in the *Holy Monasteries* case, the Commission recalled article 25(1) (now article 34) of the Convention and observed, at p 155, that

> "at the relevant time the Church of Sweden and its member parishes were to be regarded as corporations of public law. Since these religious bodies cannot be considered to have been exercising governmental powers, the Church of Sweden and notably the applicant parish can nevertheless be regarded as 'non-governmental organisations' within the meaning of article 25(1)."

A Having held that, as members of the parish, the applicants could be regarded as victims in terms of article 25(1), the Commission added, at p 156:

> "The Commission has just found that, for the purposes of article 25 of the Convention, the Church of Sweden and its member parishes are to be regarded as 'non-governmental organisations'. It follows that the respondent state cannot be held responsible for the alleged violation of
B the applicants' freedom of religion resulting from the decision of the Church Assembly . . . There has thus been no State interference with that freedom."

166 In the light of these decisions what matters is that the PCC's general function is to carry out the religious mission of the Church in the parish, rather than to exercise any governmental power. Moreover, the PCC is not
C in any sense under the supervision of the state: under section 9 of the 1956 Measure it is the bishop who has certain powers in relation to the PCC's activities. In these circumstances the fact that the PCC is constituted as a body corporate under the 1956 Measure is irrelevant. For these reasons, in respectful disagreement with the Court of Appeal, I consider that the PCC is not a core public authority for purposes of section 6 of the Act.

D **167** This conclusion finds further support in the treatment of certain churches in relation to article 19(4) of the German Constitution or Grundgesetz. That article provides that, if any person's rights are infringed by "public power" ("öffentliche Gewalt"), recourse to the courts is open to him. The history of relations between Church and State in Germany is, of course, very different from the history of that relationship in any part of the United Kingdom. In Germany it has culminated in a
E declaration that there is to be no State Church (article 137(1) of the Weimar Constitution incorporated by article 140 of the Constitution). This important difference must not be overlooked. Nevertheless, as permitted by article 137, certain churches are constituted as public law corporations. In general, domestic public law entities are regarded as exercising public power in terms of article 19(4), whereas natural persons and private law associations are not. Despite this, because of their
F particular (religious) mission which does not derive from the state, the churches that are public law corporations are treated differently from other public law corporations that are organically integrated into the state. "Church power is indeed public, but not state power" ("ist kirchliche Gewalt zwar öffentliche, aber nicht staatliche Gewalt"): BVerwGE 18, 385, 386–387; BVerwGE 25, 226, 228–229. So, in relation to these
G churches, the Administrative Court interprets the phrase "public power" in article 19(4) as being equivalent to "state power". Since within their own sphere the churches do not exercise state power, even if they exercise public power, the article 19(4) guarantee does not apply. Despite the rather different context, this interpretation of "public power" tends to confirm the interpretation of "public authority" in section 6 which I prefer. Moreover, due allowance having been made for the particular position of
H the Church of England, the reasoning of the Administrative Court also tends to confirm that the mere fact that section 3 of the 1956 Measure makes every PCC a body corporate does not carry with it any necessary implication that the PCC should, on that account alone, be regarded as a public authority for the purposes of section 6.

168 Of course, if the churches in Germany go outside their own unique sphere and undertake state functions, for example, in running schools, the constitutional guarantee in article 19(4) applies to them: BVerwGE 18, 385, 387–388; BVerwGE 25, 226, 229. In much the same way, for example, a Church of England body which was entrusted, as part of its responsibilities, with running a school or other educational establishment might find that it had stepped over into the sphere of governmental functions and was, in that respect, to be regarded as a public authority for purposes of section 6(1).

169 The Court of Appeal did indeed consider that, even if they were wrong in holding that PCCs are core public authorities, a PCC should be regarded as a public authority when enforcing the common law obligation of lay rectors, who need not be members of the Church, to maintain the chancel of the parish church. Mr Beloff reinforced this argument by pointing both to the duty of the minister under the relevant canons to hold certain services in the parish church and to the widespread belief, whether particularly well-founded or not, that any resident of a parish was entitled to be married in the church. These were indications of the public role of the parish church and, accordingly, of the public nature of the PCC's function in relation to the maintenance of the fabric of the church so that the minister could perform those public duties there. Enforcing the lay rectors' obligation was part of that public function.

170 For the most part, in performing his duties and conducting the prescribed services, the minister is simply carrying out part of the mission of the Church, not any governmental function of the state. On the other hand, when in the course of his pastoral duties the minister marries a couple in the parish church, he may be carrying out a governmental function in a broad sense and so may be regarded as a public authority for purposes of the 1998 Act. In performing its duties in relation to the maintenance of the fabric of the church so that services may take place there, the PCC is doing its part to help the minister discharge his pastoral and evangelistic duties. The PCC may be acting in the public interest, in a general sense, but it is still carrying out a church rather than a governmental function. That remains the case even although, from time to time, when performing one of his pastoral duties—conducting a marriage service in the church—the minister himself may act as a public authority.

171 Moreover, the fact that, as part of its responsibilities in relation to the maintenance of the church fabric, the PCC may have to enforce a common law obligation against a lay rector who happens not to be a member of the Church can hardly transform the PCC into a public authority. Indeed, the very term "lay rector" is a reminder that the common law obligation which the PCC is enforcing is the last remnant of a set of more complex rights and liabilities that were ecclesiastical in origin. As Ferris J held, at para 23 of his judgment, today the liability to repair the chancel can be regarded as one of the incidents of ownership of rectorial property:

> "It is, of course, an unusual incident because it does not amount to a charge on the land, is not limited to the value of the land and imposes a personal liability on the owner of the land. But in principle I do not find it possible to distinguish it from the liability which would attach to the

owner of land which is purchased subject to a mortgage, restrictive covenant or other incumbrance created by a predecessor in title."

I respectfully agree. There is nothing in the nature of the obligation itself, or in the means or purpose of its enforcement, that would lead to the conclusion that the PCC of Aston Cantlow is exercising a governmental function, however broadly defined, when it enforces the lay rectors' obligation to pay for chancel repairs. Therefore, even when it is enforcing that obligation, the PCC is not to be regarded as a public authority for the purposes of section 6 of the 1998 Act.

172 I should add that I agree with the observations of my noble and learned friend, Lord Nicholls of Birkenhead, in the final paragraph of his speech.

173 For these reasons I would allow the appeal and make the order proposed by Lord Scott of Foscote.

Appeal allowed.
Defendants to pay plaintiff's costs before Ferris J and the Court of Appeal.
No order as to costs in the House of Lords.

Solicitors: Winckworth Sherwood for Rotherham & Co, Coventry; Eddowes Perry & Osbourne, Sutton Coldfield.

S H

The Law Reports

Queen's Bench Division

Court of Appeal

Regina (Johnson and others) *v* Havering London Borough Council (Secretary of State for Constitutional Affairs and another intervening)

[2007] EWCA Civ 26

YL *v* Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)

[2007] EWCA Civ 27

2007 Jan 11, 12; 30 — Sir Anthony Clarke MR, Buxton and Dyson LJJ

Human rights — Public authority — Functions of public nature — Local authority under duty to provide accommodation for claimants — Local authority arranging for accommodation to be provided by private care home — Whether private care home exercising functions of public nature in providing accommodation — Whether transfer of local authority care home to private organisation unlawfully depriving residents of Convention rights — National Assistance Act 1948 (11 & 12 Geo 6, c 29), ss 21, 26 (as amended by Local Government Act 1972 (c 70), s 195(6), Sch 23, para 2(1), Children Act 1989 (c 41), s 108(5), Sch 13, para 11(1), National Health Service and Community Care Act 1990 (c 19), s 42(1) and as substituted by Community Care (Residential Accommodation) Act 1992 (c 49), s 1(1)) — Human Rights Act 1998 (c 42), s 6(1)(3)(b)

In the first case the elderly claimants received residential care pursuant to section 21 of the National Assistance Act 1948[1] at care homes owned and run by their local authority. The local authority decided to transfer two of the homes as going concerns to the private sector and to close two others, after the residents had

[1] National Assistance Act 1948, s 21, as amended: "(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing— (a) residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them . . . (2) In making any such arrangements a local authority shall have regard to the welfare of all persons for whom accommodation is provided . . ."

S 26, as substituted: "(1) . . . arrangements under section 21 of this Act may include arrangements made with a voluntary organisation or with any other person who is not a local authority where—(a) that organisation or person manages premises which provide for reward accommodation falling within subsection (1)(a) . . . of that section, and (b) the arrangements are for the provision of such accommodation in those premises."

been suitably accommodated elsewhere, under arrangements made pursuant to section 26 of the 1948 Act. The claimants sought judicial review of the decision on the ground that such closure and transfer to the private sector would unlawfully deprive residents of effective protection for their human rights under, in particular, articles 3 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, contrary to section 6(1) of the Human Rights Act 1998[2]. In dismissing the claim, the judge held (i) that he was bound by Court of Appeal authority to hold that a private care home, in providing accommodation under such arrangements, did not exercise "functions of a public nature" within section 6(3)(b) of the 1998 Act and thus was not a "public authority" within section 6(1) against whom the residents could bring a direct action for breach of their Convention rights, but (ii) that the proposed transfer was not incompatible with the residents' Convention rights since they would continue to retain those rights as against the local authority even after transfer. The claimants appealed against both of the judge's conclusions. The Secretary of State for Constitutional Affairs, intervening, supported the claimants' contention with respect to conclusion (i) that the Court of Appeal authority was wrongly decided or no longer binding precedent, being inconsistent with subsequent guidance of the House of Lords.

In the second case the elderly claimant, YL, was placed by her local authority in a private care home under arrangements made pursuant to sections 21 and 26 of the 1948 Act. The owners of the care home subsequently sought to terminate the contract for her care and remove her from the home. YL, by the Official Solicitor as her litigation friend, sought declarations in the Family Division under CPR Pt 8 that it was in her best interest not to be removed, that the care home, in providing accommodation and care for her, was exercising public functions under section 6 of the 1998 Act, and that in removing her the care home would be acting incompatibly with her Convention rights. On the hearing of a preliminary issue the judge concluded that he was bound by the same Court of Appeal authority to hold that the care home, in providing care and accommodation for YL, was not exercising a public function for the purposes of section 6(3)(b) of the 1998 Act. YL appealed. The Secretary of State, intervening, supported her appeal.

On the appeals—

Held, dismissing the appeals, (1) that in the first case, assuming that on transfer a private care home was not a public authority, the change in the residents' legal position that occurred when homes were transferred from public to private control under arrangements made pursuant to section 26 of the 1948 Act did not amount to a breach of the residents' Convention rights, even though they would be unable to assert their Convention rights directly against the private care home; that residents would not suffer any significant loss of protection under article 3 by the transfer of immediate control of their residence from the public to the private sector, since lack of consideration or inadequate standards would not fall within the article, degrading treatment that was akin to inhumanity would almost certainly constitute a breach of the criminal law, and inhumane treatment generally would engage the local authority's responsibilities for the residents' welfare under section 21(2) of the 1948 Act and its responsibility to enter and inspect private care homes under section 26(5); that neither did the proposed transfer involve a diminution or breach of the residents' rights under article 8, since, first, the protections afforded by the fixed and rigorous standards imposed by the Care Standards Act 2000 and supervised by the Commission for Social Care Inspection well exceeded those guaranteed by article 8, and, secondly, the local authority remained responsible under section 21 of the 1948 Act for, and continued to have article 8 obligations towards, any resident whom a private care home sought to remove (post, paras 8, 11–12, 14–17, 85, 86).

[2] Human Rights Act 1998, s 6: "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right . . . (3) In this section 'public authority' includes . . . (b) any person certain of whose functions are functions of a public nature . . ."

A (2) That existing Court of Appeal authority was not inconsistent with subsequent guidance of the House of Lords, was indistinguishable from the present case on the facts, and the court therefore remained bound by it to hold that a private care home, when accommodating residents under arrangements made with a local authority for the implementation of the authority's obligations under section 21 of the 1948 Act, was not exercising a public function for the purposes of section 6(3)(b) of the 1998 Act (post, paras 27, 63, 66, 85, 86).

B *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936, CA followed.

Young v Bristol Aeroplane Co Ltd [1944] KB 718, CA and *Kay v Lambeth London Borough Council* [2006] 2 AC 465, HL(E) applied.

Poplar Housing and Regeneration Community Association Ltd v Donoghue [2002] QB 48, CA and *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, HL(E) considered.

Decisions of Forbes J [2006] EWHC 1714 (Admin) and Bennett J [2006] EWHC 2681 (Fam) affirmed.

C

The following cases are referred to in the judgments:

A v B plc [2002] EWCA Civ 337; [2003] QB 195; [2002] 3 WLR 542; [2002] 2 All ER 545, CA

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37; [2004] 1 AC 546; [2003] 3 WLR 283; [2003] 3 All ER 1213, HL(E)

D *Buzescu v Romania* (Application No 61302/00) (unreported) 24 May 2005, ECtHR

Costello-Roberts v United Kingdom (1993) 19 EHRR 112

Ferrazzini v Italy (2001) 34 EHRR 1068

Kay v Lambeth London Borough Council [2006] UKHL 10; [2006] 2 AC 465; [2006] 2 WLR 570; [2006] 4 All ER 128, HL(E)

M v Secretary of State for Work and Pensions [2006] UKHL 11; [2006] 2 AC 91; [2006] 2 WLR 637; [2006] 4 All ER 929, HL(E)

E *Marckx v Belgium* (1979) 2 EHRR 330

Marzari v Italy (1999) 28 EHRR CD 175

Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48; [2001] 3 WLR 183; [2001] 4 All ER 604, CA

R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2) [2000] 1 AC 119; [1999] 2 WLR 272; [1999] 1 All ER 577, HL(E)

R v Wandsworth London Borough Council, Ex p Beckwith [1996] 1 WLR 60; [1996]

F 1 All ER 129, HL(E)

R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd [2003] EWCA Civ 1056; [2004] 1 WLR 233, CA

R (Bernard) v Enfield London Borough Council [2002] EWHC 2282 (Admin); [2003] LGR 423

R (Heather) v Leonard Cheshire Foundation [2002] EWCA Civ 366; [2002] 2 All ER 936, CA

G *Storck v Germany* (2005) 43 EHRR 96

Sychev v Ukraine (Application No 4773/02) (unreported) 11 October 2005, ECtHR

Van der Mussele v Belgium (1983) 6 EHRR 163

Von Hannover v Germany (2004) 40 EHRR 1

Williams v Glasbrook Bros Ltd [1947] 2 All ER 884, CA

Woś v Poland (Application No 22860/02) (unreported) 1 March 2005, ECtHR

X and Y v The Netherlands (1985) 8 EHRR 235

H *Young v Bristol Aeroplane Co Ltd* [1944] KB 718; [1944] 2 All ER 293, CA

Young, James and Webster v United Kingdom (1981) 4 EHRR 38

The following additional cases were cited in argument:

A v A Health Authority [2002] EWHC 18 (Fam/Admin); [2002] Fam 213; [2002] 3 WLR 24

Botta v Italy (1998) 26 EHRR 241
Cameron v Network Rail Infrastructure Ltd (formerly Railtrack plc) [2006] EWHC 1133 (QB); [2007] 1 WLR 163; [2007] 3 All ER 241
Collins v United Kingdom (2002) 36 EHRR CD 6
Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1; [1997] 2 WLR 898; [1997] 3 All ER 297, HL(E)
DP and JC v United Kingdom (2002) 36 EHRR 183
Eldridge v British Columbia (Attorney General) [1997] 3 SCR 624
Evans v United Kingdom (Application No 6339/05) (unreported) 7 March 2006, ECtHR
Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 WLR 113; [2004] 3 All ER 411, HL(E)
Holy Monasteries v Greece (1994) 20 EHRR 1
MC v Bulgaria (2003) 40 EHRR 459
Malone v United Kingdom (1984) 7 EHRR 14
Osman v United Kingdom (1998) 29 EHRR 245
Pentiacova v Moldova (2005) 40 EHRR SE 209
R v East Berkshire Health Authority, Ex p Walsh [1985] QB 152; [1984] 3 WLR 818; [1984] 3 All ER 425, CA
R v Kensington and Chelsea Royal London Borough Council, Ex p Kujtim [1999] 4 All ER 161; [1999] LGR 761, CA
R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213; [2000] 2 WLR 622; [2000] 3 All ER 850, CA
R v Servite Houses, Ex p Goldsmith [2001] LGR 55
R (A) v Partnerships in Care Ltd [2002] EWHC 529 (Admin); [2002] 1 WLR 2610
R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening) [2004] EWHC 2911 (Admin); [2007] QB 140; [2005] 2 WLR 1401, DC
R (Amin) v Secretary of State for the Home Department [2003] UKHL 51; [2004] 1 AC 653; [2003] 3 WLR 1169; [2003] 4 All ER 1264, HL(E)
R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2005] UKHL 57; [2006] 1 AC 529; [2005] 3 WLR 837; [2006] 3 All ER 111, HL(E)
R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323; [2004] 3 WLR 23; [2004] 3 All ER 785, HL(E)
S (Minors) (Care Order: Implementation of Care Plan), In re [2002] UKHL 10; [2002] 2 AC 291; [2002] 2 WLR 720; [2002] 2 All ER 192, HL(E)
Sørensen and Rasmussen v Denmark (Application Nos 52562/99 and 52620/99) (unreported) 11 January 2006, ECtHR
West v Secretary of State for Scotland 1992 SC 385
Woodward v Abbey National plc (No 1) [2006] EWCA Civ 822; [2006] ICR 1436; [2006] 4 All ER 1209, CA
Z v United Kingdom (2001) 34 EHRR 97

The following additional cases, although not cited, were referred to in the skeleton arguments:

Appleby v United Kingdom (2003) 37 EHRR 783
Chapman v United Kingdom (2001) 33 EHRR 399
Consejo General de Colegios Oficiales de Economistas de España v Spain (1995) 82-B DR 150
D v East Berkshire Community NHS Trust [2003] EWCA Civ 1151; [2004] QB 558; [2004] 2 WLR 58; [2003] 4 All ER 796, CA
Douce v Staffordshire County Council [2002] EWCA Civ 506; 5 CCLR 347, CA
Glaser v United Kingdom (2000) 33 EHRR 1
HL v United Kingdom (2004) 40 EHRR 761
Loizidou v Turkey (1995) 20 EHRR 99
Moreno Gómez v Spain (2004) 41 EHRR 899

A *Observer, The, and The Guardian v United Kingdom* (1991) 14 EHRR 153
R v Devon County Council, Ex p Baker [1995] 1 All ER 73, CA
R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR 1389; [2001] 2 All ER 929, HL(E)
R (Cowl) v Plymouth City Council (Practice Note) [2001] EWCA Civ 1935; [2002] 1 WLR 803, CA
B *R (Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797; [2003] 3 All ER 577, CA
R (West) v Lloyd's of London [2004] EWCA Civ 506; [2004] 3 All ER 251, CA
Steel and Morris v United Kingdom (2005) 41 EHRR 403
Wainwright v United Kingdom (2006) 44 EHRR 809
X (Minors) v Bedfordshire County Council [1995] 2 AC 633; [1995] 3 WLR 152; [1995] 3 All ER 353, HL(E)

C

R (Johnson and others) v Havering London Borough Council (Secretary of State for Constitutional Affairs and another intervening)

APPEAL from Forbes J

By a judicial review claim form filed on 19 October 2005 and amended statement of facts and grounds dated 9 February 2006, the claimants Elspeth
D Johnson (in substitution for Ivy Tabberer), Victor Thomas and Lillian Manning, who resided at care homes owned and controlled by Havering London Borough Council and who were provided by the council with care pursuant to section 21 of the National Assistance Act 1948, challenged the council's decision of 20 July 2005 that certain of the council's care homes should be transferred as going concerns to the independent sector, and that others should close when all residents had transferred to suitable alternative
E provision. The effective ground of challenge was that the closure and transfer to the private sector of the homes would lead to residents being deprived of effective protection for their human rights, which the council was obliged to guarantee, and would thus be unlawful under section 6(1) of the Human Rights Act 1998, as constituting a failure by the council to act compatibly with the Convention for the Protection of Human Rights and
F Fundamental Freedoms. The Secretary of State for Constitutional Affairs and the National Care Association ("NCA") were joined as interested parties. By order dated 11 July 2006 Forbes J dismissed the claim and refused the claimants, the Secretary of State and the NCA permission to appeal.

By an appellant's notice filed on 23 July 2006 and subsequently amended, and pursuant to permission given by the Court of Appeal (Waller and
G Hooper LJJ) on 5 December 2006, the claimants appealed on the grounds, inter alia, (1) that the judge had erred in concluding that transfer from local authority to private sector accommodation did not, in principle, lead to the residents' Convention rights being either diminished or removed, and that the residents would continue to retain their Convention rights protection under the Human Rights Act 1998 in the same way and to the same extent as
H previously; (2) that the judge's conclusion was wrong because, inter alia, after transfer to private care the claimants would no longer be able to rely on direct breaches of their substantive rights by the local authority, for example breaches of their rights under articles 2, 3, 8 and 14, but would only be able to rely on breaches of the local authority's positive obligations towards them, which constituted a fundamental and material diminution in the

nature of the rights and protection that the claimants would have in private care as compared with public care; and (3) that, in the alternative, the judge had been wrong to find that a private care provider, to whom the local authority intended to delegate its duties to the claimants under section 21 of the 1948 Act, pursuant to section 26, would not be a "public authority" under section 6(1) of the 1998 Act by virtue of the definition of "public authority" in section 6(3)(b).

By a respondent's notice filed on 19 December 2006 the Secretary of State supported the claimants' appeal to the extent that, having regard to the guidance given by the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 on the proper interpretation of section 6(3)(b) of the 1998 Act and to the jurisprudence of the European Court of Human Rights, the judge had erred in holding that he was bound by *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936 to conclude that care homes providing accommodation in the relevant circumstances did not exercise functions of a public nature within the meaning of section 6(3)(b) of the Human Rights Act 1998. The Secretary of State sought to uphold the judge's conclusion that in any event transfer of the council's care homes to the private sector would not in principle infringe the claimants' Convention rights.

The Disability Rights Commission and Help the Aged, intervening, made written submissions on the appeal.

The facts are stated in the judgment of Buxton LJ.

YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)

APPEAL from Bennett J

The claimant, YL, an elderly person requiring residential care pursuant to section 21 of the National Assistance Act 1948, was placed by the first defendant, Birmingham City Council ("Birmingham"), in a private care home owned and run by the second defendant ("the care home"). On 28 August 2006 YL, acting through the Official Solicitor as her litigation friend, issued proceedings in the Family Division of the High Court under CPR Pt 8 seeking declarations that it was in her best interest not to be moved from the care home, that the care home, in providing accommodation and care for her, was exercising public functions under section 6 of the Human Rights Act 1998 and that to move her from the home would be contrary to her rights under articles 2, 3 and 8 of the Human Rights Convention. OL and VL, relatives of YL, were joined in the proceedings as the third and fourth defendants. On 12 September 2006 Ryder J directed that the question whether the care home, in providing care and accommodation for YL, was exercising a public function for the purposes of section 6(3)(b) of the 1998 Act, should be heard as a preliminary issue. By order dated 5 October 2006 Bennett J answered the question in the negative.

By an appellant's notice filed on 19 October 2006, and with permission given by the Court of Appeal (Buxton LJ) on 11 December 2006, YL appealed on the grounds that the judge had erred in his conclusion and failed to have proper regard to (i) the imperative to give a generous interpretation to "public function" for the purpose of section 6(3)(b) of the 1998 Act, as explained in *Aston Cantlow and Wilmcote with Billesley Parochial Church*

A *Council v Wallbank* [2004] 1 AC 546, para 11, (ii) the nature of the functions being provided, being those required to be carried out by section 21 of the 1948 Act, and (iii) the case law of the European Court of Human Rights, which suggested that Convention obligations were not absolved by a transfer of functions to a non-state body. The court received written submissions from OL and VL in support of the appeal.

B The facts are stated in the judgment of Buxton LJ.

Jessica Simor for the claimants in Johnson's case. The provision of care under sections 21 and 26 of theNational Assistance Act 1948 is in almost all cases the means by which a local authority discharges its positive obligation under articles 2, 3, 5 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms: see *R (Bernard) v Enfield London*
C *Borough Council* [2003] LGR 423, paras 26–29, 34. A local authority is required to ensure real and effective protection of the Convention rights of those for whom such care is provided: see 6(1) of the Human Rights Act 1998. This involves retaining the protection of the Act itself. The claimants presently have directly enforceable rights under the 1998 Act against the council, as a public authority, but not against a private care home, assuming
D that it does not exercise functions of a public nature under section 6(3)(b) of the 1998 Act: see *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936. By transferring the claimants' care to the private sector in circumstances where the private provider would not be bound by the 1998 Act, the council would prospectively negate or substantively diminish the claimants' rights, contrary to section 6(1) of the 1998 Act.

The existing statutory and regulatory scheme governing the provision of
E care, however high and rigorous its standards, will not adequately protect the claimants' Convention rights. Nor, contrary to the dicta of Lord Woolf CJ in the *Leonard Cheshire Foundation* case, at para 34, will contractual terms between the council and the care homes fully protect those rights after transfer: see the Report of the Joint Parliamentary Committee on Human Rights on "The Meaning of Public Authorities under the Human Rights Act"
F (HL Paper 39, HC 382), paras 41, 51, 66–67, 115–116, 120, 125–126, 153. In any event such contractual protections could not be effectively enforced either by the local authority or the individual resident: see *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 16; *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55, 66 and *R v Kensington and Chelsea Royal London Borough Council, Ex p Kujtim* [1999] 4 All ER 161;
G and compare *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213.

A claimant may retain some rights against a local authority after transfer, but they will be different from and less valuable rights than those which he currently enjoys. Once a local authority has discharged its duty under section 21 of the 1948 Act through the provision of accommodation by a voluntary body or other person under section 26 its responsibility ceases.
H The private provider is not an agent of the council: see *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55. Most importantly, after transfer a claimant will no longer be able to rely on the local authority's direct interference with or failure to respect his rights, but will have to establish that the council has failed in its positive obligation to take reasonable steps to ensure that his

rights are safeguarded by the private provider: see *DP and JC v United Kingdom* (2003) 36 EHRR 183, para 109. A

There is a distinction between positive and negative obligations under the Convention. *Evans v United Kingdom* (Application No 6339/05) (unreported) 7 March 2006 and *Sørensen and Rasmussen v Denmark* (Application Nos 52562/99 and 52620/99) (unreported) 11 January 2006 do not support the council's submission to the contrary.

B

The council and the Secretary of State are wrong in submitting that the claimants are complaining about the loss of an effective remedy under article 13 rather than the loss of rights. *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 is distinguishable.

Section 6(2)(b) of the 1998 Act provides no answer to the unlawfulness of the council's proposed action. Section 26 of the 1948 Act is compatible with the Convention if the phrase public functions in section 6(3)(b) of the 1998 Act is read as including the functions carried out by private providers pursuant to section 26. Article 13 of the Convention, though not incorporated in the 1998 Act, is relevant when interpreting section 6: see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 44, 160. Moreover, section 3 of the 1998 Act applies to the interpretation of its own provisions: see *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] QB 140, para 291. The correct approach to interpreting section 6(3)(b) is set out in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

C

D

In the event that a court orders specific performance of a contract between the council and a care home, sections 21 and 26 may be read compatibly with the Convention by requiring the private provider to enter into a contract with the resident under which the resident's Convention rights form enforceable contractual terms. If section 26 cannot be read compatibly with the Convention, the court should make a declaration of incompatibility under section 4 of the 1998 Act.

E

The decision of the Court of Appeal in the *Leonard Cheshire Foundation* case is wrong for the reasons set out by the Secretary of State.

F

Roger McCarthy QC and *Jason Coppel* for the council in Johnson's case. A private sector care provider under contract to a local authority under section 26 of the 1948 Act is not a public authority exercising functions of a public nature within section 6(3)(b) of the 1998 Act: see *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 and the *Leonard Cheshire Foundation* case [2002] 2 All ER 956. *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 did not overrule these cases: see *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, paras 14–15, 25. *R (A) v Partnerships in Care Ltd* [2002] 1 WLR 2610 is distinguishable on its facts.

G

However, the proposed transfer does not contravene section 6 of the 1998 Act since there is no diminution in the claimants' rights after transfer.

H

Section 21 of the 1948 Act obliges local authorities to make arrangements for those in their area who are in need of care and attention which is not otherwise available to them. Section 26 permits local authorities to discharge that obligation by making arrangements with private sector providers: see *R v Wandsworth London Borough Council, Ex p Beckwith*

A [1996] 1 WLR 60. The obligation to provide appropriate accommodation under the Act continues after placement in a private sector care home. Compliance with the Act ensures that the claimants' Convention rights are protected.

All care home providers, whether public or private, are obliged to comply with statutory and regulatory provisions governing the operation of care homes: see the Care Standards Act 2000; regulations 5, 12–25, 37 and 40 of B the Care Homes Regulations 2001 (SI 2001/3965) and the Department of Health Guidance on National Minimum Standards for Care Homes for Older People, 3rd rev ed (February 2003). The requirements of the statutory framework are more stringent than any provision of the Convention. The regulatory framework imposes obligations upon the private operator which go far beyond any separate obligations which might be contained in a C contract with the council. By selecting a solvent provider and funding placements the council has taken reasonable steps to ensure that the provider is unlikely to fall into financial difficulties which would lead to the future closure of homes and potentially affect the residents' rights under articles 2, 3 or 8.

The Convention rights of residents can also be protected by means of contractual clauses: see the *Leonard Cheshire Foundation* case [2002] D 2 All ER 936, para 34. The council's proposed contractual terms and the remedies available in the event of breach will secure substantive protection of residents after transfer by safeguarding their rights to life, freedom from ill-treatment and respect for private life and home. Any disadvantage accruing from the availability of contractual rather than judicial review remedies against a provider can be eliminated by the court exercising its E discretion to grant injunctive relief or award damages in any contractual dispute compatibly with the Convention under section 6(1) of the 1998 Act.

In any event, transfer to a private sector provider does not divest the council of its Convention obligations: see *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 and the *Leonard Cheshire Foundation* case [2002] 2 All ER 936. The claimants will continue to enjoy the same Convention rights against the council as they do at present, F and the council will continue to be obliged to take appropriate steps to safeguard the lives of the claimants, to protect them from inhuman and degrading treatment and to safeguard their private and family life, home and correspondence. In practice there is no distinction between the council's negative and positive obligations under the Convention: see *Evans v United Kingdom* 7 March 2006; *Sørensen and Rasmussen v Denmark* 11 January G 2006; *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112, paras 27–28; *Storck v Germany* (2005) 43 EHRR 96, 101, 103; *Woś v Poland* (Application No 22860/02) (unreported) 1 March 2005, para 72 and *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20. In effect the claimants complain not of a loss or diminution in rights, but of the lack of an effective remedy for a breach of human rights by the private provider, viz, the loss of article 13 rights. However, article 13 is not incorporated into the H 1998 Act and breach of article 13 is not a competent complaint for the purposes of a claim under the 1998 Act: see *In re S (Minors)* [2002] 2 AC 291, paras 59–60.

If, on the other hand, transfer is unlawful under section 6(1) of the 1998 Act the council effecting the transfer would be acting to give effect to

primary legislation which is incompatible with Convention rights, i e, section 26 of the 1948 Act. The council would accordingly be freed from liability under section 6(1) by the operation of section 6(2)(b) of the 1998 Act.

On the facts of the present case any private sector provider with whom the council enters into a contract of transfer will be a hybrid public authority within section 6(3)(b) of the 1998 Act, since the transferee will be "standing in the shoes of" or "taking the place of . . . local authorities": see *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, para 65 and *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 6, 12, 16, 51–52, 63–64, 87, 160, 171. The claimants' challenge to the proposed transfer therefore fails. It is unnecessary to decide whether, as the Secretary of State submits, a mere section 26 placement confers public authority status on the private care home provider.

Philip Sales QC and *Cecilia Ivimy* for the Secretary of State intervening in both cases. Private care homes, when providing accommodation pursuant to arrangements with a local authority under sections 21 and 26 of the 1948 Act, are exercising "functions of a public nature" within section 6(3)(b) of the 1998 Act and are obliged to act compatibly with the Convention rights of the persons concerned. The *Leonard Cheshire Foundation* case [2002] 2 All ER 936 is not binding, being inconsistent with subsequent dicta of the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546: see *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 and *Woodward v Abbey National plc (No 1)* [2006] ICR 1436, paras 21–22.

Section 6 of the 1998 Act is to be interpreted in the light of the Convention and the jurisprudence of the European Court of Human Rights on state responsibility. The test of whether a non-governmental body exercises functions of a public nature is not the same as the test applied to determine whether its decisions are amenable to judicial review. The central question is whether the relevant body carries out a governmental function which would engage the responsibility of the United Kingdom before the Strasbourg courts. Contrary to the approach in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936; *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55, 77–79 and *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 (contrast *R (A) v Partnerships in Care Ltd* [2002] 1 WLR 2610), it is the function that the body performs that is determinative of that question, not whether the body exercises statutory powers or the extent to which it is enmeshed with the core public authority: see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 6, 11–12, 41, 44, 51, 52, 63, 86–88, 130, 160–163; *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20; *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, para 25 and *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, paras 21–27, 33–34, 47, 88, 92, 97. An activity which is intrinsically more private than public is not a function of a public nature, even if it was a function previously performed by a core public authority: see *Cameron v Network Rail Infrastructure Ltd (formerly Railtrack plc)* [2007] 1 WLR 163, paras 29,

A 37. [Reference was also made to *West v Secretary of State for Scotland* 1992 SC 385, 412, 413.]

The proper interpretation of section 6(3)(b) is informed by decisions of the European Court of Human Rights: see *Holy Monasteries v Greece* (1994) 20 EHRR 1, para 49 and *Ferrazzini v Italy* (2001) 34 EHRR 1068. That court has held in a number of cases that the state is directly responsible for the acts of the private body to whom its Convention obligations have been delegated: see *Van der Mussele v Belgium* (1983) 6 EHRR 163, para 29; *Costello-Roberts v United Kingdom* 19 EHRR 112, para 28; *Marzari v Italy* (1999) 28 EHRR CD 175; *Z v United Kingdom* (2001) 34 EHRR 97; *Woś v Poland* 1 March 2005, paras 72–73; *Buzescu v Romania* (Application No 61302/00) (unreported) 24 May 2005; *Sychev v Ukraine* (Application No 4773/02) (unreported) 11 October 2005 and *Storck v Germany* 43 EHRR 96, paras 89, 108. It is the private body to which the state's functions are delegated which must be treated as a public authority: see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546. Accordingly, private care homes accommodating residents pursuant to arrangements made with a local authority are bound to observe the Convention rights of those residents accommodated. [Reference was made to *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624, paras 44, 50–51.]

Article 8 imposes positive as well as negative obligations on the state. There is no obligation on the state to provide all persons with a home (see *Kay v Lambeth London Borough Council* [2006] 2 AC 465, para 28) but the state must provide accommodation to the chronically ill: see *Botta v Italy* (1998) 26 EHRR 241, paras 33–34; *Marzari v Italy* 28 EHRR CD 175, 179–180 and *R (Bernard) v Enfield London Borough Council* [2003] LGR 423, para 31.

A private care provider, as a hybrid public authority, is entitled under article 8(2) to have regard to its own private interests in deciding whether to close a home even if a resident's article 8 rights are thereby compromised: see *Collins v United Kingdom* (2002) 36 EHRR CD 6. *Malone v United Kingdom* (1984) 7 EHRR 14 must be treated as a special case. [Reference was also made to *Pentiacova v Moldova* (2005) 40 EHRR SE 209.]

If private care providers are not hybrid public authorities the judge correctly held that the transfer of the care homes to the private sector did not breach the claimants' Convention rights. Statutory and regulatory standards and protections, as well as the contractual obligations of the council and the private care provider would ensure that there was no breach of residents' rights under articles 2, 3, 5 or 8: see the Care Standards Act 2000; the Care Homes Regulations 2001 and the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, para 34. The lack of a remedy under the 1998 Act against a private care home for a breach of the claimants' Convention rights does not constitute a diminution or removal of those rights. The claimants will have remedies in tort against the private care home for wrongs such as assault and false imprisonment. The criminal law also provides protection against infringement of residents' Convention rights: see *X and Y v The Netherlands* (1985) 8 EHRR 235 and *MC v Bulgaria* (2003) 40 EHRR 459, paras 153, 166. Further, a local authority remains subject to the duty imposed by section 21 of the 1948 Act, and residents retain their rights under that provision against the local authority. Thus, where accommodation becomes

unsuitable for residents' needs a local authority is obliged to provide suitable accommodation: see *R v Kensington and Chelsea Royal London Borough Council, Ex p Kujtim* [1999] 4 All ER 161. In addition, the council remains, after transfer, subject to its positive obligations under section 6(1) of the Human Rights Act 1998 to safeguard residents against infringements of their Convention rights.

If section 26 of the 1948 Act is incompatible with the Convention it cannot be read down under section 3 of the 1998 Act (see *In re S (Minors)* [2002] 2 AC 291, paras 82–86) and the council can invoke section 6(2)(b).

Cherie Booth QC and *Aileen McColgan* for the National Care Association intervening in Johnson's case. The classification of private sector care home providers as hybrid public authorities for the purposes of the Human Rights Act 1998 is unnecessary and unworkable. A proper legislative and regulatory framework already exists for the comprehensive protection of Convention rights of those in residential care: see the Care Standards Act 2000; the Care Homes Regulations 2001 and the National Minimum Standards for Care Homes for Older People. Besides, contracts between local authorities and private care homes provide for a measurable quality of care which is often higher than that required by the National Minimum Standards.

Private care home providers are not to be classified as public authorities under section 6(3)(b) of the 1998 Act. The *Leonard Cheshire Foundation* case [2002] 2 All ER 936, which approved *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 and is consistent with *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, is binding on the court. The wide scope of the expression public function in section 6(3)(b) advocated in the latter case is reflected in the *Donoghue* case [2002] QB 48, para 58. Institutional as well as functional factors are relevant in determining the meaning of "public authority": see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 12, 56–61; *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233; *Holy Monasteries v Greece* 20 EHRR 1 and *Woś v Poland* 1 March 2005.

Strasbourg jurisprudence is relevant when considering the approach to be taken to core, rather than hybrid, public authorities: see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 6, 44, 51, 63, 87, 160. It is unnecessary to define a private body as a "public authority" in order to fix the state with responsibility for its actions: see *Osman v United Kingdom* (1998) 29 EHRR 245 and *Z v United Kingdom* 34 EHRR 97. The fact that the state cannot divest itself of responsibility by delegating its Convention obligations to private bodies or individuals does not require that private sector operators such as the National Care Association's members should be categorised as hybrid public authorities under section 6(3)(b) of the 1998 Act. That is not the effect of *Costello-Roberts v United Kingdom* 19 EHRR 112; *Woś v Poland* 1 March 2005; *Buzescu v Romania* 24 May 2005 or *Sychev v Ukraine* 11 October 2005, paras 53–54. [Reference was also made to *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38.]

A The public function created by sections 21 and 26 of the 1948 Act is the making of arrangements for the provision of accommodation, not the provision of accommodation itself. Providing accommodation and personal care is essentially a private function, not a governmental or public function, even when those activities are carried out by a core public authority: see *R v East Berkshire Health Authority, Ex p Walsh* [1985] QB 152. Moreover, B section 6 is concerned with liability for acts rather than functions: see Dawn Oliver, "Functions of a Public Nature under the Human Rights Act 1998" [2004] PL 329.

"Functions of a public nature" in section 6(3)(b) of the 1998 Act should be narrowly construed, since private care homes which are classified as hybrid public authorities may be deprived of remedies under the 1998 Act for breaches by the state of their Convention rights in respect of both their C public and non-public activities: see Helen Quane, "The Strasbourg Jurisprudence and the Meaning of a 'Public Authority' under the Human Rights Act" [2006] PL 106. This is contrary to the assumption made in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 that a hybrid public authority would not be prevented from relying on the Convention against the state, at least in D respect of asserted breaches of its non-public functions.

If residents can raise article 8 claims against a private care home provider those claims would trump any interest of the provider in ceasing to operate the residential facility. The residual freedom in domestic law to do that which is not prohibited does not satisfy the requirement that interferences with article 8 rights should be "in accordance with the law": see *Malone v United Kingdom* 7 EHRR 14. The interferences permitted by article 8(2) are E interferences "by a public authority . . . for the protection of the rights and freedoms of others" and would not therefore include the care home provider's own interest in closing the home for personal reasons.

Simor replied.

Sales QC also replied.

F *Ian Wise* for YL. The private care home, in providing care for YL pursuant to arrangements made by Birmingham City Council under sections 21 and 26 of the National Assistance Act 1948, is performing a public function within section 6(3)(b) of the Human Rights Act 1998. The *Leonard Cheshire Foundation* case [2002] 2 All ER 936 held that a private care home exercising such functions was not a hybrid public authority. The G decision has been the subject of debate and criticism: see the Joint Parliamentary Committee on Human Rights's 7th Report of Session 2003–2004 on "The Meaning of Public Authorities under the Human Rights Act" (HL 39, HC 382) and Paul Craig, "Contracting Out, The Human Rights Act and the Scope of Judicial Review" (2002) 118 LQR 551. The decision is wrong but binding on the court: see *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 apply. YL's rights under articles 2, 3 and 8 are engaged by H the care home's decision to cease to accommodate her, but the court is unable to make an order that is enforceable unless it is established that the care home is exercising public functions. The appropriate course is for the court to dismiss the appeal and give permission to appeal to the House of Lords.

David Carter for Birmingham. In *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936 this court decided that a private care home which accommodated persons to whom a local authority owed a duty under section 21 of the 1948 Act was not a hybrid public authority. This court must follow its own decisions except in circumstances where there are two conflicting decisions of its own so that it has to choose which it will follow; where its decision, although not expressly overruled, cannot stand with a decision of the House of Lords; or where it is satisfied that the first decision was per incuriam: see *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. None of these circumstances apply in the present case. The *Leonard Cheshire Foundation* case stands with the decision of the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 for the following reasons. First, in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 Lord Woolf CJ, at para 18, accepted that the "hybrid" category was a broad one: see also Lord Nicholls of Birkenhead in *Aston Cantlow* [2004] 1 AC 546, para 11. Secondly, the judgments in the *Leonard Cheshire Foundation* case and in *Aston Cantlow* are congruent with each other. Thirdly, despite being referred to in argument in *Aston Cantlow*, the House chose not to overrule, distinguish or comment on the decisions of this court in the *Leonard Cheshire Foundation* case and *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48. And fourthly, YL's argument was rejected by this court in *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, per Dyson LJ, at paras 15 and 25, and per Longmore LJ, at para 47. Moreover, save in exceptional circumstances (of which there are none in this case), this court cannot follow decisions of the European Court of Human Rights so as to depart from domestic precedent; judges must review Convention arguments and if they consider that a binding precedent is, or may be, inconsistent with Strasbourg authority, they may express their views and give permission to appeal: see *Kay v Lambeth London Borough Council* [2006] 2 AC 465, per Lord Bingham of Cornhill, at paras 43–44. Accordingly, this court cannot find that a private care home is not a public authority for the purposes of section 6 of the 1998 Act because it cannot depart from its own decision in the *Leonard Cheshire Foundation* case.

Ivan Hare for the care home in YL's case. The *Leonard Cheshire Foundation* case [2002] 2 All ER 936 is binding on the court, unless (i) it conflicts with another Court of Appeal decision, (ii) it cannot stand with a decision of the House of Lords, or (iii) the court is satisfied that the decision was given per incuriam: see *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. None of these qualifications apply. [Reference was made to *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 6–10, 12, 41, 46, 49, 51, 59, 64, 85 and *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, para 25.]

The *Leonard Cheshire Foundation* case did not fail to distinguish between the test for amenability to judicial review and the terms of section 6 of the 1998 Act. The court applied section 6 of the 1998 Act, not the amenability to judicial review test. In any event, judicial review cases may assist in determining whether functions are of a public or private nature: see *Aston*

Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2004] 1 AC 546, para 52. Nor did the court err in using the term "standing in the shoes of the local authorities" endorsed in *Beer's* application [2004] 1 WLR 233, para 37. Both the *Donoghue* case [2002] QB 48, para 58, and the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, para 18, recognised that a wide construction of section 6(3)(b) should be favoured. There was no failure to interpret section 6 in the light of the Strasbourg jurisprudence. [Reference was made to *Costello-Roberts v United Kingdom* 19 EHRR 112; *Holy Monasteries v Greece* 20 EHRR 1 and *Woś v Poland* 1 March 2005.]

Under the Convention the responsibility of the state is engaged (1) by the actions of any governmental organisation established for public administration purposes and exercising public functions (see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 48–49) and (2) where the state has a positive obligation to secure Convention rights, even between private individuals who are not exercising public functions (see *R (Amin) v Secretary of Syate for the Home Department* [2004] 1 AC 653 and *X and Y v The Netherlands* 8 EHRR 235, para 23). *Costello-Roberts v United Kingdom* 19 EHRR 112, para 27 is not authority for the proposition that where the state delegates its positive Convention obligations to a private body, the private body is to be treated as a public authority for 1998 Act purposes. In other cases the European court has identified specific factors indicating that the body concerned should be treated as a governmental organisation performing public functions. Those cases are fact-specific and can be distinguished from the present case: see *Buzescu v Romania* 24 May 2005; *Woś v Poland* 1 March 2005, paras 60–70; *Van der Mussele v Belgium* 6 EHRR 163, para 29 and *Sychev v Ukraine* 11 October 2005, paras 50–54.

On the facts the care home is not performing functions of a public nature. Birmingham remains liable to YL for the discharge of its duties under section 21 of the 1948 Act and in respect of any breach of her Convention rights in the discharge of those duties. The relationship between the care home and Birmingham is governed by contract, not statute. The care home cannot be required to provide accommodation for YL: see *A v A Health Authority* [2002] Fam 213, para 53. In the event of a dispute between the care home and YL over termination of the placement, YL's redress lies only in a private law claim in contract. The care home would not be amenable to judicial review as it is not a public body: see *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55. The only public feature present is the status and function of Birmingham in discharging its section 21 duty. It does not follow that the care home with which residents are placed pursuant to section 26 arrangements is performing functions of a public nature. Providing accommodation and personal care are essentially private functions which are to be distinguished from public functions such as the detention of patients in a mental hospital (see *R (A) v Partnerships in Care Ltd* [2002] 1 WLR 2610) or a prison run by a private company.

In any event YL's Convention rights are protected by the express contractual terms between Birmingham and the care home which ensure that the care home acts compatibly with residents' Convention rights.

Cur adv vult

30 January. The following judgments were handed down. A

BUXTON LJ

The nature of the appeals

1 The court is concerned with two appeals. In *Johnson's* case Mrs Johnson and others ("the claimants"), all of whom are resident in a care home maintained by Havering London Borough Council ("Havering") B under the provisions of section 21 of the National Assistance Act 1948, seek to prevent the transfer by Havering of the residents' and other care homes to private sector control, as a local authority is in principle empowered to do under section 26 of the 1948 Act. In *YL's* case the Official Solicitor represents a resident placed in a private sector care home by the responsible local authority, Birmingham City Council ("Birmingham") in respect of C whom the care home seeks, or originally did seek, to terminate the contract for her care and to remove her from the home. In *Johnson's* case it is contended that the transfer of control of the homes would in itself amount to a breach of the residents' rights under the European Convention on Human Rights, principally under article 8. In *YL's* case it is contended that to remove YL from the care home would be a breach of her rights under article 8. D

2 The claim in *Johnson's* case was rejected by Forbes J [2006] EWHC 1714 (Admin), and the claim in *YL's* case by Bennett J [2006] EWHC 2681 (Fam). The two appeals have been heard together because they were thought to raise the same point, as to the susceptibility to control under the Convention for the Protection of Human Rights and Fundamental Freedoms of private care homes that are used by local authorities under E section 26 powers: that question turning on whether and in what circumstances the homes are persons certain of whose functions are functions of a public nature under section 6(3)(b) of the Human Rights Act 1998. In *YL's* case that issue arises directly from the proposed action of the care home, and the present proceedings take the form of a preliminary point to determine whether the care home, the second defendant in the action F brought by the Official Solicitor, is: "in providing care and accommodation for [YL] . . . exercising a public function for the purposes of section 6(3)(b) of the [1998 Act]."

3 The way in which the central issue arises in *Johnson's* case is rather more elusive. Mrs Johnson's claim is based upon the contention that whilst she at present enjoys Convention rights, conspicuously but not exclusively article 8 rights, against Havering as a public authority, those rights will be G lost, or at least substantially diminished in content, if her home is transferred to a private body. Havering, supported by the Secretary of State intervening, denies that the change would involve a breach of the Convention, and that is the first issue that has to be addressed in *Johnson's* appeal. Both of those parties however further respond by contending that in any event nothing will be lost by the residents, because the new private owners of the homes will H themselves be subject to Convention obligations by reason of section 6(3)(b); and that point is, perhaps confusingly, also urged by the claimants as an alternative to the point set out at the beginning of this paragraph. That latter issue accordingly raises in principle the same question as the preliminary point in *YL's* case.

A **4** Because of what was seen as the general interest of the "public authority" issue under section 6(3)(b) a large number of organisations were good enough to intervene in the appeals in order to assist us in our task. The Secretary of State for Constitutional Affairs, although not in any way concerned with the transactions in *Johnson's* case, and not concerned with the general policy area involved, which is the responsibility of the Secretary of State for Health, was none the less given permission to intervene in that B case in the light of his policy responsibility for the implementation of the 1998 Act. As already noted, he argued that section 6(3)(b) would apply to the respective care homes once the residents were transferred to them; and it was the Secretary of State's desire to pursue that argument to this court, and indeed if needs be to the House of Lords, that caused another constitution of this court to grant permission to appeal to all parties. Since otherwise no C argument would have been advanced in that appeal contrary to the contentions of the claimants and of the Secretary of State, and there was of necessity no appearance on behalf of any individual care home because the policy complained of had not yet been implemented, the National Care Association ("NCA"), which represents the interests of private care homes, was given permission to intervene. We received submissions on its behalf from Ms Booth. In addition, submissions were received in writing from the D Disability Rights Commission, represented by Mr David Wolfe who had appeared before Forbes J, and Help The Aged, in the event equally represented by Mr Wolfe. Both of these bodies supported the position of the Secretary of State. All of these intervening submissions were taken into account in the court's consideration of *YL's* case, though as a matter of formal order the Secretary of State was given permission to intervene in that E appeal also.

5 As a result of these arrangements we received 184 pages of skeleton argument and bundles containing 106 authorities, and were addressed by eight teams of advocates over a period of two whole days.

The facts

F **6** It is important to record that there are many issues of fact and policy involved in both of the cases. We are only concerned with the threshold question, of whether issues under the Convention arise at all. If they do arise, there will remain much to be said and debated as to the facts, and in particular as to the justification under article 8(2) for the course proposed by the respective defendants. Put shortly, in *Johnson's* case Havering submitted a detailed account of its consideration of the future of its care homes, in the G light of the need to improve facilities and conditions both for residents and for staff, and of how it reached the conclusion that the preferred option was to close some homes and to transfer others to the private sector. In *YL's* case the point of departure of the proceedings was an unfortunate dispute as to the behaviour in the home of the husband and daughter of YL that in the view of those running the home rendered impossible the continuation of the family's connection with it. Since we are not concerned with the merits of H any of this it is not necessary to go further into the underlying facts. Anyone who thinks that more information is necessary can refer to the judgments of Forbes J and Bennett J, both of which, if I may respectfully say so, give a full and clear account of the respective backgrounds. We simply need to remember, in fairness to both defendants, that they have put forward full,

robust and potentially persuasive justifications for their decisions, quite apart from arguing the question of whether those decisions are in any event justiciable.

The form of this judgment

7 As already explained, there is an issue that arises in *Johnson's* case but not in *YL's* case as to whether the proposed transfer falls within the ambit of the Convention even if the receiving private home is not a public authority within section 6(3)(b) of the 1998 Act. I deal with that issue first; and then consider the "public authority" point that is potentially relevant in *Johnson's* case and is the only issue in *YL's* case. Under the latter head a major issue arises as to whether or not this court is bound by its previous decision in *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936.

Johnson's case: does the transfer of care homes from Havering to the private sector engage the Convention in any event?

The argument for the claimants and Forbes J's response to it

8 It is accepted that this argument fails, alternatively is otiose, if the private care homes are public authorities, as the Secretary of State contends. However, on the assumption that the homes are not public authorities, and therefore the residents cannot assert against them article 8 rights, or rights under any other article of the Convention, then the contention as put in the claimants' written submissions on the renewed application for permission to appeal is that

> "By transferring the [claimants] out of their care into the hands of private carers, [Havering] would be removing or diminishing the rights that they formerly guaranteed to the [claimants]. The [claimants] would no longer be able to rely on direct breaches of their substantive rights as against either [Havering] or the private carer, for example breaches of their rights under articles 2, 3, 8, 9, 10 and 14. The only enforceable rights they would have would be in relation to breaches of [Havering's] 'positive obligations' towards them. They would have no effective rights as against their carers. That constitutes a fundamental and material diminution, and indeed in certain cases, negation, of their existing rights. Accordingly, in discharging its statutory obligations to the [claimants] under sections 21 and 26 of [the 1948 Act], [Havering] would be failing to ensure real and effective protection of their rights and so be acting incompatibly with the Convention and unlawfully under section 6 of the [1998 Act]."

And the submissions went on to contend that Havering's proposal to require care homes by contract to respect the residents' rights would be ineffective in any event.

9 Forbes J took this point fairly robustly, the major part of his judgment being directed at the "public authority" issue. He said [2006] EWHC 1714 (Admin) at [44]:

> "the short answer to this particular issue is that after any such transfer, the claimants will still continue to enjoy the very same Convention rights as against the council as they do at present. The council, as a core public

A authority, has an obligation to act compatibly with the claimants' Convention rights (see section 6(1) of the 1998 Act), which may be enforced by anyone who is a 'victim' of any breach of those Convention rights. A transfer of the homes to the private sector does not absolve the council of its duty under section 6(1) to act compatibly with Convention rights, including the Convention rights of the claimants. Thus, if a B transfer does take place, the council will continue to be obliged to take appropriate steps, for example, to safeguard the lives of the claimants, to protect them from inhuman and degrading treatment and to safeguard their private and family life, home and correspondence. The real and effective protection of the claimants' rights will continue to be ensured by the council and, if necessary, by the courts. In short, transfer from local authority to private sector accommodation does not, in principle, lead C to the residents' Convention rights being either diminished or removed. In effect, the residents will continue to retain their Convention rights' protection under the 1998 Act in the same way and to the same extent as previously."

10 Ms Simor's response was to say that Forbes J's conclusion was simply wrong. After transfer, the residents might retain some rights against D Havering, but those would be different and less valuable rights compared with the rights that they enjoyed against Havering when Havering was directly their carer. Taking article 3 as an example, Ms Simor said in her submissions on the application for permission to appeal that at present the residents had a right not to be subjected to degrading treatment by Havering. After transfer, they had no such right against the care homes under article 3, E and only a right against Havering that the council would take appropriate steps, which it was far from certain would be effective, to safeguard the residents against immediate risks of degrading treatment.

Article 3

11 Although it played a prominent role in the grounds of appeal, it is difficult to see that article 3 is the best example of the present point. We were F warned against naively thinking, and evidence was given by the Official Solicitor and Help the Aged to support that warning, that treatment amounting to a breach of article 3 could not occur in a private care home. We do not need to enter upon that controversial ground. Article 3 addresses not lack of consideration or inadequate care standards, but the much more serious territory of degrading treatment that is akin to inhumanity. If a G resident in a care home, public or private, were to be treated in that way, then first almost certainly breaches of the criminal law would be involved; and secondly such breaches, and the inhumane treatment generally, would engage the responsibilities of the local authority for the welfare of the residents, under section 21(2) of the 1948 Act, and its responsibility to enter and inspect the private care home under section 26(5) of the 1948 Act. In H these extreme and hopefully hypothetical circumstances the potential problems for the residents would not lie in the absence of legal protection, but in the difficulty of the abused resident in accessing that protection: whether by taking proceedings herself against the home, or by informing the responsible local authority so that it could take action. Thus, to the extent that article 3 has any more than a theoretical role to play in such a case, the

resident does not suffer any significant loss of that protection by the transfer of immediate control of her residence from the public to the private sector.

Article 8 in the present case

12 Article 8 raises different issues. Havering submitted, to my mind entirely convincingly, that care homes, public or private, were subject to rigorous standards of services, quality of staff, extent of facilities, and record-keeping and other procedures for the protection of the residents, which are required by the Care Standards Act 2000, and supervised by the Commission for Social Care Inspection. Indeed, and ironically enough, it had been concern expressed by the Commission about the present standards in some of Havering's own facilities that had contributed to the decision now complained of to seek the assistance of the private sector. These rules, it was suggested, again convincingly, well exceeded in terms of day-to-day protection for residents anything that they could gain through the application of article 8. In this respect, therefore, the residents lost nothing in article 8 terms by the transfer.

13 Ms Simor sought to meet these objections in a number of ways, but her main contention was that even if the general public regime set higher standards than would the simple application of article 8, the proposed transfer would deprive the residents of a direct action against their actual carer under article 8, whether that action was taken in the domestic courts or in the European Court of Human Rights ("the European court"). And she pointed to one particular respect in which the content of the article 8 right would be diminished. Her clients' place of residence did indeed become their home, and was thus subject to core protection under article 8, including a right to be consulted about any proposal to alter the place of residence. If the body running the home should decide to cease to provide facilities, either generally or to a particular resident, a local authority in making such a decision would be subject to obligations under article 8 to protect the resident's home. Not so a private care home if, as the present hypothesis assumes, it is not a public authority under section 6 of the 1998 Act. It was that article 8 protection that the resident lost by the transfer of her home to the private sector.

14 There are two main objections to this argument, the first an objection of general principle, the second more a matter of practicality.

15 The nub of the complaint is that the residents will or may lose a remedy that they can deploy to assert the level of article 8 protection that they currently enjoy. But the argument that a change in the nature of the residents' remedies necessarily entails a breach of the residents' Convention rights would seem to have to assume that the state has an obligation to provide, and having provided to maintain, a particular level of article 8 protection. That assumption is faulty on two bases.

16 First, it is very doubtful whether article 8, even when read in positive rather than in negative terms, places on a member state an obligation to make welfare provision of the type and extent required by section 21 of the 1948 Act. Mr Sales showed us the judgment of the European court in *Marzari v Italy* (1999) 28 EHRR CD 175 where the positive obligations of the state were held to be engaged in order to provide housing for a person with a serious illness, on the basis that that was necessary to ensure respect for his private life. But as Sullivan J, correctly if I may respectfully say so,

A pointed out in *R (Bernard) v Enfield London Borough Council* [2003] LGR 423, such instances must necessarily be fact-specific, and not every breach of duty under section 21 of the 1948 Act will result in a breach of article 8. Since the article 8 requirements are less stringent, and manifestly less well-defined, than the requirements of domestic law, it would seem impossible to say that there is an *article 8* obligation to maintain a particular
B type or level of provision when discharging duties under section 21. And secondly, and in any event, even when article 8 places collateral obligations on the government in respect of the home that it has provided in performance of its domestic law duties, there is no reason to think that those obligations have a fixed content and, more particularly, no reason to think that a change in that content will *necessarily* entail a breach of article 8.

C 17 The practical issue is this. The resident whom the private home seeks to remove will remain the responsibility of the local authority under section 21 of the 1948 Act. That authority will continue to have article 8 obligations towards her, as well as its section 21 obligations, as indeed was made plain by this court in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, para 33. (It may be mentioned here that that is the position of YL; but because of the form of the proceedings adopted in her
D case, which seek only the declaration set out in para 2 above as to the status of the care home, that issue will not be explored when we come to her appeal.) That duty will compel the local authority to intervene and to offer resources and protection for the resident; as, it was pointed out, Birmingham had done in the case of YL, by providing funding for supervised access to enable visits from her relatives not to take a form that threatened her
E continued presence in the home. Since the local authority in that process has to secure the resident's Convention rights, it is just as vulnerable to suit as would be the home if those rights are infringed.

18 We must also remember that the issue with regard to article 8 is not the importance of the right to respect for the home, which is not in dispute, but the significance for respect of that value of the *difference* between the
F public and the private regimes. In that regard, we do well to bear in mind the recent survey of article 8 jurisprudence undertaken by Lord Walker of Gestingthorpe in his speech in *M v Secretary of State for Work and Pensions* [2006] 2 AC 91, paras 62–83. Addressing facts very different from those in the present case, Lord Walker none the less concluded in general terms that because the touchstone of article 8 is respect for the relevant rights, the interference with the citizen has to be of some seriousness before article 8
G will be engaged. Caution must be exercised before applying that insight as if it were a statutory rule. None the less, that approach reinforces the conclusion in this case that the change in the residents' legal position that occurs when the homes are transferred from public to private control is insufficient to amount to a breach of the Convention. Ms Simor said that before we could be satisfied that the change would not in itself entail a
H breach of the Convention we had to be satisfied that there was no respect, actual or prospective, likely or possible, in which the residents would have less protection under the new regime than under the old. Quite apart from the assumption of vested rights that that submission entails, it places on article 8 a weight that it will not bear.

Some wider considerations

19 For the reasons already given, I am not persuaded that the transfer proposed by Havering will involve a breach of the residents' rights under article 8. However, the claimants' argument, and the assumptions on which it proceeded, can in any event only succeed if it succeeds in avoiding two wider and more general objections, the first involving issues of policy and the second an important point of law.

20 First, the claimants' argument would place very far-reaching and surprising inhibitions on national policy. I can readily accept that, if national policy is indeed inconsistent with an article of the Convention, then it is no answer that the national government would wish to be free to act differently from the way that the Convention requires. But where the reach of an article is unclear, it is very relevant to enquire whether the jurisprudence and policy of the Convention intends the effect on freedom of governmental action that would follow from one asserted reading of that article.

21 In the present case, the argument that a change from public to private provision necessarily entails a breach of article 8 must further entail that any privatisation of services in respect of which the national government has or arguably has Convention responsibilities will in itself result in a breach of those responsibilities. The root objection, loss of direct action under the 1998 Act against the actual provider, must be the same in every case. As Havering pointed out, that at a stroke puts every local authority with social services responsibilities in breach of the 1998 Act, since all of them use private sector provision to a greater or lesser extent. It is notorious that privatisation, not just in the present field but over a very wide area of governmental activity, is a subject that attracts strong views. But those are *views*, to be adjudicated upon by the national democratic process, and a very good example of an area that the Convention will enter only with considerable diffidence.

22 The submissions on the application for permission to appeal addressed this objection (which had originally been advanced by the court as a reason amongst others for not granting permission to argue this appeal), by accepting that it might be right that no local authority could transfer a care home into private hands, but saying that that was not a reason for not accepting the claimants' argument. If the claimants' argument were otherwise unassailable that would be correct. As it is, the outcome to which that argument leads must cast doubt on whether the argument itself was correct in the first place.

23 Second, both Mr Sales and Mr McCarthy pointed out that it was English domestic law, confirmed by the House of Lords, that section 26 of the 1948 Act permits a local authority to discharge its section 21 duties by arrangements with private third parties, indeed if so advised in respect of all of those duties: see *R v Wandsworth London Borough Council, Ex p Beckwith* [1996] 1 WLR 60. Section 6(2)(b) of the 1998 Act provides that the obligation on a public authority not to act in a way which is incompatible with a Convention right does not apply to an act if

> "in the case of one or more provisions of . . . primary legislation which cannot be read or given effect in a way which is compatible with the

A Convention rights, the authority was acting so as to give effect to or enforce those provisions."

But the argument for the claimants is and has to be that it is *never* open to a local authority to exercise its section 26 powers; so section 26 cannot be read or given effect compatibly with the alleged Convention rights. The local authority is accordingly protected from its alleged breach of the Convention B by the fact that in privatising the homes it is giving effect to section 26. The only way out of that dilemma for the claimants, if their case is otherwise correct, would be a declaration of incompatibility in respect of section 26: which the claimants conspicuously did not seek from Forbes J.

24 Ms Simor's argument really did not come to terms with these two fundamental difficulties. They strongly reinforce the reasons already given C for holding that *Johnson's* case must fail.

25 That makes it unnecessary to go on, within *Johnson's* appeal, to consider whether Mrs Johnson is protected in any event by the status of the private care home as a public authority, as Havering and the Secretary of State contend. However, that is the issue, and because of the form of the order for the preliminary point the only issue, that this court has to determine in *YL's* case.

D

YL's case: is the private care home a public authority under section 6(3)(b) of the 1998 Act?

Introduction

26 As already noted, but it will be convenient to remind ourselves, we are concerned only with the preliminary issue of whether the care home, E when accommodating YL under arrangements made with Birmingham for the implementation (and funding by Birmingham) of Birmingham's obligations under section 21 of the 1948 Act, is exercising a public function for the purposes of the 1998 Act. The foregoing laborious exploration of the issues in *Johnson's* case has revealed continuing Convention (and other) obligations on the part of Havering, but the form of the question appears to F require those same obligations owed by Birmingham to be ignored in *YL's* case as that action is at present constituted. And what the practical effect would be of an affirmative answer to the question has equally been consigned to another day.

The task of this court

G **27** The question is answered in negative terms by the decision of this court in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936. The primary facts relating to the status of the care home in that case are not suggested to be relevantly different from the primary facts relating to the care home in which YL is accommodated. That therefore would appear to give a short answer to the preliminary point at any level below the House of Lords. However the Secretary of State submitted that the *Leonard Cheshire* H *Foundation* case was wrongly decided, not least because it was inconsistent with authority decided by the European court. It was recognised that such a claim was, in itself, of little assistance, because it is black letter law, recently confirmed by the House of Lords in *Kay v Lambeth London Borough Council* [2006] 2 AC 465, para 43, that the *domestic* rules of precedent

prevail even in cases concerned with Convention (or EU) rights, and a domestic case alleged to be wrongly decided in the light of European court jurisprudence retains its authority until dislodged by a domestic case of superior authority. But the Secretary of State said that that fate had indeed befallen the *Leonard Cheshire Foundation* case because that decision could not stand with the subsequent decision of the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546.

28 These arguments require close attention to the reasoning of this court in the *Leonard Cheshire Foundation* case and in the case that preceded it and was to some extent relied on in it, *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48. In the account that follows of those cases emphasis will be placed on the aspects of them that are said to fall foul of the guidance in the *Aston Cantlow* case.

The Donoghue case

29 The defendant was granted a weekly, non-secure, tenancy by her local housing authority ("Tower Hamlets") pending a decision on whether she was intentionally homeless. The property was transferred to a housing association ("Poplar"), which when it sought to evict the defendant was met with a claim that as a registered social landlord it was performing a public function and thus was subject to the constraints of the Convention. That required an examination of the provisions of section 6(3)(b) of the 1998 Act, which provides that a "public authority" includes: "any person certain of whose functions are functions of a public nature" and section 6(5) which provides that "[in] relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private".

30 This court went into the application of those principles to Poplar in some considerable detail. It will be convenient first to set out what was said by Lord Woolf CJ in the judgment of the court, at paras 58–59:

> "58. . . . The fact that a body performs an activity which otherwise a public body would be under a duty to perform cannot mean that such performance is necessarily a public function. A public body in order to perform its public duties can use the services of a private body. Section 6 should not be applied so that if a private body provides such services, the nature of the functions are inevitably public. If this were to be the position, then when a small hotel provides bed and breakfast accommodation as a temporary measure, at the request of a housing authority that is under a duty to provide that accommodation, the small hotel would be performing public functions and required to comply with [the 1998 Act] . . .
>
> "59. The purpose of section 6(3)(b) is to deal with hybrid bodies which have both public and private functions. It is not to make a body, which does not have responsibilities to the public, a public body merely because it performs acts on behalf of a public body which would constitute public functions were such acts to be performed by the public body itself. An act can remain of a private nature even though it is performed because another body is under a public duty to ensure that that act is performed."

A **31** The court then went on, at para 65, to apply that approach to the case before it. Some of the sub-paragraphs of its reasoning may be quoted:

> "(i) While section 6 of [the 1998 Act] requires a generous interpretation of who is a public authority, it is clearly inspired by the approach developed by the courts in identifying the bodies and activities subject to judicial review. The emphasis on public functions reflects the
B approach adopted in judicial review by the courts and textbooks since the decision of the Court of Appeal . . . in *R v Panel on Take-overs and Mergers, Ex p Datafin plc* [1987] QB 815. (ii) Tower Hamlets, in transferring its housing stock to Poplar, does not transfer its primary public duties to Poplar. Poplar is no more than the means by which it seeks to perform those duties. (iii) The act of providing accommodation to rent is not, without more, a public function for the purposes of
C section 6 . . . (v) What can make an act, which would otherwise be private, public is a feature or a combination of features which impose a public character or stamp on the act . . . The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public . . . (vi) The closeness of the relationship which exists between Tower Hamlets and Poplar. Poplar
D was created by Tower Hamlets to take a transfer of local authority housing stock; five of its board members are also members of Tower Hamlets; Poplar is subject to the guidance of Tower Hamlets as to the manner in which it acts towards the defendant."

32 The court then continued, at para 66:

> "while activities of housing associations need not involve
E the performance of public functions, in this case, in providing accommodation for the defendants and then seeking possession, the role of Poplar is so closely assimilated to that of Tower Hamlets that it was performing public and not private functions. Poplar therefore is a functional public authority, at least to that extent. We emphasise that this does not mean that all Poplar's functions are public. We do not even
F decide that the position would be the same if the defendant was a secure tenant. The activities of housing associations can be ambiguous. For example, their activities in raising private or public finance could be very different from those that are under consideration here. The raising of finance by Poplar could well be a private function."

33 The *Donoghue* case [2002] QB 48 has been considered in some
G detail because it was referred to extensively, and to some extent adopted, in the case with which we are primarily concerned, the *Leonard Cheshire Foundation* case [2002] 2 All ER 936.

The Leonard Cheshire Foundation case

34 The claimants were residents in a care home ("Le Court") owned and
H operated by a well-known charity ("LCF"), the claimants having been placed there and paid for by their local authority in discharge of its duties to them under section 21 of the 1948 Act. They claimed that they had been assured by LCF that at Le Court they had "a home for life". LCF decided to reorganise its provision in that area, transforming Le Court into a smaller, high-dependency, unit, and transferring those residents who did not qualify

for that provision, including the claimants, to smaller, community-based, homes. The very skilled and experienced lawyers who represented the claimants did not feel able to assert that the assurances as to a home for life created any contractual liability, but they did contend that LCF, by reason of its performance of functions on behalf of or at the request of the local authority, was a "public authority" under section 6(3)(b) of the 1998 Act, and was therefore constrained in its dealings with the claimants in respect of their home for life by its obligations under article 8.

35 The approach of this court to that argument can again be best understood by setting out verbatim the relevant passage of the court's judgment, again delivered by Lord Woolf CJ, at para 35:

> "In our judgment the role that LCF was performing manifestly did not involve the performance of public functions. The fact that LCF is a large and flourishing organisation does not change the nature of its activities from private to public: (i) It is not in issue that it is possible for LCF to perform some public functions and some private functions. In this case it is contended that this was what has been happening in regard to those residents who are privately funded and those residents who are publicly funded. But in this case except for the resources needed to fund the residents of the different occupants of Le Court, there is no material distinction between the nature of the services LCF has provided for residents funded by a local authority and those provided to residents funded privately. While the degree of public funding of the activities of an otherwise private body is certainly relevant as to the nature of the functions performed, by itself it is not determinative of whether the functions are public or private . . . (ii) There is no other evidence of there being a public flavour to the functions of LCF or LCF itself. LCF is not standing in the shoes of the local authorities. Section 26 of the 1948 Act provides statutory authority for the actions of the local authorities but it provides LCF with no powers. LCF is not exercising statutory powers in performing functions for the appellants. (iii) In truth, all that [counsel for the appellants] can rely upon is the fact that if LCF is not performing a public function the appellants would not be able to rely upon article 8 as against LCF. However, this is a circular argument. If LCF was performing a public function, that would mean that the appellants could rely in relation to that function on article 8, but, if the situation is otherwise, article 8 cannot change the appropriate classification of the function. On the approach adopted in [the *Donoghue* case [2002] QB 48] it can be said that LCF is clearly not performing any public function."

36 The court therefore saw the activity of LCF, and its relationship with the residents, as the provision of services of a private nature that had been obtained from LCF by the local authority in discharge of the latter's public responsibility to persons qualifying for assistance under section 21 of the 1948 Act. As the court had put it in the *Donoghue* case [2002] QB 48, para 60, when commenting on the decision of the European court in *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112:

> "The case concerned a seven-year-old boy receiving corporal punishment from the headmaster of an independent school. The [European court] made it clear that the state cannot absolve itself of its

A Convention obligations by delegating the fulfilment of such obligations to private bodies or individuals, including the headmaster of an independent school. However, if a local authority, in order to fulfil its duties, sent a child to a private school, the fact that it did this would not mean that the private school was performing public functions. The school would not be a hybrid body. It would remain a private body. The local authority would, however, not escape its duties by delegating the performance to B the private school. If there were a breach of the Convention, then the responsibility would be that of the local authority and not that of the school."

The Aston Cantlow case

37 The facts of the *Aston Cantlow* case [2004] 1 AC 546 were far C removed from those in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 or in our case. A parochial church council ("PCC"), a body created by the Church of England as part of its internal government, sought to recover from the lay rectors of the church for which the PCC was responsible payment to fund chancel repairs: an obligation of the lay rector to the church recognised in English domestic law over many centuries. The lay rectors did D not dispute their domestic obligation, but contended that the common law liability was an unjustified interference with their enjoyment of the property which founded their status as lay rectors, and thus benefited from the protection of article 1 of the First Protocol to the Convention. In order to assert that defence in an English court they had to establish that the PCC was either a "core" public authority under section 6 of the 1998 Act, or a person certain of whose functions (in casu, the collection of tithe rents and chancel E liabilities) were functions of a public nature, under section 6(3)(b).

38 The major part of the argument before the House of Lords addressed the first of these questions, in an attempt to establish that the PCC was a public authority, and thus that the whole of its activities were subject to control under the Convention. As Dyson LJ pointed out in *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR F 233, para 24, the only general guidance on hybrid authorities and what is a public function for the purposes of section 6(3) of the 1998 Act is to be found in two paragraphs of the speech of Lord Nicholls of Birkenhead in the *Aston Cantlow* case [2004] 1 AC 546, paras 11–12. That is a point of some importance, because Mr Sales's argument depended on applying the whole of the jurisprudence of the *Aston Cantlow* case, addressed as it almost entirely was to the question of whether the PCC, as a *body*, was a public G authority, to the different question of whether certain *functions* of a care home were functions of a public nature.

39 Although the contention that the PCC was a public authority had prevailed in this court, it received somewhat short shrift in the House of Lords. The position of the Church of England as the "established church" did not confer on it a public status, and its internal machinery was directed at its pastoral mission and the management of its own affairs. Accordingly, H in public law, and without any disrespect, the PCC had no different status from that of the committee of a golf club. And on the ancillary issue, of whether collection of the chancel liability was a public function, it would therefore be unlikely that a particular act of the PCC to promote the finances of the Church of England would be a function of a public nature. That was

indeed the view of the House. Two of their Lordship's speeches may be cited. Lord Nicholls said, at para 16:

> "I turn next to consider whether a [PCC] is a hybrid public authority. For this purpose it is not necessary to analyse each of the functions of a [PCC] and see if any of them is a public function. What matters is whether the particular act done by the plaintiff council of which complaint is made is a private act as contrasted with the discharge of a public function . . . If a [PCC] enters into a contract with a builder for the repair of the chancel arch, that could hardly be described as a public act. Likewise when a [PCC] enforces, in accordance with the provisions of the Chancel Repairs Act 1932, a burdensome incident attached to the ownership of certain pieces of land: there is nothing particularly 'public' about this. This is no more a public act than is the enforcement of a restrictive covenant of which church land has the benefit."

In similar vein, Lord Hope of Craighead said, at paras 63–64:

> "63. . . . As for the question of whether [the PCC] is a 'hybrid' public authority, I would prefer not to deal with it in the abstract. The answer must depend on the facts of each case. The issue with which your Lordships are concerned in this case relates to the functions of the PCC in the enforcement of a liability to effect repairs to the chancel. Section 6(5) of [the 1998 Act] provides that a person is not a public authority by virtue only of subsection (3) if the nature of the act which is alleged to be unlawful is private. The Court of Appeal said that the function of chancel repairs is of a public nature: [2002] Ch 51, 63, para 35. But the liability of the lay rector to repair the chancel is a burden which arises as a matter of private law from the ownership of glebe land.
>
> "64. . . . The nature of the act is to be found in the nature of the obligation which the PCC is seeking to enforce. It is seeking to enforce a civil debt."

40 Thus, not only were the basic facts in the *Aston Cantlow* case [2004] 1 AC 546 different from those in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, but so was the nature of the question that the House was asked. In the *Leonard Cheshire Foundation* case the question was whether an intrinsically private act performed by a private body, the private care home's enforcement of its own contract with one of its residents, became a function of a public nature because the private body was assisting a public body in the discharge of that latter body's public functions: see in that respect in particular the passage from the judgment in the *Donoghue* case [2002] QB 48, para 65, set out in para 31 above. In the *Aston Cantlow* case no such issue arose. No clearly public function was involved. The only issue was whether the PCC, in pursuing its own interests on its own behalf, and not performing any function on behalf of anyone else, was thereby performing a public function. And some indication that the issues were indeed seen as different may be drawn from the fact that the House was shown both the *Donoghue* case and the *Leonard Cheshire Foundation* case (see the report of the argument at [2004] 1 AC 546, 550A), but no reference was made to either case in the extremely full and detailed speeches.

41 All of this might seem to suggest that the *Aston Cantlow* case [2004] 1 AC 546 is not likely to be a sure guide to the rights or wrongs of the

Leonard Cheshire Foundation case [2002] 2 All ER 936. But it was strongly submitted to us, as it had been to the judges in the courts below, that a series of general observations in the *Aston Cantlow* case as to the proper approach to section 6(3)(b) of the 1998 Act, to which observations respectful attention must of course be given, showed that this court had not properly applied the law in the *Leonard Cheshire Foundation* case. Indeed, to quote Mr Sales's skeleton, that the approach of the House in the *Aston Cantlow* case was "in stark contrast" to the approach of this court in the *Donoghue* case [2002] QB 48 and the *Leonard Cheshire Foundation* case. To those submissions I now turn.

Can the Leonard Cheshire Foundation case stand with the Aston Cantlow case?

42 The Secretary of State expressed himself in the somewhat extreme terms just set out because he was aware that any attempt to dislodge the decision of this court in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 had to meet the test set out above, as laid down by this court in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. The test as stated is a stringent one, and intentionally so. The claimants made no attempt to show us any case in which two reasoned decisions of this court had been set aside because, in a subsequent decision of a House which was invited to but did not refer to those decisions, general statements were made that conflicted with the basis on which the Court of Appeal had proceeded. The court's own researches have not identified any such case. I also have in mind that in *Williams v Glasbrook Bros Ltd* [1947] 2 All ER 884, 885 Lord Greene MR, who had delivered the judgment in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, described the freedom of this court to depart from one of its own decisions as arising where "a subsequent case in the House of Lords is found either expressly or by implication to overrule an earlier decision of the Court of Appeal". If that statement is taken literally, it is very difficult to see how the *Aston Cantlow* case [2004] 1 AC 546 could have impliedly overruled the *decision* in the *Leonard Cheshire Foundation* case, because the issue that had to be decided in the one case was different from the issue that had to be decided in the other. And if that is thought too pedantic an objection, at the very least Lord Greene MR's understanding of the rule requires a closeness of subject-matter and a clear inconsistency of approach between the first case and the second that does not stand out from a comparison of the *Aston Cantlow* case with the *Leonard Cheshire Foundation* case.

43 It may also be said by way of introduction that what binds us is the decision in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, and the legal steps that compelled that decision. Those steps were twofold. First, the identification of the legal principles that had to be applied to the primary facts. Second, the analysis or categorisation of the primary facts in the light of those principles. Both of those are conclusions of law, or at least conclusions of mixed law and fact, and we are not free to depart from either of them. So even though, as I will explain below, I would not have categorised the primary facts in the same way as did the court in the *Leonard Cheshire Foundation* case, I am not free to substitute my categorisation for that adopted by that court. And it will be apparent in any event that the *Aston Cantlow* case [2004] 1 AC 546 could not have anything to say

relevant to the categorisation of the primary facts in the *Leonard Cheshire Foundation* case, because the facts in the two cases were different.

44 I now turn to the errors, in terms of failure to apply the law set out in the *Aston Cantlow* case, that are said to have occurred in the *Donoghue* case [2002] QB 48 and the *Leonard Cheshire Foundation* case [2002] 2 All ER 936. The objections raised in the present case can, I hope, be fairly summarised as follows. I add some commentary in each case.

45 First, the Court of Appeal adopted an "institutional" rather than a "functional" analysis: that is, it emphasised the status of the body, the nature of its relationship with the state, and the degree to which it was controlled by the state. That was said to be inconsistent with, in particular, what was said by Lord Hope of Craighead in the *Aston Cantlow* case [2004] 1 AC 546, para 41: "It is the function that the person is performing that is determinative of the question whether it is, for the purposes of that case, a 'hybrid' public authority." The reference to the function under scrutiny picks up the terminology of section 6(3)(b) of the 1998 Act. This point was addressed in detail in Mr Sales's skeleton, but I have to say that the criticism in those terms of the general approach in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 is very difficult to understand.

46 First, there is no sign that Lord Woolf CJ did not understand that the question that he was asked had to be answered in the context of and according to the functions that LCF was performing. That concept was used eleven times in the passage from his judgment [2002] 2 All ER 936, para 35, set out in para 35 above. And that there is some universal and required approach to that question is specifically denied by the Secretary of State. As Mr Sales said in his skeleton argument:

> "their Lordships emphasised that there was no single test of universal application; the question of whether or not a body exercises public functions will turn on the facts of each case: see Lord Nicholls, at para 12, Lord Hope, at para 63, and Lord Scott of Foscote, at para 130."

47 The guidance given in that context by Lord Nicholls, said by Mr Sales to be of critical importance, is to be found in the paragraph of his speech that is cited, para 12. Lord Nicholls said:

> "What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service."

It is very difficult to contend that that general analysis, and the factors to which it makes appeal, differs in clear terms, or indeed at all, from Lord Woolf CJ's view of the relevant factors that is set out in the passage from his judgment cited in para 35 above. In a later section of the judgment I will venture to suggest that some aspects of Lord Woolf CJ's *application* of those factors may be open to question: but that is very different from saying that his understanding of the questions that the law required to be asked was wrong in itself.

A **48** I should also record that the foregoing analysis mirrors that of Dyson LJ in *R (Beer) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233.

49 Second, and a major complaint, Lord Woolf CJ applied the domestic law on amenability to judicial review, rather than applying the Convention jurisprudence relevant to the enquiry under section 6. That was inconsistent with the observations of Lord Hope in the *Aston Cantlow* case [2004] 1 AC 546, at para 52:

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> "the decided cases in the amenability of bodies to judicial review have been made for purposes which have nothing to do with the liability of the state in international law. They cannot be regarded as determinative of a body's membership of the class of 'core' public authorities . . . Nor can they be regarded as determinative of the question whether a body falls within the 'hybrid' class. That is not to say that the case law on judicial review may not provide some assistance as to what does, and what does not, constitute a 'function of a public nature' within the meaning of section 6(3)(b). It may well be helpful . . ."

C

50 A fair reading of the judgments in the *Donoghue* case and the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 does not bear out the charge. It is quite right that Lord Woolf CJ saw a commonality between the two areas, as recorded in para 31(i) above, a passage much criticised by Mr Sales. However, in so saying Lord Woolf was doing no more than reflecting the Parliamentary assumption that lay behind section 6(3)(b). When introducing the Bill that became the 1998 Act the then Home Secretary said that in deciding what was a public authority or function the judicial review jurisprudence was the "most valuable asset that we have to hand": see *Grosz, Beatson & Duffy, Human Rights: The 1998 Act and the European Convention* (2000), p 61, para 4-03, footnote 24, citing other statements to the same effect by government ministers in the House of Lords. Lord Hope, in the conditional way in which he expressed himself in the quotation set out in para 49 above, and in his acceptance that judicial review authority had a part to play, may well have had that history in mind. But Lord Woolf CJ did not think, any more than did Lord Hope, that judicial review authority was dispositive. If the extended reasoning set out in para 35 above is read without pre-conception, it will be seen to have concentrated on the general question of whether the relevant functions of LCF were "public", without being coerced on that issue by the domestic law of judicial review.

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51 I would also again respectfully adopt an observation of Dyson LJ in *R (Beer) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, at para 29:

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> "[counsel has not] advanced any reasons peculiar to the public authority issue in support of the submission that, even if [the body's] decision is amenable to judicial review, nevertheless it was not made by [the body] in the exercise of a public function. In my judgment, she was right not to do so. On the facts of this case, and I would suggest on the facts of most cases, the two issues march hand in hand: the answer to one provides the answer to the other."

H

52 In his oral submissions Mr Sales said that he did not contend that Lord Woolf CJ had applied judicial review authority to the exclusion of any other. The complaint rather was that judicial review had been treated as the

primary source of authority. That was certainly the most that a reading of the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 would yield, but even if that analysis is correct it does not seem to me to suffice for the Secretary of State's purposes. There are two reasons for that. First, in order to meet the stringent requirements of *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 there has to be shown at the least a failure in the case under attack to apply a principle clearly established in the subsequent House of Lords authority. The placing of emphasis on one stream of authority rather than another is difficult to fit into that framework, particularly when the House has said that the stream of authority allegedly over-emphasised may well be helpful in the lower court's task. Second, it would in any event have to be demonstrated that the House had indeed either laid down such an established principle, or, as is contended for here, had imported such a principle from the jurisprudence of the European court. That was indeed asserted as a separate criticism of the *Leonard Cheshire Foundation* case. The argument raises sufficient difficulties of its own to justify treatment in a separate section of the judgment.

Authority in the European court and section 6(3)(b)

53 Under the authority of *Kay v Lambeth London Borough Council* [2006] 2 AC 465 (para 27 above), the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 cannot be directly attacked as being inconsistent with European court authority. Mr Sales approached the problem more subtly, by arguing that the *Aston Cantlow* case [2004] 1 AC 546 required the domestic court to follow, or at least to be influenced by, Convention authority when determining questions under section 6(3), and that had not been done in the *Leonard Cheshire Foundation* case. To succeed in that criticism, to the extent of requiring this court to depart from the *Leonard Cheshire Foundation* case, it was necessary to demonstrate both that the *Aston Cantlow* case had laid down such a requirement in general terms, and that there was Convention jurisprudence relevant to the application of that requirement to the *Leonard Cheshire Foundation* case. Mr Sales set himself to establish both of those points in two, alternative, respects. First, he said that there were some cases in which the European court would treat private care homes as performing public functions, and that authority should be applied more generally to our case. Second, even if there was no such case, the *Aston Cantlow* case had assumed or required that analysis of section 6(3)(b) must be informed by the general nature of Convention law. I deal with each of those contentions in turn. It will be apparent that, for present purposes, the second approach is markedly weaker than the first.

54 The first approach rested strongly on what was said to be the test stated in the *Aston Cantlow* case [2004] 1 AC 546 of whether the United Kingdom would be answerable for functions of the alleged public authority before the European court. Thus in the *Aston Cantlow* case Lord Rodger of Earlsferry said, at para 160: "A purposive construction of that section accordingly indicates that the essential characteristic of a public authority is that it carries out a function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs"; and at the end of the quotation set out in para 49 above Lord Hope of Craighead said, at para 52: "the domestic case law must be examined in the light of the

A jurisprudence of the Strasbourg court as to those bodies which engage the responsibility of the state for the purposes of the Convention."

55 The House did not offer any further analysis of how those tests would apply in the case of a body that was not of its nature a public authority, but which performed certain public functions. That is of importance in the present context, because in order to succeed in this B argument the Secretary of State has to show that if complaint were successfully made in the European court of conduct inconsistent with an article of the Convention by a private care home the United Kingdom government, the necessary respondent in Strasbourg, would be liable *because of the status of the care home as a public authority.* That is not likely to be the case, because in the posited circumstances there would be at least three potential routes to liability on the part of the United Kingdom C none of which require the establishment of the point that the Secretary of State seeks to establish in these proceedings.

56 First, a state may be liable for arranging its *legislative* system in such a way as enables or facilitates conduct inconsistent with the Convention by a private party. That was the basis on which the United Kingdom was held responsible for the operation of a closed shop by the (by then, private) D British Rail in *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38.

57 Second, the state, in its *administrative* rather than its legislative capacity, cannot avoid one of its own Convention responsibilities by delegating that responsibility to a private body. That was the approach of the European court in *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112, the effect of which was, with respect, correctly stated by Lord Woolf CJ E in the passage from his judgment in the *Donoghue* case [2002] QB 48, set out in para 36 above. In *Costello-Roberts v United Kingdom* the complaint against the United Kingdom was that the corporal punishment had occurred in the course of the exercise by the United Kingdom of its obligation under article 2 of the First Protocol to secure educational provision for its citizens. But the obligation remained that of the state, and not of the private body. By F the same token, it is very unlikely that the European court, if faced with a complaint about occurrences in a private care home, would find it necessary to go further than to implead the state on the basis of its transfer or delegation of its responsibility under section 26 of the 1948 Act.

58 Third, and with particular reference to article 8, the state may be impleaded before the European court in a care home case because of the inadequacy of its *judicial* provision. That springs from the positive G obligation of the state, under article 8, to respect, and therefore to promote, the interests of private and family life. That obligation has been recognised in the Convention jurisprudence since *Marckx v Belgium* (1979) 2 EHRR 330, and a particularly strong expression of it is to be found in *X and Y v The Netherlands* (1985) 8 EHRR 235. The way in which that obligation is enforced in the domestic legal system has been described by Lord Woolf CJ H in *A v B plc* [2003] QB 195, at para 4:

> "under section 6 of the 1998 Act, the court, as a public authority, is required not to act 'in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of

confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles."

On that basis, a transaction between private parties may be brought before the European court on the basis that the domestic judicial organs, as an emanation of the state, have failed to accord respect to article 8 rights. It may be noted that that was the route whereby the European court found itself adjudicating on the essentially private argument between Princess Caroline and "Bunte" that was pursued in *Von Hannover v Germany* (2004) 40 EHRR 1.

59 It is also to be noted that most of the cases cited address delegation by the national state of its own responsibility under the Convention. Thus, for instance, *Costello-Roberts v United Kingdom* 19 EHRR 112, cited above, related to the state's obligation under article 2 of the First Protocol to secure the right to education; and *Buzescu v Romania* (Application No 61302/00) (unreported) 24 May 2005, *Woś v Poland* (Application No 22860/02) (unreported) 1 March 2005, *Van der Mussele v Belgium* (1983) 6 EHRR 163 and *Sychev v Ukraine* (Application No 4773/02) (unreported) 11 October 2005 were all of them concerned with various aspects of the state's obligations under article 6. A revealing passage may be cited in this context from *Woś v Poland*, where complaint was made of the exclusion of access to the Polish courts to challenge decisions made by a private foundation created to administer reparation payments made by Germany under an agreement with the Polish government. The Polish government argued that it could not be impleaded in the European court in respect of matters relating to the foundation, because the latter was not a governmental agency. The European court rejected that argument, saying, at para 73:

> "The court observes that the respondent state has decided to delegate its obligations arising out of the international agreements to a body operating under private law. In the court's view, such an arrangement cannot relieve the Polish state of the responsibilities it would have incurred had it chosen to discharge these obligations itself, as it well could have (see, mutatis mutandis, [*Van der Mussele v Belgium* and *Costello-Roberts v United Kingdom*])."

60 Mr Sales also relied on a case that he said fell into a somewhat different category, *Storck v Germany* (2005) 43 EHRR 96, which concerned state responsibility under article 5 for detention in a private psychiatric hospital. Germany denied responsibility for a detention that had taken place in a private establishment without any coercive order by the state. Again the European court rejected that contention, explaining its approach in general terms, at para 89:

> "there are three aspects which could engage Germany's responsibility under the Convention for the applicant's detention in the private clinic in Bremen. Firstly, her deprivation of liberty could be imputable to the state owing to the direct involvement of public authorities in the applicant's detention. Secondly, the state could be found to have violated article 5(1) in that its courts, in the compensation proceedings brought by the applicant, failed to interpret the provisions of civil law relating to her claim in the spirit of article 5. Thirdly, the state could have breached its

positive obligation to protect the applicant against interferences with her liberty by private persons."

And in more detailed discussion the court referred again to *Van der Mussele v Belgium* 6 EHRR 163 and *Costello-Roberts v United Kingdom* 19 EHRR 112.

61 The upshot of all the European court authorities shown to us is that there are various ways in which complaints about the conduct or policy of a private care home might be brought before that court, but none of them would involve or require any finding or assumption that the care home was itself a public authority. And there is certainly no stream of jurisprudence sufficiently clear and strong to the latter effect to require it to have been adopted in the *Donoghue* case [2002] QB 48 and the *Leonard Cheshire Foundation* case [2002] 2 All ER 936.

62 The other basis on which it was, somewhat tentatively, suggested that the court in the *Leonard Cheshire Foundation* case should have been coerced into finding that the care homes were public authorities equally fails to meet the stringent standards of *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. The authority referred to was *Ferrazzini v Italy* (2001) 34 EHRR 1068, in which at paras 26–28 some general remarks fell from the court as to the need, in interpreting the Convention as a living instrument, to recognise the state's increasing involvement in matters that might on one level be classified as private in nature. But that was said in the context of considering the ambit of "civil" rights and obligations under article 6. It really does not touch the issue with which we are concerned, and certainly does not do so with the certainty that is required to support the Secretary of State's criticism of the *Leonard Cheshire Foundation* case.

63 For those reasons the attempt to demonstrate that the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 cannot stand with the *Aston Cantlow* case [2004] 1 AC 546 fails. The general approach of this court was not falsified; and it is not open to us to differ from the way in which that approach was applied by the earlier court to facts that in all relevant respects are the same as the facts of our case. And the arguments based on the *Aston Cantlow* case can be criticised further by reference to the decision of this court in *R (Beer) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, to which I now turn.

R (Beer) v Hampshire Farmers' Markets Ltd

64 The local authority established a number of farmers' markets under Local Government Act powers, and subsequently decided to transfer the running of those markets to a limited company. B was excluded from participation in a market, and sought to quash that decision by judicial review, and also damages under the 1998 Act on the basis that when making its decision the company had been performing a function of a public nature and thus acting as a public authority under section 6(3)(b). Under the latter heading, counsel for B sought to dislodge any relevance that the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 might have to the question by appealing to the *Aston Cantlow* case, in broadly the same terms as those in which we have been pressed with that decision. However Dyson LJ, giving the leading judgment, did not accept that the *Aston Cantlow* case had disturbed the *Leonard Cheshire Foundation* case. Dyson LJ said, at para 25:

"[Counsel] submitted that [the *Donoghue* case and the *Leonard Cheshire Foundation* case] have been 'superseded' by the *Aston Cantlow* case. If by 'superseded' she means that the two earlier decisions are to be taken as having been overruled, then I do not agree. As I have said, apart from what Lord Nicholls said, at p 288, paras 11 and 12, the *Aston Cantlow* case contains no guidance as to what amounts to the exercise by a hybrid public authority of functions of a public nature. Provided that it is borne in mind that regard should be had to any relevant Strasbourg jurisprudence, then the passages which I have quoted from the judgments in the two earlier cases will continue to be a source of valuable guidance. Indeed, para 12 of Lord Nicholls's speech is redolent of the flavour of that guidance."

Sir Martin Nourse agreed with the whole of Dyson LJ's reasoning, and Longmore LJ specifically agreed with para 25, at para 47.

65 Viewing the matter in terms of strict precedent, we are not bound by the view expressed by the court in *R (Beer) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233. That is because, although the court was clearly influenced by the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, its actual decision, that the farmers' market was a public authority, was based on its analysis of the market being a close proxy for, and emanation of, the local authority, of a kind that was not present in the *Leonard Cheshire Foundation* case. But the observations about the relationship between the *Leonard Cheshire Foundation* case and the *Aston Cantlow* case [2004] 1 AC 546 were none the less a considered response to a question that was directly in issue before the court. As such, I would be most reluctant to reach a different conclusion unless driven to it. For the reasons already set out, I am not so driven.

Conclusion

66 For all the reasons stated, we are bound to follow both the reasoning and the decision in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, and therefore bound to say in answer to the preliminary point that the private care home when accommodating the claimant was not performing the functions of a public authority under section 6(3)(b) of the 1998 Act. The appeals of the Secretary of State and of YL must fail.

Apart from authority, what is the correct answer to the preliminary point?

67 I enter upon these considerations with no little diffidence, in view of the opinion expressed in their judgments by both the Master of the Rolls and Dyson LJ that the court should leave matters where they stand. However, in the course of the appeals it became clear that the issue in *YL's* case, and the second issue in *Johnson's* case, were they not decided by binding authority, raise some fundamental questions as to the operation of Convention rights and obligations in domestic law. In view of the importance of that issue, and in view of the detailed arguments that we have received, it does not seem sufficient to leave those questions unnoticed. I therefore go on with due deference to indicate the answer that I would have given to the preliminary point were we not constrained by the *Leonard Cheshire Foundation* case [2002] 2 All ER 936. Everything that follows is of course obiter and carries even less authority by representing the view of one member only of the court.

A 68 In drafting what became section 6 of the 1998 Act the Government sought to provide as much protection as possible for the rights of the individual against the misuse of power by the state: see the parliamentary material cited by *Grosz, Beatson & Duffy, Human Rights: The 1998 Act and the European Convention*, para 4-02. It was no doubt that consideration that led, for instance, Lord Nicholls in his speech in the *Aston Cantlow* case [2004] 1 AC 546, para 11, to urge a "generously wide scope
B [for] the expression 'public function' in section 6(3)(b)". Two comments are however necessary. First, the purpose of the 1998 Act was to introduce Convention jurisprudence into English domestic law. As we have already noted, it is difficult to find in that jurisprudence a parallel for the step that it is said should have been taken in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, of creating Convention liability just because of the
C status of the private home as a public authority. Second, the importation of the Convention jurisprudence demands the importation of the whole of that jurisprudence. I will say something further below about the implications of that point for the present case.

69 First, however, I address the application to the present case of the terms of section 6(3)(b) as if it were part of an ordinary English statute; so that the expression "functions of a public nature" has to be read according to
D the simple meaning of the words used. Two general observations may be made about how that approach was applied in the *Leonard Cheshire Foundation* case.

70 First, Lord Woolf CJ emphasised that the nature of the services provided to residents placed with LCF by local authorities was exactly the same as that provided to privately-paying residents. LCF was essentially a
E private organisation, and before the 1998 Act came into force it is doubtful whether it would even have been contemplated that it was performing any sort of public function: the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, at para 15. This analysis was strongly supported by the care home, in *YL's* appeal, and by the NCA intervening in *Johnson's* case. For the latter body Ms Booth stressed that the members of the NCA were not charities, like
F LCF, but businesses owned by private investors. They should have the freedom that any other private business might expect, to dispose of its resources in the way that seemed to it most profitable. Constraints imposed on that freedom by Convention rights held by the residents, what the Chief Executive of the NCA described in her evidence as "rights of occupation having priority over the right of the care home provider to freely deal with his business asset", were inconsistent with the private status of the care
G homes.

71 If I were free to do so, I would reject that consideration as dispositive as to whether on the facts of *Johnson's* case the care home is performing a public function in accommodating Mrs Johnson. Although no comprehensive figures were given, the Chief Executive said that the majority of placements in private care homes are publicly funded by local authorities
H under the 1948 Act. That was borne out by the evidence of the care home in *YL's* case, who said that of the 29,000 beds that it provides in the United Kingdom about 80% are funded by social services departments of local authorities. And that also reflects the position at the two care homes that we know about in any detail. At the time of the hearings in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, 38 of the 43 residents at Le

Court had been placed there by local authorities. We were told that at the care home where YL is resident 60 of the 72 residents are publicly funded. And on the other side of the coin, Birmingham told us of the some ten thousand persons for whom it provided residential accommodation, 9,000 were placed in private homes. These figures seriously undermine the claims of the homes to be providing an essentially private service. It seems clear that these care homes can only continue, whether as viable charities or as profitable businesses, because they are accepted by the public function as acceptable providers of a public obligation. That degree of close integration into, and dependence on, the work of local authorities in discharging their section 21 duties should be a strong indicator that the care of persons placed under section 26 is itself a "public" function.

72 Second, it is necessary to consider the nature of the service that the care homes provide. Lord Woolf CJ may have understated that point when he said in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, para 17: "The issue here can . . . be refined by asking, is LCF, in providing accommodation for the claimants, performing a public function?" That reference to accommodation, with a comparison with a small hotel providing bed and breakfast, was repeated in the *Donoghue* case [2002] QB 48, at para 58, quoted in para 30 above. That, with deference, undervalues what the care home does, and what the local authority seeks from it. The home is not just a hotel, but a *care* home. It would not adequately perform the local authority's duties to place persons where only accommodation was provided. In their range of provision, which is subject to stringent standards, the homes can indeed be argued to stand in the shoes of the local authority as it discharges its public duties under section 21. This is another factor that might be thought to point towards the care functions of the homes being of a public nature.

73 That said, however, different, more general, and with respect more cogent objections were also raised in the skeleton argument presented by Ms Booth and Ms McColgan. The argument can be explained in the following way. The 1998 Act is not an ordinary English statute. Rather, it is the vehicle through which the jurisprudence of the Convention, as understood by the European court, is made available in the English domestic legal order. Section 6(3)(b) was thus included in the Act in an attempt to replicate in the domestic jurisdiction the range of bodies in respect of whose activities within the United Kingdom liability would attach under the jurisprudence of the European court. It is not just a quibble to say that it is very difficult to find within that jurisprudence any direct parallel to a private body becoming a public authority, therefore a body for which the state is directly responsible in the European court, because it performs some public functions. And that is not least because, if, for instance, a private care home is in respect of some of its activities a public authority in Convention terms, the whole of the Convention jurisprudence, and the whole of those articles of the Convention set out in Schedule 1 to the 1998 Act, apply to that part of its activities. The monocular concentration on the assertion of the rights of the individual against the state that inspired section 6 (see para 68 above) causes no, or at least not much, difficulty when applying section 6(3)(b) in relation to what have been called the absolute obligations, such as that arising under article 3. But as the skeleton argument urged, it does cause considerable

A difficulty in relation to the qualified obligations in other articles: the most obvious example, in issue in the present case, being article 8.

74 Article 8(2) provides that a "public authority" may interfere with the exercise of the article 8 right when that 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
B of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others."

The public authority's actions that interfere with a citizen's private or family life have therefore to be judged by that standard. But the language and assumptions of article 8(2) are all redolent of the powers and discretions of
C public authorities in the full sense of the expression: that is, bodies that actually have power and responsibility to do something about national security or the protection of morals. This essentially public nature of the article 8 balance was indeed one of the reasons motivating those who, at the time of the passing of the 1998 Act, warned against facile assumptions that the language of the Convention could simply be applied to transactions between private individuals. So how is article 8(2) to be applied in the
D case of, for instance, a private care home that needs a resident to leave because the home is going into liquidation; or wishes a resident to leave for the kind of reasons that apply in the case of YL? The terms of article 8(2) really make no sense in the first case, and very little sense in the second; so if the care home is to be treated as a public authority, article 8 will have been translated into the domestic jurisdiction as conferring not
E conditional but absolute rights.

75 A particular difficulty has been seen in this connection in respect of the right of the care home to protect its own position, for instance by asserting its right to control its property under article 1 of the First Protocol. That difficulty arises as follows. When addressing the position of core public authorities, Lord Nicholls in the *Aston Cantlow* case [2004] 1 AC 546, at
F para 8 (a passage relied on by Mr Sales as in some way undermining the *Leonard Cheshire Foundation* case [2002] 2 All ER 936), pointed to the definition of "victim" in article 34 of the Convention: "any person, *non-governmental organisation* or group of individuals" (Lord Nicholls's emphasis). It therefore followed that a core public authority would be, or was likely to be, a body that was not a victim, and thus had no Convention rights of its own. But if that is so of core public authorities, it is very difficult
G to see why that is not so of hybrid public authorities in relation to the activities that confer on them their public status. True it is that in the *Aston Cantlow* case Lord Nicholls said, at para 11: "Unlike a core public authority, a 'hybrid' public authority, exercising both public functions and non-public functions, is not absolutely disabled from having Convention rights." But, with deference, that does not meet the objection in relation to those
H functions of the hybrid, in the present case the care of section 26 residents, that confer the status of a public authority. And it would therefore seem to follow that when making decisions of the sort indicated above the care home cannot take into account, under the rubric of the rights of others, its own Convention rights, because when discharging its public functions it has no such rights.

76 I find these considerations troubling. The argument presented by the NCA taken on its own proves too much, because the logic of it was that, at least in relation to an article such as article 8, a private body could never be a public authority. That cannot be right, granted that we have to apply section 6(3)(b) of the 1998 Act. But I do consider that in applying that section we have to have firmly in mind its instrumental nature, and the purpose that it serves, and not merely interpret the literal language in the terms suggested in paras 71–72 above. The question to be asked in any given case should, therefore, be whether it is necessary for the protection of the claimant's Convention rights that the body concerned should be held to be a public authority against which those rights can be directly asserted. The answer to that question will vary according to the article of the Convention that it is sought to assert. If it is seriously asserted that the body has indulged in conduct contrary to article 3, then to be able to make that assertion directly against the body will be the obvious course. But if the article in issue is article 8, with all the difficulties indicated above, the question of whether it is necessary and justified to treat the body as a public authority for the purposes of article 8 will be much more difficult to answer.

77 In *YL's* case, because the proceedings have taken the form of a preliminary point, the full implications of finding the care home to be a public authority have not been explored, and we certainly have not heard submissions on them. However, granted that this part of the judgment proceeds on the basis indicated in para 67 above, I feel able to observe as follows. Appeal is made to the Convention in the present case because in the "best interests" proceedings in which the issue arises the court would not have power to compel either the care home to continue to accommodate YL, or Birmingham to continue to maintain her there; it would appear, even if the professional advice was that to move her to another home would be seriously detrimental to her health or even to her life. It has been noted in the discussion of *Johnson's* case that Birmingham has in any event to protect the article 8 rights of any person for whom it is responsible under section 21: see para 17 above. Whether it is necessary or possible in any given case to go further, and impose on the care home what is in effect an absolute obligation to accommodate YL (as to which analysis see para 74 above), is much more questionable. To answer that question in the affirmative would seem to confer on YL the sort of absolute right that article 8 does not provide: see paras 15–16 above.

78 I therefore venture to suggest that the approach to the issue of whether a particular body is a (hybrid) "public authority" should respect the instrumental nature of section 6 of the 1998 Act, and its purpose in promoting access to the Convention jurisprudence. That does not exclude the conclusion that a hybrid body may be directly impleaded in the protection of some Convention rights but not of others. Nor does it exclude consideration of the necessity of imposing liability on a body even where that significantly distorts the balance required by some articles of the Convention. What is not likely to be helpful is to ask whether in performing a particular function a hybrid body falls under the Convention for all purposes and at all times, in the same way as the status of a core public authority is fixed without reference to the instant context.

79 It is unfortunately that last question that we are asked in this case. For the reasons indicated I would not give it a positive answer, but also

A I draw back from the implications of giving a negative answer that will be binding in all circumstances. Whether it is necessary to find that the care home is bound by any and if so which of the articles of the Convention must depend, first, on what would be legitimate relief in the "best interests" proceedings; and, second, on whether that relief can be provided without infringing any other Convention values. I appreciate that this may be an B unattractive invitation to further litigation, not only in this case but in many others. But I fear that that is the unavoidable outcome, however the courts proceed, once domestic enforcement of the Convention embraces the relativist values of articles 8 to 11; and once the bodies bound by those values pass from the core case of the national government to bodies with legitimate interests of their own to assert.

80 As already indicated, these considerations are not open to this court, C but it might be thought that they should be taken into account in any future investigation of the impact of article 8 on the care home sector.

Disposal

81 The appeals both in *Johnson's* case and in *YL's* case fail. In the hope that it may be of some assistance to the parties I go on and make some D observations about costs, and about any further appeals. These are of course subject to any appropriate argument that the parties wish to advance.

Costs

82 In *Johnson's* case Havering is entitled to its costs, subject to any issues arising in relation to Legal Services Commission liability. I would not E award any costs in favour of the Secretary of State, whose intervention, although valuable to the court, was confessedly directed at policy objectives that went wider than this case. We need to know more about the arrangements for the appearance of the NCA before determining the issue of its costs. While it is quite correct that the court welcomed that intervention, the intervention was originally proposed by the Secretary of State, the court understood at his expense, in order to give substance in the sense of F opposition to his own intervention. And the NCA made it plain that it had a strong interest in supporting the commercial interests of its members. I doubt whether it would be equitable to expect the claimants to meet the costs of the NCA as well as those of Havering.

83 In *YL's* case, and again subject to any issue arising in relation to Legal Services Commission liability, YL is liable for the costs of Birmingham G and of the care home. She will be jointly and severally liable with the Secretary of State, who by intervening in the appeal in support of a particular case became in practice a party to the appeal: *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet (No 2)* [2000] 1 AC 119, 134A. There will have to be an assessment of the latter costs, in order to ensure that there is no double recovery for the cost of litigating the same point. The third and fourth defendants played only a limited role in the H appeals, and I would make no order for costs in their cases.

Appeal to the House of Lords

84 The issue in *YL's* case is of public importance, at present determined by authority in this court that might benefit from reconsideration. I would

be minded to give permission to appeal both to YL and to the Secretary of State. I would not give permission to appeal on the first issue in *Johnson's* case. The second issue as to whether the homes are public authorities, remains live in *Johnson's* case because of the interest in it of the claimants. I would grant permission to appeal on that issue only. It will be for their Lordships' House to determine how many advocates they wish to hear in support of the point that arises in *YL's* case as in *Johnson's* case.

DYSON LJ

85 I agree that these appeals should be dismissed for the reasons given by Buxton LJ. I do not, however, wish to make any obiter observations as to what the answer to the preliminary point should be if the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 were not binding on this court.

SIR ANTHONY CLARKE MR

86 I also agree that these appeals should be dismissed for the reasons given by Buxton LJ. Like Dyson LJ, I too do not wish to express any view as to what the position would be if the *Leonard Cheshire Foundation* case were not binding on this court. The purpose of the rules of precedent is that courts bound by previous decisions should not embark upon detailed debate on questions determined by such decisions. In these circumstances, it is only in very rare cases that I would think it appropriate to express a view upon such questions. This is not such a case.

Order accordingly.

Solicitors: Hossacks, Kettering; Assistant Chief Executive of Legal and Democratic Services, Havering London Borough Council, Romford; Treasury Solicitor; Lester Aldridge, Bournemouth; Irwin Mitchell, Sheffield; Legal and Democratic Services, Birmingham City Council, Birmingham; Lester Aldridge, Bournemouth.

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CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF ISLAMIC REPUBLIC OF IRAN SHIPPING LINES v. TURKEY

(Application no. 40998/98)

JUDGMENT

STRASBOURG

13 December 2007

FINAL

13/03/2008

In the case of Islamic Republic of Iran Shipping Lines v. Turkey,

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

Boštjan M. Zupančič, *President*,
Corneliu Bîrsan,
Rıza Türmen,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele,
Isabelle Berro-Lefèvre, *judges*,
and Stanley Naismith, *Deputy Section Registrar*,

Having deliberated in private on 22 November 2007,

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

PROCEDURE

1. The case originated in an application (no. 40998/98) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Iranian shipping company registered in Teheran (Iran), the Islamic Republic of Iran Shipping Lines ("the applicant company"), on 18 December 1997. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998 and in accordance with Article 5 § 2 thereof, the case was examined by the Court.

2. The applicant company was represented by Mr T. Marshall, Mr D. Lloyd Jones and Ms J. Stradford, lawyers practising in London. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicant company alleged that the seizure by the Turkish authorities of the cargo aboard a Cypriot-owned vessel of which it was time charterer had constituted an unjustified control of the use of property within the meaning of Article 1 of Protocol No. 1.

4. On 10 April 2003 the Court declared the application partly inadmissible and decided to communicate to the Government the complaints concerning the allegedly unjustified control of the use of property and the alleged denial of the right to a fair trial. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Background to the case

6. By a charter of 12 September 1991, the applicant company chartered a Cypriot-owned vessel called the *Cape Maleas* ("the vessel"). The charter party was on an amended New York Produce Exchange time-charter form, and was for a time-charter voyage to the south Iranian ports. The duration of the voyage was stated to be fifty days and the purpose to carry general cargo, steels and commercial containers.

7. By agreement between the parties, namely the applicant company and the owner of the vessel, Seabeach Shipping Ltd, on 18 September 1991 the charter party became subject to "Addendum No. 1". This provided that the applicant charterer could load 2,500 cubic metres of "IMCO 1" cargo. "IMCO 1" denotes cargo which falls within the "Class 1 – Explosives" category of the International Maritime Dangerous Goods Code.

8. The applicant company ordered the vessel to proceed to the port of Burgas in Bulgaria and, on 8 October 1991, further cargo commenced loading. This consisted of general cargo but also arms, ammunition and military spare parts which fell within the "IMCO Class 1" category ("the arms cargo").

9. The applicant company's agent in Burgas drew up bills of lading in respect of the cargo, including the arms cargo ("the bills of lading"). These bills of lading described the arms cargo as "special equipment", followed by a reference to a numbered contract. The port of discharge for the "special equipment" was specified as Tartus in the Syrian Arab Republic. The shipper was stated to be "Socotrade" and the consignee as "to order".

10. The applicant company's agent in Burgas also prepared a manifest of cargo. Like the bills of lading, this described the arms cargo as "special equipment", and gave the port of discharge as Tartus. The applicant company at all times intended that the arms cargo should be discharged at the port of Bandar Abbas in Iran. The vessel sailed from Burgas at 7 p.m. on 21 October 1991 and was ordered to proceed to Setúbal in Portugal in order to load further cargo. In order to reach Setúbal from Burgas, the vessel had to transit through the Bosphorus.

B. The seizure of the vessel

11. On 22 October 1991, at about 3.30 p.m., the vessel was about to commence transit through the Bosphorus. Before entering the Straits the master of the vessel requested the assistance of a pilot for navigation through the Bosphorus. The vessel was flying the international signal flag to indicate that it carried dangerous cargo.

12. As a result of information received by the Turkish customs authorities from a Turkish vessel which had recently arrived from Bulgaria, the Turkish authorities believed that the arms cargo on board the vessel was bound for Cyprus, from where it would be smuggled into Turkey.

13. According to the Turkish authorities, the vessel was first sighted when it was ten miles outside the Straits. After the vessel had entered the Straits, a pilot went on board and invited the master to declare any hazardous materials which were on board. The master duly did so, and the vessel proceeded for a few minutes through the Straits before the pilot instructed the master to stop the engines.

14. The Turkish coastguard and other Turkish authorities boarded and seized the vessel. Since the waters were rough at the point where the vessel was stopped, it was towed by a military boat to the Turkish port of Büyükdere. All parties to the case subsequently proceeded on the basis that the seizure of the vessel had taken place in the Straits, governed by the Montreux Convention of 20 July 1936.

15. At Büyükdere the vessel was searched and the bills of lading and manifest of cargo examined. The Turkish authorities discovered the arms cargo and questioned the master of the vessel. The statement entitled "Protocol of Facts", in which the Turkish authorities summarised their allegations and the actions which they had taken in respect of the vessel, was prepared and signed by all the officials who were present at the seizure and search of the vessel. The master, the first officer and the radio operator of the vessel were taken into custody by the Turkish authorities.

16. On 24 October 1991 statements were taken from the master and first officer in the form of affidavits. These formed part of the file which was submitted by the public prosecutor to a single judge of the Istanbul State Security Court.

C. The proceedings before the Istanbul State Security Court

17. On 28 October 1991, having examined the file and citing, *inter alia,* Articles 5 and 6 of the Montreux Convention, a single judge of the Istanbul State Security Court approved the arrest of the vessel and the detention of its crew, namely the master, the first officer and the radio operator. The judge referred in his decision to "systematic weapon smuggling" and stated

that the "evidence confirmed that the above-mentioned smuggled weapons could be used against the security of the Republic of Turkey".

18. On 30 October 1991 that decision was served on the lawyer instructed on behalf of the vessel and the master. The following day, the lawyer filed an objection against the decision, setting out the relevant provisions of the Montreux Convention and noting that Turkey was not in a state of war with any country within the meaning of the provisions of its Constitution and that there was neither a threat nor a risk of war.

19. On 4 November 1991 the Istanbul State Security Court dismissed that objection.

20. On 5 November the Chief Public Prosecutor at the Istanbul State Security Court indicted the master, the first officer and the radio officer of the vessel, charging them with organised transportation of firearms and ammunition. In the public prosecutor's view, Turkey was at war with Cyprus. He cited various decrees of the Turkish parliament which had authorised the sending of troops to Cyprus, and stated that:

> "... notwithstanding the ceasefire achieved through the efforts of the United Nations putting an end to the armed conflict, no treaty having yet been signed, the state of war is ongoing from a legal point of view. Consequently, it has become necessary to enforce Article 5 of the Montreux Convention. ...
>
> Pursuant to [Article 5 of the Montreux Convention], the commercial vessels of countries at war with Turkey do not enjoy free passage through the Straits. Therefore, there being no right of unrestricted passage through the Straits of a ship flying the Cypriot flag and laden with weapons, the Turkish Government may exercise, for its own security and based on its sovereign rights and Article 5 of the said Convention, control over that ship and the weapons contained therein."

21. Since the vessel was registered as a Cypriot ship and flew the Cypriot flag, the Turkish authorities concluded that they had been entitled under Article 5 of the Montreux Convention to seize the vessel and to launch proceedings for arms smuggling.

22. During November and December 1991 the government of the Islamic Republic of Iran sought the release of the vessel and its cargo through high-level diplomatic meetings. The issue was raised at presidential level and, on 11 November 1991, the Iranian ambassador to Turkey visited the Deputy Minister for Foreign Affairs to deliver copies of one of the bills of lading and of the Montreux Convention. This was intended to establish that the arms cargo was in fact being carried on behalf of the Iranian State.

23. On 12 November 1991 the Turkish Minister for Foreign Affairs wrote to the Ministry of Justice, giving an account of the meetings which had taken place, enclosing copies of the bill of lading and the Montreux Convention and offering to obtain further information on the "special equipment" listed on the bill of lading.

24. On 13 November 1991 the lawyer acting on behalf of the owners and the master of the vessel pointed out to the Istanbul State Security Court that

the assumption that Turkey and Cyprus were at war with each other was the "crucial point" of the case. He requested the Istanbul State Security Court to enquire immediately of the Ministry of Foreign Affairs whether a state of war existed. He also submitted that the Presidency of the Parliament should be asked whether there had been a declaration of war.

25. On 18 November 1991 the lawyer filed another application with the court reiterating that Turkey was not at war with any country (Cyprus included) and seeking the release of the master on bail.

26. On 25 November 1991 the lawyer submitted a petition to the Istanbul State Security Court asking the court to rephrase the question which it had put to the Turkish Ministry of Foreign Affairs. He objected to the question which had been put, namely "whether the peace operations in Cyprus have ended with a treaty of peace ...", and submitted that the proper question to be asked was "whether the Republic of Turkey is in a state of war or not with the State of Cyprus".

27. In another communication, dated 29 November 1991, the applicant company's lawyer sent the Istanbul State Security Court translations of the charter party and the bills of lading. He explained that the nature of a time charter was similar to a lease, and that charterers had control over the cargo and its documentation.

28. The Turkish Ministry of Foreign Affairs responded to the questions posed by the Istanbul State Security Court in two letters of 13 and 26 December 1991. The letters stated:

> "... as there is no 'state of war' between Turkey and any other country, including the Greek Cypriot Administration, it is obvious that the seizure of the ship cannot be based on Articles 5 and 6 of the Montreux Convention. In fact, ships carrying the flag of the Greek Cypriot Administration have always traversed the Straits freely.
>
> 2. In the Note sent to our Ministry by the Iranian embassy in Ankara, it was stated that the arms found on the ship belonged to Iran. This had been certified by the Iranian authorities on several occasions.
>
> On the other hand, the Bulgarian authorities stated that the said arms had officially been sold to Iran by an agreement signed between Bulgaria and Iran in 1989 and that the arms had been loaded in Burgas.
>
> 3. Except for the limitations set out in Articles 4 and 5 of the Montreux Convention in 'time of war', commercial ships flying foreign flags enjoy full freedom of transit passage at times of peace, whatever their flag and cargo may be. As stated above, it is impossible to invoke the 'time of war' provisions of the Montreux Convention in this case because no state of war with the Greek Cypriot Administration exists. Moreover, in accordance with customary international and treaty laws, ships have the 'right of innocent passage' through the territorial waters of other countries ..."

29. On 16 December 1991 the Istanbul State Security Court issued a decision for the release of the master on bail, but ordered the seizure and

confiscation of the vessel and its cargo on suspicion of their being intended for use for the commission or preparation of a crime.

30. On 10 January 1992 the public prosecutor filed his observations on the merits. He maintained his earlier position, relying upon Article 5 of the Montreux Convention, contending that the vessel and the arms cargo should be seized and the master imprisoned.

31. By January 1992 the applicant company had concluded that attempts to secure the release of the vessel and its cargo through diplomatic negotiations were unlikely to succeed. The applicant company applied through its Turkish lawyer, Mr Aydın, to intervene in the proceedings before the Istanbul State Security Court. In its application, the applicant company set out its interest in the case as the owner of the cargo and stressed that the arms cargo was being carried as part of a normal and legal commercial transaction and that Turkey was not at war with any country. It therefore asked for the unconditional release of the vessel and its cargo. The court ordered that the applicant company be joined as an intervening party in the proceedings.

32. On 22 February 1992 the then Prime Minister of Turkey, Mr Süleyman Demirel, issued a certificate which stated:

> "The Republic of Turkey is not in a state of war with any country, Southern Cyprus included ..."

33. By a judgment of 12 March 1992, the Istanbul State Security Court acquitted the first officer and the radio operator, but convicted the master of the vessel of importing arms into Turkey without official permission and sentenced him to five years' imprisonment and a fine of 50,000 Turkish liras (TRL). The court ordered that the arms cargo and the vessel be confiscated pursuant to the final paragraph of section 12 of Law no. 6136, that all the cargo other than the arms be returned to the applicant company and that the master bear the costs of the court hearing. With reference to a judgment of the Court of Cassation in a similar case[1], the Istanbul State Security Court held that in the present case there was bad faith on the part of the applicant company since the bill of lading gave inaccurate information as to the contents of the cargo and the route of the vessel. It noted that there was no justification for not informing the Turkish authorities of Iranian weapons passing through the Straits. The court further considered the following in relation to the Montreux Convention:

> "The second question is whether the Turkish authorities were entitled to seize the munitions and weapons. Pursuant to the relevant Article of the Montreux Convention, the passage of ships carrying firearms and owned by any State with which Turkey is in a state of war is forbidden.

1. By a decision of 19 June 1978 (no. 978/8-189-245) in the *Vassoula* case, the General Criminal Panel of the Court of Cassation held that the state of war had not yet ended following the Cyprus Peace Operation which started on 20 July 1974.

> The other important issue is whether Turkey is in a state of war with the Greek Cypriot State, or in other words, whether a peace agreement has been reached after the war. It is known that Turkey has engaged in war with the Greek Cypriot State, as a result of which Cyprus has been divided into two sections, that the Turkish Republic of Northern Cyprus has been established, that the Greek Cypriot State has not recognised the Turkish Republic of Northern Cyprus and until now no agreement has been reached, and that inter-State negotiations are in progress.
>
> Therefore, the letter of the Ministry of Foreign Affairs ... and the letter of the Prime Minister ... were disregarded."

34. The judgment went on to refer to the *Vassoula* case[1], concerning another vessel, and concluded that "the existence of a state of war has been confirmed".

35. Following the judgment of the Istanbul State Security Court, the applicant company paid the hire charge and expenses due to the owner and the charter party in the sum of 1,161,374.50 United States dollars (USD). Although the judgment of the Istanbul State Security Court had ordered the return of the non-arms cargo to the applicant company, it was not returned and, by an order of 29 May 1992, the Istanbul Court of Commerce granted an injunction to the owner of the vessel which imposed a lien of TRL 4,111,168,608 over the cargo to secure the unpaid hire. The owner of the vessel, Seabeach Shipping Ltd, then commenced enforcement proceedings for encashment of the lien over the cargo which belonged to the applicant company.

D. The appeal

36. On 13 March 1992 the applicant company appealed against the judgment of the Istanbul State Security Court. The applicant company disputed the court's conclusion that a state of war existed between Turkey and Cyprus. The ground of appeal also questioned the legitimacy of the court's reliance on the earlier *Vassoula* case, and pointed out that the arms cargo had only been in transit through the Straits.

37. By a decision of 3 June 1992, the Court of Cassation quashed the Istanbul State Security Court's judgment. It held that there was no material evidence in the file indicating that the arms would be discharged from the vessel in Turkey. As regards the applicability of the provisions of the Montreux Convention, the Court of Cassation held:

> "... that the state of war mentioned in Article 4 of the Convention did not exist as also evidenced by the letters of the Ministry of Foreign Affairs and the Prime Minister which explicitly state that 'Turkey is not at war with any country, including the Southern Greek Cyprus Administration' ... and that there is no room for application of Article 6 of the Montreux Convention. ..."

1. Ibid.

38. The case was remitted to the State Security Court for retrial.

39. In an application of 3 September 1992, pending the retrial of the master of the vessel before the Istanbul State Security Court, the applicant company sought removal of the lien which had been imposed by the Istanbul Court of Commerce over the cargo.

40. On 8 September 1992 the Istanbul Court of Commerce refused the applicant company's request, so on 18 September 1992 the applicant company agreed to pay the owner some of the hire charges, without prejudice as to liability. In return, the owner agreed to relinquish its lien on the non-arms cargo. Under that agreement the applicant company had to pay 80% of the hire charge in respect of the period from 14 March 1992 to 13 September 1992 inclusive (USD 1,118,074.40). The applicant company also agreed to pay 100% of future charges, as and when the payments fell due. The owner provided the applicant company with a guarantee to repay the sum of USD 1,118,074.40. The applicant company considered that it was obliged to pay the hire charges due, otherwise the Istanbul Court of Commerce and the owner would not have released the vessel and its cargo.

41. On 30 September 1992 the Istanbul State Security Court acquitted the master on retrial. An appeal by the public prosecutor against that judgment was dismissed by the Court of Cassation in a decision of 12 November 1992, which was approved on 13 November 1992.

42. On 18 November 1992 the Istanbul State Security Court ordered the release of the vessel and the arms cargo. The vessel left Turkey on 8 December 1992 and was returned to the owner by the applicant company under the terms of the charter party on 9 March 1993.

E. The compensation proceedings

43. In a written application of 22 July 1993, the applicant company brought an action before the Istanbul Court of Commerce claiming TRL 38,087,249,964 (equivalent to USD 3,386,598.98) plus interest against the Ministry of Finance and Customs, with reference to the Ministry of the Interior and the Ministry of Defence. The applicant company based its claim on Article 41 of the Code of Obligations and submitted that the seizure and detention of the vessel and its cargo had been unjustified. It argued in this connection that the arms and ammunition had belonged to the Islamic Republic of Iran, that the vessel had been wrongfully impounded for 413 days, 2 hours and 30 minutes and, as a result, it had had to pay USD 3,263,522.92 to the owner, USD 81,978.86 in fuel charges and USD 41,097.20 in harbour fees.

44. The application went on to distinguish this case from the *Vassoula* case, and to explain the circumstances in which the applicant company had been forced to pay the hire charges and other expenses to the owner of the vessel.

45. On 28 September 1994 a first expert report was submitted to the Court of Commerce following its interlocutory order of 9 March 1994. The experts advised that the applicant company's claim should be declared inadmissible, principally on the basis that the applicant company had chosen voluntarily and without legal compulsion to pay the hire charges under the charter party.

46. The applicant company objected to the first report and the Court of Commerce ordered the preparation of a second expert report on 11 November 1994.

47. On 3 April 1995 the second expert report was submitted to the court with the conclusion that the applicant company's claim should be dismissed. This second panel of experts considered that the owner of the vessel, but not the applicant company, might in appropriate circumstances claim compensation from the Turkish State. They expressed the opinion that the applicant company's claim might succeed in relation to dock and fuel expenses incurred, as well as supplementary losses under Article 105 of the Code of Obligations, but that the claim in respect of hire charges should fail.

48. On 13 June 1995 the applicant company filed an objection against the second report and requested the court to rule on the case without obtaining a further report, or alternatively to order a third expert report.

49. By a decision of 20 September 1995, the Istanbul Court of Commerce dismissed the applicant company's claim for compensation, holding that the vessel was not a merchant vessel since it was carrying, in part, a cargo of arms. It considered that the security authorities had merely carried out their statutory duty to investigate serious allegations of arms smuggling. The court therefore ruled that there had been no breach of the Montreux Convention or of Turkish law, in particular Article 41 of the Code of Obligations.

50. On 6 November 1995 the applicant company appealed.

51. On 27 December 1996 the Court of Cassation dismissed the appeal and upheld the judgment of the Istanbul Court of Commerce. A request by the applicant company for rectification of that decision was rejected by a new decision of the Court of Cassation of 22 May 1997, served on the applicant company on 22 June 1997.

F. The London arbitration

52. The charter party provided, *inter alia*, that any dispute arising under it should be referred to arbitration in London. As a result of the seizure and subsequent detention of the vessel and its cargo by the respondent government, a dispute arose between the applicant company and the owner of the vessel concerning the hire charges and other expenses paid by the applicant company.

53. Following arbitration proceedings in London, on 20 September 1995 the arbitration panel decided that the charter party had been frustrated by the Istanbul State Security Court's decision of 12 March 1992. The applicant company therefore recovered from the owner of the vessel the hire charges and other expenses which had been paid in respect of the period after 12 March 1992, but was unable to recover USD 1,300,403.83 which it had paid or which it thereupon had to pay to the owner in respect of the period between the seizure on 22 October 1991 and 12 March 1992.

G. The proceedings instituted by the owner of the vessel and the cargo receiver

54. Meanwhile, the owner of the vessel, Seabeach Shipping Ltd, brought an action in the Beyoğlu Commercial Court in Istanbul seeking a lien on the cargo for the hire charges. In a decision of 29 May 1992 the Beyoğlu Commercial Court accepted the owner's claim on the ground that it was owed freight charges.

55. The cargo receiver, the Mobarakeh Steel Complex, also brought an action in the Beyoğlu Commercial Court claiming USD 2,236,208 in damages from the Ministry of Finance on behalf of the Ministry of the Interior and the Ministry of Defence. It submitted that it had lost revenue as a result of the detention of its merchandise carried on the vessel and that new commercial goods had been purchased in order to replace the seized merchandise.

56. In a judgment of 17 January 2000, the Beyoğlu Commercial Court dismissed that claim on the grounds that the seizure of the vessel had been lawful since the arms cargo was not clearly indicated on the bill of lading. On appeal by the plaintiff, the Court of Cassation quashed the judgment. Relying on the outcome of the criminal proceedings, the Court of Cassation noted that the goods in question were not contraband or of a kind requiring them to be confiscated. It accordingly held that the defendant must be liable for the damage resulting from the wrongful confiscation of the goods.

57. In a judgment of 15 December 2000, the Beyoğlu Commercial Court confirmed its earlier judgment and held that the plaintiff's claim must be dismissed on the grounds that the seizure and detention of the vessel had been in compliance with domestic law and the Montreux Convention governing the Straits. Taking into account the fact that the vessel had been sailing under the Cypriot flag, and the inconsistency between the cargo and the documents, the court considered that the seizure of the vessel had been lawful. The court further noted that the State of Turkey had acted with the aim of preventing activities designed to undermine it. The plaintiff again appealed against that judgment.

58. On 21 November 2000 the Court of Cassation sitting as a full civil court upheld the judgment of the Beyoğlu Commercial Court and dismissed

the action. It considered that while under the Montreux Convention merchant ships were entitled to innocent passage, this did not outweigh Turkey's sovereign rights. That being so, any arms trafficking would adversely affect Turkey and would thus mean that the passage was no longer innocent. It further stated the following:

> "... On the other hand, the bill of lading described the 2,131 boxes opened as containing 'Special Equipment'. The Turkish Commercial Code specifies in Articles 1098 and 1114 the points to be included in the bill of lading. The cargo received or loaded onto the vessel for transportation must be described on the bill of lading in order for the acknowledgment of receipt and the delivery contract to be complete ... This description, which is an essential element of the bill of lading, must be such as to allow the cargo to be distinguished at all times from the other cargoes on the vessel and must be complete. The carrier is obliged to indicate on the bill of lading the amount, brand and external appearance as well as the characteristics of the cargo ... Clearly, as is apparent from the bills of lading in the case file, these indications, some of which are mandatory, were not included on the bill of lading and invited suspicion.
>
> A country may purchase the arms it needs for its defence from another country, or may secure them by means such as aid or donations. In other words, arms trading between States is a normal and lawful procedure. Transportation of these arms is also normal and lawful. Arms purchased and transported must be indicated clearly as such on the bill of lading and other documents, in accordance with international rules. There should be no need to conceal them or make use of other channels. The file did not include a sales contract to the effect that the party sending these arms had purchased them lawfully, nor did it include any evidence to the effect that a letter of credit had been opened by banks. Given the manner in which the arms were loaded onto the vessel, it was essential from the point of view of Turkey's security to inspect the vessel. In the matter of innocent passage, the coastal State has the right to impose sanctions on the vessel and cargo in accordance with the rule on the prevention of non-innocent passage which stems from customary law and the Montreux Convention. The Montreux Convention, customary law and the principle of *ex aequo et bono* do not prevent Turkey from exercising this right. For these reasons, the trial court's decision to dismiss the action must be upheld on the grounds that it is in conformity with the law and with statutory procedure."

II. RELEVANT LEGAL MATERIALS AND DOMESTIC LAW

A. The Montreux Convention of 20 July 1936

59. The former signatories to the Treaty of Lausanne (1923), together with Yugoslavia and Australia, met at Montreux, Switzerland, in 1936 and abolished the International Straits Commission, returning the Straits zone to Turkish military control. Turkey was authorised to close the Straits to warships of all countries when it was at war or threatened by aggression. Merchant ships were to be allowed free passage during peacetime and, except for countries at war with Turkey, during wartime. The convention

was ratified by Turkey, Great Britain, France, the USSR, Bulgaria, Greece, Germany and Yugoslavia, and – with reservations – by Japan. The preamble to the convention stated that the desire of the parties was "to regulate transit and navigation in the Straits of the Dardanelles, the Sea of Marmara and the Bosphorus, comprised under the general term 'Straits', in such manner as to safeguard, within the framework of Turkish security and of the security, in the Black Sea, of the riparian States, the principle enshrined in Article 23 of the Treaty of Peace signed at Lausanne on the 24th July, 1923".

The relevant provisions of the convention read as follows:

Article 1

"The High Contracting Parties recognise and affirm the principle of freedom of transit and navigation by sea in the Straits.

The exercise of this freedom shall henceforth be regulated by the provisions of the present Convention."

Article 2

"In time of peace, merchant vessels shall enjoy complete freedom of transit and navigation in the Straits, by day and by night, under any flag and with any kind of cargo, without any formalities, except as provided in Article 3 below. No taxes or charges other than those authorised by Annex I to the present Convention shall be levied by the Turkish authorities on these vessels when passing in transit without calling at a port in the Straits.

In order to facilitate the collection of these taxes or charges merchant vessels passing through the Straits shall communicate to the officials at the stations referred to in Article 3 their name, nationality, tonnage, destination and last port of call (provenance).

..."

Article 3

"All ships entering the Straits by the Aegean Sea or by the Black Sea shall stop at a sanitary station near the entrance to the Straits for the purposes of the sanitary control prescribed by Turkish law within the framework of international sanitary regulations. This control, in the case of ships possessing a clean bill of health or presenting a declaration of health testifying that they do not fall within the scope of the provisions of the second paragraph of the present Article, shall be carried out by day and by night with all possible speed, and the vessels in question shall not be required to make any other stop during their passage through the Straits.

Vessels which have on board cases of plague, cholera, yellow fever exanthemic typhus or smallpox, or which have had such cases on board during the previous seven days, and vessels which have left an infected port within less than five times twenty-four hours shall stop at the sanitary stations indicated in the preceding paragraph in order to embark such sanitary guards as the Turkish authorities may direct. No tax or

charge shall be levied in respect of these sanitary guards and they shall be disembarked at a sanitary station on departure from the Straits."

Article 4

"In time of war, Turkey not being belligerent, merchant vessels, under any flag or with any kind of cargo, shall enjoy freedom of transit and navigation in the Straits subject to the provisions of Articles 2 and 3.

..."

Article 5

"In time of war, Turkey being belligerent, merchant vessels not belonging to a country at war with Turkey shall enjoy freedom of transit and navigation in the Straits on condition that they do not in any way assist the enemy.

..."

Article 6

"Should Turkey consider herself to be threatened with imminent danger of war, the provisions of Article 2 shall nevertheless continue to be applied except that vessels must enter the Straits by day and their transit must be effected by the route which shall, in each case, be indicated by the Turkish authorities.

..."

Article 24

"The functions of the International Commission set up under the Convention relating to the regime of the Straits of the 24th July 1923, are hereby transferred to the Turkish Government.

The Turkish Government undertake to collect statistics and to furnish information concerning the application of Articles 11, 12, 14 and 18 of the present Convention.

They will supervise the execution of all the provisions of the present Convention relating to the passage of vessels of war through the Straits.

As soon as they have been notified of the intended passage through the Straits of a foreign naval force the Turkish Government shall inform the representatives at Angora of the High Contracting Parties of the composition of that force, its tonnage, the date fixed for its entry into the Straits, and, if necessary, the probable date of its return.

The Turkish Government shall address to the Secretary-General of the League of Nations and to the High Contracting Parties an annual report giving details regarding the movements of foreign vessels of war through the Straits and furnishing all

information which may be of service to commerce and navigation, both by sea and by air, for which provision is made in the present Convention."

Article 25

"Nothing in the present Convention shall prejudice the rights and obligations of Turkey, or of any of the other High Contracting Parties members of the League of Nations, arising out of the Covenant of the League of Nations."

B. The United Nations Convention on the Law of the Sea of 10 December 1982

60. The relevant provisions provide as follows:

Article 35

"Nothing in this Part affects:

(a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in Article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such;

(b) the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas; or

(c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits."

Article 37

"This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."

Article 38
Right of transit passage

"1. In straits referred to in Article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through

the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention."

Article 39
Duties of ships and aircraft during transit passage

"1. Ships and aircraft, while exercising the right of transit passage, shall:

(a) proceed without delay through or over the strait;

(b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress;

(d) comply with other relevant provisions of this Part.

2. Ships in transit passage shall:

(a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;

(b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.

..."

C. The Turkish Code of Obligations

61. This provides as relevant:

Article 41

"Any person who causes damage to another in an unjust manner, be it intentionally or negligently, shall afford redress for that damage."

62. The civil courts are not bound by either the findings or the verdict of the criminal court (Article 53).

D. Law no. 6136 of 15 July 1953 (as amended by Laws nos. 2249 and 2478 of 12 June 1979 and 23 June 1981 respectively)

63. Section 12 makes it an offence to smuggle, to attempt to smuggle or to assist in smuggling firearms or ammunition into the country.

E. Article 36 of the former Turkish Criminal Code

64. Article 36 of the Turkish Criminal Code which was in force at the relevant time prescribed the seizure and confiscation of objects which were used for the commission or preparation of a crime.

F. Article 90 § 5 of the Turkish Constitution

65. The relevant parts of Article 90 § 5 provide:

> "International agreements duly put into effect bear the force of law ... In the event of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."

THE LAW

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

66. The applicant company complained that the seizure by the Turkish authorities of the vessel and its cargo had constituted an unjustified control of the use of property within the meaning of Article 1 of Protocol No. 1, which reads as follows:

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

A. Admissibility

1. The Government's submissions

67. The Government alleged that the applicant company did not have *locus standi* and that it was therefore not entitled to lodge an application under Article 34 of the Convention. They contended, in the alternative, that the applicant company had failed to comply with the six-month rule in respect of the complaint.

68. The Government submitted that the applicant company was a State-owned corporation which could not be considered to be distinct, *de jure* or *de facto*, from the government of the Islamic Republic of Iran. At the time this application was lodged, all of the applicant company's shares had been owned by the State.

69. However, in January 2000, 51% of the company's shares had been transferred to the Social Security Organisation and the State Pension Fund, which were public-sector organisations under the control of the State. According to Articles 9, 10 and 13 of the memorandum of association of the applicant company, three-fifths of the members of the board of directors were appointed by the State, which owned Class A shares. Any Class A share conferred the right to vote, equal to two votes of Class B shares (owned by the Social Security Institution and the State Pension Fund), in the extraordinary general meeting held for the modification of the memorandum of association. Furthermore, Article 18 of the memorandum provided that all decisions of the board should be taken by a majority of the members present. Thus, bearing in mind that three members of the board were representatives of the State, it was impossible to pass an adverse resolution against the instructions of the State. Accordingly, the present application had been lodged by a State which was not a party to the Convention.

70. Furthermore, the established case-law of the Convention institutions indicated that public corporations were not entitled to bring an application under Article 34 of the Convention (see *Radio France and Others v. France* (dec.), no. 53984/00, ECHR 2003-X; *Ayuntamiento de M. v. Spain*, no. 15090/89, Commission decision of 7 January 1991, Decisions and Reports (DR) 68, p. 209; and *Sixteen Austrian Communes and some of their Councillors v. Austria*, nos. 5767/72, 5922/72, 5929-5931/72, 5953-5957/72, 5984-5988/73 and 6011/73, Commission decision of 31 May 1974, Yearbook 17, pp. 338-52).

71. The Government lastly asserted that the applicant company had not filed the complaints within six months of the deposition of the final decision with the registry of the Istanbul Court of Commerce. Referring to the Court's decision in *Tahsin İpek v. Turkey* ((dec.), no. 39706/98, 7 November 2000), they claimed that the six-month period had started to run from 12 June 1997, the date on which the Court of Cassation's final

decision had been deposited with the registry of the Beyoğlu Commercial Court, and that the application had been lodged on 18 December 1997, which was more than six months later.

72. In sum, the Government argued that, given that the applicant company lacked *locus standi* as it was a government corporation, the application should be declared inadmissible as being incompatible *ratione personae*. Alternatively, it should be declared inadmissible for failure to comply with the six-month rule.

2. The applicant company's arguments

73. The applicant company disputed the Government's submissions. It claimed that it was a company limited by shares, with a salaried board of directors and articles of association. At all material times it had been registered as an independent entity under the applicable Iranian trade law. It was run as a commercial business and operated in a sector that was open to competition. In no sense did it have a monopoly or a special position in that sector. Thus, just as in the *Radio France and Others* case (cited above), the applicant company was essentially subject to the legislation on incorporated companies, exercised no powers which were not subject to ordinary law in the exercise of its activities and was subject to the ordinary courts. It was therefore in law and in fact a separate legal entity distinct from the government of Iran, as was provided by Article 3 of the memorandum of association. Since January 2000, 51% of the shares in the applicant company had been owned by private shareholders.

74. Furthermore, the fact that the applicant company was incorporated in Iran, a State which was not a party to the Convention, was of no relevance. There was no requirement that an applicant should be a citizen of the respondent State or indeed of any Council of Europe member State.

75. As regards the Government's reliance on cases concerning the standing of communes and municipalities, the applicant company pointed out that it was in no sense such an organ of local or central government. Rather, it was a separate corporate body at the time of the unlawful and unjustified arrest of the vessel.

76. In view of the above, the applicant company claimed that it was not, at the time of the arrest of the vessel or the subsequent court proceedings, a "governmental organisation" in the relevant sense. It accordingly had *locus standi* to bring an application under Article 34 of the Convention.

77. Finally, the applicant company submitted that the Court of Cassation's final decision had been served on its lawyer on 22 June 1997 and that the application had been lodged on 18 December 1997, that is, within the six-month time-limit.

3. The Court's considerations

78. As regards the first limb of the Government's objections, the Court observes that a legal entity "claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention and the Protocols thereto" may submit an application to it (see, for example, *Agrotexim and Others v. Greece*, 24 October 1995, Series A no. 330-A, and *Société Faugyr Finance S.A. v. Luxembourg* (dec.), no. 38788/97, 23 March 2000), provided that it is a "non-governmental organisation" within the meaning of Article 34 of the Convention (see *RENFE v. Spain*, no. 35216/97, Commission decision of 8 September 1997, DR 90-B, p. 179).

79. The term "governmental organisations", as opposed to "non-governmental organisations" within the meaning of Article 34, includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities (see *Radio France and Others*, cited above).

80. In the light of the above principles, the Court notes that the applicant company is a corporate body which carries out commercial activities subject to the ordinary law of the Republic of Iran. It neither participates in the exercise of governmental powers nor has a public-service role or a monopoly in a competitive sector (see, in this connection, *The Holy Monasteries v. Greece*, 9 December 1994, § 49, Series A no. 301-A, and more recently, *Österreichischer Rundfunk v. Austria*, no. 35841/02, §§ 48-54, 7 December 2006). Although at the time of the events giving rise to the present application the applicant company was wholly owned by the State and currently an important part of its shares still belong to the State and a majority of the members of the board of directors are appointed by the State, it is legally and financially independent of the State, as transpires from Article 3 of the memorandum of association. In this connection the Court notes that in the *Radio France and Others* case, which was relied on by the Government, it found that the national company Radio France was a "non-governmental organisation" within the meaning of Article 34 of the Convention despite the fact that the State held all of the capital in Radio France, its memorandum and articles of association were approved by decree, its resources were to a large extent public, it performed "public-service missions in the general interest", and it was obliged to comply with terms of reference and to enter into a contract with the State setting out its objectives and means. Therefore, it follows that public-law entities can have the status of a "non-governmental organisation" in so far as they do not

exercise "governmental powers", were not established "for public-administration purposes" and are completely independent of the State (see *The Holy Monasteries*, cited above, § 49).

81. That being so, it is true that governmental bodies or public corporations under the strict control of a State are not entitled to bring an application under Article 34 of the Convention (see *Radio France and Others*; *Ayuntamiento de M.*; *Sixteen Austrian Communes and some of their Councillors*; and *RENFE*, all cited above). However, the idea behind this principle is to prevent a Contracting Party acting as both an applicant and a respondent party before the Court. The circumstances of the present case are therefore different from those cited by the Government and the fact that the applicant company was incorporated in a State which is not party to the Convention makes no difference in this respect. Furthermore, the Court finds that the applicant company is governed essentially by company law, does not enjoy any powers beyond those conferred by ordinary law in the exercise of its activities and is subject to the jurisdiction of the ordinary rather than the administrative courts. Having regard to the foregoing, the Court considers that the applicant company is run as a commercial business and that therefore there is nothing to suggest that the present application was effectively brought by the Islamic Republic of Iran, which is not a party to the Convention.

82. It follows that the applicant company is entitled to bring an application under Article 34 of the Convention and that therefore the first part of the Government's objection should be dismissed.

83. As regards the second part of the Government's objection, namely the alleged failure of the applicant company to comply with the six-month rule, the Court notes that the Government relied on its decision in the *Tahsin İpek* case, which concerned the failure of the applicant to procure the judgment of the Court of Cassation for more than six months after it had been deposited with the registry of the assize court. In this connection, it observes that its findings in the *Tahsin İpek* case applied solely to criminal proceedings since, according to the established practice of the Court of Cassation, the latter's decisions in criminal cases are not served on the defendants. In civil-law cases, however, the Court of Cassation's decisions are served on the parties when payment of the postage fee has been made in advance. Given that the proceedings in the instant case are of a civil nature and that the applicant company lodged its application within six months of the service of the Court of Cassation's final decision, it must be considered to have complied with the six-month rule laid down in Article 35 § 1 of the Convention.

84. Accordingly, the Government's objection concerning the alleged failure to observe the six-month rule must also be dismissed. The Court finds furthermore that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and that it is not inadmissible on any other grounds. This complaint must therefore be declared admissible.

B. Merits

85. The Court notes that the parties did not contest that the matters complained of constituted an interference with the peaceful enjoyment of the applicant company's possessions. Accordingly, it must next determine the applicable rule in the instant case.

1. The applicable rule

86. The Court reiterates that Article 1 of Protocol No. 1 comprises three distinct rules. The first rule, which is set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property. The second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions. The third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose. However, the rules are not "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see *AGOSI v. the United Kingdom*, 24 October 1986, § 48, Series A no. 108).

87. The Court notes that the parties did not comment on the rule applicable to the case. It considers that in this case there was neither a confiscation nor a forfeiture as the applicant company regained possession of the cargo following a temporary detention of the vessel. It therefore amounted to control of the use of property. Accordingly, the second paragraph of Article 1 is applicable in the present case (see *Air Canada v. the United Kingdom*, 5 May 1995, § 34, Series A no. 316-A).

2. Compliance with the conditions in the second paragraph

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

(a) Lawfulness and object of the interference

(i) The Government's arguments

89. The Government submitted that the authorities had searched the vessel on suspicion of organised arms smuggling into Turkey. The arms cargo had thus been seized in accordance with section 12 of Law no. 6136 and Article 36 of the former Turkish Criminal Code as well as Articles 2 and 25 of the Montreux Convention and Article 19 § 2 and Article 39 of the United Nations Convention on the Law of the Sea of 10 December 1982. The above-mentioned provisions of the Montreux Convention and the Convention on the Law of the Sea empowered the Government to limit the transit passage of commercial vessels through the Straits if the vessels posed a threat to the sovereignty, territorial integrity or political independence of the State or in any other manner violated the principles of international law embodied in the Charter of the United Nations. In this connection, arms smuggling was a threat to international peace and order and in violation of the principles of international law and customs. Thus, the provisional seizure of the arms cargo was necessary for the prevention of crime and the protection of public safety in accordance with the general interest.

(ii) The applicant company's arguments

90. The applicant company contended that the arrest and detention of the vessel and its cargo had been unjustified since there was no evidence indicating that an offence had been committed or would have been committed. Nor were they in accordance with the principles of international law within the meaning of Article 1 of Protocol No. 1. The Montreux Convention, which was a *lex specialis* in the instant case, conferred in its Articles 1 to 3 complete freedom of transit and navigation on merchant vessels in the Straits. In particular, Article 3 made it clear that merchant vessels should not be required to make any stop during their passage through the Straits, with the exception of sanitary control which might be imposed by Turkish law within the framework of international sanitary regulations.

91. As regards the Government's reliance on the Convention on the Law of the Sea, the applicant company pointed out that Turkey was not a party to it and that, in any event, it could not have any application to the Bosphorus or the Dardanelles, passage through which was regulated by the Montreux Convention. The latter convention had been incorporated into the domestic law of Turkey. In view of the Court of Cassation's ruling that there was no evidence to suggest that the arms were to be introduced into Turkey and unloaded there, and that the Turkish authorities' reliance on Articles 5 and 6 of the Montreux Convention was untenable, the seizure of the vessel and its cargo had been contrary to the domestic law of Turkey.

(iii) The Court's considerations

92. The Court notes that the parties admitted that there was some legal basis for the interference with the applicant company's property rights; they disagreed, however, on the exact meaning and scope of the applicable law. It further notes that during various stages of the national proceedings their views also differed on the degree of applicability of the Montreux Convention, rules of customary international law governing transit passage through straits and provisions of national law prohibiting arms smuggling. Although in the early stages of the proceedings the national courts relied on Article 5 of the Montreux Convention in justifying Turkey's right to seize the arms cargo because of the continuing state of war with Cyprus, in their observations before the Court the Government's arguments hinged upon the application of the legislation prohibiting arms smuggling, which undermines international peace.

93. The Court accepts that the Montreux Convention is a *lex specialis* as concerns the transit regime through the Bosphorus. In this connection, it notes the points of conflicting interpretation of this convention raised by the parties. The Court considers, however, that it is not its role in the circumstances of this case to pronounce on the interpretation and application of the Montreux regime by Turkey, as there was arbitrary interference with the applicant company's property rights for the following reasons.

(b) Proportionality of the interference

94. The Court reiterates that an interference, particularly one falling to be considered under the second paragraph of Article 1 of Protocol No. 1, must strike a "fair balance" between the demands of the general interest and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, and therefore also in its second paragraph. There must be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question (see *Air Canada*, cited above, § 48).

95. The Court notes that neither the applicant company nor the Government commented on the proportionality of the interference. They limited themselves to comments on the lawfulness and purpose of the interference.

96. Be that as it may, in order to assess the proportionality of the interference, the Court has to examine the degree of protection from arbitrariness that is afforded by the proceedings in this case and whether a

total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1.

97. In the present case, the vessel carrying the cargo belonging to the applicant company was arrested on 22 October 1991 and detained until 8 December 1992, the date on which the vessel left Turkey by order of the Istanbul State Security Court. As noted above, the authorities' suspicion that the vessel was involved in international arms smuggling provided the justification for the arrest of the vessel. However, that suspicion was dispelled by the Minister for Foreign Affairs' letter of 12 November 1991, which informed the Istanbul State Security Court, via the Ministry of Justice, that the arms cargo belonged to the Islamic Republic of Iran (see paragraphs 22-23 above). The prosecuting authorities, however, also attached fundamental importance to the fact that there was an ongoing state of war between Turkey and Cyprus and that therefore the vessel was not entitled to free passage through the Straits within the meaning of Article 5 of the Montreux Convention (see paragraph 20 above). Yet that assertion was also disputed by the Ministry of Foreign Affairs, which responded to the Istanbul State Security Court's questions in letters of 13 and 26 December 1991, and by the then Prime Minister's certificate of 22 February 1992 (see paragraphs 28 and 32 above). Despite this information, the Istanbul State Security Court instead relied on an old and isolated precedent, the *Vassoula* case, which had been decided in 1978 and concerned very different circumstances, in concluding that there was a state of war between Turkey and Cyprus and that, therefore, the detention of the vessel and arms cargo should be continued (see paragraphs 33-35 above). It gave no reasons for rejecting the statements and certification from the relevant State officials and representatives that there was no state of war.

98. In view of the above, the Court considers that the vessel and its cargo should have been released, at the latest, on 12 March 1992, when the State Security Court issued its decision, and that their detention from the above-mentioned date onwards was arbitrary since there was no basis for suspecting an arms-smuggling offence or general power to seize the ship on account of a state of war between Turkey and Cyprus.

99. Furthermore, the Court observes that the compensation proceedings are also material in determining whether the contested interference in this case respected the requisite fair balance and, notably, whether it imposed a disproportionate burden on the applicant company. In this connection, the arbitrary control of use of a property for a prolonged period of time without justification will normally constitute a disproportionate interference, and a total lack of compensation can be considered unjustifiable under Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *The Holy Monasteries*, cited above, §§ 70-71, and *Papachelas v. Greece* [GC], no. 31423/96, § 48, ECHR 1999-II).

100. In that regard the Court notes that the applicant company's claim for compensation for the damage it had sustained was dismissed by the Beyoğlu Court of Commerce, which held that the vessel was not a merchant vessel since it was carrying, in part, a cargo of arms and that its passage was therefore not innocent within the meaning of the Montreux Convention (see paragraphs 49 and 58 above).

101. The Court observes that the Court of Cassation had already found that there was no offence of arms smuggling and that Article 6 § 1 of the Montreux Convention did not apply (see paragraph 37 above). Accordingly, even though the civil courts were not bound by the findings of the criminal courts (see paragraph 62 above), the reasons given by the Beyoğlu Commercial Court were not capable of justifying its decision to deprive the applicant company of its claims for compensation for damage suffered from 12 March 1992 (see paragraph 99 above).

102. The foregoing considerations are sufficient to enable the Court to conclude that the authorities' interference with the applicant company's rights is disproportionate and unable to strike a fair balance between the interests at stake.

103. There has accordingly been a violation of Article 1 of Protocol No. 1.

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

104. The applicant company also complained that the initial seizure and subsequent detention of the vessel the *Cape Maleas* and the exercise of criminal jurisdiction over the officers and the vessel had constituted an infringement of public international law, the Montreux Convention and Turkish law. It relied on Article 6 § 1 of the Convention, which provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

105. The Government contended that this complaint had been brought outside the six-month period since the criminal proceedings had become final by virtue of the Istanbul State Security Court's judgment of 13 November 1992 and the application had been lodged on 18 December 1997.

106. The applicant company contested the Government's submissions. It argued that the harm it had suffered as a result of the initial seizure and subsequent detention of the vessel had potentially entitled it to damages. Accordingly, the applicant company had brought compensation proceedings before the Turkish courts and the Strasbourg application had been lodged only after the conclusion of those proceedings.

107. The Court notes that it is not required to determine whether the applicant company complied with the six-month rule since this part of the application is inadmissible for the following reasons.

108. It reiterates that, according to Article 34 of the Convention, it may receive applications from any person 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. This provision requires that an individual applicant should claim to have been directly and actually affected by the violation he alleges (see *Ireland v. the United Kingdom*, 18 January 1978, §§ 239-40, Series A no. 25).

109. The Court notes that in the circumstances of the present case, criminal proceedings were brought only against the crew of the vessel. The applicant company has not demonstrated that any criminal proceedings were brought against it. Furthermore, the applicant company has successfully appealed to the Court of Cassation and secured the release of the cargo, which belonged to it. Accordingly, the applicant company cannot claim to be a victim, within the meaning of Article 34 of the Convention, of a violation of the Convention provision on which it relies.

110. This part of the application is therefore incompatible *ratione personae* with the provisions of the Convention and must be rejected under Article 35 § 3 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

111. 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

112. The applicant company claimed 1,195,429.17 United States dollars (USD) (approximately 879,270 euros (EUR)) in respect of pecuniary damage. This amount comprised:

– USD 1,043,900 (EUR 766,885) for the hire charge paid to the owners of the vessel during the period of detention between 22 October 1991 and 12 March 1992;

– USD 76,862.50 (EUR 56,470) for the cost of fuel used by the vessel while in detention; and

– USD 74,666.67 (EUR 54,860) paid to the owners of the vessel, following London arbitration, in respect of the agency fees incurred by them for the period between 22 October 1991 and 12 March 1992

(USD 12,166.67) and in respect of the reimbursement of Turkish legal fees incurred by the owners (USD 62,500).

113. The Government submitted that no award should be made under this head since the alleged damage had been caused by the applicant company, which had given untrue information about the nature of the cargo. They further claimed that the amounts claimed were unsubstantiated.

114. The Court reiterates that there must be a clear causal link between the damage claimed and the violation of the Convention (see, among other authorities, *Barberà, Messegué and Jabardo v. Spain* (Article 50), 13 June 1994, §§ 16-20, Series A no. 285-C).

115. The Court accepts that the applicant company suffered damage as a result of disproportionate interference by the authorities with its rights under Article 1 of Protocol No. 1. However, it notes that the applicant company has already recovered the losses it sustained in respect of the period after 12 March 1992 in the London arbitration proceedings (see paragraph 53 above). The applicant company's claim for damages thus relates only to the period between the date of the vessel's arrest and 12 March 1992. In this connection, the Court refers to its finding that the vessel and its cargo should have been released, at the latest, on 12 March 1992 and that their detention from that date onwards was arbitrary (see paragraph 98 above). It considers therefore that no award should be made under this head for the period before 12 March 1992. It follows that the applicant company's claims in respect of pecuniary damage must be dismissed.

B. Costs and expenses

116. The applicant company also claimed 31,060 pounds sterling (GBP) (approximately EUR 45,870) for the costs and expenses incurred for the preparation and presentation of its case before the Court. This sum included fees for work done by its representatives in the proceedings before the Court.

117. The Government contended that the amount claimed was excessive and unjustified.

118. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, the Court is not satisfied that all the costs and expenses were necessarily and actually incurred. It considers that part of the amounts claimed by the legal representatives for consultations between themselves is exaggerated. The Court also considers excessive the total number of hours of legal work and the hourly rate claimed in respect of the applicant company's lawyers. It therefore finds that it has not been proved that all those legal costs were necessarily and reasonably incurred. Having regard to the details of the claims and vouchers submitted by the applicant

company, the Court considers it reasonable to award the sum of EUR 35,000 for costs and expenses before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 1 of Protocol No. 1 admissible and the remainder of the application inadmissible;

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

3. *Holds*
   (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 35,000 (thirty-five thousand euros) for costs and expenses, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 13 December 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Boštjan M. Zupančič
Deputy Registrar	President

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Applications nos. 57691/09 and 19719/10
JKP VODOVOD KRALJEVO
against Serbia

The European Court of Human Rights (Third Section), sitting on 16 October 2018 as a Chamber composed of:

Vincent A. De Gaetano, *President,*
Branko Lubarda,
Helen Keller,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides,
Jolien Schukking, *judges,*
and Stephen Phillips, *Section Registrar,*

Having regard to the above applications lodged on 22 September 2009 and 1 April 2010 respectively,

Having regard to the observations submitted by the parties,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, JKP Vodovod Kraljevo, is a statutory utility company (*javno komunalno preduzeće*). It was represented before the Court by Ms I. Jelenić, a lawyer practising in Belgrade.

2. The Serbian Government ("the Government") were represented by their successive Agents, Ms V. Rodić and Ms N. Plavšić.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. The applicant company was founded by a decision of the municipality of Kraljevo in 1990, for the provision of water and sewerage services in that municipality.

5. On 18 October 2004 the competent local court ordered Magnohrom, a socially-owned company (*društveno preduzeće*), to pay the applicant company unpaid water and sewerage charges in the amount of around 450,000 euros (EUR)[1] plus statutory interest and legal costs. On 21 December 2004 the same court slightly reduced the amount of the debt, whilst upholding the remainder of the decision of 18 October 2004.

6. In the meantime, on 9 December 2004 the same court ordered another socially-owned company – Fabrika vagona Kraljevo – to pay the applicant company unpaid charges in the amount of around EUR 350,000 plus statutory interest and legal costs. That decision became final on 10 January 2005.

7. On 1 March 2005 the Privatisation Agency initiated the restructuring of Magnohrom in order to prepare it for privatisation.

8. For the purpose of privatising Fabrika vagona Kraljevo, on 31 March 2005 the Privatisation Agency invited interested parties to submit bids.

9. At the invitation of the Privatisation Agency, the applicant company reported its claims against Magnohrom and Fabrika vagona Kraljevo on 5 July 2005 and 12 August 2005 respectively.

10. In 2006 Magnohrom and Fabrika vagona Kraljevo were privatised. In 2007, from the funds so obtained, the applicant company received approximately EUR 15,000 and EUR 2,000 in respect of its claims against Magnohrom and Fabrika vagona Kraljevo respectively. Despite the fact that the amounts paid were only a fraction of the amounts actually due, this constituted a final settlement of the applicant company's claims against those companies (see paragraph 13 below).

11. Consequently, on 13 February 2009 the competent local court ended the enforcement proceedings against Magnohrom. On 16 March 2009 and 2 November 2011 the competent second-instance court and the Constitutional Court, respectively, upheld that decision. On 7 September 2009 the same first-instance court also ended the enforcement proceedings against Fabrika vagona Kraljevo. On 2 October 2009 and 22 February 2012 the competent second-instance court and the Constitutional Court, respectively, upheld that decision.

12. The privatisation of both Magnohrom and Fabrika vagona Kraljevo has ultimately been annulled, but this is irrelevant in the present case.

1. For ease of reading, all the amounts have been converted from Serbian dinars to euros according to the conversion rate applicable at the relevant time.

B. Relevant domestic law and practice

1. As regards the privatisation of State- and socially-owned companies

13. The Privatisation Act 2001[2] was in force from 2001 until 2014. Pursuant to section 20 of that Act (as amended on 8 June 2005), statutory companies and "other State agencies" had to write off any and all claims against State- and socially-owned companies undergoing restructuring. Other creditors were free, but were not obliged, to do that. If a company undergoing restructuring was eventually privatised, the funds so obtained were distributed pro rata among the creditors whose claims had been written off (see section 20g of that Act). Pursuant to section 20d of that Act, this constituted a final settlement of the claims in question, irrespective of the amount actually distributed. As of 3 January 2008, that legal regime applied to all State- and socially-owned companies (see section 20e of that Act).

2. As regards the status of water and sewerage companies

14. The provision of water and sewerage services was at the relevant time, and still is, a responsibility of the municipalities (see section 6 of the Public Utilities Act 1997[3] and section 4 of the Public Utilities Act 2011[4]). Each municipality had to set up a statutory utility company for that purpose. As a rule, water and sewerage services, unlike other public utility services, could not be operated by private actors as a concession (see section 8 of the Public Utilities Act 1997 and section 5 of the Public Utilities Act 2011).

15. The directors of water and sewerage companies and the members of their executive and supervisory boards were appointed and removed by the founding municipalities (see sections 11-16 of the Statutory Companies Act 2000[5]). Furthermore, the following key decisions required the consent of the founding municipalities: distribution of profits, adoption and alteration of articles of association (*statut*) and setting of the costs charged to consumers (sections 21 and 27 of that Act). The Statutory Companies Act 2016[6], which is currently in force, contains substantially the same provisions (see sections 17, 24, 59(7) and 69).

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2. *Zakon o privatizaciji*, Official Gazette of the Republic of Serbia nos. 38/01, 18/03, 45/05, 123/07, 30/10, 93/12, 119/12, 51/14 and 52/14.
3. *Zakon o komunalnim delatnostima*, published in the Official Gazette of the Republic of Serbia nos. 16/97 and 42/98. That Act was in force from 1997 until 2011.
4. *Zakon o komunalnim delatnostima*, published in the Official Gazette of the Republic of Serbia nos. 88/11 and 104/16. That Act has been in force since 2011.
5. *Zakon o javnim preduzećima i obavljanju delatnosti od opšteg interesa*, published in the Official Gazette of the Republic of Serbia nos. 25/00, 25/02, 107/05, 108/05 and 123/07. That Act was in force from 2000 until 2012.
6. *Zakon o javnim preduzećima*, published in the Official Gazette of the Republic of Serbia no. 15/16.

16. All assets in the possession of water and sewerage companies were, at the relevant time, State-owned; the companies had the right to use them in accordance with the law, and the nature and purpose of the assets in question (sections 1, 4, 7 and 13 of the State Assets Act 1995[7]; the Act was in force from 1996 until 2011). Under the current legal regime (see the Public Assets Act 2011[8]), some assets in the possession of water and sewerage companies may be owned by those companies. However, water, the water supply system and the sewerage system administered by those companies are still public assets.

17. Both the Insolvency Act 2004[9], which was in force from 2004 until 2010 (see section 6 thereof), and the Insolvency Act 2009[10], which has been in force since then (see section 14 thereof), provide that statutory companies which are entirely or predominantly financed by public authorities cannot be declared insolvent; the founders of such companies are liable for their debts. The present applicant company does not belong to that category of companies as it is predominantly financed from water and sewerage charges paid for by the users.

18. Lastly, the decisions of water and sewerage companies concerning access to their services were at the relevant time, and still are, subject to the jurisdiction of administrative courts (see the Water and Sewerage Decisions of the Municipality of Kraljevo[11]; section 2 of the Administrative Procedure Act 1997[12]; and section 31 of the Administrative Procedure Act 2016[13]).

COMPLAINTS

19. The applicant company complained that the court decisions of 18 October and 9 December 2004 had not been enforced. In this regard, it relied on Article 6 of the Convention and Article 1 of Protocol No. 1. It also complained, under Article 13 of the Convention, that it had not had an

7. *Zakon o sredstvima u svojini Republike Srbije*, published in the Official Gazette of the Republic of Serbia nos. 53/95, 3/96, 54/96, 32/97 and 101/05.
8. *Zakon o javnoj svojini*, published in the Official Gazette of the Republic of Serbia nos. 72/11, 88/13, 105/14, 104/16, 108/16 and 113/17.
9. *Zakon o stečajnom postupku*, published in the Official Gazette of the Republic of Serbia nos. 84/04 and 85/05.
10. *Zakon o stečaju*, published in the Official Gazette of the Republic of Serbia nos. 104/09, 99/11, 71/12, 83/14, 113/17 and 44/18.
11. *Odluka o vodovodu i kanalizaciji*, published in the Official Gazette of the Municipality of Kraljevo nos. 2/98, 15/99 and 10/05, and *Odluka o vodovodu i kanalizaciji*, published in the Official Gazette of the Municipality of Kraljevo nos. 3/15, 29/15 and 2/18.
12. *Zakon o opštem upravnom postupku*, published in the Official Gazette of the Republic of Serbia nos. 33/97, 31/01 and 20/10. That Act was in force from 1997 until 2017.
13. *Zakon o opštem upravnom postupku*, published in the Official Gazette of the Republic of Serbia nos. 18/16. That Act has been in force since 2017.

"effective remedy before a national authority" for its Convention complaints.

THE LAW

A. Joinder of the applications

20. Given their common factual and legal background, the Court finds it appropriate to examine the applications jointly in a single decision.

B. Admissibility of the applications

21. The Government maintained that the applicant company was a "governmental organisation" and that it accordingly lacked *locus standi* under Article 34 of the Convention. They relied in this regard on the provisions of the domestic laws set out in paragraphs 14-18 above.

22. The applicant company recognised that the industry in which it operated was a natural monopoly and heavily regulated. This was simply because water and sewerage services were of public interest and used natural resources which were State-owned. For the same reason, the applicant company indeed exercised some governmental powers. That being said, the applicant company submitted that the same regime would have applied to a private water and sewerage company. While acknowledging that the municipality of Kraljevo had the power to appoint and remove its management, the applicant company maintained that it nevertheless enjoyed sufficient institutional and operational independence and that it was accordingly a "non-governmental organisation" for the purposes of Article 34 of the Convention.

23. A legal entity claiming to be the victim of a violation by a member State of the rights set forth in the Convention and the Protocols has standing before the Court only if it is a "non-governmental organisation" within the meaning of Article 34 of the Convention. The category of "governmental organisations", as opposed to "non-governmental organisations" within the meaning of Article 34, includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities (see *Radio France and Others v. France* (dec.), no. 53984/00, § 26, ECHR 2003-X (extracts)).

24. To begin with, the present case must be distinguished from *Zastava It Turs v. Serbia* (dec.), no. 24922/12, 9 April 2013, in which the Court dealt with the *locus standi* of a socially-owned company. In that case, like in *R. Kačapor and Others v. Serbia*, nos. 2269/06 and 5 others, 15 January 2008, and thousands of other cases, the Court held that socially-owned companies, which were at different stages of the privatisation process, did not enjoy "sufficient institutional and operational independence from the State" (see *R. Kačapor and Others*, cited above, § 98, and as concerns the status of socially-owned companies in Serbia see *R. Kačapor and Others*, cited above, §§ 71-76). Unlike the applicant in *Zastava It Turs*, cited above, the applicant company in the present case is a statutory utility company, which falls under a different legal regime.

25. The Court notes that the applicant company is incorporated under the domestic law as a separate legal entity. However, the company's legal status under domestic law is not decisive in determining whether it is a "non-governmental organisation" within the meaning of Article 34 of the Convention. The Court has held on several occasions that companies lacked *locus standi* under Article 34, regardless of their formal classification under domestic law (see, for example, *State Holding Company Luganksvugillya v. Ukraine* (dec.), no. 23938/05, 27 January 2009; *Transpetrol, a.s. v. Slovakia* (dec.), no. 28502/08, 15 November 2011; and *Zastava It Turs*, cited above).

26. What is more relevant is the special nature of the applicant company's activity. As the only water and sewerage company in the municipality of Kraljevo, it provides a public service of vital importance to the municipality population (see, *mutatis mutandis*, *Yershova v. Russia*, no. 1387/04, § 58, 8 April 2010, and *Liseytseva and Maslov v. Russia*, nos. 39483/05 and 40527/10, § 209, 9 October 2014). The assets used by the company for those purposes (notably, water, the water supply system and the sewerage system) were (and continue to be) public assets (see paragraph 16 above). Furthermore, it has not been disputed that the tariffs of the water and sewerage services provided by the applicant company required the consent of the local authorities (see paragraph 15 above). Because of the special nature of those services, only statutory utility companies were (and continue to be) allowed to provide them (see paragraph 14 above). The applicant company's claim that water and sewerage services could have been operated by private actors, which would have been subject to the same rules, does not seem to properly reflect the content of the domestic law. The present case should therefore be distinguished from *Islamic Republic of Iran Shipping Lines v. Turkey*, no. 40998/98, § 80, ECHR 2007-V, in which the Court found that the applicant company was a "non-governmental organisation" within the meaning of Article 34 of the Convention, despite the fact that it was wholly owned by the Iranian State and that a majority of the members of the board

of directors were appointed by the State, because, among other reasons, it did not have a public-service role or a monopoly. It should further be distinguished from *Radio France and Others*, cited above, in which the Court held that the applicant company was a "non-governmental organisation" within the meaning of Article 34, although it was wholly owned by the French State and performed "public-service missions in the general interest", because, *inter alia*, it did not hold a monopoly over radio broadcasting and there was little difference between Radio France and the companies operating "private" radio stations, which were themselves also subject to various legal and regulatory constraints.

27. Lastly, the Court observes that the applicant company was required to write off its large claims against State- and socially-owned companies (see paragraphs 10 and 13 above). The State thus disposed of the applicant's assets as it saw fit. This shows that the applicant company does not enjoy sufficient independence from the political authorities (compare *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, § 117, ECHR 2014, and *Liseytseva and Maslov*, cited above, §§ 211 and 217).

28. In view of the above, the applicant company cannot be regarded as a "non-governmental organisation" within the meaning of Article 34 of the Convention (compare *RENFE v. Spain*, no. 35216/97, Commission decision of 8 September 1997, Decisions and Reports 90-B).

29. Therefore the present applications are incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4 thereof.

For these reasons, the Court, unanimously,

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 15 November 2018.

Stephen Phillips
Registrar

Vincent A. De Gaetano
President

Department for Transport

Framework Document

Between the Secretary of State for Transport and

High Speed 2 Limited

Moving Britain Ahead

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HS2 Ltd Framework Document

This document

1. This framework document has been drawn up by the Department for Transport in consultation with HS2 Ltd. It sets out the broad framework within which HS2 Ltd will operate.

1.1. The document does not convey any legal powers or responsibilities, but the parties agree to operate in accordance with its terms. It is signed and dated by Clive Maxwell (Director General with responsibility for High Speed Rail) on behalf of the Secretary of State, and by Sir David Higgins (Chair) and Mark Thurston (Chief Executive) on behalf of HS2 Ltd.

1.2. Copies of the document and any subsequent amendments have been placed in the Libraries of both Houses of Parliament and made available to members of the public on the HS2 Ltd pages of the GOV.UK website.

1.3. Any question regarding the interpretation of the document will be resolved by the Secretary of State after consultation with HS2 Ltd and, as necessary, with the Cabinet Office and/or HM Treasury.

1.4. Interim variations to this document can be proposed by either the Department for Transport or HS2 Ltd and must be cleared by the Department and HM Treasury with Cabinet Office agreement as appropriate. This Framework Document supersedes and replaces the version signed by the parties in December 2014.

1.5. A list of statutory guidance and relevant publications referred to in the document is set out in Appendix 1.

Purpose of HS2 Ltd

2. HS2 Ltd is a corporate body established on 14 January 2009 by incorporation under the Companies Act 2006, and limited by guarantee. It is an Executive Non-Departmental Public Body tasked with delivering the High Speed 2 project. The Secretary of State is its 'sole member', for whom it is remitted to undertake work (the Secretary of State's sole member status is referred to as the 'shareholder' function throughout this document, as it is equivalent to the rights of a sole shareholder). HS2 Ltd is a separate legal entity from the Crown and is therefore not a Crown Body.

2.1 HS2 Ltd has been established to develop, promote and deliver the UK's new high speed rail network. HS2 Ltd's main duties and powers are specified in Section 4 of the Company's constitution (which is available from Companies House on payment of a fee) and in the Development Agreement (see 2.2 below).

2.2 The Department for Transport and HS2 Ltd have also entered into a *Development Agreement* which will be the principal mechanism for managing the relationship between the Department as funder and sponsor of the High Speed 2 project and HS2 Ltd as delivery entity for the project. This Framework Document and the *Development Agreement* should be considered together in order to understand the controls environment and the operational relationship between HS2 Ltd and the Department. The relative precedence of any duplication, ambiguity or inconsistency that arises between this framework document and the *Development Agreement* shall be determined by the Secretary of State after consultation with HS2 Ltd and, as necessary, with the Cabinet Office and/or HM Treasury. A redacted version of the *Development Agreement* is available on the HS2 Ltd pages of the GOV.UK website.

Partnership relationship

3. The Department for Transport is the responsible department for HS2 Ltd.

3.1 The Department for Transport and HS2 Ltd will have an open and honest, trust-based partnership supported by the principles set out in the Cabinet Office guidance '*Partnerships between Departments and Arms-Length Bodies; Code of Good Practice*' and the Department's own guide: *'DfT's Approach to Delivery Body Partnership'*. As such, both parties will ensure that they clearly understand the strategic aims and objectives of the other party. Both parties will also commit to keeping each other informed of any significant issues and concerns.

3.2 The HS2 Ltd Shareholder Team in the Department for Transport is the primary contact for HS2 Ltd in terms of the management of this Framework Document. They are the main source of advice to the responsible minister on the discharge of his or her shareholder responsibilities in respect of HS2 Ltd. They also support the Department for Transport Principal Accounting Officer (PAO) on their responsibilities with respect to HS2 Ltd.

Governance and accountability: roles and responsibilities

Ministerial responsibility

4. The Secretary of State for Transport will account for HS2 Ltd business in Parliament, and keep Parliament informed about the performance of HS2 Ltd by ensuring HS2 Ltd's Annual Report and Accounts are laid before Parliament each year.

4.1 As sole shareholder in HS2 Ltd the Secretary of State also has specific shareholding responsibilities that include:

- Ensuring that HS2 Ltd is guided and monitored in the public and taxpayer interest.
- Approving the amount of capital contribution to be paid to HS2 Ltd and securing Parliamentary or HM Treasury approval if necessary.
- Holding the HS2 Ltd Board to account for its governance of the Company and its performance.
- Appointing the HS2 Ltd Chair and annually reviewing their performance, and appointing Non-Executive Directors.
- Removing a member of the Board from their position if given due cause in accordance with the relevant provisions of the Companies Act 2006 and/or subject to the terms of their appointment letter.
- Exercising the right to amend the Memorandum and Articles of the Company at any time.

Contact and engagement

5. The relationship between the Department for Transport and HS2 Ltd is critically important and needs careful management. The quality of this relationship influences the ability of the Company to do its job, and is important in ensuring value for money and proper accountability. Effective partnerships between the Department and HS2 Ltd should be characterised by trust, mutual respect, communication, evidence based assurance and by being clear about what the Department can expect from HS2 Ltd and what HS2 Ltd can expect from the Department.

The Department for Transport

6. Department for Transport officials will support the Secretary of State by providing advice and assist him/her in carrying out his/her duties, acting on his/her behalf as appropriate. In this regard there are two separate functions:

    - The Shareholder Team, under the Department for Transport Director General responsible for Resources and Strategy, will manage the Department's corporate and shareholder relationship with HS2 Ltd. The Shareholder Team advises, and as appropriate, acts on behalf of the Secretary of State in holding the Board to account for its stewardship of HS2 Ltd and its delivery of high value performance for the travelling public, taxpayers and the wider community, including:

- Challenging and supporting the HS2 Ltd Board in achieving its corporate objectives.

- Establishing and maintaining a strong relationship with the HS2 Ltd Board, ensuring it is well led and functioning effectively.

- Advising the Secretary of State in appointing the HS2 Ltd Board Chair and any other DfT appointed Non-Executive Director (NED).

- Maintaining an overview of the HS2 Ltd Board's corporate development plans and governance arrangements.

- Ensuring shareholder interests are protected under this Framework Document and any other shareholder agreements.

- Monitoring HS2 Ltd Board performance and ensuring the Board is effectively addressing risks and opportunities.

- Providing the Board with the wider political and policy context as appropriate.

▪ The Sponsor Team, under the Department's Director General responsible for High Speed Rail, will manage policy on the Government's relationship as client and sponsor (i.e. delivery of the railway issues) with HS2 Ltd including:

- Acting as a focal point of contact for HS2 Ltd, providing clear and timely communications about central requirements.

- Acting as the HS2 Ltd champion within the Department, being an advocate across Government, and in relation to other key stakeholders.

- Assisting the HS2 Ltd Chief Executive in working through the implications of any recommendations emerging from formal reviews that cover the organisation.

- Advising the HS2 Ltd Chief Executive of central policy developments that might impact on the organisation, steering their activities to ensure HS2 Ltd effectively supports the delivery of Departmental objectives.

- Establishing and maintaining a good relationship with the HS2 Ltd Chair and Chief Executive.

- Providing assurance to the Permanent Secretary and the relevant Department for Transport Board (supported by the Group Audit and Risk Assurance Committee (GARAC) and Internal Audit) on the effectiveness of HS2 Ltd governance structures and processes.

- Managing the specified frameworks as set out in the Development Agreement in relation to HS2 Ltd delivery of objectives and targets, their approaches to risk management and business case approval, and information flow requirements.

6.1 Together, these two teams will be responsible for liaising with HS2 Ltd on all aspects of its work and are the first point of contact between the Government and HS2 Ltd. Clear separation between the two teams will ensure clarity and transparency in decision making. The Shareholder and Sponsor teams will ensure that HS2 Ltd does not receive conflicting instructions from the Department, and will work together to ensure clarity and consistency in all advice, decisions and instructions provided to HS2 Ltd.

The Principal Accounting Officer in the Department for Transport

7. The Principal Accounting Officer in the Department for Transport designates the Chief Executive of HS2 Ltd as the HS2 Ltd Accounting Officer. The respective responsibilities of the Principal Accounting Officer and all accounting officers for arm's length bodies are set out in Chapter 3 of the HM Treasury guidance '*Managing Public Money'* which is sent separately to the Accounting Officer on appointment. The Accounting Officer designation may be withdrawn if the Department's Principal Accounting Officer believes that the incumbent is no longer suitable for the role.

7.1 The Principal Accounting Officer is accountable to parliament for the issue of any capital contribution or other resources provided to HS2 Ltd. In particular, the Department's Principal Accounting Officer must ensure that:

- The financial and other management controls applied by the Department to HS2 Ltd are appropriate and sufficient to safeguard public funds and that HS2 Ltd compliance with those controls is effectively monitored.

- The internal controls applied by HS2 Ltd conform to the requirements of regularity, propriety and good financial management.

- Any capital contribution to HS2 Ltd is within the ambit and the amount of the Request for Resources and that Parliamentary authority and/or HM Treasury approval has been sought and given.

7.2 The Principal Accounting Officer is also responsible for advising the responsible minister:

- On an appropriate framework of objectives and targets for HS2 Ltd in the light of the Department's wider strategic aims and priorities.

- On an appropriate budget for HS2 Ltd in the light of the Department's overall public expenditure priorities.

- How well HS2 Ltd is achieving its strategic objectives and whether it is delivering value for money.

7.3 In addition, the Principal Accounting Officer is responsible for ensuring arrangements are in place in order to:

- Monitor HS2 Ltd activity and spending.
- Address significant problems in HS2 Ltd, making such interventions as are judged necessary.
- Periodically carry out an assessment of the risks both to the Department for Transport and to the delivery of HS2 Ltd objectives and activities.
- Inform HS2 Ltd of relevant Government policy in a timely manner.
- Bring concerns about the activities of HS2 Ltd to the attention of the Chief Executive and/or HS2 Ltd Chair, and to the attention of the Department if necessary, with explanations and assurances that appropriate action has been taken.

Responsibilities of the HS2 Chief Executive as Accounting Officer

8. As Accounting Officer the Chief Executive is personally responsible for safeguarding the public funds for which he or she has charge; for ensuring propriety, regularity, value for money and feasibility in the handling of those public funds; and for the day-to-day operations and management of HS2 Ltd. In addition, he or she should ensure that HS2 Ltd as a whole is run on the basis of the standards, in terms of governance, decision-making and financial management that are set out in Box 3.1 of *Managing Public Money*.

8.1 The responsibilities of the Accounting Officer include:

- Signing the accounts, ensuring that proper records relating to the accounts are maintained and retained, and that the accounts are properly prepared and presented in accordance with any directions issued by the Secretary of State.
- Preparing and signing a Governance Statement covering corporate governance, risk management and assurance, for inclusion in the Annual Report and Accounts.
- Producing a Statement of Accounting Officer's responsibilities, for inclusion in the Annual Report and Accounts.
- Ensuring that effective procedures for handling complaints about HS2 Ltd are established and made widely known within the organisation, and that official requests and/or information required under the Freedom of Information Act and

Environmental Information Regulations are completed in an accurate and timely manner.

- Acting in accordance with the terms of this document, *Managing Public Money* and other instructions and guidance issued from time to time to HS2 Ltd by the Department, the Treasury and the Cabinet Office.

- Giving evidence, normally with the Principal Accounting Officer, when summoned before the Public Accounts Committee, Transport Select Committee (or any other relevant parliamentary authority) in relation to the stewardship of public funds by HS2 Ltd.

8.2 The Chief Executive's responsibilities to the Department for Transport include:

- Producing the HS2 Ltd corporate and business plans in the light of the Department's goals and objectives for high speed rail as set out in the *Development Agreement* and submitting them for approval by the Department.

- Informing the Department of progress in meeting these objectives and in demonstrating how resources, including staff, are being used effectively to achieve them.

- Ensuring that timely forecasts and monitoring information on performance and finance are provided to the Department in line with the requirements and processes set out in the *Development Agreement*.

- Ensuring that the Department is notified promptly if over or under spends against the yearly budget and business plan are likely.

- Ensuring that any significant problems whether financial or otherwise, and whether detected by internal audit or by other means, are notified to the Department in a timely fashion.

8.3 The Chief Executive's responsibilities to the HS2 Ltd Board include:

- Advising the Board on the discharge of the HS2 Ltd Board responsibilities as set out in this document, in Section 4 of the HS2 Ltd constitution, in the *Development Agreement* and in any other relevant instructions and guidance that may be issued from time to time.

- Advising the HS2 Ltd Board on HS2 Ltd's performance compared with its aims and objectives.

- Ensuring that financial considerations are taken fully into account by the HS2 Ltd Board at all stages in reaching and executing its decisions, and that standard financial appraisal techniques are followed.

- Taking action as set out in paragraph 3.8.6 of *Managing Public Money* if the HS2 Ltd Board, or its Chair, is contemplating a course of action involving a transaction which the Chief Executive considers would infringe the requirements of propriety or regularity or does not represent prudent or economical administration, efficiency or effectiveness, is of questionable feasibility, or is unethical.

8.4 The Chief Executive will report to the Department's Director General responsible for High Speed Rail (the Senior Responsible Officer for the HS2 project) on all programme (HS2 railway) matters relating to the Development Agreement. The Chief Executive will report in the first instance to the HS2 Ltd Shareholder Team in regard to all matters relating to the operation of HS2 Ltd under this Framework Document. The Chief Executive should not advise Ministers directly without first informing the Director General responsible for High Speed Rail (in person or via the Sponsor Team) or the Department's Shareholder Team.

8.5 The Chief Executive may obtain the assistance of employees of HS2 Ltd in performing the day-to-day administration of his/her Accounting Officer responsibilities. The Chief Executive must not assign absolutely to any other person any of the responsibilities set out in this document, unless both the HS2 Ltd Board and the Director General responsible for High Speed Rail are satisfied that a particular matter (e.g. a conflict of interest or reputational risk) warrants that specific responsibilities should be assigned to another HS2 Ltd Board member, who in such instances will then report on those responsibilities directly to the HS2 Ltd Chair.

Responsibilities of the HS2 Ltd Board

9. The HS2 Ltd Board has corporate responsibility for ensuring that the organisation is fit for purpose in terms of delivering the aims and objectives agreed with the Department. The Board must ensure that in delivering those objectives, they consider the skills and capability HS2 Ltd will need to deliver the programme, and manage and promote the efficient and effective use of staff and other resources.

9.1 In terms of corporate control, the Board is specifically responsible for:

- Establishing and taking forward the agreed goals and objectives of HS2 Ltd (i.e. to deliver the specified scope of the HS2 railway on time and within budget) and holding the Executive to account for the effective and efficient delivery of the corporate and business plans, consistent with its overall strategic direction and within the policy and resources framework determined by the Secretary of State.

- Ensuring that there are appropriate Board committees in place including an Audit & Risk Assurance Committee(s), Remuneration Committee and Health and Safety Committee.

- Ensuring that effective arrangements are in place to provide assurance on risk management (including regular review of the HS2 Ltd risk register and seeking clarification and additional information from the risk owners where appropriate), governance and internal control, and assuring itself of the effectiveness of the internal control and risk management systems.

- Ensuring that the Department for Transport is kept informed of any changes which are likely to impact on the strategic direction of the organisation or on the attainability of its targets, and determining the steps needed to deal with such changes, in liaison with the Department.

- Putting in place delegations of functions to the Chief Executive, any employee or a committee as appropriate.

- Reaching decisions that take account of guidance issued by the Department.

9.2 In relation to the management of public funds, the Board must:

- Ensure that any statutory or administrative requirements for the use of public funds as set out in *Managing Public Money* are complied with.

- Operate within its statutory limits and within any delegated authority agreed with the Department for Transport, and in accordance with any other conditions relating to the use of public funds.

- Receive and review regular financial information concerning the management of HS2 Ltd in a timely manner and address any concerns about the activities of HS2 Ltd, providing positive assurance to the Department that appropriate action has been taken in relation to those concerns.

- Demonstrate high standards of corporate governance at all times, including by using an independent audit committee to help the Board to address key financial and other risks.

9.3 Subject to any confidentiality requirements which may require redactions to be made, Board minutes must be published on the HS2 Ltd pages of the GOV.UK website, within three months of the applicable Board meeting.

Responsibilities of the HS2 Ltd Chair

10. The Chair is responsible for ensuring that HS2 Ltd fulfils the aims and objectives agreed with the Department and the Secretary of State and operates in accordance with HS2 Ltd's constitution and the *Development Agreement*. The HS2 Ltd Chair advises the Secretary of State on matters relating to HS2 Ltd. Communications between the HS2 Ltd Board and the Secretary of State are normally through the Chair. The Chair must ensure that all other

Directors are kept informed of such communications. The Chair shares with other Directors the corporate responsibilities set out in Section 9 of this document.

10.1 The Chair has the following leadership responsibilities:

- Ensuring that HS2 Ltd delivers its obligations under this Framework Document and the *Development Agreement,* and has an effective strategy for achieving this.
- Ensuring that its affairs are conducted with probity.
- Ensuring that the HS2 Ltd Board, in reaching decisions, takes account of guidance provided by the Secretary of State and the Department.
- Delivering high standards of regularity and propriety and promoting the efficient and effective use of staff and other resources.
- Representing the views of the HS2 Ltd Board to the general public.
- Reporting annually on his/her own performance - supported by feedback including peer review - to the Secretary of State and sharing this with the Department's Shareholder Team.

10.2 In terms of the effectiveness of the HS2 Ltd Board, the Chair has an obligation to:

- Ensure the Board is working effectively and the work of the HS2 Ltd Board and the performance of its individual members is reviewed annually, and recorded in writing.
- Provide feedback and evidence of any effectiveness review of the HS2 Ltd Board and its members to the Secretary of State and the Department's Shareholder Team.
- Report to the Secretary of State any concerns in relation to the balance of skills appropriate to directing the organisation's business, as set out in the '*Government Code of Good Practice for Corporate Governance'*.
- Report any concerns over HS2 Ltd Board effectiveness to the HS2 Nominations Committee and (if necessary) to the Secretary of State and the Department's Shareholder Team
- Ensure all non-executive Board members are fully briefed on their terms of appointment, duties, rights and responsibilities.
- Ensure all Board members receive appropriate training on financial management and reporting requirements and on any differences that may exist between private and public sector practice.

- Ensure the Secretary of State is advised by the HS2 Nominations Committee of Board needs (e.g. in relation to required skills, knowledge, or particular areas for improvement) when non-executive Board vacancies arise.

- Assess the performance of non-executive Board members annually and when they are being considered for re-appointment (bearing in mind re-appointments are not automatic) by providing a formal written performance appraisal to the Department's Shareholder Team.

- Ensure there is a HS2 Ltd Board operating framework in place setting out the role and responsibilities of the Board consistent with the *Government Code of Good Practice for Corporate Governance*.

- Ensure there is a code of practice for all HS2 Ltd Board members in place, which is consistent with the Cabinet Office '*Code of Conduct for Board Members of Public Bodies'*.

Responsibilities of individual HS2 Ltd Board members

11. Legal duties are imposed on all Directors appointed to the HS2 Ltd Board by virtue of their holding office as a 'Director', including duties under Company, employment, and health and safety law. Under the terms of their appointment, each Non-Executive Director is protected by an indemnity which will apply in connection with any claim made against such Director as a result of that Director exercising their official duties and/or acting in their official capacity.

11.1 In fulfilling their duties, individual HS2 Ltd Board members must:

- Comply at all times with the *Code of Conduct for Board Members of Public Bodies* and with the rules relating to the use of public funds and to conflicts of interest.

- Comply with HS2 Ltd's rules on the acceptance of gifts and hospitality, on business appointments, and with any requirements of the Bribery Act 2010.

- Not misuse information gained in the course of their public appointment for personal gain or for political profit, nor seek to use the opportunity of their public appointment to promote their private interests or the interests of persons or organisations connected to them.

- Comply with their statutory duties under the *Companies Act 2006*.

11.2 A register of the business interests of the Board must be published by HS2 Ltd on the HS2 Ltd pages of the GOV.UK website and be regularly updated.

Governance and accountability: reporting and auditing requirements

Annual Report & Accounts

12. HS2 Ltd must keep proper accounts and must prepare and publish an Annual Report of its activities together with its audited Accounts after the end of each financial year. HS2 Ltd shall provide finalised and audited Accounts to the Department each year, in accordance with the timescales specified by the Department in order for the Accounts to be consolidated within the Department for Transport's annual reporting requirements. For national accounts purposes HS2 Ltd is classified to the central government sector. In practice this means that the annual Accounts of HS2 Ltd are fully consolidated into the Department's Accounts.

12.1 The HS2 Ltd Annual Report must:

- Outline HS2 Ltd activities and performance during the previous financial year and set out forward plans in summary form.
- Provide information on performance against key financial targets in the notes to the accounts.
- Comply with the Treasury's *Financial Reporting Manual* (FReM) and relevant Cabinet Office controls. Any risk of a departure from the FReM should be discussed with the Department's Sponsor Team, who will also seek guidance or agreement from HM Treasury, Cabinet Office and the National Audit Office as necessary.
- Prepare the accounts in accordance with the relevant statutes and specific accounts directions issued by the Department and/or by HMT Treasury and the Cabinet Office.
- Cover any corporate, subsidiary or joint ventures under its control.

12.2 The report and accounts shall be laid in parliament and made available on the HS2 Ltd pages of the GOV.UK website, in accordance with the guidance in the FReM.

12.3 HS2 Ltd Board Directors are required to comply with duties concerning Annual Accounts under the Companies Act (2006).

Internal audit

13. HS2 Ltd must establish and maintain its own arrangements for internal audit in accordance with the *Treasury's Public Sector Internal Audit Standards* (PSIAS) and with regard to the Department's Group Internal Audit operating model. HS2 Ltd must establish an Audit and Risk Assurance Committee (A&RAC) as a sub-committee of the HS2 Ltd Board in accordance with *Government Code of Good Practice on Corporate Governance*, and HM

Treasury's *Audit and Risk Assurance Committee Handbook*. The chair of the A&RAC must be a Non-Executive Board Director with relevant experience and, as far as possible, other committee members should be Non-Executive Board Directors. The A&RAC will approve the internal audit programme, monitor progress against it, and consider the issues arising from the auditor's work.

13.1 In relation to internal audit, HS2 Ltd must:

- Arrange for periodic quality reviews of its internal audit service in accordance with PSIAS (the Department must consider whether it can rely on these reviews to provide assurance on the quality of internal audit, and HS2 Ltd must allow the Department access to carry out independent reviews of internal audit in HS2 Ltd).

- Ensure that HS2 Ltd is satisfied with the competence and qualifications of the Head of Internal Audit (HIA) and with the requirements for approving appointments in accordance with the PSIAS.

- Supply to the Department for Transport the audit strategy, periodic audit plans and annual audit report, including the HS2 Ltd Head of Internal Audit (HIA) opinion on risk management, control and governance in accordance with the required Departmental timetable for completing year-end reporting.

- Supply to the HIA in the Department for Transport the HS2 Ltd HIA opinion on the overall control framework, in accordance with the required Departmental timetable for completing year-end reporting.

- Keep records of, and prepare and forward to the Department for Transport an annual report on fraud and theft suffered by HS2 Ltd and notify the Department of any unusual or major fraud or theft incidents as soon as possible.

- Ensure that the Department for Transport's internal audit team have complete access to all documents prepared by the internal auditor for HS2 Ltd, including where the service is contracted out, and to all relevant records.

- Allow the Department for Transport, and the Government Internal Audit Agency when operating on the Department's behalf, access to all HS2 Ltd records and personnel for purposes such as (but not necessarily limited to) audits or operational investigations.

External audit

14. The Comptroller & Auditor General (C&AG) audits HS2 Ltd's Annual Accounts, which must be laid in Parliament alongside his report. The C&AG may carry out examinations into the economy, efficiency and effectiveness with which HS2 Ltd has used its resources in discharging its functions. For the purpose of these examinations the C&AG has statutory access to documents as provided for under section 8 of the National Audit Act 1983. HS2

Ltd will provide access, so far as is possible in conditions to grants and contracts, to documents held by grant recipients, contractors and sub-contractors as may be required for C&AG examinations. HS2 Ltd shall use its best endeavours to secure access for the C&AG to any other documents required by the C&AG which are held by other bodies.

14.1 In carrying out their duties, the C&AG will:

- Consult the Department and HS2 Ltd on whether the NAO or a commercial auditor will undertake audit activities on his/her behalf (though the final decision rests with the C&AG).

- Have a statutory right of access to relevant documents held by another party in receipt of payments or contributions from HS2 Ltd, including by virtue of section 25(8) of the Government Resources and Accounts Act 2000.

- Share with the Department at the end of the audit, information identified during the audit process and the audit report (together with any other outputs), in particular on issues impacting on the Department's responsibilities in relation to financial systems within HS2 Ltd.

- Where asked, provide the Department and other relevant bodies with Regulatory Compliance Reports and other similar reports which the Departments may request at the commencement of the audit and which are compatible with the independent auditor's role.

14.2 In the event that HS2 Ltd has established or has control over subsidiary companies, HS2 Ltd will, in light of the provisions in the Companies Act 2006, ensure that the C&AG is appointed auditor of those Company subsidiaries, and that their accounts are consolidated within its own.

Management and financial responsibilities

Managing Public Money **and other government-wide corporate guidance and instructions**

15. HS2 Ltd is funded from the public purse by capital contribution from the Department and shall follow the principles, rules, guidance and advice in *Managing Public Money*, unless agreed otherwise by the Department who will liaise as necessary with HM Treasury. Any difficulties or potential bids for exceptions should be referred to the Department's Shareholder Team in the first instance.

15.1 Once the budget has been approved by the Department (and subject to any restrictions imposed by statute or the Secretary of State's instructions), HS2 Ltd shall have authority to incur expenditure approved in the budget without further reference to the Department, as established in the *Development Agreement* and its annexes and detailed in the Operational Delegation Letter (which sets the parameters within which HS2 Ltd has delegated authority to undertake various

functions covering procurements, contract changes, change control and land and property acquisitions) and the Financial Delegations Letter (which sets out the budget delegations from the Director General for the High Speed Rail Group to the Chief Executive and Accounting Officer for HS2 Ltd).

15.2 In doing so, HS2 Ltd will also:

- Comply with the financial requirements as set out in the *Development Agreement* and its annexes.
- Comply with *Managing Public Money* regarding novel, contentious or repercussive proposals.
- Provide the Department with information about its operations, the performance of individual projects or any other expenditure as the Department may reasonably require.
- Ensure continuous improvement in line with the appropriate expectations set out in the *Government Commercial Operating Standards*.

Corporate Governance

Board appointments - the Chair, the Chief Executive and Board members

16. In line with the government's '*Corporate governance in central government departments: Code of Good Practice',* the HS2 Ltd Board will consist of a Chair, a Chief Executive and up to three executive members that have a balance of skills and experience appropriate to directing HS2 Ltd's business. The HS2 Ltd Board should include non-executive members to ensure that executive members are supported and constructively challenged in their role.

16.1 The HS2 Ltd Chair is appointed by the Secretary of State for a three to five year term. Subject to satisfactory performance, the Chair may be appointed for a further term as long as their total period of service does not exceed ten years. The appointment, re-appointment or extension of the HS2 Ltd Chair role is regulated by the Commissioner for Public Appointments and made in accordance with the Government's '*Governance Code for Public Appointments'*. Other non-executive Directors are appointed for a period of three to five years by the responsible minister. Such appointments will also comply with the *Governance Code for Public Appointments*.

16.2 The Chief Executive is appointed by the Chair of HS2 Ltd following an open competition, with representation from the Department throughout the selection process, and with approval from the Secretary of State. The performance objectives and remuneration terms for the Chief Executive will be set by the Chair of the HS2 Ltd Board (in consultation with the HS2 Ltd Remuneration Committee). The initial

appointment and any extensions must be made in line with the '*Code of Practice issued by the Commissioner for Public Appointments'*.

16.3 The Secretary of State must ensure a sufficient (and majority) number of Non-Executive Directors to enable good corporate governance and will appoint them for three to five year terms. Subject to satisfactory performance a Non-Executive Director may be appointed for a further term as long as their total period of service does not exceed ten years. The HS2 Ltd Board may nominate up to three Executive Directors (in addition to the Chief Executive) to sit on the Board. Any nominations must be approved by the Secretary of State and HM Treasury. The Secretary of State may remove any HS2 Ltd Director

16.4 The Department for Transport Director General responsible for High Speed Rail may nominate a standing representative of the Department with observer status on the Board of HS2 Ltd. The key role of the departmental representative is to support the relationship between the Department and HS2 Ltd by providing factual information and representing Ministers' interests.

Risk management

17. HS2 Ltd shall ensure that the risks it faces are dealt with in an appropriate manner, in accordance with relevant aspects of best practice in corporate governance, and develop a risk management strategy, in accordance with the Treasury guidance *Management of Risk: Principles and Concepts* (referred to as *The Orange Book*).

17.1 HS2 Ltd should adopt and implement policies and practices to safeguard itself against fraud and theft, in line with the HM Treasury guidance *Tackling Internal Fraud.* It should also take all reasonable steps to appraise the financial standing of any firm or other body with which it intends to enter into a contract with. HS2 Ltd should not make capital contribution payments (nor award any other grant) to any other firm without prior agreement from the Department.

17.2 HS2 Ltd will have regard, where appropriate, to the Department for Transport's Risk Management Policy and Guidance launched in 2018. This will include working with the Department's Governance Division Risk Team to implement and operate the 'Delivery Body Risk Escalation protocol' as set out in the policy.

17.3 A Non-Executive HS2 Ltd Board Director will also chair the Board's Health & Safety Committee and Remuneration Committee, to provide independent advice and assurance, with other members being drawn from across other HS2 Ltd Board members.

Financial Management

Corporate and Business Plans

18. HS2 Ltd shall submit annually to the Department a proposed draft of their corporate plan (including proposed key performance indicators) covering three years ahead for approval. HS2 Ltd must agree with the Department the key matters to be addressed in the plan and the timetable for its publication. The plan shall demonstrate how HS2 Ltd contributes to the achievement of the Department's priorities with regard to high speed rail, and how the HS2 railway will be delivered. It will be approved by the Department, and shall reflect any additional priorities set by the Secretary of State.

18.1 The first year of the corporate plan, amplified as necessary, shall inform the business plan. The business plan shall be updated to include key targets and milestones for the year immediately ahead and shall be linked to budgeting information so that resources allocated to achieve specific objectives can readily be identified by the Department, including numbers of HS2 Ltd staff. Subject to any commercial considerations, the corporate plan should be published on the HS2 Ltd pages on the GOV.UK website and separately be made available to staff.

18.2 Subject to the agreement of the parties as to the key matters that should be addressed in the plan (as stated in clause 18 above), the following key matters should be included in the plans:

- Key objectives and associated key performance targets for the forward years, and the strategy for achieving those objectives.
- Key non-financial performance targets.
- A review of performance in the preceding financial year, together with comparable outturns for the previous (two to five) years, and an estimate of performance in the current year.
- Medium term financial projections for the forthcoming three years.
- Alternative scenarios and an assessment of the risk factors that may significantly affect the execution of the plan but that cannot be accurately forecast.
- Any other matters as agreed between the Department and HS2 Ltd.

18.3 The main elements of the plan, including the key performance targets, must be agreed between the Department and HS2 Ltd in the light of the Department's decisions on policy and resources taken in the context of the Government's wider public expenditure plans and decisions.

Business planning and delegated authorities

19. HS2 Ltd must submit annually to the Department for approval a draft business plan and budget covering the financial year ahead. The business plan must be agreed by the HS2 Ltd Board and must take account of the approved funding provision from the Department and include a budget of estimated payments and receipts. The budget must provide the Department with a profile of expected expenditure and draw-down of Departmental funding over the financial year.

19.1 In the light of consideration of the draft business plan and budget, and decisions by the Department on the updated draft corporate plan, the Department will then issue each year:

- A formal statement of the annual budgetary provision allocated by the Department in the light of competing priorities across the Department and of any forecast income approved by the Department.

- A statement of any planned change in policies affecting HS2 Ltd.

19.2 HS2 Ltd's delegated financial authorities and budget delegation are governed by the *Development Agreement* and set out the *Financial Delegation Letter*, which will be sent annually from the Department to HS2 Ltd.

19.3 As Accounting Officer, the HS2 Ltd Chief Executive will receive and act in accordance with a budget delegation each year from the Department and operate within that delegation, and in accordance with framework set out in the *Development Agreement* and within the limits of the annual *Financial Delegation Letter* issued at the start of the financial year by the Director General responsible for High Speed Rail.

19.4 Any capital contribution provided by the Department must be noted in the Department's Supply Estimate and is subject to Parliamentary control.

Investment and spending

20. Once HS2 Ltd's budget has been approved by the Department and subject to any restrictions imposed by statute, the Secretary of State, Government policy, the *Development Agreement* and its annexes or this document, HS2 Ltd has authority to incur expenditure approved in the budget without further reference to the Department, on the following conditions:

- HS2 Ltd must refer any novel, contentious or repercussive spending proposals (as defined by *Managing Public Money*) back to the Department for consideration.

- HS2 Ltd must provide the Department with such information about its operations, performance, individual projects or other expenditure as the Department reasonably requires.

- HS2 Ltd must comply with the conditions set out in the *Operational Delegations Letter*

issued by the Department.

20.1 HS2 Ltd must have appropriate procedures and controls in place to govern and approve investment decisions. If any question arises as to whether a spending proposal should require additional approval, then (as required) HS2 Ltd should refer it in the first instance to the Department for advice.

20.2 Where an area of spending has been identified as needing further approval, HS2 Ltd should put in place procedures to monitor progress with the required approvals process, refrain from committing spending until approvals have been received, and report regularly to the Department on these areas of spending.

20.3 Where business cases are required for project expenditure, they will be produced and updated in accordance with the *HM Treasury Green Book* and the Departments *Guide to Drafting a Business Case,* the *Development Agreement* and *WebTAG* guidance.

Capital contribution and ring-fenced grants

21. HS2 Ltd's resource and capital expenditure forms part of the Department's Resource DEL and Capital DEL respectively (DEL control totals). HS2 Ltd is paid by capital contribution on a periodic basis.

21.1 Capital contribution provided by the Department for the year in question will be voted in the Department's Supply Estimate and be subject to Parliamentary control. Capital contribution will normally be paid in monthly instalments on the basis of written applications from HS2 Ltd showing evidence of need. HS2 Ltd will comply with the general principle, that there is no payment in advance of need. Cash balances accumulated during the course of the year from capital contribution or other HM Treasury funds shall be kept to a minimum level consistent with the efficient operation of HS2 Ltd and the effective delivery of the HS2 project. Subject to approval by Parliament of the relevant Estimates provision, where capital contribution is delayed to avoid excess cash balances at the year-end, the Department will make available in the next financial year any such capital contribution that is required to meet any liabilities at the year-end, such as creditors.

21.2 In the event that the Department provides HS2 Ltd with a separate capital contribution for a specific ring-fenced activity or purpose, it will issue the contribution as and when HS2 Ltd needed it on the basis of a written request. HS2 Ltd must provide evidence that the contribution was used for the purposes on which it was authorised by the Department.

21.3 No grant or capital contribution can be paid into any reserve held by HS2 Ltd. Funds in any reserve may be a factor for consideration when the need for a capital contribution is determined.

21.4 Any additional income, for example interest earned, income from disposal of assets, gifts or bequests received, income from the European Union, rental income, or income from third parties must be managed in accordance with the HMT guidance *Managing Public Money*.

21.5 No money can be borrowed nor loaned by HS2 Ltd, other than that reasonably required for efficient day-to-day management and operation of the Company's duties (such as corporate credit cards).

21.6 HS2 Ltd must not, without the Department's prior written consent, provide grants, lend money, charge any asset or security, give any guarantee or indemnity (except, in the case of indemnities, those given in the normal course of business), or letter of comfort (except in the normal course of business), whether or not in a legally binding form.

Reporting performance to the Department

22. HS2 Ltd shall operate management, information and accounting systems that enable it to review in a timely and effective manner its financial and non-financial performance against the budgets and targets set out in the corporate and business plans to the frequency and format specified in the *Development Agreement*. HS2 Ltd shall inform the Department of progress in achieving its objectives, and shall report financial and non-financial performance, including performance in helping to deliver ministers' objectives, according to the requirements set out in *Development Agreement*.

22.1 The Department's shareholder and Sponsor Teams will liaise regularly with HS2 Ltd to review its financial performance against plans, achievement against targets and expenditure against its Departmental Expenditure Limits and Annually Managed Expenditure allocations.

Commercial insurance

23. HS2 Ltd must not take out any insurance without the prior written approval of the Department other than; third party insurance required by the Road Traffic Acts, Employers Liability insurance, Public Liability (non-contracting or railway operations), and Directors & Officers Liability insurance on commercial terms, and any other insurance which is a statutory obligation or which is permitted in *Managing Public Money* Chapter 4 and Annex 4.4.

23.1 The Department has already granted HS2 Ltd approval to procure an owner-controlled insurance policy for Phase one and Phase 2a of the railway.

23.2 The Department must consider on a case-by-case basis whether, in relation to a major loss or third-party claim, an addition to budget out of the Department's funds and/or an adjustment to HS2 Ltd's current budget is appropriate.

23.3 HS2 Ltd standard conditions of contract require contractors of HS2 Ltd to indemnify HS2 Ltd in respect of personal injury and/or loss or damage to property caused by such a contractor.

Disposal of assets

24. HS2 Ltd must dispose of assets which are surplus to its requirements save that it may not dispose of land without the written consent of the Department. Assets must be sold for best price, taking into account any costs of sale. High-value assets must be sold by auction or competitive tender, unless otherwise agreed in writing by the Department, and in accordance with *Managing Public Money (including Crichel Downs Rules)*, Chapter 4.10 and section 17 of the Development Agreement.

24.1 HS2 Ltd may normally retain receipts derived from the sale of non-land and property assets provided that:

- The Department and HM Treasury are content for HS2 Ltd to retain these receipts.
- They are used to finance other capital spending.
- The Department receives prior written notification of individual sales.
- Total sales in any financial year do not exceed three per cent of HS2 Ltd's capital contribution.

24.2 If, notwithstanding the above, HS2 Ltd disposes of individual or composite assets which have been purchased, improved or developed with Exchequer funds and the receipts amount to more than £1 million, or where the disposal has unusual features of which Parliament should be made aware, Parliamentary approval must be secured for the receipts to be reinvested. The receipts must therefore be surrendered to the Department, which must then submit an Estimate seeking approval for the receipts to be appropriated in aid by the Department and for a corresponding increase in HS2 Ltd's grant-in-aid. If the proposed new investment exceeds HS2 Ltd's relevant delegated authority the Department's approval is needed. If the proposed new investment is novel, contentious or repercussive, then HM Treasury's approval is also needed.

Land and Property management

25. All property records and electronic boundaries for land and property shall be entered onto e-PIMS (the mandatory Government property recording system), within ten business days of the completion of any transaction.

25.1 HS2 Ltd will frequently and regularly update e-PIMS as land and property is acquired and disposed.

25.2 HS2 will ensure that property deeds and other files (including reports of consultants, lawyers, surveyors, valuers and engineers whom they employ) relating to acquisitions, estate management, facilities management and sales are retrieved by HS2 Ltd from those consultants within a reasonable time of the completion of any transaction and shall be recorded by HS2 Ltd and the whereabouts of those records shall be recorded on e-PIMS.

25.3 HS2 Ltd shall demonstrate to the Department for Transport and/or the Government Internal Audit Agency that it has the financial and staff resources to comply in full with property recording on e-PIMS and has in place training and succession planning for property recording staff "

Wider financial compliance

26. HS2 Ltd must comply with all of the requirements and controls set out in *Managing Public Money* and *Cabinet Office Spending Controls* in the course of its operation and business, including in relation to capital and operational expenditure, transfer of funds within budgets, gifts made, write offs, losses and any other special payments, property leasing and financial investments. Where further guidance is required then HS2 Ltd should raise the matter with the Department who will liaise with HMT Treasury on its behalf. Furthermore, HS2 Ltd shall not enter into any joint venture arrangements (or other analogous arrangements) without the prior written approval of the Department.

26.1 Any financial receipts classified as fees, charges, fines, penalties or taxes, or any other receipts, must be managed in accordance with *Managing Public Money*. HS2 Ltd must ensure that any other funds received are notified to the Department.

26.2 HS2 Ltd's Accounting Officer is responsible for ensuring that HS2 Ltd's banking arrangements are in accordance with the requirements of *Managing Public Money*, Section 5.11 and Annex 5.6. In particular he/she must ensure that the arrangements for safeguarding public funds and are carried out efficiently, economically and effectively.

Staff and resources

Responsibilities for staff

27. Within the arrangements described in this Framework Document or otherwise approved by the Secretary of State and HM Treasury, HS2 Ltd will have responsibility for the recruitment, retention and motivation of its staff. Subject to compliance with any wider government HR policy requirements set out in the HM Treasury *Guidance Note: Public*

Sector Pay and Terms, and as set out from time to time in correspondence from the Department's Director of Human Resources.

27.1 HS2 Ltd must ensure that:

- It complies with the Cabinet Office business appointment rules and *Managing Public Money*.
- The rules for recruitment and management of staff create an inclusive culture in which diversity is fully valued; appointment and advancement is based on merit, following fair and open competition; and there is no discrimination on grounds of gender, marital status, sexual orientation, race, colour, ethnic or national origin, religion, disability, community background or age.
- The level and structure of HS2 Ltd staffing, including grading and staff numbers, are appropriate to its functions and the requirements of economy, efficiency and effectiveness.
- The performance of HS2 Ltd staff at all levels is satisfactorily appraised and the performance measurement systems in use are regularly reviewed.
- HS2 Ltd staff are encouraged to acquire the appropriate professional, management and other expertise necessary to achieve HS2 Ltd's objectives.
- Proper consultation with staff takes place on key issues affecting them.
- Appropriate grievance and disciplinary procedures are in place, and whistleblowing procedures are in place consistent with the Public Interest Disclosure Act 1998.
- A code of conduct for staff is in place based on the Cabinet Office's *Model Code for Staff of Executive Non-departmental Public Bodies.*
- Subject to its delegated authorities, HS2 Ltd shall ensure that the creation of any additional posts does not incur forward commitments that will exceed its ability to pay for them.

27.2 Departmental approval is required for changes to the staff budget over and above that set out in the approved corporate and business plans. The *HS2 Ltd Remuneration Framework* provides further details on recruitment.

Pay and conditions of service

28. HS2 Ltd staff are subject to levels of remuneration and terms and conditions of service (including pensions) within the general pay structure approved by the Department in

liaison with HM Treasury and Cabinet Office. These are set out in a separate *HS2 Ltd Remuneration Framework*. HS2 Ltd has no delegated power to amend these terms and conditions and must ensure:

- HS2 Ltd posts are individually defined as set out under the conditions in the *Remuneration Framework*.
- The travel expenses of all HS2 Ltd employees are subject to a travel expenses policy whereby reasonable actual costs are reimbursed in accordance with the HM Treasury *Guidance Note: Public Sector Pay and Terms* and *Managing Public Money* except where prior approval has been given by the Department to vary such rates.
- Staff terms and conditions should be set out in an Employee Handbook.
- HS2 Ltd shall comply with the EU Directive on contract workers – the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations.

Pensions, redundancy and compensation

29. HS2 Ltd must meet the statutory and/or Government requirements on pension provision for its staff, as set out in *Managing Public Money, Cabinet Office Spending Controls* and the requirements set out in the *HS2 Ltd Remuneration Framework*. Any proposal by HS2 Ltd to deviate from the requirements set out in the *Remuneration Framework* requires the prior approval of the Department, who will liaise with HM Treasury as necessary.

29.1 Proposals on severance must comply with the rules in Chapter 4 and Annex 4.13 of *Managing Public Money*.

Relationships with devolved administrations or other bodies

30. HS2 Ltd's relationships with the devolved administrations of Scotland, Wales and Northern Ireland must follow the principles set out in the *Memorandum of Understanding and Supplementary Agreement* between the Westminster Parliament and those administrations, and relevant Concordats which are in force.

Review of HS2 Ltd status

31. HS2 Ltd will be subjected to a 'tailored review' every five years (sometimes referred to as a 'quinquennial review'). These reviews ensure that HS2 Ltd is delivering effectively against its aims and objectives.

31.1 A tailored review may be conducted sooner in the event of a significant change in the scope or direction of HS2 Ltd's primary aims.

31.2 This Framework Document will be reviewed by the Department and HS2 Ltd at least every three years or following a review of HS2 Ltd's functions as provided for above. In the event of a requirement to review the document earlier (precipitated by a specific event or issue) then this can be conducted with the agreement of the Department and HS2 Ltd.

Arrangements in the event that HS2 Ltd is wound up

32. The sponsor Department shall put in place arrangements to ensure the orderly winding up of HS2 Ltd. In particular it should ensure that HS2 Ltd's assets and liabilities are passed to any successor organisation and accounted for properly. In the event that there is no successor organisation, the assets and liabilities should revert to the sponsor Department.

32.1 In winding up HS2 Ltd, the Department shall:

- Ensure that procedures are in place in HS2 Ltd to gain independent assurance on key transactions, financial commitments, cash flows and other information needed to handle the wind-up effectively and to maintain the momentum of work inherited by any residual body.

- Specify the basis for the valuation and accounting treatment of HS2 Ltd assets and liabilities.

- Ensure that arrangements are in place to prepare closing Accounts and to pass them to the Comptroller & Auditor General for external audit, and that sufficient funds are in place to pay for such audits. It shall be for the Comptroller & Auditor General to lay the final accounts in Parliament, together with his report on the accounts.

- Arrange for the most appropriate person to sign the closing Accounts. In the event that another body takes on the role of HS2 Ltd responsibilities, assets and liabilities; the succeeding Accounting Officer should sign the closing Accounts. In the event that the Department inherits the role, responsibilities, assets and liabilities of HS2 Ltd, then the Principal Accounting Officer should sign.

32.2 HS2 Ltd shall provide the Department with full details of all agreements where HS2 Ltd or its successors have a right to share in the financial gains of developers. It should also pass to the Department details of any other forms of claw-back due to HS2 Ltd.

APPENDIX 1

Statutory guidance and relevant publications

Guidance referred to in this document:

Cabinet Office guidance *Partnerships between Departments and DBs: Code of Good Practice*
https://www.gov.uk/government/publications/partnerships-with-arms-length-bodies-code-of-good-practice

HM Treasury guidance *Managing Public Money*
https://www.gov.uk/government/publications/managing-public-money

Cabinet Office *Corporate governance in central government departments: Code of Good Practice*
https://www.gov.uk/government/publications/corporate-governance-code-for-central-government-departments

Cabinet Office *Code of Conduct for Board Members of Public Bodies*
https://www.gov.uk/government/publications/board-members-of-public-bodies-code-of-conduct

HM Treasury's *Financial Reporting Manual* (FReM)
https://www.gov.uk/government/publications/government-financial-reporting-manual-2016-to-2017

Government Commercial Function guidance *Government Commercial Operating Standards*
https://www.gov.uk/government/publications/commercial-operating-standards-for-government

Cabinet Office guidance *Governance Code for Public Appointments*
https://www.gov.uk/government/publications/governance-code-for-public-appointments

Commissioner for Public Appointments guidance *Code of Practice issued by the Commissioner for Public Appointments*
https://publicappointmentscommissioner.independent.gov.uk/regulating-appointments/governance-code/

HM Treasury guidance *Management of Risk: Principles and Concepts* (referred to as *The Orange Book*)
https://www.gov.uk/government/publications/orange-book

HM Treasury guidance on how to appraise and evaluate policies, projects and programmes (*The Green Book: appraisal and evaluation in central government)*
https://www.gov.uk/government/publications/the-green-book-appraisal-and-evaluation-in-central-governent

HM Treasury guidance *Tackling Internal Fraud*
http://webarchive.nationalarchives.gov.uk/20130102192905/http://www.hm-treasury.gov.uk/d/managing_the_risk_fraud_guide_for_managers.pdf.pdf

DfT *Guide to Drafting a Business Case* and *WebTAG* guidance
https://www.gov.uk/government/publications/transport-business-case

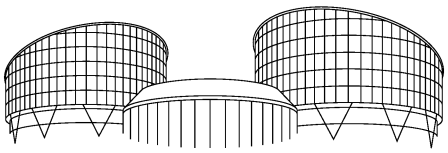
Cabinet Office's *Controls Guidance (spending controls)*
https://www.gov.uk/government/publications/cabinet-office-controls/cabinet-office-controls-guidance-version-40

Cabinet Office's *Model Code for Staff of Executive Non-departmental Public Bodies.*
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/80082/PublicBodiesGuide2006_5_public_body_staffv2_0.pdf

HM Treasury *Public Sector Internal Audit Standards*
https://www.gov.uk/government/publications/public-sector-internal-audit-standards

HM Treasury *Guidance Note: Public Sector Pay and Terms*
https://www.gov.uk/government/publications/public-sector-pay-and-terms-guidance-note/guidance-note-public-sector-pay-and-terms

HS2 Ltd *Development Agreement*
https://www.gov.uk/government/publications/hs2-development-agreement-july-2017



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Practical Guide on Admissibility Criteria

Updated on 1 February 2022

This Guide was originally drafted in English. It is updated regularly and, most recently, on 1 February 2022. It may be subject to editorial revision.

The Admissibility Guide and the Case-Law Guides are available for downloading at www.echr.coe.int (Case-law – Case-law analysis – Admissibility guides). For publication updates please follow the Court's Twitter account at *https://twitter.com/ECHR_CEDH*.

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Note to readers

This Practical Guide is part of the series of Guides on the Convention published by the European Court of Human Rights (hereafter "the Court", "the European Court" or "the Strasbourg Court") to inform legal practitioners, and in particular lawyers who may be called upon to represent applicants before the Court, about the conditions of admissibility of individual applications. This Guide is designed to present a clearer and more detailed picture of the conditions of admissibility with a view, firstly, to reducing as far as possible the number of applications which have no prospect of resulting in a ruling on the merits and, secondly, to ensuring that those applications which warrant examination on the merits pass the admissibility test.

This guide does not therefore claim to be exhaustive and will concentrate on the most commonly occurring scenarios. The case-law cited has been selected among the leading, major, and/or recent judgments and decisions.*

The Court's judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, § 154, 18 January 1978, Series A no. 25, and, more recently, *Jeronovičs v. Latvia* [GC], no. 44898/10, § 109, 5 July 2016).

The mission of the system set up by the Convention is thus to determine issues of public policy in the general interest, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (*Konstantin Markin v. Russia* [GC], § 89, no. 30078/06, ECHR 2012). Indeed, the Court has emphasised the Convention's role as a "constitutional instrument of European public order" in the field of human rights (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 156, ECHR 2005-VI, and more recently, *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 110, 13 February 2020).

This Guide contains references to keywords for each cited Article of the Convention and its Additional Protocols. The legal issues dealt with in each case are summarised in a List of keywords, chosen from a thesaurus of terms taken (in most cases) directly from the text of the Convention and its Protocols.

The HUDOC database of the Court's case-law enables searches to be made by keyword. Searching with these keywords enables a group of documents with similar legal content to be found (the Court's reasoning and conclusions in each case are summarised through the keywords). Keywords for individual cases can be found by clicking on the Case Details tag in HUDOC. For further information about the HUDOC database and the keywords, please see the HUDOC user manual.

* The case-law cited may be in either or both of the official languages (English and French) of the Court and the European Commission of Human Rights. Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation "(dec.)" indicates that the citation is of a decision of the Court and "[GC]" that the case was heard by the Grand Chamber. Chamber judgments that were not final when this update was published are marked with an asterisk (*).

Introduction

1. The system of protection of fundamental rights and freedoms established by the European Convention on Human Rights ("the Convention") is based on the principle of subsidiarity. The importance of this principle has been reaffirmed with the adoption and entry into force of Protocol No. 15 to the Convention, which has introduced an explicit reference to it in the Preamble to the Convention. The task of ensuring the application of the Convention falls primarily to the States Parties to the Convention; the European Court of Human Rights ("the Court") should intervene only where States have failed in their obligations.

Supervision by Strasbourg is triggered mainly by individual applications, which may be lodged with the Court by any individual or non-governmental legal entity located within the jurisdiction of a State Party to the Convention. The pool of potential applicants is therefore vast: in addition to the eight hundred million inhabitants of greater Europe and the nationals of third countries living there or in transit, there are millions of associations, foundations, political parties, companies and so forth (not to mention those persons who, as a result of extraterritorial acts committed by the States Parties to the Convention outside their respective territories, fall within their jurisdiction).

For a number of years now, and owing to a variety of factors, the Court has been submerged by individual applications (64,100 were pending as of 31 January 2021). The overwhelming majority of these applications are, however, rejected without being examined on the merits for failure to satisfy one of the admissibility criteria laid down by the Convention. For instance, in 2020, out of the 39,190 applications disposed of by the Court, 37,289 were declared inadmissible or struck out of the list of cases. This situation is frustrating on two counts. Firstly, as the Court is required to respond to each application, it is prevented from dealing within reasonable time-limits with those cases which warrant examination on the merits, without the public deriving any real benefit. Secondly, tens of thousands of applicants inevitably have their claims rejected.

2. The States Parties to the Convention, and also the Court and its Registry, have constantly sought ways to tackle this problem and ensure effective administration of justice. One of the most visible measures has been the adoption of Protocol No. 14 to the Convention. This provides, among other things, for applications which are clearly inadmissible to be dealt with by a single judge assisted by non-judicial rapporteurs, rather than by a three-judge committee. Protocol No. 14, which came into force on 1 June 2010, also introduced a new admissibility criterion relating to the degree of disadvantage suffered by the applicant, aimed at discouraging applications from persons who have not suffered significant disadvantage.

On 19 February 2010, representatives of the forty-seven member States of the Council of Europe, all of which are bound by the Convention, met in Interlaken in Switzerland to discuss the future of the Court and, in particular, the backlog of cases resulting from the large number of inadmissible applications. In a solemn declaration, they reaffirmed the Court's central role in the European system for the protection of fundamental rights and freedoms, and undertook to increase its effectiveness while preserving the principle of individual application.

The need to ensure the viability of the Convention mechanism in the short, medium and long term was further stressed in the declarations adopted at follow-up conferences in İzmir, Brighton, Brussels and Copenhagen held in 2011, and 2012, 2015 and 2018 respectively. The Brighton Conference led to the adoption of Protocol No. 15 to the Convention, which apart from inserting a reference to the the principle of subsidiarity and the doctrine of the margin of appreciation into the Convention's Preamble, reduces from six to four months the time within which an application must be lodged with the Court after a final national decision.

3. The idea of providing potential applicants with comprehensive and objective information on the application procedure and admissibility criteria is expressly articulated in point C-6(a) and (b) of the

Interlaken Declaration. This practical guide to the conditions of admissibility of individual applications is to be seen in the same context. It is designed to present a clearer and more detailed picture of the conditions of admissibility with a view, firstly, to reducing as far as possible the number of applications which have no prospect of resulting in a ruling on the merits and, secondly, to ensuring that those applications which warrant examination on the merits pass the admissibility test. At present, in most cases which pass that test, the admissibility and merits are examined at the same time, which simplifies and speeds up the procedure.

This document is aimed principally at legal practitioners and in particular at lawyers who may be called upon to represent applicants before the Court.

All the admissibility criteria set forth in Articles 34 (individual applications) and 35 (admissibility criteria) of the Convention have been examined in the light of the Court's case-law. Naturally, some concepts, such as the four month time-limit and, to a lesser extent, the exhaustion of domestic remedies, are more easily defined than others such as the concept of "manifestly ill-founded", which can be broken down almost *ad infinitum*, or the Court's jurisdiction *ratione materiae* or *ratione personae*. Furthermore, some Articles are relied on much more frequently than others by applicants, and some States have not ratified all the additional Protocols to the Convention, while others have issued reservations with regard to the scope of certain provisions. This guide does not therefore claim to be exhaustive and will concentrate on the most commonly occurring scenarios. Although it will focus on cases originated in individual applications (submitted under Article 34 of the Convention), it will refer to certain judgments and decisions delivered in inter-State cases (submitted under Article 33 of the Convention[1]) in so far as relevant to individual applications.

4. The guide was prepared by the Directorate of the Jurisconsult of the Court, and its interpretation of the admissibility criteria is in no way binding on the Court. It will be updated regularly. It was drafted in French and in English and will be translated into some other languages, with priority being given to the official languages of the high case-count countries.

5. After defining the notions of individual application and victim status, the guide will look at procedural grounds for inadmissibility (part I), grounds relating to the Court's jurisdiction (part II) and those relating to the merits of the case (part III)[2].

[1] Not all the admissibility crtieria set forth in Article 35 of the Convention are applicable to inter-State applications submitted under Article 33 of the Convention (see *Slovenia v. Croatia* [GC] (dec.), §§ 40-44). Inter-State applications call for a different approach as regards admissibility.

[2]. For a clear view of the various stages of the procedure by which the Court examines an application, see the "Case processing" page of the Court website (www.echr.coe.int – The Court – How the Court works), and particularly the flow chart "Life of an application".

A. Individual application

Article 34 of the Convention – Individual applications

"The Court may receive applications from any person, non-governmental 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. ..."

HUDOC keywords

Petition (34) – Defendant State Party (34) – Individual (34) – Non-governmental organisation (34) – Group of individuals (34) – Victim (34) – *Actio popularis* (34) – *Locus standi* (34)

1. Purpose of the provision

6. Article 34, which guarantees the right of individual application, gives individuals a genuine right to take legal action at international level. It is also one of the fundamental guarantees of the effectiveness of the Convention system – one of the "key components of the machinery" for the protection of human rights (*Mamatkulov and Askarov v. Turkey* [GC], §§ 100 and 122; *Loizidou v. Turkey* (preliminary objections), § 70).

7. As a living instrument, the Convention must be interpreted in the light of present-day conditions. The well-established case-law to this effect also applies to the procedural provisions, such as Article 34 (ibid., § 71).

8. In order to rely on Article 34 of the Convention, an applicant must meet two conditions: he or she must fall into one of the categories of petitioners mentioned in Article 34 and must be able to make out a case that he or she is the victim of a violation of the Convention (*Vallianatos and Others v. Greece* [GC], § 47).

2. Categories of petitioners

a. Physical persons

9. Any person may rely on the protection of the Convention against a State Party when the alleged violation took place within the jurisdiction of the State concerned, in accordance with Article 1 of the Convention (*Van der Tang v. Spain*, § 53), regardless of nationality, place of residence, civil status, situation or legal capacity. For a mother deprived of parental rights, see *Scozzari and Giunta v. Italy* [GC], § 138; for a minor, see *A. v. the United Kingdom*; for a person lacking legal capacity, without the consent of her guardian, see *Zehentner v. Austria*, §§ 39 et seq.

10. Applications can be brought only by living persons or on their behalf; a deceased person cannot lodge an application (*Aizpurua Ortiz and Others v. Spain*, § 30; *Dvořáček and Dvořáčková v. Slovakia*, § 41).

b. Legal persons

11. A legal entity claiming to be the victim of a violation by a member State of the rights set forth in the Convention and the Protocols has standing before the Court only if it is a "non-governmental organisation" within the meaning of Article 34 of the Convention.

12. The term "governmental organisations", as opposed to "non-governmental organisations" within the meaning of Article 34, applies not only to the central organs of the State, but also to decentralised authorities that exercise "public functions", regardless of their autonomy *vis-à-vis* the

central organs; likewise it applies to local and regional authorities (*Radio France and Others v. France* (dec.), § 26), a municipality (*Ayuntamiento de Mula v. Spain* (dec.)), or part of a municipality which participates in the exercise of public authority (*Municipal Section of Antilly v. France* (dec.)), none of which are entitled to make an application on the basis of Article 34 (see also *Döşemealtı Belediyesi v. Turkey* (dec.)). A State not party to the Convention cannot be qualified as a "non-governmental organisation" and is therefore not entitled bring a case to the Court under Article 34 (*Democratic Republic of the Congo v. Belgium* (dec.), §§ 13-21).

13. The category of "governmental organisation" includes legal entities which participate in the exercise of governmental powers or run a public service under government control (*JKP Vodovod Kraljevo v. Serbia* (déc.), §§ 23-28, concerning a water and sewerage company established by a municipality; *İhsan Doğramacı Bilkent Üniversitesi v. Turkey* (dec.), §§ 35-47, concerning a university established by a foundation). The private nature of the act complained of is not relevant in this respect (§ 38).

14. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities (*Radio France and Others v. France* (dec.), § 26; *Kotov v. Russia* [GC], § 93; *Slovenia v. Croatia* [GC] (dec.), § 61). For public-law entities which do not exercise any governmental powers or public-service broadcasters, see *The Holy Monasteries v. Greece*, § 49; *Radio France and Others v. France* (dec.), §§ 24-26; *Österreichischer Rundfunk v. Austria*, §§ 46-53; *Schweizerische Radio- und Fernsehgesellschaft and publisuisse SA v. Switzerland*, §§ 46-48. For State-owned companies, which enjoy sufficient institutional and operational independence from the State, see *Islamic Republic of Iran Shipping Lines v. Turkey*, §§ 80-81; *Ukraine-Tyumen v. Ukraine*, §§ 25-28; *Unédic v. France*, §§ 48-59; and, by contrast, *Zastava It Turs v. Serbia* (dec.); *State Holding Company Luganskvugillya v. Ukraine* (dec.); see also *Transpetrol, a.s., v. Slovakia* (dec.). As far as companies are concerned, the Court has considered a company to be "non-governmental" for the purposes of Article 34 where it was governed essentially by company law, did not enjoy any governmental or other powers beyond those conferred by ordinary private law in the exercise of its activities, and was subject to the jurisdiction of the ordinary rather than the administrative courts. The Court has also taken into account the fact that an applicant company carried out commercial activities and had neither a public service role nor a monopoly in a competitive sector (*Slovenia v. Croatia* [GC] (dec.), §§ 62-63, and the references cited therein).

15. The Court has clarified that Article 33 of the Convention (inter-State applications) does not allow an applicant Government to vindicate the rights of a legal entity which would not qualify as a "non-governmental organisation" and therefore would not be entitled to lodge an individual application under Article 34 (*Slovenia v. Croatia* [GC] (dec.), §§ 60-70 and 76-79, concerning a bank owned by the applicant State). Taking into account the specific nature of the Convention as a human rights treaty and recalling that even in inter-State cases it is the individual who is primarily "injured" by a violation of the Convention, the Court confirmed that only individuals, groups of individuals and legal entities which qualify as "non-governmental organisations" can be bearers of rights under the Convention, but not a Contracting State or any legal entity belonging to it (*ibid.*, § 66).

c. Any group of individuals

16. An application can be brought by a group of individuals. However, local authorities or any other government bodies cannot lodge applications through the individuals who make up them or represent them, relating to acts punishable by the State to which they are attached and on behalf of which they exercise public authority (*Demirbaş and Others v. Turkey* (dec.)). By contrast, a group of MPs from a regional parliament can be considered as "group of individuals" (instead of a governmental organisation) when they complain about the suspension of the plenary sitting of the

Parliament of an autonomous community. In such a case, the rights and freedoms invoked by the applicants concern them individually and are not attributable to the Parliament as an institution (*Forcadell i Lluis and Others v. Spain* (dec.)).

3. Victim status

17. The Court has consistently held that the Convention does not provide for the institution of an *actio popularis* and that its task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention (for example, *Roman Zakharov v. Russia* [GC], § 164).

a. Notion of "victim"

18. The word "victim", in the context of Article 34 of the Convention, denotes the person or persons directly or indirectly affected by the alleged violation. Hence, Article 34 concerns not just the direct victim or victims of the alleged violation, but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end (*Vallianatos and Others v. Greece* [GC], § 47). The notion of "victim" is interpreted autonomously and irrespective of domestic rules such as those concerning interest in or capacity to take action (*Gorraiz Lizarraga and Others v. Spain*, § 35), even though the Court should have regard to the fact that an applicant was a party to the domestic proceedings (*Aksu v. Turkey* [GC], § 52; *Micallef v. Malta* [GC], § 48; *Bursa Barosu Başkanliği and Others v. Turkey*, §§ 109-117). It does not imply the existence of prejudice (*Brumărescu v. Romania* [GC], § 50), and an act that has only temporary legal effects may suffice (*Monnat v. Switzerland*, § 33).

19. 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*, § 38; *Stukus and Others v. Poland*, § 35; *Ziętal v. Poland*, §§ 54-59). The Court has held that the issue of victim status may be linked to the merits of the case (*Siliadin v. France*, § 63; *Hirsi Jamaa and Others v. Italy* [GC], § 111). The Court can examine the question of victim status and *locus standi ex officio*, since it concerns a matter which goes to the Court's jurisdiction (*Buzadji v. the Republic of Moldova* [GC], § 70; *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], § 93; *Unifaun Theatre Productions Limited and Others v. Malta*, §§ 63-66; Jakovljević v. Serbia (dec.), § 29).

20. The distribution of the burden of proof is intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake (*N.D. and N.T. v. Spain* [GC], §§ 83-88).

b. Direct victim

21. In order to be able to lodge an application in accordance with Article 34, an applicant must be able to show that he or she was "directly affected" by the measure complained of (*Tănase v. Moldova* [GC], § 104; *Burden v. the United Kingdom* [GC], § 33; *Lambert and Others v. France* [GC], § 89). This is indispensable for putting the protection mechanism of the Convention into motion (*Hristozov and Others v. Bulgaria*, § 73), although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (*Micallef v. Malta* [GC], § 45; *Karner v. Austria*, § 25; *Aksu v. Turkey* [GC], § 51). 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], § 92). However, in *Margulev v. Russia,* 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 outcome of the defamation proceedings (§ 36). In *Mukhin v. Russia**, 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). Further, in some specific circumstances, direct victims who had not participated in the domestic proceedings were accepted as applicants before the Court (*Beizaras and Levickas v. Lithuania*, §§ 78-81). Standing in domestic proceedings is therefore not decisive, as the notion of "victim" is interpreted autonomously in the Conventon system (see, for instance, *Kalfagiannis and Pospert v. Greece* (dec.), §§ 44-48, concerning the financial administrator of a public service broadcaster whose victim status was accepted by the domestic courts but not by the Court).

22. Moreover, in accordance with the Court's practice and with Article 34 of the Convention, applications can only be lodged by, or in the name of, individuals who are alive (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], § 96). 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 (§§ 103-114).[3]

c. Indirect victim

23. If the alleged victim of a violation has died before the introduction of the application, it may be possible for the person with the requisite legal interest as next-of-kin to introduce an application raising complaints related to the death or disappearance of his or her relative (*Varnava and Others v. Turkey* [GC], § 112). This is because of the particular situation governed by the nature of the violation alleged and considerations of the effective implementation of one of the most fundamental provisions in the Convention system (*Fairfield v. the United Kingdom* (dec.)).

24. In such cases, the Court has accepted that close family members, such as parents, of a person whose death or disappearance is alleged to engage the responsibility of the State can themselves claim to be indirect victims of the alleged violation of Article 2, the question of whether they were legal heirs of the deceased not being relevant (*Van Colle v. the United Kingdom*, § 86; *Tsalikidis and Others v. Greece*, § 64; *Kotilainen and Others v. Finland*, §§ 51-52).

25. The next-of-kin can also bring other complaints, such as under Articles 3 and 5 of the Convention on behalf of deceased or disappeared relatives, provided that the alleged violation is closely linked to the death or disappearance giving rise to issues under Article 2. For example, see *Khayrullina v. Russia*, §§ 91-92 and §§ 100-107, regarding the next-of-kin's standing to lodge a complaint under Article 5 § 1 and Article 5 § 5. The same logic could be applied to a complaint under Article 6 if a person had died during the criminal proceedings against him or her and if the death had occurred in circumstances engaging the State's responsibility (*Magnitskiy and Others v. Russia*, §§ 278-279).

26. For married partners, see *McCann and Others v. the United Kingdom*, *Salman v. Turkey* [GC]; for unmarried partners, see *Velikova v. Bulgaria* (dec.); for parents, see *Ramsahai and Others v. the Netherlands* [GC], *Giuliani and Gaggio v. Italy* [GC]; for siblings, see *Andronicou and Constantinou v. Cyprus*; for children, see *McKerr v. the United Kingdom*; for nephews, see *Yaşa v. Turkey*; conversely, for a divorced partner who was not considered to have a sufficient link to her deceased ex-husband, see *Trivkanović v. Croatia*, §§ 49-50; for an uncle and a first cousin, see *Fabris and Parziale v. Italy*, §§ 37-41 and the recapitulation of the case-law. With regard to missing persons whose bodies have not been found following a boat accident, the Court has accepted that the next-of-kin can lodge an application under Article 2, in particular where the State has not found all the

[3] See section Representation.

victims and has even failed to identify all those who had been found (*Ranđelović and Others v. Montenegro*, § 85).

27. In cases where the alleged violation of the Convention was not closely linked to the death or disappearance of the direct victim the Court's approach has been more restrictive (*Karpylenko v. Ukraine*, § 104, *A and B v. Croatia*, §§ 88-91). The Court has generally declined to grant standing to any other person unless that person could, exceptionally, demonstrate an interest of their own (*Nassau Verzekering Maatschappij N.V. v. the Netherlands* (dec.), § 20). See, for example, *Sanles Sanles v. Spain* (dec.), which concerned the prohibition of assisted suicide in alleged breach of Articles 2, 3, 5, 8, 9 and 14 and where the Court held that the rights claimed by the applicant, who was the deceased's sister-in-law and legal heir, belonged to the category of non-transferable rights and that therefore she could not claim to be the victim of a violation on behalf of her late brother-in-law; see under Article 8, *Petithory Lanzmann v. France* (dec.), § 16, where the Court held that the fate of gametes deposited by an individual and his wish that they be used after his death concerned an individual's right to decide how and when he wished to become a parent and that this right fell within the category of non-transferable rights; see also *Biç and Others v. Turkey* (dec.) (concerning complaints under Articles 5 and 6); *Fairfield v. the United Kingdom* (dec.) (complaints under Articles 9 and 10); *Rõigas v. Estonia*, § 127, and Jakovljević v. Serbia (dec.), §§ 29-30 (relating to complaints under Article 8).

28. As regards complaints of ill-treatment of deceased relatives under Article 3 of the Convention, the Court has accepted the *locus standi* of applicants in cases where the ill-treatment was closely linked to the death or the disappearance of their relatives (*Karpylenko v. Ukraine*, § 105; *Dzidzava v. Russia*, § 46). The Court has also affirmed that it may recognise the standing of applicants who complain about ill-treatment of their late relative if the applicants show either a strong moral interest, besides the mere pecuniary interest in the outcome of the domestic proceedings, or other compelling reasons, such as an important general interest which requires their case to be examined (*Boacă and Others v. Romania*, § 46; *Karpylenko v. Ukraine*, § 106; see also *Stepanian v. Romania*, §§ 40-41; *Selami and Others v. the former Yugoslav Republic of Macedonia*, §§ 58-65).

29. In those cases where victim status was granted to close relatives, allowing them to submit an application in respect of complaints under, for example, Articles 5, 6 or 8, the Court took into account whether they have shown a moral interest in having the late victim exonerated of any finding of guilt (*Nölkenbockhoff v. Germany*, § 33; *Grădinar v. Moldova*, §§ 95 and 97-98; *Akbay and Others v. Germany,* §§ 73, 80-82) or in protecting their own reputation and that of their family (*Brudnicka and Others v. Poland*, §§ 27-31; *Armonienė v. Lithuania*, § 29; *Polanco Torres and Movilla Polanco v. Spain*, §§ 31-33), or whether they have shown a material interest on the basis of the direct effect on their pecuniary rights (*Nölkenbockhoff v. Germany*, § 33; *Grădinar v. Moldova*, § 97; *Micallef v. Malta* [GC], § 48; *Akbay and Others v. Germany,* §§ 74, 83-85). The existence of a general interest which necessitated proceeding with the consideration of the complaints has also been taken into consideration (ibid., §§ 46 and 50; see also *Biç and Others v. Turkey* (dec.), §§ 22-23; *Akbay and Others v. Germany,* §§ 76, 86-88).

30. The applicant's participation in the domestic proceedings has been found to be only one of several relevant criteria (*Nölkenbockhoff v. Germany*, § 33; *Micallef v. Malta* [GC], §§ 48-49; *Polanco Torres and Movilla Polanco v. Spain*, § 31; *Grădinar v. Moldova*, §§ 98-99; see also *Kaburov v. Bulgaria* (dec.), §§ 57-58, where the Court found that, in a case concerning the transferability of Article 3 of the Convention, the applicant, in the absence of a moral interest in the outcome of proceedings or other compelling reason, could not be considered a victim merely because the domestic law allowed him to intervene in the tort proceedings as the late Mr Kaburov's heir; see also *Nassau Verzekering Maatschappij N.V. v. the Netherlands* (dec.) where the applicant company's claim to have victim status on account of having acquired a Convention claim by a deed of assignment was rejected by the Court).

31. The Court has usually considered the above criteria cumulatively and made its assessment of whether close relatives had standing to submit an application having regard to all the circumstances of the case (*Akbay and Others v. Germany*, §§ 77 and 89).

32. In addition to their status as "indirect victims", family members can also be "direct victims" of a treatment contrary to Article 3 of the Convention on account of the suffering stemming from serious human rights violations affecting their relatives (see the relevant criteria in *Janowiec and Others v. Russia* [GC], §§ 177-181, and *Selami and Others v. the former Yugoslav Republic of Macedonia*, §§ 54-56).

33. Close relatives may under some circumstances claim to be indirect victims of a violation directly affecting a living relative. For instance, a mother can claim indirect victim status in respect of an alleged discrimination affecting her disabled child, in so far as, in addition to the care which she provided, she had instituted the domestic proceedings in her capacity as guardian to her daughter, who was incapable of discernment (*Belli and Arquier-Martinez v. Switzerland*, § 97).

34. As regards complaints pertaining to companies (*Agrotexim and Others v. Greece*, §§ 64-71), the Court has considered that a person cannot complain of a violation of his or her rights in proceedings to which he or she was not a party, even if he or she was a shareholder and/or director of a company which was party to the proceedings (*Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], §§ 92-93).

When it comes to cases brought by shareholders of a company (notably under Article 1 of Protocol Nno. 1), the Court has found it crucial to draw a distinction between complaints brought by shareholders about measures affecting their rights as shareholders and those about acts affecting companies, in which they hold shares (*Agrotexim and Others v. Greece*, §§ 65-66; *Albert and Others v. Hungary* [GC], § 122). In the former group, shareholders themselves may be considered victims within the meaning of Article 34 of the Convention (see Olczak v. Poland (dec.), §§ 57-62; *Albert and Others v. Hungary* [GC], §§ 126-134, and the references cited therein; *Project-Trade d.o.o. v. Croatia*, §§ 44-47*; Papachela and Amazon S.A. v. Greece,* §§ 37-41). In the latter group the general principle is that shareholders of companies cannot be seen as victims, within the meaning of Article 34 of the Convention, of acts and measures affecting their companies. The Court has recognised that this principle may be justifiably qualified in two kinds of situations, firstly, where the company and its shareholders are so closely identified with each other that it is artificial to distinguish between the two (see, for example, *Ankarcrona v. Sweden* (dec.)) and, secondly, if it is warranted by "exceptional circumstances" (*Albert and Others v. Hungary* [GC], §§ 124, 135-145). In this connection, the disregarding of a company's legal personality can be justified only in "exceptional circumstances", in particular where it is clearly established that it is impossible for the company to bring the case to the Court in its own name. In order for applicants to satisfy the Court that their pursuit, as shareholders, of a matter affecting the company is justified by such reasons, they ought to give weighty and convincing reasons demonstrating that it is practically or effectively impossible for the company to apply to the Court through the organs set up under its articles of association and that they should therefore be allowed to proceed with the complaint on the company's behalf (ibid., §§ 138-145, and the references cited therein; see, for an application of these principles, §§ 159-165).

As to the 'victim' status of applicant companies and/or their managers respectively when it comes to secret surveillance authorisations not formally issued against the companies, see *Liblik and others v. Estonia*, §§ 111-112.

35. As regards non-governmental organisations, 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*, § 90 and § 93 and the references cited therein; see also *Kalfagiannis and Pospert v. Greece* (dec.), §§ 49-51, concerning a federation of trade unions representing media employees; *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey* (dec.), §§ 42-44,

concerning a non-governmental organisation created with a view to defending the residents of an area where a dam was being built, and *Genderdoc-M and M.D. v. the Republic of Moldova**, §§ 25-26, concerning a non-governmental organisation representing the interests of LGBT persons. See, by contrast, *AsDAC c. the Republic of Moldova,* §§ 21-37, concerning a non-governmental organisation set up for the collective management of intellectual property rights of its members and its victim status in relation to an Article 1 of Protocol No. 1 complaint). However, it should be noted that under certain circumstances NGOs (instead of the applicants) can take part in domestic proceedings, defending the applicants' interests. This does not deprive the applicants, who have not participated in the domestic proceedings, of their victim status (*Gorraiz Lizarraga and Others v. Spain*, §§ 37-39; *Centre of Societies for Krishna Consciousness in Russia and Frolov v. Russia**, § 30; see also *Beizaras and Levickas v. Lithuania*, §§ 78-81 and the interplay between victim status under Article 34 and exhaustion of domestic remedies under Article 35 § 1).

d. Potential victims and *actio popularis*

36. Article 34 of the Convention does not allow complaints *in abstracto* alleging a violation of the Convention (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], § 101 and the references cited therein). In certain specific situations, however, the Court has accepted that an applicant may be a potential victim. For example, where he was not able to establish that the legislation he complained of had actually been applied to him on account of the secret nature of the measures it authorised (*Klass and Others v. Germany*) or where an alien's removal had been ordered, but not enforced, and where enforcement would have exposed him in the receiving country to treatment contrary to Article 3 of the Convention or to an infringement of his rights under Article 8 of the Convention (*Soering v. the United Kingdom*) or where a law punishing homosexual acts was likely to be applied to a certain category of the population, to which the applicant belonged (*Dudgeon v. the United Kingdom*). The Court has also held that an applicant can claim to be a victim of a violation of the Convention if he or she is covered by the scope of legislation permitting secret surveillance measures and if the applicant has no remedies to challenge such cover surveillance (*Roman Zakharov* v. *Russia* [GC], §§ 173-78).

37. In order to be able to claim to be a victim in such a situation, an applicant must produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur; mere suspicion or conjecture is insufficient (*Senator Lines GmbH v. fifteen member States of the European Union* (dec.) [GC]; *Shortall and Others v. Ireland* (dec.)). For the absence of a formal expulsion order, see *Vijayanathan and Pusparajah v. France*, § 46; for alleged consequences of a parliamentary report, see *Fédération chrétienne des témoins de Jéhovah de France v. France* (dec.); for alleged consequences of a judicial ruling concerning a third party in a coma, see *Rossi and Others v. Italy* (dec.); for alleged consequences of anti-doping measures for sports associations and individual sports professionals, see *National federation of Sportspersons' Associations and unions (FNASS) and Others v. France*, §§ 91-103.

38. An applicant cannot claim to be a victim in a case where he or she is partly responsible for the alleged violation (*Paşa and Erkan Erol v. Turkey*).

39. 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 (*Aksu v. Turkey* [GC], § 50; *Burden v. the United Kingdom* [GC], § 33; *Dimitras and Others v. Greece* (dec.), §§ 28-32; *Cordella and Others v. Italy*, § 100; *Kalfagiannis and Pospert v. Greece* (dec.), § 46). For instance, 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 Aritcle 6 § 1 (*Bursa Barosu Başkanliği and Others v. Turkey*, §§ 114-116, concerning an environmental case; compare with *Beizaras and*

Levickas v. Lithuania, § 80). Where an applicant alleges a breach of the right to respect for private and family life on account of statutory restrictions on visits from family members or other persons, in order to claim to be a victim of the alleged violation , he should demonstrate at least: a) that he has relatives or other persons with whom he genuinely wishes and attempts to maintain contact in detention; and b) that he has used his right to visits as frequenty as was permitted under domestic law (*Chernenko and Others v. Russia* (dec.), § 45). In the context of Article 10 of the Convention, the mere fact that an applicant could no longer watch or listen to the programmes previously broadcast by a public service broadcaster closed by the Government did not suffice to establish his victim status with respect to the right to receive information (*Kalfagiannis and Pospert v. Greece* (dec.), §§ 46-47).

40. However, it is open to a person to contend that a law violates his or her rights, in the absence of an individual measure of implementation, if he or she is required either to modify his or her conduct or risks being prosecuted or if he or she is a member of a class of people who risk being directly affected by the legislation (ibid., § 34; *Tănase v. Moldova* [GC], § 104; *Michaud v. France*, §§ 51-52; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], § 28).

e. Loss of victim status

41. It falls first to the national authorities to redress any alleged violation of the Convention. Hence, the question whether an applicant can claim to be a victim of the violation alleged is relevant at all stages of the proceedings before the Court (*Scordino v. Italy (no. 1)* [GC], § 179; *Rooman v. Belgium* [GC], §§ 128-133). In this regard, the applicant must be able to justify his or her status as a victim throughout the proceedings (*Burdov v. Russia*, § 30; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], § 80).

42. The issue of whether a person may still claim to be the victim of an alleged violation of the Convention essentially entails on the part of the Court an *ex post facto* examination of his or her situation (ibid., § 82).

43. A decision or measure favourable to the applicant is not, in principle, sufficient to deprive him or her of his or her status as a "victim" for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (*Scordino v. Italy (no. 1)* [GC], § 180; *Gäfgen v. Germany* [GC], § 115; *Nada v. Switzerland* [GC], § 128; *Blyudik v. Russia*, §§ 49-50; *Dimo Dimov and Others v. Bulgaria*, §§ 51-56; *Roth v. Germany*, §§ 75-81). Only when these conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application (*Jensen and Rasmussen v. Denmark* (dec.); *Albayrak v. Turkey*, § 32; *Selahattin Demirtaş v. Turkey (no. 2)* [GC], §§ 217-223).

44. The applicant would remain a victim if the authorities have failed to acknowledge either expressly or in substance that there has been a violation of the applicant's rights (ibid., § 33; *Jensen v. Denmark* (dec.)) even if the latter received some compensation (*Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], § 88).

45. Moreover, the redress afforded must be appropriate and sufficient. This will depend on all the circumstances of the case, with particular regard to the nature of the Convention violation in issue (*Gäfgen v. Germany* [GC], § 116; *Bivolaru v. Romania (no. 2)*, § 170).

46. For instance, in cases of willful ill-treatment by State agents in breach of Article 3, the Court has repeatedly found that two measures are necessary to provide sufficient redress. Firstly, the State authorities must have conducted a thorough and effective investigation capable of leading to the identification and punishment of those responsible. Secondly, an award of compensation to the applicant is required where appropriate or, at least, the possibility of seeking and obtaining

compensation for the damage which the applicant sustained as a result of the ill-treatment (*Gäfgen v. Germany* [GC], §§ 116-118).

47. In cases of willful ill-treatment by State agents, the breach of Article 3 cannot be remedied only by an award of compensation to the victim (*ibid.,* § 119; *Shmorgunov and Others v. Ukraine,* §§ 397-401). These principles are not only applicable to cases of ill-treatment by State agents but also to cases of ill-treatment inflicted by private individuals (*Beganović v. Croatia*, § 56; *Škorjanec v. Croatia,* § 47).

48. When domestic courts afford appropriate and sufficient redress for an alleged violation of Article 3 (conditions of detention) to applicants who are no longer in detention, these applicants lose their victim status. This is the case, for instance, where domestic authorities have compensated for the poor conditions of detention in which the applicants were held by a specific and measurable reduction in their sentences leading to their early release (*Dîrjan and Ștefan v. Romania* (dec.), §§ 23-34).

However, if domestic courts compensate individuals who are still detained, the compensation does not enable these individuals to obtain direct and appropriate redress for their rights under Article 3, namely the cessation or improvement of their conditions of detention (*J.M.B. and Others v. France*, §§ 167-169).

49. Where a breach of Article 5 § 1 had been expressly acknowledged at domestic level, which opened up the possibility for the applicant of claiming compensation in a separate set of proceedings and of obtaining an adequate amount of compensation, the applicant could reasonably have been expected to turn to the domestic courts to obtain compensation, rather than turning to the Court to seek confirmation of the unlawfulness of his detention which had already been recognised (*Al Husin v. Bosnia and Herzegovina (no. 2)*, §§ 89-90; for an acknowledgment of the unlawfulness of the detention in the context of disciplinary proceedings against the judges who had authorised the applicants' detention and the payment of the compensation awarded in separate civil proceedings, see *Dubovtsev and Others v. Ukraine,* §§ 57-66). As regards Article 5 § 5, an applicant might lose his victim status when national authorities grant redress by reducing the sentence imposed on the applicant in an express and measurable manner instead of granting the applicant a financial benefit (*Porchet v. Switzerland* (dec.), §§ 14-26). The mitigation of a sentence may also be relevant for removing victim status in respect of the length of a detention on remand in breach of Article 5 § 3 (ibid, § 20; *Ščensnovičius v. Lithuania*, §§ 88-93; compare and contrast *Malkov v. Estonia*, §§ 40-41).

50. Also, a person may not claim to be a victim of a violation of his right to a fair trial under Article 6 of the Convention which, according to him, took place in the course of proceedings in which he was acquitted or which were discontinued (*Sakhnovskiy v. Russia* [GC], § 77; *Oleksy v. Poland* (dec.); *Koç and Tambaş v. Turkey* (dec.); *Bouglame v. Belgium* (dec.)), except for the complaint pertaining to the length of the proceedings in question (*Osmanov and Husseinov v. Bulgaria* (dec.)). By contrast, for Article 10 complaints, an acquittal may not be relevant for removing victim status (*Döner and Others v. Turkey*, § 89).

If an applicant is finally convicted in proceedings which breached Article 6 and therefore acquires victim status, it is then for the State to provide him or her with adequate and sufficient redress in respect of that complaint in a timely manner. The Court would then assess whether those subsequent proceedings deprived the applicant of victim status because he or she had been provided with sufficient redress (*Webster v. the United Kingdom* (dec.) and the references cited therein).

The imposition of a more lenient sentence by a domestic criminal court on the ground of the excessive length of the proceedings may amount to an adequate acknowledgment of and sufficient redress for delays in those proceedings (Article 6 § 1), provided that the reduction is express and

measurable (*Chiarello v. Germany*, §§ 54-59). The mitigation of a sentence may also be relevant for removing victim status in respect of the length of a detention on remand in breach of Article 5 § 3 (*Ščensnovičius v. Lithuania*, §§ 88-93; compare and contrast *Malkov v. Estonia*, §§ 40-41). Victim status as regards the right to a fair trial cannot be lost when another judgment, on a different issue from that alleged by the person concerned, was rendered in favour of him in another proceeding (*Sine Tsaggarakis A.E.E. v. Greece*, §§ 27-31).

51. In some other cases whether an individual remains a victim may also depend on the amount of compensation awarded by the domestic courts or at least on the possibility of seeking and obtaining compensation for the damage sustained, having regard to the facts about which he or she complains before the Court and the effectiveness (including the promptness) of the remedy affording the award (*Normann v. Denmark* (dec.); *Scordino v. Italy (no. 1)* [GC], § 202; see also *Jensen and Rasmussen v. Denmark* (dec.); *Kurić and Others v. Slovenia* [GC], § 262; *J.B. and Others v. Hungary* (dec.), § 59). With regard to the sufficiency of compensation awarded to an association representing several individuals, see *Društvo za varstvo upnikov v. Slovenia* (dec.), §§ 48-64. The express acknowledgment at the domestic level of a violation of an applicant's right to a fair trial within a reasonable time in criminal proceedings may not be sufficient to remove that applicant's victims status, in the absence of any award of compensation or reduction of the sentence (*Tempel v. the Czech Republic,* §§ 77-83).

52. An applicant 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,* §§ 37-38).

53. For other specific situations, see *Marshall and Others v. Malta*, §§ 33-34, 46-47 (Article 6); *Arat v. Turkey*, § 47 (Article 6); *Constantinescu v. Romania*, §§ 40-44 (Articles 6 and 10); *Guisset v. France*, §§ 66-70 (Article 6); *Chevrol v. France*, §§ 30 et seq. (Article 6); *Kerman v. Turkey*, § 106 (Article 6); *Moskovets v. Russia*, § 50 (Article 5); *Bivolaru v. Romania (no. 2)*, §§ 168-175 (Article 8); *X. and Y. v. Romania,* §§ 109-114 (Article 8); Kemal Çetin v. Turkey, § 33 (Article 11); *Moon v. France*, §§ 29 et seq. (Article 1 of Protocol No. 1); *D.J. and A.-K.R. v. Romania* (dec.), §§ 77 et seq. (Article 2 of Protocol No. 4); and *Sergey Zolotukhin v. Russia* [GC], § 115 (Article 4 of Protocol No. 7); *Dalban v. Romania* [GC], § 44 (Article 10); *Güneş v. Turkey* (dec.) (Article 10); *Çölgeçen and Others v. Turkey*, §§ 39-40, (Article 2 of Protocol No. 1).

54. The fact that a legal person is declared bankrupt during the Convention proceedings does not necessarily deprive it of its victim status (*Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], § 94). The same applies to a company which has ceased to exist and whose sole shareholders have indictated their interest in continuing the application in its name (*Euromak Metal Doo v. the former Yugoslav Republic of Macedonia*, §§ 32-33, concerning a tax dispute under Article 1 of Protocol No. 1; see also *Schweizerische Radio- und Fernsehgesellschaft and publisuisse SA v. Switzerland,* § 43*,* concerning a company which ceased to operate after having lodged its application with the Court and whose activities were taken over by another firm which wished to pursue the proceedings).

55. A case may be struck out of the list because the applicant ceases to have victim status/*locus standi*. Regarding resolution of the case at domestic level after the admissibility decision, see *Ohlen v. Denmark* (striking out); for an agreement transferring rights which were the subject of an application being examined by the Court, see *Dimitrescu v. Romania*, §§ 33-34.

56. The Court also examines whether the case should be struck out of its list on one or more of the grounds set forth in Article 37 of the Convention, in the light of events occurring subsequent to the lodging of the application, notwithstanding the fact that the applicant can still claim to be a "victim" (*Pisano v. Italy* (striking out) [GC], § 39), or even irrespective of whether or not he or she can continue to claim victim status. For developments occurring after a decision to relinquish jurisdiction

in favour of the Grand Chamber, see *El Majjaoui and Stichting Touba Moskee v. the Netherlands* (striking out) [GC], §§ 28-35; after the application had been declared admissible, see *Shevanova v. Latvia* (striking out) [GC], §§ 44 et seq.; and after the Chamber judgment, see *Sisojeva and Others v. Latvia* (striking out) [GC], § 96.

f. Death of the applicant

57. In principle, an application lodged by the original applicant before his or her death may be continued by heirs or close family members expressing the wish to pursue the proceedings, provided that they have a sufficient/legitimate interest in the case (*López Ribalda and Others v. Spain* [GC], §§ 71-73; *Malhous v. the Czech Republic* (dec.) [GC]; *Tagiyev and Huseynov v. Azerbaijan*, §§ 23-24 and the references cited therein; *Hristozov and Others v. Bulgaria*, § 71; *Ergezen v. Turkey*, § 30; *Pais Pires de Lima v. Portugal*, §§ 36-40; *Karastelev and Others v. Russia,* § 51; *Mile Novaković v. Croatia*, §§ 33-34).

58. However, where the applicant has died in the course of the proceedings and either no one has come forward with a wish to pursue the application or the persons who have expressed such a wish are not heirs or sufficiently close relatives of the applicant, and cannot demonstrate that they have any other legitimate interest in pursuing the application, the Court will strike the application out of its list (*Léger v. France* (striking out) [GC], § 50; *Hirsi Jamaa and Others v. Italy* [GC], § 57; *Burlya and Others v. Ukraine*, §§ 70-75) save for in very exceptional cases where the Court finds that respect for human rights as defined in the Convention and the Protocols thereto requires a continuation of the examination of the case (*Paposhvili v. Belgium* [GC], §§ 129-133; *Delecolle v. France*, § 39; *Karner v. Austria*, §§ 25 and seq.).

59. See, for example, *Raimondo v. Italy*, § 2, and *Stojkovic v. the former Yugoslav Republic of Macedonia*, § 25 (widow and children); *X v. France*, § 26 (parents); *Malhous v. the Czech Republic* (dec.) [GC] (nephew and potential heir); *Velikova v. Bulgaria* (dec.), *Ivko v. Russia*, §§ 64-70 and *Delecolle v. France*, §§ 39-44 (unmarried or *de facto* partner); contrast with *Thévenon v. France* (dec.) (universal legatee not related to the deceased); *Léger v. France* (striking out) [GC], §§ 50-51 (niece); *Savenko and Others v. Russia*, § 53 (former wife who divorced the applicant twelve years before his death and did not have any close contact with him afterwards).

4. Representation

60. Where applicants choose to be represented under Rule 36 § 1 of the Rules of Court, rather than lodging the application themselves, Rule 45 § 3 requires them to produce a written authority to act, duly signed. It is essential for representatives to demonstrate that they have received specific and explicit instructions from the alleged victim within the meaning of Article 34 on whose behalf they purport to act before the Court (*Post v. the Netherlands* (dec.); *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], § 102 - see also *Oliyevskyy v. Ukraine* (dec.), §§ 16-22 and *V.M. and Others v. Belgium* (striking out) [GC], §§ 32-41, where the applicants did not maintain contact with their representative and contrast with *N.D. and N.T. v. Spain* [GC], §§ 69-79, and the references therein, where the representative remained in contact with both applicants *via* telephone and WhatsApp, and the existence of special circumstances regarding respect for human rights as defined in the Convention and the Protocols thereto requiring the Court to continue the examination of the application (Article 37 § 1 *in fine*)). On the validity of an authority to act, see *Aliev v. Georgia*, §§ 44-49; on the authenticity of an application, see *Velikova v. Bulgaria*, §§ 48-52.

61. As a general rule, minor children are represented before the Court by their parents. The standing as the natural parent suffices to afford him or her the necessary power to apply to the Court on the child's behalf in order to protect the child's interests also, even—or indeed especially—if that parent is in conflict with the authorities and criticises their decisions and conduct as not being consistent with the rights guaranteed by the Convention (*Iosub Caras v. Romania*, § 21). In any

event, the key criterion in relation to questions of *locus standi* is the risk that children's interests might not be brought to its attention and that they would be denied effective protection of their Convention rights (*Strand Lobben and Others v. Norway* [GC], § 157). However, the situation may be different if the Court identifies conflicting interests between a parent and child in the case brought before it, for example, if serious joint parental child neglect has occurred (*ibid.*, § 158, and *E.M. and Others v. Norway**, §§ 64-65; compare and contrast with *Pedersen and Others v. Norway*, § 45).

62. Moreover, special considerations may arise in the case of victims of alleged breaches of Articles 2, 3 and 8 of the Convention at the hands of the national authorities, having regard to the victims' vulnerability on account of their age, sex or disability, which rendered them unable to lodge a complaint on the matter with the Court, due regard also being paid to the connections between the person lodging the application and the victim. In such cases, applications lodged by individuals on behalf of the victim(s), even though no valid form of authority was presented, have thus been declared admissible (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], § 103; however, compare and contrast with *Lambert and Others v. France* [GC], §§ 96-106). See, for example, *İlhan v. Turkey* [GC], § 55, where the complaints were brought by the applicant on behalf of his brother, who had been ill-treated; *Y.F. v. Turkey*, § 29, where a husband complained that his wife had been compelled to undergo a gynaecological examination; *S.P., D.P. and A.T. v. the United Kingdom*, Commission decision, where a complaint was brought by a solicitor on behalf of children he had represented in domestic proceedings, in which he had been appointed by the guardian *ad litem*; *C.N. v. Luxembourg*, § 28-33, where the power of attorney had been given by the parents whose parental authority was later revoked; *V.D. and Others v. Russia*, §§ 80-84, where an application was brought by a guardian acting on behalf of minors. See also, by contrast, *Lambert and Others v. France* [GC], § 105, where the Court held that the parents of the direct victim, who was unable to express his wishes regarding a decision to discontinue nutrition and hydration which allowed him to be kept alive artificially, did not have standing to raise complaints under Articles 2, 3 and 8 of the Convention in his name or on his behalf; and *Gard and Others v. the United Kingdom* (dec.), § 63-70, which differed from *Lambert and Others* since the direct victim was a minor, who had never been able to express his views or live an independent life, and where the Court discussed whether the parents of the direct victim had standing to raise complaints under Articles 2 and 5 on his behalf, but did not come to a final conclusion on this point, given that the issues were also raised by the applicants on their own behalf.

63. In *Blyudik v. Russia* (§§ 41-44), relating to the lawfulness of a placement in a closed educational institution for minors, the Court stated that the applicant was entitled to apply to the Court to protect the interest of the minor under Article 5 and 8 as regards her placement in the institution: the daughter was a minor at the time of the events in issue, as well as at the time when the application was lodged. Once she had reached the age of majotity, the applicant's daughter has confirmed her interest in the application and issued a power of attorney to the lawyer already representing the applicant in the case before the Court.

64. The Court has established that in exceptional circumstances an association can act as a representative of a victim, in the absence of a power of attorney and not withstanding that the victim may have died before the application was lodged under the Convention (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], § 112). It considered that to find otherwise would amount to preventing serious allegations of a violation of the Convention from being examined at an international level, with the risk that the respondent State might escape accountability under the Convention (*Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania*, § 42; *Kondrulin v. Russia*, § 31). In the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], which concerned the failure of the State to provide adequate care for a HIV positive mental patient, the Court accepted the applicant association's standing to bring proceedings without a power of attorney for the following reasons: the vulnerability of Valentin Câmpeanu, who suffered from a serious mental

disability; the seriousness of the allegations made under Articles 2 and 3 of the Convention; the absence of heirs or legal representatives to bring Convention proceedings on his behalf; the contacts which the applicant had with Valentin Câmpeanu and its involvement in the domestic proceedings following his death, during which it had not been contested that it had standing to act on his behalf (§§ 104-11).

65. In the case of *L.R. v. North Macedonia* (examined under Article 3), the applicant did have a legal guardian who could have provided an association with the requisite authority to represent the applicant before the Court. However, the applicant's guardian was accused of having failed in its responsibility to protect the applicant's interests both before the domestic authorities and before the Court. Accordingly, it could not be expected that the person suspected of having been part of the applicant's alleged overall neglect in violation of his rights under Article 3 would make a complaint on those grounds before the Court (§ 50). On the other hand, the association representing the applicant had visited the applicant shortly after his case had been made public, had contacted various authorities about his situation, had submitted the criminal complaint to the public prosecutor without delay and had pursued the matter, taking it up to the highest prosecuting authorities. As a result, the Court exceptionally accepted the association's standing to act on behalf of the applicant (§§ 51-53).

66. In the case of *Association Innocence en Danger and Association Enfance et Partage v. France* (examined under Articles 3 and 13 in conjunction with 3), the Court accepted the standing of two child protection associations to act on behalf of a child who had died as a result of ill-treatment at the hands of her parents (§§ 119-131). The existence of known heirs or legal representatives of the child (his abusive convicted parents, three brothers and a sister, and an aunt) did not preclude the Court from granting standing to the applicant associations, in view of the exceptional circumstances of the case.

67. By contrast, in the case of *Bulgarian Helsinki Committee v. Bulgaria* (dec.), the Court did not accept the victim status of the applicant association acting on behalf of deceased minors who died in homes for mentally handicapped children because the applicant never had any contact with the minors prior to their deaths and the association had lacked formal standing in the domestic proceedings (§ 59); see also, *Nencheva and Others v. Bulgaria*, § 93, where the Court did not accept the victim status of the applicant association acting on behalf of the direct victims, noting that it had not pursued the case before the domestic courts and also that the facts complained of did not have any impact on its activities, since the association was able to continue working in pursuance of its goals.

68. No provision of the Convention permits a third-party intervener to represent another person before the Court (*Lambert and Others v. France* [GC], § 110).

B. Freedom to exercise the right of individual application

Article 34 of the Convention – Individual applications

"... The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

HUDOC keywords

Hinder the exercise of the right of application (34)

1. Principles and examples

69. The right to apply to the Court is absolute and admits of no hindrance. This principle implies freedom to communicate with the Convention institutions (for correspondence in detention, see *Peers v. Greece*, § 84; *Kornakovs v. Latvia*, §§ 157 et seq.). See also, in this connection, the 1996 European Agreement relating to persons participating in proceedings of the European Court of Human Rights (CETS No. 161).

70. The domestic authorities must refrain from putting any form of pressure on applicants to withdraw or modify their complaints. According to the Court, pressure may take the form of direct coercion and flagrant acts of intimidation in respect of applicants or potential applicants, their families or their legal representatives, but also improper indirect acts or contacts (*Mamatkulov and Askarov v. Turkey* [GC], § 102). The Court examines the dissuasive effect on the exercise of the right of individual application (*Colibaba v. Moldova*, § 68). A failure by the respondent Government to comply with their procedural obligation under Article 34 does not necessarily require that the alleged interference should have actually restricted, or had any appreciable impact on, the exercise of the right of individual petition. The procedural obligations under Articles 34 and 38 of the Convention must be enforced irrespective of the eventual outcome of the proceedings, and in such a manner as to avoid any actual or potential chilling effect on applicants or their representatives (*Mehmet Ali Ayhan and Others v. Turkey*, § 41).

71. In some circumstances, the Court can, of its own motion, raise the issue whether the applicant had been subjected to intimidation which had amounted to a hindrance to the effective exercise of his right of individual petition (*Lopata v. Russia*, § 147).

72. Consideration must be given to the vulnerability of the applicant and the risk that the authorities may influence him or her (*Iambor v. Romania (no. 1)*, § 212). Applicants may be particularly vulnerable when they are in pre-trial detention and restrictions have been placed on contact with their family or the outside world (*Cotleţ v. Romania*, § 71).

73. Some noteworthy examples:

- as regards interrogation by the authorities concerning the application: *Akdivar and Others v. Turkey*, § 105; *Tanrıkulu v. Turkey* [GC], § 131;
- threats of criminal proceedings against the applicant's lawyer: *Kurt v. Turkey*, §§ 159-65; complaint by the authorities against the lawyer in the domestic proceedings: *McShane v. the United Kingdom*, § 151; disciplinary and other measures against the applicant's lawyers: *Khodorkovskiy and Lebedev v. Russia*, §§ 929-33;
- police questioning of the applicants' lawyer concerning the signature of a power of attorney (*M.H. and Others v. Croatia**, §§ 62, 64, and §§ 325-336); police questioning of the applicant's lawyer and translator concerning the claim for just satisfaction: *Fedotova v. Russia*, §§ 49-51; regarding an inquiry ordered by the Government's representative: *Ryabov v. Russia*, §§ 53-65;
- inability of the applicant's lawyer and doctor to meet: *Boicenco v. Moldova*, §§ 158-59;
- measures limiting an applicant's contacts with her/his representative: *Shtukaturov v. Russia*, § 140, where a ban on a lawyer's visits, coupled with a ban on telephone calls and correspondence, was held to be incompatible with the respondent State's obligations under Article 34, and *Zakharkin v. Russia*, §§ 157-60, where the applicant's contacts with his representative before the Court had been restricted on the grounds that the representative in question was not a professional advocate and did not belong to any Bar association;
- interception of letters sent to the detained applicants by their legal representatives enclosing forms of authority to be completed for the purpose of lodging and then

subsequently finalising their application with the Court: *Mehmet Ali Ayhan and Others v. Turkey,* §§ 39-45 and the references cited therein;

- failure to respect the confidentiality of lawyer-applicant discussions in a meeting room: *Oferta Plus SRL v. Moldova*, § 156;
- threats by the prison authorities: *Petra v. Romania*, § 44;
- refusal by the prison authorities to forward an application to the Court on the ground of non-exhaustion of domestic remedies: *Nurmagomedov v. Russia*, § 61;
- pressure put on a witness in a case before the Court concerning conditions of detention: *Novinskiy v. Russia*, §§ 119 et seq.;
- dissuasive remarks by the prison authorities combined with unjustified omissions and delays in providing the prisoner with writing materials for his correspondence and with the documents necessary for his application to the Court: *Gagiu v. Romania*, §§ 94 et seq.;
- the authorities' refusal to provide an imprisoned applicant with copies of documents required for his application to the Court: *Naydyon v. Ukraine*, § 68; *Vasiliy Ivashchenko v. Ukraine*, §§ 107-10;
- loss by prison authorities of irreplaceable papers relating to prisoner's application to the Court: *Buldakov v. Russia*, §§ 48-50;
- intimidation and pressuring of an applicant by the authorities in connection with the case before the Court: *Lopata v. Russia*, §§ 154-60.

74. The circumstances of the case may make the alleged interference with the right of individual application less serious (*Sisojeva and Others v. Latvia* (striking out) [GC], §§ 118 et seq.). See also *Holland v. Sweden* (dec.), where the Court found that the destruction of tape recordings from a court hearing in accordance with Swedish law before the expiry of the six-month time-limit for lodging an application with the Court did not hinder the applicant from effectively exercising his right of petition; *Farcaş v. Romania* (dec.), where the Court considered that the alleged inability of the physically disabled applicant to exhaust domestic remedies, owing to lack of special facilities providing access to public services, did not hinder him from effectively exercising his right of petition; *Yepishin v. Russia*, §§ 73-77, where the Court considered that the prison administration's refusal to pay postage for dispatch of prisoner's letters to the Court did not hinder the applicant from effectively exercising his right of petition; *Yam v. the United Kingdom*, §§ 79-83, where the Court considered that the domestic authorities' decision not to disclose *in camera* material in the absence of a request from the Court did not hinder the applicant from effectively exercising his right of petition because there had been a meaningful independent scrutiny of the asserted basis for the continuing need for confidentiality.

2. Obligations of the respondent State

a. Rule 39 of the Rules of Court

75. Under Rule 39 of the Rules of Court, the Court may indicate interim measures (*Mamatkulov and Askarov v. Turkey* [GC], §§ 99-129). Article 34 will be breached if the authorities of a Contracting State fail to take all steps which could reasonably have been taken in order to comply with the measure indicated by the Court (*Paladi v. Moldova* [GC], §§ 87-92).

76. The Government must demonstrate to the Court that the interim measure was complied with or, in an exceptional case, that there was an objective impediment which prevented compliance and that the Government took all reasonable steps to remove the impediment and to keep the Court informed about the situation (see, for example, *A.N.H. v. Finland* (dec.), § 27).

77. Some examples:

- failure to secure a timely meeting between an asylum-seeker in detention and a lawyer despite the interim measure indicated under Rule 39 in this respect: *D.B. v. Turkey*, § 67;
- transfer of detainees to Iraqi authorities in contravention of interim measure: *Al-Saadoon and Mufdhi v. the United Kingdom*, §§ 162-65;
- expulsion of the first applicant in contravention of interim measure: *Kamaliyevy v. Russia*, §§ 75-79;
- inadvertent but not irremediable failure to comply with interim measure indicated in respect of Article 8: *Hamidovic v. Italy* (dec.);
- failure to comply with interim measure requiring a prisoner's placement in specialised medical institution: *Makharadze and Sikharulidze v. Georgia*, §§ 100-05, or an unjustified delay in complying with such measure: *Sy v. Italy**, §§ 167-174;
- failure to comply with interim measure indicated by the Court on account of a real risk of torture if extradited: *Mannai v. Italy*, §§ 54-57; *Labsi v. Slovakia*, §§ 149-51;
- secret transfer of a person at risk of ill-treatment in Uzbekistan and in respect of whom an interim measure was in force: *Abdulkhakov v. Russia*, §§ 226-31;
- forcible transfer of person to Tajikistan with a real risk of ill-treatment and circumvention of interim measures: *Savriddin Dzhurayev v. Russia*, §§ 218-19; see also failure by Russian authorities to protect a Tajik national in their custody from forcible repatriation to Tajikistan in breach of interim measure: *Nizomkhon Dzhurayev* v. *Russia*, §§ 157-59.
- preparation of an expulsion in a way that deliberately created a situation whereby the applicant would have great difficulty in submitting a request for an interim measure to the Court: *M.A. v. France*, § 70.

78. It is for the Court to verify compliance with the interim measure, while a State which considers that it is in possession of materials capable of convincing the Court to annul the interim measure should inform the Court accordingly (*Paladi v. Moldova* [GC], §§ 90-92; *Olaechea Cahuas v. Spain*, § 70; *Grori v. Albania*, §§ 181 et seq.).

The mere fact that a request has been made for application of Rule 39 is not sufficient to oblige the State to stay execution of an extradition decision (*Al-Moayad v. Germany* (dec.), §§ 122 et seq.; see also the obligation of the respondent State to cooperate with the Court in good faith).

While there is no exhaustion requirement in respect of Article 34 complaints and the Court is the sole authority to verify compliance with an interim measure, the Court may find a complaint under Article 34 to be premature if it is closely related to a complaint about the authorities' failure to protect the right to life and the latter complaint is still pending before the domestic courts (*Ahmet Tunç and Others v. Turkey* (dec.), §§ 141-145.

b. Establishment of the facts

79. Whereas the Court is responsible for establishing the facts, it is up to the parties to provide active assistance by supplying it with all the relevant information. Their conduct may be taken into account when evidence is sought (*Ireland v. the United Kingdom*, § 161).

80. The Court has held that proceedings in certain types of applications do not in all cases lend themselves to a rigorous application of the principle whereby a person who alleges something must prove that allegation, and that it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications (*Bazorkina v. Russia*, § 170; *Tahsin Acar v. Turkey* [GC], § 253). This obligation requires the Contracting States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. A

failure on a Government's part to submit such information which is in its hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 of the Convention (ibid., § 254; *Imakayeva v. Russia*, § 200; *Janowiec and Others v. Russia* [GC], § 202).

81. The obligation to furnish the evidence requested by the Court is binding on the respondent Government from the moment such a request has been formulated, whether it be on initial communication of an application to the Government or at a subsequent stage in the proceedings (ibid., § 203; *Enukidze and Girgvliani v. Georgia*, § 295; *Bekirski v. Bulgaria*, §§ 111-13). It is a fundamental requirement that the requested material be submitted in its entirety, if the Court has so directed, and that any missing elements be properly accounted for (*Janowiec and Others v. Russia* [GC], § 203). In addition, any material requested must be produced promptly and, in any event, within the time-limit fixed by the Court, for a substantial and unexplained delay may lead the Court to find the respondent State's explanations unconvincing (ibid.).

82. The Court has previously found that the respondent Government failed to comply with the requirements of Article 38 in cases where it did not provide any explanation for the refusal to submit documents that had been requested (see, for example, *Maslova and Nalbandov v. Russia*, §§ 128-29) or submitted an incomplete or distorted copy while refusing to produce the original document for the Court's inspection (see, for example, *Trubnikov v. Russia*, §§ 50-57).

83. If the Government advances confidentiality or security considerations as the reason for its failure to produce the material requested, the Court has to satisfy itself that there exist reasonable and solid grounds for treating the documents in question as secret or confidential (*Janowiec and Others v. Russia* [GC], § 205). As regards failure to disclose a classified report to the Court: ibid., §§ 207 et seq.; *Nolan and K. v. Russia*, §§ 56 et seq.

Regarding the relationship between Articles 34 and 38, see *Bazorkina v. Russia*, §§ 170 et seq. and 175. Article 34, being designed to ensure the effective operation of the right of individual application, is a sort of *lex generalis*, while Article 38 specifically requires States to cooperate with the Court.

c. Investigations

84. The respondent State is also expected to assist with investigations (Article 38), for it is up to the State to furnish the "necessary facilities" for the effective examination of applications (*Çakıcı v. Turkey* [GC], § 76). Obstructing a fact-finding visit constitutes a breach of Article 38 (*Shamayev and Others v. Georgia and Russia*, § 504).

I. Procedural grounds for inadmissibility

A. Non-exhaustion of domestic remedies

Article 35 § 1 of the Convention – 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 ..."

HUDOC keywords

Exhaustion of domestic remedies (35-1) – Exemption from exhaustion of domestic remedies (35-1) – Effective domestic remedy (35-1)

85. As the text of Article 35 itself indicates, this requirement is based on the generally recognised rules of international law. The obligation to exhaust domestic remedies forms part of customary international law, recognised as such in the case-law of the International Court of Justice (for example, see the case of Interhandel (Switzerland v. the United States), judgment of 21 March 1959). It is also to be found in other international human-rights treaties: the International Covenant on Civil and Political Rights (Article 41(1)(c)) and the Optional Protocol thereto (Articles 2 and 5(2)(b)); the American Convention on Human Rights (Article 46); and the African Charter on Human and Peoples' Rights (Articles 50 and 56(5)). The European Court of Human Rights observed in *De Wilde, Ooms and Versyp v. Belgium* that the State may waive the benefit of the rule of exhaustion of domestic remedies, there being a long-established international practice on this point (§ 55).

86. The Court is intended to be subsidiary to the national systems safeguarding human rights and it is appropriate that the national courts should initially have the opportunity to determine questions regarding the compatibility of domestic law with the Convention (*A, B and C v. Ireland* [GC], § 142). If an application is nonetheless subsequently brought to Strasbourg, the Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the vital forces of their countries (*Burden v. the United Kingdom* [GC], § 42).

87. Article 35 § 1 concerns only domestic remedies; it does not require the exhaustion of remedies within the framework of international organisations. On the contrary, if the applicant submits the case to another procedure of international investigation or settlement, the application may be rejected under Article 35 § 2 (b) of the Convention (see point I.E.). However, the principle of subsidiarity may entail a requirement to exhaust domestic remedies in the context of which a preliminary ruling by the Court of Justice of the European Union (CJEU) is requested (*Laurus Invest Hungary KFT and Others v. Hungary* (dec.), § 42, where a preliminary ruling by the CJEU provided the domestic courts with guidance as to the criteria to be applied in a pending case concerning an alleged breach of Article 1 of Protocol No. 1 rights). It is for the Court to determine whether a particular body is domestic or international in character having regard to all relevant factors including the legal character, its founding instrument, its competence, its place (if any) in an existing legal system and its funding (*Jeličić v. Bosnia and Herzegovina* (dec.); *Peraldi v. France* (dec.)) (see point I.E.).

1. Purpose of the rule

88. The rationale for the exhaustion rule is to afford the national authorities, primarily the courts, the opportunity to prevent or put right the alleged violations of the Convention (see the summary of the principles in *Gherghina v. Romania* (dec.) [GC], §§ 84-89; *Mocanu and Others v. Romania* [GC], §§ 221 and seq.; *Vučković and Others v. Serbia* (preliminary objection) [GC], §§ 69-77, with further

references therein). It is based on the assumption, reflected in Article 13, that the domestic legal order will provide an effective remedy for violations of Convention rights. This is an important aspect of the subsidiary nature of the Convention machinery (*Selmouni v. France* [GC], § 74; *Kudła v. Poland* [GC], § 152; *Andrášik and Others v. Slovakia* (dec.)). It applies regardless of whether the provisions of the Convention have been incorporated into national law (*Eberhard and M. v. Slovenia*). The rule of exhaustion of domestic remedies is an indispensable part of the functioning of the protection system under the Convention and a basic principle (*Demopoulos and Others v. Turkey* (dec.) [GC], §§ 69 and 97, *Vučković and Others v. Serbia* (preliminary objection) [GC], §§ 69-77 with further references therein, in particular to *Akdivar and Others v. Turkey*).

Determining whether a domestic procedure constitutes an effective remedy within the meaning of Article 35 § 1, which an applicant must exhaust and which should therefore be taken into account for the purposes of the four-month time-limit, depends on a number of factors, notably the applicant's complaint, the scope of the obligations of the State under that particular Convention provision, the available remedies in the respondent State and the specific circumstances of the case (*Lopes de Sousa Fernandes v. Portugal* [GC], § 134; see, also, *Kozacıoğlu v. Turkey* [GC], § 40 and *D.H. and Others v. the Czech Republic* [GC], § 116).

2. Application of the rule

a. Flexibility

89. The exhaustion rule may be described as one that is golden rather than cast in stone. The Commission and 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*, § 89; *Lehtinen v. Finland* (dec.); *Gherghina v. Romania* (dec.) [GC], § 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], § 40). For example, the Court decided that it would be unduly formalistic to require the applicants to avail themselves of a remedy which even the highest court of the country had not obliged them to use (*D.H. and Others v. the Czech Republic* [GC], §§ 116-18). The Court took into consideration in one case the tight deadlines set for the applicants' response by emphasising the "haste" with which they had had to file their submissions (*Financial Times Ltd and Others v. the United Kingdom*, §§ 43-44). However, making use of the available remedies in accordance with domestic procedure and complying with the formalities laid down in national law are especially important where considerations of legal clarity and certainty are at stake (*Saghinadze and Others v. Georgia*, §§ 83-84).

90. 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.), §§ 55-63, concerning an alleged discrimination against Roma children). In *Beizaras and Levickas v. Lithuania*, §§ 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 courts (two instances) had never been questioned or challenged in any way (see also *Gorraiz Lizarraga and Others v. Spain*, §§ 37-39).

b. Compliance with domestic rules and limits

91. Applicants must comply with the applicable rules and procedures of domestic law, failing which their application is likely to fall foul of the condition laid down in Article 35 (*Ben Salah Adraqui and Dhaime v. Spain* (dec.); *Merger and Cros v. France* (dec.); *MPP Golub v. Ukraine* (dec.); *Agbovi v. Germany* (dec.); *Vučković and Others v. Serbia* (preliminary objection) [GC], §§ 72 and 80). Article 35 § 1 has not been complied with when an appeal is not accepted for examination because of a procedural mistake by the applicant (*Gäfgen v. Germany* [GC], § 143). Where the Government claims that an applicant has failed to comply with domestic rules (e.g. rules on the exhaustion of ordinary remedies before constitutional redress), the Court must verify whether those rules were pre-existing mandatory legal requirements deriving from law or well-established case-law (*Brincat and Others v. Malta*, § 69; *Pop-Ilić and Others v. Serbia*, § 42).

92. However, it should be noted that where an appellate court examines the merits of a claim even though it considers it inadmissible, Article 35 § 1 will be complied with (*Voggenreiter v. Germany*). The Court also considers the available remedy to be exhausted when a Constitutional Court declares the complaint inadmissible when the applicant raises sufficiently in substance the complaint about an alleged infringement of Convention rights (*Magyar Kétfarkú Kutya Párt v. Hungary* [GC], §§ 53, 56-57 and the references cited therein). This is also the case regarding applicants who have failed to observe the forms prescribed by domestic law, if the competent authority has nevertheless examined the substance of the claim (*Vladimir Romanov v. Russia*, § 52). The same applies to claims worded in a very cursory fashion barely satisfying the legal requirements, where the court has ruled on the merits of the case albeit briefly (*Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], §§ 43-45).

c. Existence of several remedies

93. If more than one potentially effective remedy is available, the applicant is only required to have used one of them (*Moreira Barbosa v. Portugal* (dec.); *Jeličić v. Bosnia and Herzegovina* (dec.); *Karakó v. Hungary*, § 14; *Aquilina v. Malta* [GC], § 39). Indeed, when one remedy has been attempted, use of another remedy which has essentially the same purpose is not required (*Riad and Idiab v. Belgium*, § 84; *Kozacıoğlu v. Turkey* [GC], §§ 40 et seq.; *Micallef v. Malta* [GC], § 58; *Lagutin and Others v. Russia*, § 75; *Nicolae Virgiliu Tănase v. Romania* [GC], § 177). It is for the applicant to select the remedy that is most appropriate in his or her case (*Fabris and Parziale v. Italy*, where the applicant was unable to bring a civil action due to the discontinuation of the criminal proceedings after seven years which he had joined as a civil party, §§ 49-59; *O'Keeffe v. Ireland* [GC], §§ 110-111; *Nicolae Virgiliu Tănase v. Romania* [GC], § 176, concerning the choice made by an applicant to join the criminal proceedings as a civil party and not lodge a separate civil action). To sum up, if domestic law provides for several parallel remedies in different fields of law, an applicant who has sought to obtain redress for an alleged breach of the Convention through one of these remedies is not necessarily required to use others which have essentially the same objective (*Jasinskis v. Latvia*, §§ 50 and 53-54). For a contrary example (different levels of effectiveness of complaints before the federal Constitutional Court and before the constitutional court of a federal entity), see *Köhler v. Germany* (dec.), §§ 67-74.

d. Complaint raised in substance

94. 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*, § 32; *Ahmet Sadik v. Greece*, § 33; *Fressoz and Roire v. France* [GC], § 38; *Azinas v. Cyprus* [GC], §§ 40-41; *Vučković and*

Others v. Serbia (preliminary objection) [GC], §§ 72, 79 and 81-82; *Platini v. Switzerland* (dec.), § 51; *Kemal Çetin v. Turkey*, §§ 28-30). 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], §§ 142, 144 and 146; *Radomilja and Others v. Croatia* [GC], § 117; *Karapanagiotou and Others v. Greece*, § 29; *Marić v. Croatia*, § 53; *Portu Juanenea and Sarasola Yarzabal v. Spain*, §§ 62-63; *Rodina v. Latvia,* §§ 81-83; and, in relation to a complaint that was not raised, even implicitly, at the final level of jurisdiction, *Association Les témoins de Jéhovah v. France* (dec.); *Nicklinson and Lamb v. the United Kingdom* (dec.), §§ 89-94; *Peacock v. the United Kingdom* (dec.), §§ 32-41). 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], § 75; *Nicklinson and Lamb v. the United Kingdom* (dec.), § 90). The applicant is not dispensed from this requirement even if the national courts might have been able, or even obliged, to examine the case of their own motion under the Convention" (*Van Oosterwijck v. Belgium*, § 39; *Gaziyev v. Azerbaijan* (dec.)).

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, as even in those jurisdictions where the domestic courts are able, or even obliged, to examine the case of their own motion, applicants are not dispensed from the obligation to raise before them the complaint subsequently made to the Court. Thus, in order properly to exhaust domestic remedies it is not sufficient for a violation of the Convention to be "evident" from the facts of the case or the applicant's submissions. Rather, the applicant must actually have complained (expressly or in substance) about it in a manner which leaves no doubt that the same complaint that is subsequently submitted to the Court was indeed raised at the domestic level (*Farzaliyev v. Azerbaijan*, § 55; *Peacock v. the United Kingdom* (dec.), § 38).

For instance, where the applicant complains of the lack of an effective criminal investigation under the procedural limb of Article 2 or 3 of the Convention, it is sufficient, in order to comply with Article 35 § 1 of the Convention, including with regard to legal arguments not explicitly raised at the domestic level, if the applicant has challenged the effectiveness of that investigation before the competent domestic court and, by describing the course and duration of the investigation and subsequent court proceedings in detail, referred to the relevant factual elements for that court to assess the investigation's effectiveness (*Hanan v. Germany* [GC], §§ 149-151).

e. Existence and appropriateness

95. Applicants are only obliged to exhaust domestic remedies which are available in theory and in practice at the relevant time and which they can directly institute themselves – that is to say, remedies that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success (*Sejdovic v. Italy* [GC], § 46; *Paksas v. Lithuania* [GC], § 75; see also the Court's subsidiary consideration in *S.A.S. v. France* [GC], § 61, regarding reasonable prospects of success of an appeal on points of law on the basis of Article 9 of the Convention).

96. Discretionary or extraordinary remedies need not be used, for example requesting a court to review its decision (*Çınar v. Turkey* (dec.); *Prystavska v. Ukraine* (dec.)), or requesting the reopening of proceedings, except in special circumstances where, for example, it is established under domestic law that such a request does in fact constitute an effective remedy (*K.S. and K.S. AG v. Switzerland*, Commission decision; *Shibendra Dev v. Sweden* (dec.), §§ 41-43, 45 and 48), or where the quashing of a judgment that has acquired legal force is the only means by which the respondent State can put matters right through its own legal system (*Kiiskinen and Kovalainen v. Finland* (dec.); *Nikula v. Finland* (dec.); *Dinchev v. Bulgaria* (dec.), §§ 27-29). Similarly, an appeal to a higher authority does

not constitute an effective remedy (*Horvat v. Croatia*, § 47; *Hartman v. the Czech Republic*, § 66); nor does a remedy that is not directly accessible to the applicant but is dependent on the exercise of discretion by an intermediary (*Tănase v. Moldova* [GC], § 122). A complaint to the Ministry amounts to a hierarchical complaint and is not considered an effective remedy (*Polyakh and Others v. Ukraine,* § 135; *Milovanović v. Serbia*, § 104). Regarding the effectiveness in the case in question of an appeal that does not in principle have to be used (Ombudsman), see the reasoning in *Egmez v. Cyprus*, §§ 66-73. Lastly, a domestic remedy which is not subject to any precise time-limit and thus creates uncertainty cannot be regarded as effective (*Williams v. the United Kingdom* (dec.) and the references cited therein; *Nicholas v. Cyprus*, §§ 38-39).

97. Whether an individual application to the Constitutional Court is required by Article 35 § 1 of the Convention will depend largely on the particular features of the respondent State's legal system and the scope of its Constitutional Court's jurisdiction (*Uzun v. Turkey* (dec.), §§ 42-71 and the references cited therein). Thus, in a State where this jurisdiction is limited to reviewing the constitutionality of legal provisions and their compatibility with provisions of superior legal force, applicants will be required to avail themselves of a complaint to the Constitutional Court only if they are challenging a provision of a statute or regulation as being in itself contrary to the Convention (*Grišankova and Grišankovs v. Latvia* (dec.); *Liepājnieks v. Latvia* (dec.)). However, this will not be an effective remedy where the applicant is merely complaining of the erroneous application or interpretation of statutes or regulations which are not unconstitutional *per se* (*Smirnov v. Russia* (dec.); *Szott-Medyńska and Others v. Poland* (dec.); *Petrova v. Latvia*, §§ 69-70). In a federal State, the Court may reach different conclusions as to the respective effectiveness of complaints before the federal Constitutional Court and before the constitutional court of a federal entity (*Köhler v. Germany* (dec.), §§ 67-74). The Court has also taken into account whether an individual complaint to the Constitutional Court has evolved over time to be considered to offer the appropriate kind of redress in respect of a certain complaint (*Riđić and Others v. Serbia*, §§ 68-74, as regards the non-enforcement of judgements rendered in respect of socially/State owned companies) and whether such a remedy, that is effective in principle, would also be effective in practice, due to the duration of such proceedings (*Story and Others v. Malta*, §§ 82-85, in respect of complaints of conditions of detention under Article 3 of the Convention). For instance, the Court considered a constitutional complaint an effective remedy when the Constitutional Court had reviewed in recent cases the effectiveness of investigations under Articles 2 and 3, taking the Court's case-law as the basis for its assessment (*Kušić and Others v. Croatia* (dec.), §§ 104-105). Furthermore, the Court interprets the term "remedy" extensively which is why remedial actions that are not remedies in a strict sense, should be exhausted (*Dos Santos Calado and Others v. Portugal*, § 91, concerning an objection lodged with the three‑judge committee of the Constitutional Court against the summary decision in question).

98. 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.), *Prystavska v. Ukraine* (dec.)).

f. Availability and effectiveness

99. The existence of remedies must be sufficiently certain not only in theory but also in practice. In determining whether any particular remedy meets the criteria of availability and effectiveness, regard must be had to the particular circumstances of the individual case (see point 4 below). The position taken by the domestic courts must be sufficiently consolidated in the national legal order. Thus, the Court has held that recourse to a higher court ceases to be "effective" on account of divergences in that court's case-law, as long as these divergences continue to exist (*Ferreira Alves v. Portugal (no. 6)*, §§ 27-29).

100. For example, the Court has held that where an applicant complains about conditions of detention after the detention has already ended, a compensatory remedy that is available and sufficient – that is to say, one which offers reasonable prospects of success – is a remedy that has to

be used for the purposes of Article 35 § 1 of the Convention (*Lienhardt v. France* (dec.); *Rhazali and Others v. France* (dec.); *Ignats v. Latvia* (dec.); *J.M.B. and Others v. France*, § 163). However, if the applicant was still detained at the time of the lodging of the application, the remedy must be capable of preventing the alleged continuous situation in order for it to be effective (*Torreggiani and Others v. Italy*, § 50; *Neshkov and Others v. Bulgaria*, §§ 181 and 192-93; *Vasilescu v. Belgium*, §§ 70 and 128). Normally, before bringing their complaints to the Court concerning their conditions of detention, applicants are first required to use properly the available and effective preventive remedy and then, if appropriate, the relevant compensatory remedy. However, the Court accepted that there may be instances in which the use of an otherwise effective preventive remedy would be futile in view of the brevity of an applicant's stay in inadequate conditions of detention and thus the only viable option would be a compensatory remedy allowing for a possibility to obtain redress for the past placement in such conditions. This period may depend on many factors related to the manner of operation of the domestic system of remedies (*Ulemek v. Croatia*, §§ 84-88). The Court has examined different remedies in this context: see, for instance, *Petrescu v. Portugal* (§§ 81-84), *J.M.B. and Others v. France* (§§ 212-221) and *Shmelev and Others v. Russia* (dec.) (§§ 123-131).[4]

101. Where an applicant seeks to prevent his removal from a Contracting State for an alleged risk of a violation of Articles 2 or 3 in a third State, a remedy will only be effective if it has suspensive effect (see, for Article 3 and Article 4 of Protocol No. 4 complaints, *M.K. and Others v. Poland,* §§ 142-148, and the references cited therein). Conversely, where a remedy does have suspensive effect, the applicant will normally be required to exhaust that remedy. Judicial review, where it is available and where the lodging of an application for judicial review will operate as a bar to removal, must be regarded as an effective remedy which in principle applicants will be required to exhaust before lodging an application with the Court or indeed requesting interim measures under Rule 39 of the Rules of Court to delay a removal (*NA v. the United Kingdom*, § 90; *A.M. v. France*, §§ 64 and 79).

102. In the context of Article 5 of the Convention, preventive and compensatory remedies are complementary. A remedy that does not afford a possibility of release cannot be regarded as an effective remedy while the deprivation of liberty is ongoing. However, where the applicant complains that he or she was detained in breach of domestic law and where the detention has come to an end, a compensation claim capable of leading to an acknowledgment of the alleged violation and an award of compensation is in principle an effective remedy which needs to be pursued if its effectiveness in practice has been convincingly established (*Selahattin Demirtaş v. Turkey (no. 2)* [GC], §§ 205-214, where a compensation claim was not considered to be an effective remedy in the absence of a previous acknowledgment by the criminal courts or the Constitutional Court that the applicant's pre-trial detention was unlawful; see also *Dubovtsev and Others v. Ukraine,* §§ 67-71, where the compensation claim with civil courts was not considered to be an effective remedy that could have adequately dealt with the specific complaints submitted under Article 5).

103. The Court has held that an effective remedy must operate without excessive delay (*Story and Others v. Malta*, § 80). As regards length-of-proceedings cases, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. However, States can also choose to introduce only a compensatory remedy, without that remedy being regarded as ineffective (*Scordino v. Italy (no. 1)* [GC], § 183 and seq.; *Marshall and Others v. Malta*, §§ 82). To conform with the reasonable time principle, a remedy for length of proceedings should not, in principle and in the absence of exceptional circumstances, last more than two and half years over two jurisdictions, including the execution phase (*ibid.*, § 88).

104. As concerns non-enforcement of judgments, the Court found, in *Solonskiy and Petrova v. Russia* (dec.), that the possibility to lodge a vicarious liability claim against authorities, which had

[4] See the Guide on Prisoners' rights.

not paid judgment debts to applicants, constituted an effective remedy as it had reasonable prospects of success in the applicants' cases (§§ 34-40).

105. As concerns the presumption of innocence (Article 6 § 2), a remedy under civil law can, in principle, be considered effective against alleged violations. In several cases the Court found remedies under civil law, offering the possibility of obtaining monetary compensation, together with various other procedures for acknowledgment of or putting an end to the infringement of the presumption of innocence, to be effective within the meaning of the Convention (see *Januškevičienė v. Lithuania*, §§ 58-62 and the references cited therein, where the applicant could have lodged a civil claim to obtain monetary compensation for the breach of her honour and dignity).

106. In the context of continuous non-enforcement of custody/contact-related rights under Article 8, an applicant cannot be expected to make a separate complaint to the Constitutional Court or this Court about the non-enforcement of each and every interim order, of which there may be a large number, within the main proceedings. The Court therefore adopts a global approach when considering the domestic proceedings and has regard to the overall facts which may be important for the context and merits of the main proceedings (*Milovanović v. Serbia*, § 106).

107. In the context of defamation proceedings, the Court considered a remedy, which did not allow a claim to be made in respect of non-pecuniary damages, to be ineffective for the purposes of privacy cases under Article 8 (*Lewit v. Austria*, §§ 66-67). In a case concerning an alleged breach of the right to protection of reputation, the Court found that compensation proceedings before civil courts (ensuring full procedural guarantees for both parties and allowing for an appropriate balancing exercise between the various interests in dispute) were an appropriate remedy as opposed to an expedited rectification procedure, subscribing to the interpretation given by the Constitutional Court of the respondent State (*Gülen v. Turkey* (dec.), §§ 58-69).

108. Whether raising an issue of covert surveillance in criminal proceedings can be regarded as an effective remedy in respect of a complaint under Article 8 will depend on the circumstances of the case. Although criminal courts could consider questions of the fairness of admitting evidence in the criminal proceedings, the Court has found that they were not capable of providing an effective remedy where it was not open to them to deal with the substance of the Article 8 complaint that the interference was not "in accordance with the law" or not "necessary in a democratic society", or to grant appropriate relief in connection with that complaint (*Hambardzumyan v. Armenia*, §§ 40-44 and and the references cited therein; *Zubkov and Others v. Russia*, § 88).

109. The Court must take realistic account not only of formal remedies available in the domestic legal system, but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant (*Akdivar and Others v. Turkey*, §§ 68-69; *Khashiyev and Akayeva v. Russia*, §§ 116-117; *Chiragov and Others v. Armenia* [GC], § 119; *Sargsyan v. Azerbaijan* [GC], §§ 117-119). It must examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (*D.H. and Others v. the Czech Republic* [GC], §§ 116-122). For instance, an applicant has not exhausted domestic remedies when he failed to use the remedy - which could not be regarded as obviously futile - suggested by the domestic court, which guided him as to the further concrete steps to be taken (*P. v. Ukraine* (dec.), §§ 52-55). In a case where the enforcement of a judgment ordering urgent rehousing was delayed and achieved after the requisite deadline, an action for damages against the State in order to challenge the lengthy non-enforcement of the judgment can be considered an effective remedy even if it was enforced after the application had been lodged with the Court (*Bouhamla v. France* (dec.), §§ 35-44).

110. It should be noted that borders, factual or legal, are not an obstacle *per se* to the exhaustion of domestic remedies; as a general rule applicants living outside the jurisdiction of a Contracting State are not exempted from exhausting domestic remedies within that State, practical inconveniences or understandable personal reluctance notwithstanding (*Demopoulos and Others v. Turkey* (dec.) [GC],

§§ 98 and 101, concerning applicants who had not voluntarily submitted to the jurisdiction of the respondent State).

3. Limits on the application of the rule

111. According to the "generally recognised rules of international law", there may be special circumstances dispensing the applicant from the obligation to avail him or herself of the domestic remedies available (*Sejdovic v. Italy* [GC], § 55) (and see point 4 below).

The rule is also inapplicable where an "administrative practice" consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective (*Aksoy v. Turkey*, § 52; *Georgia v. Russia (I)* [GC], §§ 125-159; *Ukraine v. Russia (re Crimea)* (dec.) [GC], §§ 260-263, 363-368; *Georgia v. Russia (II)* [GC], §§ 98-99 and 220-221). However, only if both component elements of the alleged "administrative practice" (the "repetition of acts" and "official tolerance") are sufficiently substantiated by *prima facie* evidence does the exhaustion rule under Article 35 § 1 of the Convention not apply (*Ukraine v. Russia (re Crimea)* (dec.) [GC], § 366).

In cases where requiring the applicant to use a particular remedy would be unreasonable in practice and would constitute a disproportionate obstacle to the effective exercise of the right of individual application under Article 34 of the Convention, the Court concludes that the applicant is dispensed from that requirement (*Veriter v. France*, § 27; *Gaglione and Others v. Italy*, § 22; *M.S. v. Croatia (no. 2)*, §§ 123-125).

Imposing a fine based on the outcome of an appeal when no abuse of process is alleged excludes the remedy from those that have to be exhausted (*Prencipe v. Monaco*, §§ 95-97).

In situations raising legitimate doubts to a judge's impartiality under Article 6 of the Convention, it may not be necessary for an applicant to seek the judge's disqualification but instead it may be for the judge to be removed from the case when national law required this (*Škrlj v. Croatia*, §§ 43-45 and the references cited therein). Where no further remedy is available because the applicant alleges a violation of Article 6 § 1 of the Convention on account of lack of impartiality of the last-instance judicial authority of the domestic legal system, the principle of subsidiarity may require special diligence from the applicants in complying with their obligation to exhaust domestic remedies (for instance, seeking withdrawal of the judge concerned). Naturally, these considerations apply only if the applicant knew or could have known of the composition of the court in question (*Croatian Golf Federation v. Croatia*, §§ 110-120, and the references cited therein).

As a rule, the requirement that domestic remedies should be exhausted, including the option of reopening the proceedings, does not apply to just satisfaction claims submitted under Article 41 of the Convention (*Jalloh v. Germany* [GC], § 129; *S.L. and J.L. v. Croatia* (just satisfaction), § 15).

4. Distribution of the burden of proof

112. Where the Government claims non-exhaustion of domestic remedies, it bears the burden of proving that the applicant has not used a remedy that was both effective and available (*Molla Sali v. Greece* [GC], § 89; *Mocanu and Others v. Romania* [GC], § 225; *Dalia v. France*, § 38; *McFarlane v. Ireland* [GC], § 107; *Vučković and Others v. Serbia* (preliminary objection) [GC], § 77). The availability of any such remedy must be sufficiently certain in law and in practice (*Vernillo v. France*). The remedy's basis in domestic law must therefore be clear (*Scavuzzo-Hager and Others v. Switzerland* (dec.); *Norbert Sikorski v. Poland*, § 117; *Sürmeli v. Germany* [GC], §§ 110-112). The remedy must be capable of providing redress in respect of the applicant's complaints and of offering reasonable prospects of success (*Scoppola v. Italy (no. 2)* [GC], § 71; *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, § 50; *Karácsony and Others v. Hungary* [GC], §§ 75-82; *Selahattin Demirtaş v. Turkey (no. 2)* [GC], § 205). As an example, in the area of unlawful use of force by State

agents, an action leading only to an award of damages is not an effective remedy in respect of complaints based on the substantive or procedural aspect of Articles 2 and 3 of the Convention (*Mocanu and Others v. Romania* [GC], §§ 227 and 234; *Jørgensen and Others v. Denmark* (dec.), §§ 52-53; see, by contrast, medical negligence cases, where the Court has accepted or required that applicants use civil or administrative remedies to obtain redress, *Lopes de Sousa Fernandes v. Portugal* [GC], §§ 137-138; *V.P. v. Estonia* (dec.), §§ 52-61; *Dumpe v. Latvia* (dec.), §§ 55-76; see also, by contrast, cases concerning the alleged failure by the State to ensure the protection of property in the context of dangerous industrial activities, for instance a case concerning an oil refinery explosion resulting in damage to property, *Kurşun v. Turkey*, §§ 118-132). The development and availability of a remedy said to exist, including its scope and application, must be clearly set out and confirmed or complemented by practice or case-law (*Mikolajová v. Slovakia*, § 34). This applies even in the context of a common law-inspired system with a written constitution implicitly providing for the right relied on by the applicant (*McFarlane v. Ireland* [GC], § 117, concerning a remedy that had been available in theory for almost twenty-five years but had never been used).

The Government's arguments will clearly carry more weight if examples from national case-law are supplied (*Andrášik and Others v. Slovakia* (dec.); *Di Sante v. Italy* (dec.); *Giummarra and Others v. France* (dec.); *Paulino Tomás v. Portugal* (dec.); *Johtti Sapmelaccat Ry and Others v. Finland* (dec.); *Parrillo v. Italy* [GC], §§ 87-105; *P. v. Ukraine* (dec.), § 53). Even though the Government normally should be able to illustrate the practical effectiveness of a remedy with examples of domestic case-law, the Court accepts that this may be more difficult in smaller jurisdictions, where the number of cases of a specific kind may be fewer than in larger jurisdictions (*Aden Ahmed v. Malta*, § 63; *M.N. and Others v. San Marino*, § 81).

The decisions cited should in principle have been delivered before the application was lodged (*Norbert Sikorski v. Poland*, § 115, *Dimitar Yanakiev v. Bulgaria (no. 2)*, §§ 53 and 61), and be relevant to the case at hand (*Sakhnovskiy v. Russia* [GC], §§ 43-44); see, however, the principles (referred to below) concerning the creation of a new remedy while the proceedings are pending before the Court.

113. Where the Government argues that the applicant could have relied directly on the Convention before the national courts, the degree of certainty of such a remedy will need to be demonstrated by concrete examples (*Slavgorodski v. Estonia* (dec.)). The same applies to a purported remedy directly based on certain general provisions of the national Constitution (*Kornakovs v. Latvia*, § 84).

114. The Court has been more receptive to these arguments where the national legislature has introduced a specific remedy to deal with excessive length of judicial proceedings (*Brusco v. Italy* (dec.); *Slaviček v. Croatia* (dec.)). See also *Scordino v. Italy (no. 1)* [GC], §§ 136-148. Contrast with *Merit v. Ukraine*, § 65.

115. Once the Government has discharged its burden of proving that there was an appropriate and effective remedy available to the applicant, it is for the latter to show that:

- the remedy was in fact used (*Grässer v. Germany* (dec.)); or
- the remedy was for some reason inadequate and ineffective in the particular circumstances of the case (*Selmouni v. France* [GC], § 76; *Vučković and Others v. Serbia* (preliminary objection) [GC], § 77; *Gherghina v. Romania* (dec.) [GC], § 89; *Joannou v. Turkey*, §§ 86-87 and §§ 94-106) – for example, in the case of excessive delays in the conduct of an inquiry (*Radio France and Others v. France* (dec.), § 34), or a remedy which is normally available, such as an appeal on points of law, but which, in the light of the approach taken in similar cases, was ineffective in the circumstances of the case (*Scordino v. Italy* (dec.); *Pressos Compania Naviera S.A. and Others v. Belgium*, §§ 26-27), even if the decisions in question were recent (*Gas and Dubois v. France* (dec.)). This is also the case if the applicant was unable to apply directly to the court concerned (*Tănase v. Moldova* [GC], § 122). In certain specific circumstances, there may be applicants in similar situations,

some of whom have not applied to the court referred to by the Government but are dispensed from doing so because the domestic remedy used by others has proved ineffective in practice and would have been in their case too (*Vasilkoski and Others v. the former Yugoslav Republic of Macedonia*, §§ 45-46; *Laska and Lika v. Albania*, §§ 45-48). However, this applies in very specific cases (compare *Saghinadze and Others v. Georgia*, §§ 81-83); or

- there existed special circumstances absolving the applicant from the requirement (*Akdivar and Others v. Turkey*, §§ 68-75; *Sejdovic v. Italy* [GC], § 55; *Veriter v. France*, § 60.

116. One such factor may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what it has done in response to the scale and seriousness of the matters complained of (*Demopoulos and Others v. Turkey* (dec.) [GC], § 70).

117. Mere doubts on the part of the applicant regarding the effectiveness of a particular remedy will not absolve him or her from the obligation to try it (*Epözdemir v. Turkey* (dec.); *Milošević v. the Netherlands* (dec.); *Pellegriti v. Italy* (dec.); *MPP Golub v. Ukraine* (dec.); *Vučković and Others v. Serbia* (preliminary objection) [GC], §§ 74 and 84; *Zihni v. Turkey* (dec.), §§ 23 and 29-30, in respect of the applicant's fears as to the impartiality of the judges of the Constitutional Court). On the contrary, it is in the applicant's interests to apply to the appropriate court to give it the opportunity to develop existing rights through its power of interpretation (*Ciupercescu v. Romania*, § 169). In a legal system providing constitutional protection for fundamental rights, it is incumbent on the aggrieved individual to test the extent of that protection and to allow the domestic courts to develop those rights by way of interpretation (*A, B and C v. Ireland* [GC], § 142; *Vučković and Others v. Serbia* (preliminary objection) [GC], § 84). But where a suggested remedy did not in fact offer reasonable prospects of success, for example in the light of settled domestic case-law, the fact that the applicant did not use it is no bar to admissibility (*Pressos Compania Naviera S.A. and Others v. Belgium*, § 27; *Carson and Others v. the United Kingdom* [GC], § 58).

5. Procedural aspects

118. The requirement for the applicant to exhaust domestic remedies is normally determined with reference to the date on which the application was lodged with the Court (*Baumann v. France*, § 47), subject to exceptions which may be justified by the particular circumstances of the case (see point 6 below). This applies in principle to a request for interim measures under Rule 39 of the Rules of Court, which may be submitted to the Court before the lodging of a formal application (*A.M. v. France*, §§ 65 and 68). Nevertheless, the Court accepts that the last stage of such remedies may be reached shortly after the lodging of the application but before it determines the issue of admissibility (*Molla Sali v. Greece* [GC], § 90; *Karoussiotis v. Portugal*, § 57; *Cestaro v. Italy*, §§ 147-148, where the applicant lodged his application with the Court concerning Article 3 of the Convention without awaiting the judgment of the Court of Cassation, which was deposited one year and eight months after; *A.M. v. France*, §§ 66 and 80, where the only stage at which a measure with suspensive effect could be secured – an asylum request – had been reached after the application was lodged with the Court; *Selahattin Demirtaş v. Turkey (no. 2)* [GC], §§ 193-194).

119. Where the Government intends to lodge a non-exhaustion plea, it must do so, in so far as the character of the plea and the circumstances permit, in its written or oral observations on the admissibility of the application, though there may be exceptional circumstances dispensing it from that obligation (*López Ribalda and Others v. Spain* [GC], § 83; *Mooren v. Germany* [GC], § 57-59 and the references cited therein; *Svinarenko and Slydanev v. Russia* [GC], §§ 79-83; *Blokhin v. Russia* [GC], §§ 96-98; see also Rule 55 of the Rules of Court). At this stage, when notice of the application

has been given to the respondent Government and the Government has not raised the question of non-exhaustion, the Court cannot examine it of its own motion. The Government must raise an explicit plea of inadmissibility on grounds of failure to exhaust domestic remedies (*Navalnyy v. Russia* [GC], §§ 60-61, where the respondent Government had only mentioned in passing when addressing the merits of a complaint that the applicant had not challenged the disputed measures in the domestic proceedings; *Liblik and others v. Estonia*, § 114, where the Government outlined other remedies available to the applicants but did not raise an objection of non-exhaustion of domestic remedies). In *Strezovski and Others v. North Macedonia*, the Court found that the Government was not estopped from raising the objection of non-exhaustion of domestic remedies although they had raised their objection for the first time in their additional observations, having regard to the special circumstances of the case (the adoption of a Supreme Court's legal opinion subsequent to the Government's initial observations on the admissibility and merits, §§ 33, 35; see, conversely, *Khlaifia and Others v. Italy* [GC], § 52). The Court may reconsider a decision to declare an application admissible, even at the merits stage and subject to Rule 55 of the Rules of Court (*O'Keeffe v. Ireland* [GC], § 108; *Muršić v. Croatia* [GC], § 69; *Merabishvili v. Georgia* [GC], § 214).

120. It is not uncommon for an objection on grounds of non-exhaustion to be joined to the merits, particularly in cases concerning procedural obligations or guarantees (*Nicolae Virgiliu Tănase v. Romania* [GC], § 103), for example applications relating to:

- the procedural limb of Article 2 (*Dink v. Turkey*, §§ 56-58; *Oruk v. Turkey*, § 35; *Nicolae Virgiliu Tănase v. Romania* [GC], §§ 103-104; *Vovk and Bogdanov v. Russia*, § 58);
- the procedural limb of Article 3 (*Husayn (Abu Zubaydah) v. Poland*, § 337; *Al Nashiri v. Poland*, § 343);
- Article 5 (*Margaretić v. Croatia*, § 83);
- Article 6 (*Scoppola v. Italy (no. 2)* [GC], § 126);
- Article 8 (*A, B and C v. Ireland* [GC], § 155; *Konstantinidis v. Greece*, § 31);
- Article 13 (*Sürmeli v. Germany* [GC], § 78; *M.S.S. v. Belgium and Greece* [GC], § 336; *J.M.B. and Others v. France*, § 176);
- Article 1 of Protocol No. 1 (*S.L. and J.L. v. Croatia*, § 53; *Joannou v. Turkey*, § 63).

6. Creation of new remedies

121. The assessment of whether domestic remedies have been exhausted is normally carried out with reference to the state of the proceedings on the date on which the application was lodged with the Court. This rule is, however, subject to exceptions following the creation of new remedies (*İçyer v. Turkey* (dec.), §§ 72 et seq.). The Court has departed from this rule in particular in cases concerning the length of proceedings (*Predil Anstalt v. Italy* (dec.); *Bottaro v. Italy* (dec.); *Andrášik and Others v. Slovakia* (dec.); *Nogolica v. Croatia* (dec.); *Brusco v. Italy* (dec.); *Korenjak v. Slovenia* (dec.), §§ 66-71; *Techniki Olympiaki A.E. v. Greece* (dec.)) or concerning a new compensatory remedy in respect of interferences with property rights (*Charzyński v. Poland* (dec.); *Michalak v. Poland* (dec.); *Demopoulos and Others v. Turkey* (dec.) [GC]; *Beshiri and Others v. Albania* (dec.), §§ 177 and 216-218); or failure to execute domestic judgments (*Nagovitsyn and Nalgiyev v. Russia* (dec.), §§ 36-40; *Balan v. Moldova* (dec.)); or prison overcrowding (*Łatak v. Poland* (dec.); *Stella and Others v. Italy* (dec.), §§ 42-45); or improper conditions of detention (*Shmelev and Others v. Russia* (dec.), §§ 123-131).

The Court takes into account the effectiveness and accessibility of supervening remedies (*Demopoulos and Others v. Turkey* (dec.) [GC], § 88). For a case where the new remedy is not effective in the case in question, see *Parizov v. the former Yugoslav Republic of Macedonia*, §§ 41-47; for a case where a new constitutional remedy is effective, see *Cvetković v. Serbia*, § 41.

As regards the date from which it is fair to require the applicant to use a remedy newly incorporated into the judicial system of a State following a change in case-law, the Court has held that it would not be fair to require exhaustion of such a new remedy without giving individuals reasonable time to familiarise themselves with the judicial decision (*Broca and Texier-Micault v. France*, § 20). The extent of a "reasonable time" depends on the circumstances of each case, but generally the Court has found it to be about six months (ibid.; *Depauw v. Belgium* (dec.); *Yavuz Selim Güler v. Turkey*, § 26). For, example, in *Leandro Da Silva v. Luxembourg*, § 50, the period was eight months from the adoption of the domestic decision in question and three and a half months from its publication. See also *McFarlane v. Ireland* [GC], § 117; for a remedy newly introduced after a pilot judgment, see *Fakhretdinov and Others v. Russia* (dec.), §§ 36-44; regarding a departure from domestic case-law, see *Scordino v. Italy (no. 1)* [GC], § 147.

The Court gave indications in *Scordino v. Italy (no. 1)* [GC] and *Cocchiarella v. Italy* [GC] as to the characteristics that domestic remedies must have in order to be effective in length-of-proceedings cases (see also *Vassilios Athanasiou and Others v. Greece*, §§ 54-56). As a rule, a remedy without preventive or compensatory effect in respect of the length of proceedings does not need to be used (*Puchstein v. Austria*, § 31). A remedy in respect of the length of proceedings must, in particular, operate without excessive delays and provide an appropriate level of redress (*Scordino v. Italy (no. 1)* [GC], §§ 195 and 204-207).

122. Where the Court has found structural or general defects in the domestic law or practice, it may ask the State to examine the situation and, if necessary, to take effective measures to prevent cases of the same nature being brought before the Court (*Lukenda v. Slovenia*, § 98). It may conclude that the State should either amend the existing range of remedies or add new ones so as to secure genuinely effective redress for violations of Convention rights (see, for example, the pilot judgments in *Xenides-Arestis v. Turkey*, § 40; and *Burdov v. Russia (no. 2)*, §§ 42, 129 et seq. and 140). Special attention should be devoted to the need to ensure effective domestic remedies (see the pilot judgment in *Vassilios Athanasiou and Others v. Greece*, § 41).

Where the respondent State has introduced a new remedy, the Court has ascertained whether that remedy is effective (see, for example, *Robert Lesjak v. Slovenia*, §§ 34-55; *Demopoulos and Others v. Turkey* (dec.) [GC], § 87; *Xynos v. Greece*, §§ 37 and 40-51; *Preda and Others v. Romania*, §§ 118-133). It does so by examining the circumstances of each case; its finding as to whether or not the new legislative framework is effective must be based on its practical application (*Nogolica v. Croatia* (dec.); *Rutkowski and Others v. Poland*, §§ 176-186). However, neither the fact that no judicial or administrative practice has yet emerged as regards the application of the framework nor the risk that the proceedings might take a considerable time can in themselves render the new remedy ineffective (*Nagovitsyn and Nalgiyev v. Russia* (dec.), § 30).

123. If the Court finds that the new remedy is effective, this means that other applicants in similar cases are required to have used the new remedy, provided that they were not time-barred from doing so. It has declared these applications inadmissible under Article 35 § 1, even if they had been lodged prior to the creation of the new remedy (*Grzinčič v. Slovenia*, §§ 102-110; *İçyer v. Turkey* (dec.), §§ 74 et seq.; *Stella and Others v. Italy* (dec.), §§ 65-68; *Preda and Others v. Romania*, §§ 134-42; *Muratovic v. Serbia* (dec.), §§ 17-20; *Beshiri and Others v. Albania* (dec.), §§ 177 and 216-218).

This concerns domestic remedies that became available after the applications were lodged. The assessment of whether there were exceptional circumstances compelling applicants to avail themselves of such a remedy will take into account, in particular, the nature of the new domestic regulations and the context in which they were introduced (*Fakhretdinov and Others v. Russia* (dec.), § 30). In this case, the Court held that the effective domestic remedy, introduced following a pilot judgment in which it had ordered the introduction of such a remedy, should be used before applicants were able to apply to the Court.

The Court has also taken into account the fact that the State was dealing with an exceptionally difficult and complex situation which involved a choice as to which pecuniary and moral obligations could be fulfilled, while referring to the authorities' wide margin of appreciation in situations involving a wide-reaching but controversial legislative scheme with significant economic impact for the country as a whole (*Beshiri and Others v. Albania* (dec.), § 194, with regard to a new remedy dealing with prolonged non-enforcement of final decisions awarding compensation for property expropriated during the communist regime, introduced in response to a pilot judgment).

The Court has pointed out that it is ready to change its approach as to the potential effectiveness of the remedy introduced after a pilot judgment, should the practice of the domestic authorities show, in the long run, that the new legislation is not applied in a manner that is in conformity with the pilot judgment and the Convention standards in general (*Muratovic v. Serbia* (dec.), §§ 17-20; *Beshiri and Others v. Albania* (dec.), § 222).

The Court has also specified the conditions for the application of Article 35 § 1 according to the date of the application (*Fakhretdinov and Others v. Russia* (dec.), §§ 31-33; *Nagovitsyn and Nalgiyev v. Russia* (dec.), §§ 29 et seq. and 40-41).

B. Non-compliance with the four-month time-limit

Article 35 § 1 of the Convention – Admissibility criteria

"1. The Court may only deal with the matter ... within a period of four months from the date on which the final decision was taken."

HUDOC keywords

Six-month period (35-1) – Final domestic decision (35-1) – Continuing situation (35-1)

1. Purpose of the rule

124. The primary purpose of the four-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], § 258; *Lopes de Sousa Fernandes v. Portugal* [GC], § 129). It also affords the prospective applicant time to consider whether 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], §§ 99-101; *Sabri Güneş v. Turkey* [GC], § 39).

125. The rule marks out the temporal limit of the supervision exercised by the Court and signals, both to individuals and State authorities, the period beyond which such supervision is no longer possible (*Radomilja and Others v. Croatia* [GC], § 138). It reflects the wish of the High Contracting Parties to prevent past judgments being constantly called into question and constitutes a legitimate concern for order, stability and peace (*Idalov v. Russia* [GC], § 128; *Sabri Güneş v. Turkey* [GC], § 40; *Lopes de Sousa Fernandes v. Portugal* [GC], § 129).

126. The four-month rule is a public policy rule and the Court has jurisdiction to apply it of its own motion, even if the Government has not raised that objection (*Sabri Güneş c. Turquie* [GC], § 29 ; § 29; *Svinarenko and Slydanev v. Russia* [GC], § 85; *Blokhin v. Russia* [GC], § 102; *Merabishvili v. Georgia* [GC], § 247; *Radomilja and Others v. Croatia* [GC], § 138).

127. The four-month rule cannot require an applicant to lodge his or her complaint with the Court before his or her position in connection with the matter has been finally settled at the domestic level (*Varnava and Others v. Turkey* [GC], § 157; *Lekić v. Slovenia* [GC], § 65; *Chapman v. Belgium* (dec.), § 34). For a recapitulation of the relevant principles, see *Svinarenko and Slydanev v. Russia* [GC], § 86.

128. 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[5] 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 (see the Explanatory Report to Protocol No.15, § 22).

Although the judgments and decisions pre-dating Protocol No. 15 mentioned in this section referred to the "six-month period" or "six-month rule", those terms have been replaced in this guide by the terms "four-month period" and "four-month rule", in order to reflect the new time-limit established in the Convention. The general principles in the Court's case-law on how the former rule operated remain valid for the operation of the new time limit.

2. Starting date for the running of the four-month period

a. Final decision

129. The four-month period runs from the final decision in the process of exhaustion of domestic remedies (*Paul and Audrey Edwards v. the United Kingdom* (dec.); *Lekić v. Slovenia* [GC], § 65). The applicant must have made normal use of domestic remedies which are likely to be effective and sufficient (*Moreira Barbosa v. Portugal* (dec.); *O'Keeffe v. Ireland* [GC], §§ 110-113; see also *Călin and Others v. Romania*, §§ 59-60 and 62-69, regarding a momentarily effective remedy). When there is only one final decision, there is only one set of proceedings for the purposes of the four-month time limit, even if the case is examined twice before the different levels of jurisdiction (*Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], § 93). Where an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take the start of the four-month period from the date when the applicant first became or ought to have become aware of those circumstances (*Mocanu and Others v. Romania* [GC], § 260).

130. The pursuit of remedies which do not satisfy the requirements of Article 35 § 1 will not be considered by the Court for the purposes of establishing the date of the "final decision" or calculating the starting point for the running of the four-month rule (*Jeronovičs v. Latvia* [GC], § 75; *Alekseyev and Others v. Russia*, §§ 10-16). 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], § 132; *Fernie v. the United Kingdom* (dec.)). However, in the case of *Červenka v. the Czech Republic*, 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).

[5] Article 4 of Protocol No. 15: In Article 35, paragraph 1 of the Convention, the words "within a period of six months" shall be replaced by the words "within a period of four months".

Equally, in *Polyakh and Others v. Ukraine*, 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).

131. Determining whether a domestic procedure constitutes an effective remedy, which an applicant must exhaust and which should therefore be taken into account for the purposes of the four-month time-limit, depends on a number of factors, notably the applicant's complaint, the scope of the obligations of the State under that particular Convention provision, the available remedies in the respondent State and the specific circumstances of the case. For example, it will differ in cases concerning unlawful use of force by State agents compared to cases concerning medical negligence (*Lopes de Sousa Fernandes v. Portugal* [GC], §§ 134-137). For a case concerning covert surveillance measures, see *Hambardzumyan v. Armenia*, §§ 52-53.

132. Account cannot be taken of remedies the use of which depends on the discretionary powers of public officials and which are, as a consequence, not directly accessible to the applicant. Similarly, remedies which have no precise time-limits create uncertainty and render nugatory the four-month rule contained in Article 35 § 1 (*Williams v. the United Kingdom* (dec.); *Abramyan and Others v. Russia* (dec.), §§ 97-102 and 104; *Kashlan v. Russia* (dec), §§ 23 and 26-30). Yet, in an exceptional case, the Court found it reasonable for an applicant to await the final decision of a discretionary remedy. The applicant was therefore not considered to have deliberately tried to defer the time-limit by making use of inappropriate procedures which could not offer her effective redress (*Petrović v. Serbia*, §§ 57-61).

133. As a rule Article 35 § 1 does not require applicants to have applied for the reopening of proceedings or to have used similar extraordinary remedies and does not allow the four-month time-limit to be extended on the grounds that such remedies have been used (*Berdzenishvili v. Russia* (dec.); *Tucka v. the United Kingdom (no. 1)* (dec.); *Haász and Szabó v. Hungary*, §§ 36-37). However, if an extraordinary remedy is the only judicial remedy available to the applicant, the four-month time-limit may be calculated from the date of the decision given regarding that remedy (*Ahtinen v. Finland* (dec.); *Tomaszewscy v. Poland*, §§ 117-119).

An application in which an applicant submits his or her complaints within four months of the decision dismissing his or her request for reopening of the proceedings is inadmissible because the decision is not a "final decision" (*Sapeyan v. Armenia*, § 23).

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 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 (ibid., § 24). Even when an application for extraordinary review could not lead to the reopening of the initial proceedings, but the domestic courts were provided with the opportunity of addressing the core of the human rights issues that the applicant subsequently brought before the Court and did address them, the running of the four-month time-limit has been considered to have restarted (*Schmidt v. Latvia*, §§ 70-71).

b. Starting point

134. The four-month rule is autonomous and must be construed and applied to the facts of each individual case, so as to ensure the effective exercise of the right to individual petition. While taking account of domestic law and practice is an important aspect, it is not decisive in determining the starting point of the four-month period (*Sabri Güneş v. Turkey* [GC], §§ 52 and 55). As an example, the Court has considered that it would be an overly formalistic interpretation of the four-month time-limit to require an applicant with two related complaints to bring two applications before it on

different dates in order to take account of certain procedural rules of domestic law (*Sociedad Anónima del Ucieza v. Spain*, §§ 43-45).

i. Knowledge of the decision

135. The four-month period starts running from the date on which the applicant and/or his or her representative has sufficient knowledge of the final domestic decision (*Koç and Tosun v. Turkey* (dec.)).

136. It is for the State which relies on the failure to comply with the four-month time-limit to establish the date when the applicant became aware of the final domestic decision (*Şahmo v. Turkey* (dec.); *Belozorov v. Russia and Ukraine*, §§ 93-97).

ii. Service of the decision

137. Service on the applicant: Where an applicant is entitled to be served automatically with a copy of the final domestic decision, the object and purpose of Article 35 § 1 of the Convention are best served by counting the four-month period as running from the date of service of the copy of the decision (*Worm v. Austria*, § 33), irrespective of whether that decision had been previously delivered orally (*Akif Hasanov v. Azerbaijan*, § 27).

138. Service on the lawyer: 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.)).

iii. No service of the decision

139. Where the domestic law does not provide for service, it is appropriate to take the date the decision was finalised as the starting-point, that being when the parties were definitely able to find out its content (*Papachelas v. Greece* [GC], § 30). The applicant or his or her lawyer must show due diligence in obtaining a copy of the decision deposited with the court's registry (*Ölmez v. Turkey* (dec.)). When a decision is not served, although domestic law sets a time-limit of three days for deciding such appeals, an applicant cannot remain inactive indefintely. He or she has an individual obligation to undertake elementary steps and to seek information from the relevant authorities about the outcome of the appeal (*Akif Hasanov v. Azerbaijan*, §§ 28-33).

iv. No remedy available

140. It is important to bear in mind that the requirements in Article 35 § 1 concerning the exhaustion of domestic remedies and the four-month period are closely interrelated (*Jeronovičs v. Latvia* [GC], § 75; *Lopes de Sousa Fernandes v. Portugal* [GC], § 130). 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.); *Varnava and Others v. Turkey* [GC], § 157; *Aydarov and Others v. Bulgaria* (dec.) , § 90).

141. Where an applicant avails himself or herself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate to take the start of the four-month period from the date when the applicant first became or ought to have become aware of those circumstances (ibid., §§ 157-158; *Jeronovičs v. Latvia* [GC], § 75; *Zubkov and Others v. Russia*, §§ 105-109).

v. Continuing situation

142. The concept of a "continuing situation" refers to a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims. The continuing situation may also be a direct effect of legislation that has an impact on an applicant's private life (*S.A.S. v. France* [GC], § 110; *Parrillo v. Italy* [GC], §§ 109-114). The fact that an event has significant consequences over time does not mean that the event has produced a "continuing situation" (*Iordache v. Romania*, § 49; *Călin and Others v. Romania*, §§ 58-60).

143. In the situation of a repetition of the same events, the absence of any marked variation in the conditions to which the applicant had been routinely subjected created, in the Court's view, a "continuing situation" which brought the entire period complained of within the Court's competence (*Fetisov and Others v. Russia*, § 75 and the references cited therein, regarding the transfer conditions from prison to court; *Svinarenko and Slydanev v. Russia* [GC], §§ 86-87, regarding the use of a metal cage to hold defendants during criminal trial; *Chaldayev v. Russia*, §§ 54-57, regarding the conditions of visits in prison; *Shlykov and Others v. Russia,* §§ 60-65, regarding the systematic handcuffing of life prisoners every time time left their cells).

144. 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], § 54; *Varnava and Others v. Turkey* [GC], § 159; *Ülke v. Turkey* (dec.)). As long as the situation continues, the four-month rule is not applicable (*Iordache v. Romania*, § 50; *Oliari and Others v. Italy*, §§ 96-97).

145. Nevertheless, a continuing situation may not postpone the application of the four-month rule indefinitely. The Court has imposed a duty of diligence and initiative on applicants wishing to complain about the continuing failure of the State to comply with certain of its obligations, such as ongoing disappearances, the right to property or home and non-enforcement of pecuniary debts of a State-owned company (*Varnava and Others v. Turkey* [GC], §§ 159-172; *Sargsyan v. Azerbaijan* (dec.) [GC], §§ 124-148; *Sokolov and Others v. Serbia* (dec.), §§ 31-36; see also point 5.a below).

3. Expiry of the four-month period

146. 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.); *Ataykaya v. Turkey*, § 40).

147. Compliance with the four-month deadline is determined using criteria specific to the Convention, not those of each respondent State's domestic legislation (*BENet Praha, spol. s r.o., v. the Czech Republic* (dec.); *Poslu and Others v. Turkey*, § 10). Application by the Court of its own criteria in calculating time-limits, independently of domestic rules, tends to ensure legal certainty, proper administration of justice and thus, the practical and effective functioning of the Convention mechanism (*Sabri Güneş v. Turkey* [GC], § 56).

148. The fact that the last day of the four-month period falls on a Saturday, a Sunday or an official holiday and that in such a situation, under domestic law, time-limits are extended to the following working day, does not affect the determination of the *dies ad quem* (ibid., §§ 43 and 61).

149. It is open to the Court to determine a date for the expiry of the four-month period which is at variance with that identified by the respondent State (*İpek v. Turkey* (dec.)).

4. Date of introduction of an application

a. Completed application form

150. According to Rule 47 of the Rules of Court, as in force from 1 January 2014, the date of introduction of an application for the purposes of Article 35 § 1 of the Convention is the date on which an application form satisfying the requirements of that Rule is sent to the Court. An application must contain all of the information requested in the relevant parts of the application form and be accompanied by copies of the relevant supporting documents. The decision in *Malysh and Ivanin v. Ukraine* illustrates how the amended Rule 47 operates in practice. Except as provided otherwise by Rule 47, only a completed application form will interrupt the running of the four-month time-limit (Practice Direction on Institution of Proceedings, § 1).

If the applicant chooses to have his or her application lodged by a representative, the authority section on the application form must be filled in. Both the applicant and the representative must sign the authority section (see Rule 47 § 1 (c) of the Rules of the Court). A separate power of attorney is not acceptable at this stage as the Court requires all essential information to be contained in its application form. If it is claimed that it is not possible to obtain the applicant's signature on the authority section in the application form due to insurmountable practical difficulties, this should be explained to the Court with any substantiating elements. The requirement of completing the application form speedily within the four-month time-limit will not be accepted as an adequate explanation (Practice Direction on Institution of Proceedings, § 9).

By virtue of Rule 47 § 5 (1), a failure to comply with the requirements set out in paragraphs 1 to 3 of this Rule may, under certain conditions, result in the application not being examined by the Court (*Radomilja and Others* [GC], §§ 112).

b. Date of dispatch

151. The date of introduction of the application is the date of the postmark when the applicant dispatched a duly completed application form to the Court (Rule 47 § 6 (a) of the Rules of Court; see also *Abdulrahman v. the Netherlands* (dec.); *Brežec v. Croatia*, § 29; *Vasiliauskas v. Lithuania* [GC], §§ 115-17); *J.L. v. Italy*, §§ 73-74).

152. Only special circumstances – such as an impossibility to establish when the application has been posted – could justify a different approach: for example, taking the date of the application form or, in its absence, the date of its receipt at the Court's Registry as the introduction date (*Bulinwar OOD and Hrusanov v. Bulgaria*, §§ 30-32).

153. Applicants cannot be held responsible for any delays that may affect their correspondence with the Court in transit (*Anchugov and Gladkov v. Russia*, § 70).

c. Dispatch by fax

154. Applications sent by fax will not interrupt the running of the four-month time-limit. Applicants must also dispatch the signed original by post within the same four-month time-limit (Practice Direction on Institution of Proceedings, § 3).

d. Characterisation of a complaint

155. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (*Scoppola v. Italy (no. 2)* [GC], § 54); *Radomilja and Others v. Croatia* [GC], §§ 110-126). By virtue of the jura novit curia principle the Court is not bound by the legal grounds adduced by the applicant under the Convention and the Protocols thereto and has the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under

Articles or provisions of the Convention that are different from those relied upon by the applicant (*Navalnyy v. Russia* [GC], §§ 62-66, where the Court observed that the factual elements of the complaints under Article 18 were present in all the initial applications although the applicant had only relied on this provision in two of them, and therefore dismissed the Government's objection that parts of these complaints had been introduced out of time, that is to say, during the Grand Chamber proceedings). Some indication of the factual basis of the complaint and the nature of the alleged violation of the Convention is required to introduce a complaint and interrupt the running of the four-month period. Applicants must set out the complaints and provide information that should be enough to enable the Court to determine the nature and scope of the application. Ambiguous phrases or isolated words do not suffice to accept that a particular complaint has been raised (*Ilias and Ahmed v. Hungary* [GC], §§ 82-85 and the references cited therein).

In this connection, Rule 47 § 1 (e) and (f) of the Rules of Court provides that all applications must contain, amongst other things, a concise and legible statement of the facts and of the alleged violation(s) of the Convention and the relevant arguments. According to Rule 47 §§ 1 (f) and 2 (a) of the Rules of Court, when determining the nature and scope of the submitted complaints, the Court cannot be expected to have regard to any document other than the concise and legible statement of the alleged violation(s) of the Convention as described by the applicant (*Rustavi 2 Broadcasting Company Ltd and Others v. Georgia*, §§ 244-246).

e. Subsequent complaints

156. As regards complaints not included in the initial application, the running of the four-month time-limit is not interrupted until the date when the complaint is first submitted to the Court (*Allan v. the United Kingdom* (dec.)).

157. An applicant can clarify or elaborate on the facts initially submitted, but if such additions amount, in effect, to raising new and distinct complaints these complaints must comply with the admissibility requirements, including the four-month rule (*Radomilja and Others v. Croatia* [GC], §§ 122 and 128-139). Complaints raised after the expiry of the four-month time-limit can only be examined if they are not in fact separate complaints but simply further aspects, or further arguments in support of, the initial complaints raised within the time-limit (*Merabishvili v. Georgia* [GC], § 250; *Sâmbata Bihor Greco-Catholic Parish v. Romania* (dec.)).

158. The mere fact that the applicant has relied on Article 6 in his or her application is not sufficient to constitute introduction of all subsequent complaints made under that provision where no indication has initially been given of the factual basis of the complaint and the nature of the alleged violation (*Ramos Nunes de Carvalho e Sá v. Portugal* [GC], §§ 102-106; *Allan v. the United Kingdom* (dec.); *Adam and Others v. Germany* (dec.)). Similarly, a complaint under Article 14 should provide at least an indication of the person or group of persons in comparison with whom the applicant claims he or she was treated differently, as well as of the ground of the distinction that was allegedly applied. The Court cannot accept that the mere fact that a complaint under Article 14 of the Convention was included in the application form is sufficient to constitute introduction of all subsequent complaints made under that provision (*Fábián v. Hungary* [GC], § 96).

159. The provision of documents from the domestic proceedings is not sufficient to constitute an introduction of all subsequent complaints based on those proceedings. Some, albeit summary, indication of the nature of the alleged violation under the Convention is required to introduce a complaint and thereby interrupt the running of the four-month time-limit (*Božinovski v. the former Yugoslav Republic of Macedonia* (dec.)).

5. Special situations

a. Applicability of time constraints to continuing situations concerning the right to life, home and property

160. Although there is no precise point in time on which the four-month period would start running, the Court has imposed a duty of diligence and initiative on applicants wishing to complain about the continued failure to investigate disappearances in life-threatening situations. Because of the uncertainty and confusion typical of such situations, the relatives of a disappeared person may be justified in waiting lengthy periods of time for the national authorities to conclude their proceedings, even if the latter are sporadic and plagued by problems (*Varnava and Others v. Turkey* [GC], §§ 162-163). Nevertheless, applicants cannot wait indefinitely before coming to Strasbourg. They must introduce their complaints without undue delay (ibid., §§ 161-166). Considerations of undue delay by the applicants will not generally arise as long as there is some meaningful contact between relatives and authorities concerning complaints and requests for information, or some indication, or realistic possibility, of progress in investigative measures (ibid., § 165; see also *Pitsayeva and Others v. Russia*, §§ 386-393; *Sultygov and Others v. Russia*, §§ 375-380; *Sagayeva and Others v. Russia*, §§ 58-62; *Doshuyeva and Yusupov v. Russia* (dec.), §§ 41-47). Where more than ten years have elapsed, applicants would generally have to show convincingly that there was some ongoing, and concrete, advance being achieved to justify further delay in coming to Strasbourg (*Varnava and Others v. Turkey* [GC], § 166; see also *Açış v. Turkey*, §§ 41-42; *Er and Others v. Turkey*, §§ 59-60 and *Trivkanović v. Croatia*, §§ 54-58).

161. Similarly, where alleged continuing violations of the right to property or home in the context of a long-standing conflict are at stake, the time may come when an applicant should introduce his or her case, as remaining passive in the face of an unchanging situation would no longer be justified. Once an applicant has become aware or should have been aware that there is no realistic hope of regaining access to his or her property and home in the foreseeable future, unexplained or excessive delay in lodging the application may lead to the application being rejected as out of time. In a complex post-conflict situation the time-frames must be generous in order to allow for the situation to settle and to permit applicants to collect comprehensive information of obtaining a solution at the domestic level (*Sargsyan v. Azerbaijan* (dec.) [GC], §§ 140-141, for a period of about three years after ratification of the Convention; *Chiragov and Others v. Armenia* (dec.) [GC], §§ 141-142, for a period of four years and almost four months after ratification; compare and contrast *Samadov v. Armenia* (dec.), §§ 9-18, for a period of more than six years after ratification).

162. The principle of duty of diligence has also been applied in the context of non-enforcement of pecuniary debts of a State-owned company (*Sokolov and Others v. Serbia* (dec.), §§ 31-33).

b. Applicability of time constraint concerning the lack of an effective investigation into deaths and ill-treatment

163. In establishing the extent of the duty of diligence on applicants who wish to complain about the lack of an effective investigation into deaths or ill-treatment (Article 2 and 3 of the Convention), the Court has been largely guided by the case-law on the disappearance of individuals in a context of international conflict or state of emergency within a country (*Mocanu and Others v. Romania* [GC], § 267). In these cases too, the Court has considered whether there has been meaningful contact with the authorities or some indication, or realistic possibility, of progress in investigative measures (*Şakir Kaçmaz v. Turkey*, §§ 72-75; *Vatandaş v. Turkey*, §§ 26-27). The Court has also considered the scope and the complexity of the domestic investigation in the assessment of whether an applicant legitimately could have believed that it would be effective (*Melnichuk and Others v. Romania*, §§ 87-89). For the determination of the date in which the applicant must have become aware of the

ineffectiveness of domestic remedies in the face of the failure of the authorities to act on his complaint, see *Mehmet Ali Eser v. Turkey*, §§ 30-31).

164. The obligation of diligence contains two distinct but closely linked aspects: applicants must contact the domestic authorities promptly concerning progress in the investigation and, they must lodge their application promptly with the Court as soon as they become aware or should have become aware that the investigation is not effective. Applicants' inactivity at the domestic level is not as such relevant for the assessment of the fulfilment of the four-month requirement. However, if the Court were to conclude that before the applicants petitioned the competent domestic authorities they were already aware, or ought to have been aware, of the lack of any effective criminal investigation, it is obvious that the subsequent applications lodged with the Court have *a fortiori* been lodged out of time (*Mocanu and Others v. Romania* [GC], §§ 256-257, 262-64 and 272). In *Sakvarelidze v. Georgia*, the Court found that the applicant, who regularly enquired about progress in the investigation, starting from an early stage of the proceedings, and took steps to speed up the investigation's progress in the hope of a more effective outcome, fulfilled his obligation of due diligence (§§ 41-46 and the references cited therein).

165. The question of compliance with the duty of diligence must be assessed in the light of the circumstances of the case. An applicant's delay in lodging a complaint with the domestic authorities is not decisive where the authorities ought to have been aware that an individual could have been subjected to ill-treatment as the authorities' duty to investigate arises even in the absence of an express complaint (*Velev v. Bulgaria*, §§ 40 and 59-60). Nor does such a delay affect the admissibility of the application where the applicant was in a particularly vulnerable situation. As an example, the Court has acknowledged an applicant's vulnerability and feeling of powerlessness as an acceptable explanation for a delay in lodging a complaint at the domestic level (*Mocanu and Others v. Romania* [GC], §§ 265 and 273-275).

The issue of identifying the exact point in time at which the applicant realised, or ought to have realised, that an investigation is not effective, is difficult to determine with precision. Thus, the Court has rejected as out of time applications where a delay on the part of the applicants has been excessive or unexplained (*Melnichuk and Others v. Romania*, §§ 82-83 and the references cited therein; see also *Khadzhimuradov and Others v. Russia*, §§ 73-74).

166. In some cases information purportedly casting new light on the circumstances of a death may come into the public domain at a later stage. Depending on the situation the procedural obligation to investigate can then be revived and provide a new starting point for the purposes of calculating the four-month time-limit (*Khadzhimuradov and Others v. Russia*, §§ 67 and 75-77). If different phases of an investigation are regarded as distinct an applicant may fail to comply with the four-month rule in respect of complaints alleging deficiencies in the initial investigation (*Tsalikidis and Others v. Greece*, § 52, where more than five years had elapsed between two phases of a preliminary criminal investigation).

c. Application of the four-month rule as regards the conditions of detention

167. The applicant's detention should be regarded as a "continuing situation" as long as the applicant was detained in the same type of detention facility in substantially similar conditions. Short periods of absence (if the applicant was taken out of the facility for interviews or other procedural acts) would have no incidence on the continuous nature of the detention. However, the applicant's release or transfer to a different type of detention regime, both within and outside the facility, would put an end to the "continuing situation". The complaint about the conditions of detention must be filed within four months from the end of the situation complained about or, if there was an effective domestic remedy to be exhausted, of the final decision in the process of exhaustion (*Ananyev and Others v. Russia,* §§ 75-78 and the references cited therein, and for an example of detention in two prisons, *Petrescu v. Portugal*, § 93). When there has been an interruption of more

than three months between the periods of detention, the Court does not regard them as a "continuing situation" (*Shishanov v. the Republic of Moldova*, §§ 68-69). Similarly, multiple consecutive arrests, with ensuing prosecutions, convictions and sentences of imprisonment, which followed directly upon offences committed by the applicant, do not constitute a "continuing situation" even if the applicant enjoyed periods of liberty only for minutes (*Gough v. the United Kingdom*, §§ 133-134).

In *Ulemek v. Croatia* the highest court in the State had examined the merits of the applicant's complaints about inadequate conditions of detention for the overall period of his confinement in two different prisons after his release, his complaints before the Court were not dismissed for failure to exhaust domestic remedies and/or non‑compliance with the four-month time limit (§§ 117-118).

d. Application of the four-month rule in cases of multiple periods of detention under Article 5 § 3 of the Convention

168. Multiple, consecutive detention periods should be regarded as a whole, and the four-month period should only start to run from the end of the last period of detention (*Solmaz v. Turkey*, § 36).

169. Where an accused person's pre-trial detention is broken into several non-consecutive periods, those periods should not be assessed as a whole, but separately. Therefore, once at liberty, an applicant is obliged to bring any complaint which he or she may have concerning pre-trial detention within four months of the date of actual release. However, where such periods form part of the same set of criminal proceedings against an applicant, the Court, when assessing the overall reasonableness of detention for the purposes of Article 5 § 3, can take into consideration the fact that an applicant has previously spent time in custody pending trial (*Idalov v. Russia* [GC], §§ 129-30).

C. Anonymous application

Article 35 § 2 (a) of the Convention – Admissibility criteria

"1. The Court shall not deal with any application submitted under Article 34 that

(a) is anonymous;"[6]

HUDOC keywords

Anonymous application (35-2-a)

170. The applicant must be duly identified in the application form (Rule 47 § 1 (a) of the Rules of Court). The Court may decide that the applicant's identity should not be disclosed to the public (Rule 47 § 4); in that case, the applicant will be designated by his or her initials or simply by a letter.

171. The Court alone is competent to determine whether an application is anonymous within the meaning of Article 35 § 2 (a) (*Sindicatul Păstorul cel Bun v. Romania* [GC], § 69). If the respondent Government has doubts as to the authenticity of an application, it must inform the Court in good time (ibid.).

1. Anonymous application

172. An application to the Court is regarded as anonymous where the case file does not indicate any element enabling the Court to identify the applicant (*"Blondje" v. the Netherlands* (dec.)). None of the forms or documents submitted contained a mention of the name of the applicant, but only a reference and aliases, and the power of attorney was signed "X": the identity of the applicant was not disclosed.

173. An application introduced by an association on behalf of unidentified persons, the association not claiming to be itself the victim but complaining of a violation of the right to respect for private life on behalf of unidentified individuals, who had thus become the applicants whom they declared that they were representing, was considered anonymous (*Federation of French Medical Trade Unions and National Federation of Nurses v. France*, Commission decision).

2. Non-anonymous application

174. Article 35 § 2 (a) of the Convention is not applicable where applicants have submitted factual and legal information enabling the Court to identify them and establish their links with the facts in issue and the complaint raised (*Sindicatul Păstorul cel Bun v. Romania* [GC], § 71).

175. Applications lodged under fictitious names: Individuals using pseudonyms and explaining to the Court that the context of an armed conflict obliged them not to disclose their real names in order to protect their family members and friends. Finding that "behind the tactics concealing their real identities for understandable reasons were real people identifiable from a sufficient number of indications, other than their names" and "the existence of a sufficiently close link between the applicants and the events in question", the Court did not consider that the application was

6. An **"**anonymous**"** application within the meaning of Article 35 § 2 (a) of the Convention is to be distinguished from the question of non-disclosure to the public of the identity of an applicant by way of derogation from the normal rule of public access to information in proceedings before the Court, and from the question of confidentiality before the Court (see Rule 33 and Rule 47 § 4 of the Rules of Court and the Practice directions annexed thereto).

anonymous (*Shamayev and Others v. Georgia and Russia* (dec.)); see also the judgment in *Shamayev and Others*, § 275.

176. Applications lodged by a church body or an association with religious and philosophical objects the identity of whose members is not disclosed have not been rejected as being anonymous (Articles 9, 10 and 11 of the Convention): see *Omkarananda and Divine Light Zentrum v. Switzerland*, Commission decision.

D. Substantially the same

Article 35 § 2 (b) of the Convention – Admissibility criteria

"2. The Court shall not deal with any application submitted under Article 34 that

...

(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."

HUDOC keywords

Matter already examined by the Court (35-2-b) – Matter already submitted to another international procedure (35-2-b) – Relevant new information (35-2-b)

177. An application will be rejected pursuant to Article 35 § 2 (b) of the Convention where it is substantially the same as a matter which has already been examined by the Court or by another procedure of international investigation or settlement and contains no relevant new information.

1. Substantially the same as a matter that has been examined by the Court

178. The purpose of the first limb of Article 35 § 2 (b) is to ensure the finality of the Court's decisions and to prevent applicants from seeking, through the lodging of a fresh application, to appeal previous judgments or decisions of the Court (*Harkins v. the United Kingdom* (dec.) [GC], § 51; *Kafkaris v. Cyprus* (dec.), § 67; *Lowe v. the United Kingdom* (dec.)). Moreover, in addition to serving the interests of finality and legal certainty, 35 § 2 (b) also marks out the limits of the Court's jurisdiction. While certain rules on admissibility must be applied with a degree of flexibility and without excessive formalism the Court has adopted a more rigorous approach in applying those admissibility criteria whose object and purpose is to serve the interests of legal certainty and mark out the limits of its competence (*Harkins v. the United Kingdom* (dec.) [GC], § 52-54).

179. An application or a complaint is declared inadmissible if it "is substantially the same as a matter that has already been examined by the Court ... and contains no relevant new information". This includes cases where the Court has struck the previous application out of its list of cases on the basis of a friendly settlement procedure (*Kezer and Others v. Turkey* (dec.)). However, if a previous application has never formed the subject of a formal decision, the Court is not precluded from examining the recent application (*Sürmeli v. Germany* (dec.)).

180. The Court examines whether the two applications brought before it by the applicants relate essentially to the same persons, the same facts and the same complaints (*Vojnović v. Croatia* (dec.), § 28; *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], § 63; *Amarandei and Others v. Romania*, §§ 106-111; *Leon Madrid v. Spain*, § 44). In order to determine whether an application or a complaint is substantially the same in terms of Article 35 § 2 (b) of the Convention, the complaint is always characterised by the facts alleged in it (*Radomilja and Others v. Croatia* [GC], § 120).

181. An inter-State application does not deprive individual applications of the possibility of introducing, or pursuing their own claims (*Varnava and Others v. Turkey* [GC], § 118; *Shioshvili and Others v. Russia*, §§ 46-47).

182. An application will generally fall foul of this Article where it has the same factual basis as a previous application. It is insufficient for an applicant to allege relevant new information where he has merely sought to support his past complaints with new legal arguments (*I.J.L. v. the United Kingdom* (dec.); *Mann v. the United Kingdom and Portugal* (dec.)) or provided supplementary information on domestic law incapable of altering the reasons for the dismissal of his/her previous application (*X. v. the United Kingdom*, Commission decision of 10 July 1981). In order for the Court to consider an application which relates to the same facts as a previous application, the applicant must genuinely advance a new complaint or submit new information which has not been previously considered by the Court (*Kafkaris v. Cyprus* (dec.), § 68). The relevant new information must be new *factual* information, which may include significant changes in the applicable domestic law (*Ekimdzhiev and Others v. Bulgaria**, § 255). Developments in the Court's jurisprudence do not constitute "relevant new information" for the purposes of Article 35 § 2 (b) (*Harkins v. the United Kingdom* (dec.) [GC], §§ 50 and 55-56).

183. The Convention organs have found that the application or a complaint was not essentially the same as a previous application in *Nobili Massuero v. Italy* (dec.); *Riener v. Bulgaria*, § 103; *Chappex v. Switzerland*, Commission decision; *Yurttas v. Turkey*, §§ 36-37; *Sadak v. Turkey*, §§ 32-33; *Amarandei and Others v. Romania*, §§ 106-112; *Tsalikidis and Others v. Greece*, §§ 56-58; *Volodina v. Russia (no. 2)*, §§ 37-40; *Ekimdzhiev and Others v. Bulgaria**, §§ 253-255). On the contrary, they have found that the application or a complaint was essentially the same in *Moldovan and Others v. Romania* (dec.); *Hokkanen v. Finland*, Commission decision; *Adesina v. France*, Commission decision; *Bernardet v. France*, Commission decision; *Gennari v. Italy* (dec.); *Manuel v. Portugal* (dec.).

2. Substantially the same as a matter submitted to another procedure of international investigation or settlement

184. The purpose of the second limb of Article 35 § 2 (b) is to avoid the situation where several international bodies would be simultaneously dealing with applications which are substantially the same. A situation of this type would be incompatible with the spirit and the letter of the Convention, which seeks to avoid a plurality of international proceedings relating to the same cases (*OAO Neftyanaya Kompaniya Yukos v. Russia*, § 520; *Eğitim ve Bilim Emekçileri Sendikası v. Turkey*, § 37; *Selahattin Demirtaş v. Turkey (no. 2)* [GC], § 180). For this reason, it is necessary for the Court to examine this matter of its own motion (*POA and Others v. the United Kingdom* (dec.), § 27).

185. In determining whether its jurisdiction is excluded by virtue of this Convention provision the Court would have to decide whether the case before it is substantially the same as a matter that has already been submitted to a parallel set of proceedings and, if that is so, whether the simultaneous proceedings may be seen as "another procedure of international investigation or settlement" within the meaning of Article 35 § 2 (b) of the Convention (*OAO Neftyanaya Kompaniya Yukos v. Russia*, § 520; *Gürdeniz v. Turkey* (dec.), §§ 39-40; *Doğan and Çakmak v. Turkey* (dec.), § 20).

a. The assessment of similarity of cases

186. The assessment of similarity of the cases would usually involve the comparison of the parties in the respective proceedings, the relevant legal provisions relied on by them, the scope of their claims and the types of the redress sought (*OAO Neftyanaya Kompaniya Yukos v. Russia*, § 521; *Greek Federation of Bank Employee Unions v. Greece* (dec.), § 39).

187. The Court therefore verifies, like it is the case with the first limb of Article 35 § 2 (b) mentioned above, whether the applications to the different international institutions concern substantially the same persons, facts and complaints (*Patera v. the Czech Republic* (dec.); *Karoussiotis v. Portugal*, § 63; *Gürdeniz v. Turkey* (dec.), §§ 41-45; *Pauger v. Austria*, Commisison decision).

188. For example, if the complainants before the two institutions are not identical the "application" to the Court cannot be considered as being "substantially the same as a matter that has ... been submitted to another procedure of international investigation or settlement" (*Folgerø and Others v. Norway* (dec.)). Thus, the Court found that it was not precluded from examining the application before it when the other international procedure was initiated by a non-governmental organisation (*Celniku v. Greece*, §§ 39-41; *Illiu and Others v. Belgium* (dec.)) or by a Confederation of Unions which it was affiliated to (*Eğitim ve Bilim Emekçileri Sendikası v. Turkey*, § 38) and not by the applicants themselves. In *Kavala v. Turkey*, UN Special Rapporteurs and the Vice-Chair of the Working Group on Arbitrary Detention (WGAD) had sent a letter to Turkey containing an "urgent appeal", in the context of special proceedings introduced by the Office of the UN High Commissioner for Human Rights, which could give rise to the opening of a procedure. However, since the WGAD had not opened such a procedure and since neither the applicant nor his close relatives had lodged any appeal before the UN bodies, the "application" was not "substantially the same" (§§ 92-94).

189. However, the Court has recently reaffirmed that an application lodged with the Court which was virtually identical with an application submitted previously to another international body (ILO) but is brought by individual applicants who were not, and could not be, parties to that previous application, as the procedure was collective in nature with standing confined to trade unions and employer organisations, was substantially the same as the one submitted to that body. This is because these individual applicants must be seen as being closely associated with the proceedings and the complaints before that body by virtue of their status as officials of the trade union in question. Allowing them to maintain their action before the Court would therefore have been tantamount to circumventing Article 35 § 2 (b) of the Convention (*POA and Others v. the United Kingdom* (dec.), §§ 30-32).

b. The concept of "another procedure of international investigation or settlement"

190. In its assessment under Article 35 § 2 (b), the Court has to determine whether the parallel proceedings in question constitute another international procedure for the purposes of this admissibility criterion (*POA and Others v. the United Kingdom*, § 28).

191. The Court's examination in this respect is not limited to a formal verification but would extend, where appropriate, to ascertaining whether the nature of the supervisory body, the procedure it follows and the effect of its decisions are such that the Court's jurisdiction is excluded by Article 35 § 2 (b) (*OAO Neftyanaya Kompaniya Yukos v. Russia*, § 522; *De Pace v. Italy*, §§ 25-28; *Karoussiotis v. Portugal*, §§ 62 and 65-76; *Greek Federation of Bank Employee Unions v. Greece* (dec.), §§ 33-38; *Doğan and Çakmak v. Turkey* (dec.), § 21; *Peraldi v. France* (dec.)). The Court has developed the criteria that an international body must satisfy in order to be regarded as "another procedure of international investigation or settlement" within the meaning of that provision. The requirement of judicial or quasi-judicial proceedings similar to the Convention mechanism means that the examination must be clearly defined in scope and limited to certain rights based on a legal instrument whereby the relevant body is authorised to determine the State's responsibility and to afford legal redress capable of putting an end to the alleged violation. It must also afford institutional and procedural safeguards, such as independence, impartiality and an adversarial procedure (*Selahattin Demirtaş v. Turkey (no. 2)* [GC], §§ 182-186).

E. Abuse of the right of application

Article 35 § 3 (a) of the Convention – Admissibility criteria

"3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is ... an abuse of the right of individual application;"

HUDOC keywords

Abuse of the right of application (35-3-a)

1. General definition

192. The concept of "abuse" within the meaning of Article 35 § 3 (a) must be understood in its ordinary sense according to general legal theory – namely, the harmful exercise of a right for purposes other than those for which it is designed. Accordingly, any conduct of an applicant that is manifestly contrary to the purpose of the right of individual application as provided for in the Convention and impedes the proper functioning of the Court or the proper conduct of the proceedings before it constitutes an abuse of the right of application (*Zhdanov and Others v. Russia*, §§ 79-81 and the references cited therein; *Miroļubovs and Others v. Latvia*, §§ 62 and 65; *S.A.S. v. France* [GC], § 66; *Bivolaru v. Romania*, §§ 78-82).

193. The Court has stressed that rejection of an application on grounds of abuse of the right of application is an exceptional measure (*Miroļubovs and Others v. Latvia*, § 62). The cases in which the Court has found an abuse of the right of application can be grouped into five typical categories: misleading information; use of offensive language; violation of the obligation to keep friendly-settlement proceedings confidential; application manifestly vexatious or devoid of any real purpose; and all other cases that cannot be listed exhaustively (*S.A.S. v. France* [GC], § 67).

2. Misleading the Court

194. An application is an abuse of the right of application if it is knowingly based on untrue facts with a view to deceiving the Court (*Varbanov v. Bulgaria*, § 36; *Gogitidze and Others v. Georgia*, § 76). The most serious and blatant examples of such abuses are, firstly, the submission of an application under a false identity (*Drijfhout v. the Netherlands* (dec.), §§ 27-29), and, secondly, the falsification of documents sent to the Court (*Jian v. Romania* (dec.); *Bagheri and Maliki v. the Netherlands* (dec.); *Poznanski and Others v. Germany* (dec.); *Gogitidze and Others v. Georgia*, §§ 77-78). In a case concerning detention pending expulsion, the Court has found that there was an abuse of the right of application when an applicant had misled both the domestic authorities and the Court about his nationality (see *Bencheref v. Sweden* (dec.), § 39). The Court has also deemed an application abusive when the applicants had used vague and undefined terms in order to make the circumstances of the case appear similar to another case where the Court had found a violation (*Kongresna Narodna Stranka and Others v. Bosnia and Herzegovina* (dec.), §§ 13 and 15-19).

195. This type of abuse may also be committed by omission, where the applicant fails to inform the Court at the outset of a factor essential for the examination of the case (*Kerechashvili v. Georgia* (dec.); *Martins Alves v. Portugal* (dec.), §§ 12-15; *Gross v. Switzerland* [GC], §§ 35-36; *Gevorgyan and Others v. Armenia* (dec.), §§ 31-37; *Safaryan v. Armenia* (dec.), §§ 24-30; contrast with *Al-Nashif v. Bulgaria*, § 89; *G.I.E.M. S.R.L. and Others v. Italy* [GC], § 174; *S.L. and J.L. v. Croatia*, § 49; *Zličić v. Serbia*, §§ 55-56). The misleading information should however concern the very core of the case in order for the Court to find the omission to amount to an abuse of the right of individual application

(*Bestry v. Poland*, § 44; *Mitrović v. Serbia*, §§ 33-34; *Shalyavski and Others v. Bulgaria*, § 45). Whenever an applicant omits, contrary to Rule 44C § 1 of the Rules of Court, to divulge relevant information, depending on the particular circumstances of the case, the Court may draw such inferences as it deems appropriate, including striking the application out under either of the three sub-paragraphs of Article 37 § 1 of the Convention (*Belošević v. Croatia* (dec.), §§ 48-49 and §§ 51-54, and *Şeker v. Turkey* (dec.), §§ 19-23).

196. Likewise, if new, important developments occur during the proceedings before the Court and if - despite the express obligation on him or her under the Rules of Court - the applicant fails to disclose that information to the Court, thereby preventing it from ruling on the case in full knowledge of the facts, his or her application may be rejected as being an abuse of application (*Hadrabová and Others v. the Czech Republic* (dec.); *Predescu v. Romania*, §§ 25-27; *Gross v. Switzerland* [GC], §§ 28-37; *Dimo Dimov and Others v. Bulgaria*, §§ 42-47).

197. Furthermore, the applicant is entirely responsible for the conduct of his or her lawyer or any other person representing him or her before the Court. Any omissions on the representative's part are in principle attributable to the applicant himself or herself and may lead to the application being rejected as an abuse of the right of application (*Bekauri v. Georgia* (preliminary objections), §§ 22-25; *Migliore and Others v. Italy* (dec.); *Martins Alves v. Portugal* (dec.), §§ 11-13 and 16-17; *Gross v. Switzerland* [GC], § 33).

198. An intention to mislead the Court must always be established with sufficient certainty (*Melnik v. Ukraine*, §§ 58-60; *Nold v. Germany*, § 87; *Miszczyński v. Poland* (dec.); *Gross v. Switzerland* [GC], § 28; *S.L. and J.L. v. Croatia*, §§ 48-49; *Bagdonavicius and Others v. Russia*, §§ 64-65; *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey* (dec.), §§ 29-30). Parties can submit arguments which are rejected by the Court without such contentious submissions being regarded as an abuse of the right of individual application (*Hoti v. Croatia*), § 92.

199. Even where the Court's judgment on the merits has already become final and it subsequently transpires that the applicant had concealed a fact that would have been relevant to the examination of the application, the Court is able to reconsider its judgment by means of the revision procedure (laid down in Rule 80 of the Rules of Court) and to reject the application as an abuse of the right of application (*Gardean and S.C. Grup 95 SA v. Romania* (revision), §§ 12-22; *Vidu and Others v. Romania* (revision), §§ 17-30; *Petroiu v. Romania* (revision), §§ 16-30). Revision of a judgment is possible only if the respondent Government could not reasonably have known of the fact in question at the time of the Court's examination of the case, and if it submits the request for revision within a period of six months after acquiring knowledge of the fact, in accordance with Rule 80 § 1 (*Grossi and Others v. Italy* (revision), §§ 17-24; *Vidu and Others v. Romania* (revision), §§ 20-23; *Petroiu v. Romania* (revision), §§ 19 and 27-28).

3. Offensive language

200. There will be an abuse of the right of application where the applicant, in his or her correspondence with the Court, uses particularly vexatious, insulting, threatening or provocative language – whether this be against the respondent Government, its Agent, the authorities of the respondent State, the Court itself, its judges, its Registry or members thereof (*Řehák v. the Czech Republic* (dec.); *Duringer and Others v. France* (dec.); *Stamoulakatos v. the United Kingdom*, Commission decision). The same applies when an applicant publishes offensive statements about the Court and its judges outside the context of the pending case and continues to do so after a warning (*Zhdanov and Others v. Russia*, §§ 82-86).

201. It is not sufficient for the applicant's language to be merely cutting, polemical or sarcastic; it must exceed "the bounds of normal, civil and legitimate criticism" in order to be regarded as abusive (*Di Salvo v. Italy* (dec.), *Apinis v. Latvia* (dec.); for a contrary example, see *Aleksanyan v. Russia*, §§ 116-118; *X and Others v. Bulgaria* [GC], § 146). If, during the proceedings, the applicant ceases

using offensive remarks after a formal warning from the Court, expressly withdraws them or, better still, offers an apology, the application will no longer be rejected as an abuse of application (*Chernitsyn v. Russia*, §§ 25-28).

4. Breach of the principle of confidentiality of friendly-settlement proceedings

202. An intentional breach, by an applicant, of the duty of confidentiality of friendly-settlement negotiations, imposed on the parties under Article 39 § 2 of the Convention and Rule 62 § 2 of the Rules of Court, may be considered as an abuse of the right of application and result in the application being rejected (*Hadrabová and Others v. the Czech Republic* (dec.); *Popov v. Moldova (no. 1)*, § 48; *Miroļubovs and Others v. Latvia*, § 66).

203. In order to determine whether the applicant has breached the duty of confidentiality, the limits on that duty must first be defined. It must always be interpreted in the light of its general purpose, namely, facilitating a friendly settlement by protecting the parties and the Court against possible pressure. Accordingly, whereas the communication to a third party of the content of documents relating to a friendly settlement can, in theory, amount to an abuse of the right of application within the meaning of Article 35 § 3(a) of the Convention, it does not mean that there is an absolute and unconditional prohibition on showing or talking about such documents to any third party. Such a wide and rigorous interpretation would risk undermining the protection of the applicant's legitimate interests – for example, where he or she seeks informed advice on a one-off basis in a case in which he or she is authorised to represent him or herself before the Court. Moreover, it would be too difficult, if not impossible, for the Court to monitor compliance with such a prohibition. What Article 39 § 2 of the Convention and Rule 62 § 2 of the Rules of Court prohibit the parties from doing is publicising the information in question, for instance through the media, in correspondence liable to be read by a large number of people, or in any other way (*Miroļubovs and Others v. Latvia*, § 68; see also *Mătăsaru v. the Republic of Moldova* (dec.), §§ 36-39, where the applicant's wife disclosed to the media the Court's friendly-settlement proposal). It is thus this type of conduct, where a degree of seriousness is involved, that is an abuse of the right of application.

204. In order to be regarded as an abuse of application, the disclosure of confidential information must be intentional. The direct responsibility of the applicant in the disclosure must always be established with sufficient certainty; a mere suspicion will not suffice (ibid., § 66 *in fine*). Concrete examples of the application of this principle: for an example where the application was rejected, see *Hadrabová and Others v. the Czech Republic* (dec.), in which the applicants had expressly cited the proposals of the friendly settlement formulated by the Court Registry in their correspondence with the Ministry of Justice of their country, which led to their application being rejected as an abuse of application; for an example where the application was found admissible, see *Miroļubovs and Others v. Latvia*, in which it was not established with certainty that all three applicants had been responsible for the disclosure of confidential information, with the result that the Court rejected the Government's preliminary objection.

205. A distinction must be drawn between, on the one hand, declarations made in the context of strictly confidential friendly-settlement proceedings and, on the other, unilateral declarations made by a respondent Government in public and adversarial proceedings before the Court, even though the material outcome of those procedures may be similar. A disclosure of the conditions of a unilateral declaration does not amount to an abuse of the right of individual application (*Eskerkhanov and Others v. Russia*, § 26-29).

206. With regard to the failure to respect the rule of confidentiality after the principal judgment has been handed down, but before the Court has ruled on just satisfaction, see *Žáková v. the Czech Republic* (just satisfaction), §§ 18-25, where the Court, in light of the particular circumstances of the case, found it appropriate to continue the examination of the case.

5. Application manifestly vexatious or devoid of any real purpose

207. An applicant abuses the right of application where he or she repeatedly lodges vexatious and manifestly ill-founded applications with the Court that are similar to an application that he or she has lodged in the past that has already been declared inadmissible (*M. v. the United Kingdom* and *Philis v. Greece*, both Commission decisions). It cannot be the task of the Court to deal with a succession of ill-founded and querulous complaints or with otherwise manifestly abusive conduct of applicants or their authorised representatives, which creates gratuitous work for the Court, incompatible with its real functions under the Convention (*Bekauri v. Georgia* (preliminary objections), § 21; see also *Migliore and Others v. Italy* (dec.) and *Simitzi-Papachristou and Others v. Greece* (dec.)).

208. The Court found an abuse of the right of application on the part of an applicant who had published, on his website and on YouTube, calls to visitors to join him in lodging a collective application with the Court and to submit multiple applications through an automatically generated and standardised application form. Almost 18,000 applications had already been sent to the Court as a result of this technique. In unambiguous terms, the objective being pursued was not to win the respective cases, but, on the contrary, to bring about "congestion, excessive workload and a backlog" at the Court, to "paralyse its operations", to "create a relationship of power" in order to "negotiate" with the Court by threatening its operations, and to "derail the system" in which the Court was a "link in the chain". This approach, seeking to undermine the Convention system and the functioning of the Court, was manifestly contrary to the purpose of the right of individual application, to the spirit of the Convention and the objectives pursued by it (*Zambrano v. France* (dec.), §§ 35-38).

209. The Court may also find that there has been an abuse of the right of application where the application manifestly lacks any real purpose, concerns a petty sum of money or, generally speaking, has no bearing on the objective legitimate interests of the applicant (*Simitzi-Papachristou and Others v. Greece* (dec.); *Bock v. Germany* (dec.), contrast with *S.A.S. v. France* [GC], §§ 62 and 68). Since the entry into force of Protocol No. 14 on 1 June 2010, applications of this kind are more readily dealt with under Article 35 § 3 (b) of the Convention (no significant disadvantage).

6. Other cases

210. Sometimes judgments and decisions of the Court, and cases still pending before it, are used for the purposes of a political speech at national level in the Contracting States. An application inspired by a desire for publicity or propaganda is not for this reason alone an abuse of the right of application (*McFeeley and Others v. the United Kingdom*, Commission decision, and also *Khadzhialiyev and Others v. Russia*, §§ 66-67). However, there may be an abuse if the applicant, motivated by political interests, gives interviews to the press or television in which he or she expresses an irresponsible and frivolous attitude towards proceedings pending before the Court (*Georgian Labour Party v. Georgia*). Dissemination of false information to the press in a way that could have been a result of an error in good faith has not been found to be an abuse of the right of application (*Podeschi v. San Marino*, § 88, where the applicant or his representatives had erroneously publicly alleged that the application had already been declared admissible by the Court.).

211. The Court has found that there was an abuse of the right of individual petition when an applicant invoked Article 8 before the Court on the basis of evidence obtained in violation of others' Convention rights. The applicant had, in an attempt to prove that he was not the father of a child, obtained DNA samples by force, without consent, and had been convicted of an attack on his former wife's physical integrity as a result (*Koch v. Poland* (dec.), §§ 31-34).

7. Approach to be adopted by the respondent Government

212. If the respondent Government considers that the applicant has abused the right of application, it must inform the Court accordingly and bring to its attention the relevant information in its possession so that the Court can draw the appropriate conclusions. It is for the Court itself and not the respondent Government to monitor compliance with the procedural obligations imposed by the Convention and by its Rules on the applicant party. However, threats on the part of the Government and its bodies to bring criminal or disciplinary proceedings against an applicant for an alleged breach of its procedural obligations before the Court could raise a problem under Article 34 *in fine* of the Convention, which prohibits any interference with the effective exercise of the right of individual application (*Miroļubovs and Others v. Latvia*, § 70).

213. Even if the Government does not argue that the applicants' behaviour amounted to an abuse of the right of individual petition, the question of possible abuse can be raised by the Court *proprio motu* (*Gevorgyan and Others v. Armenia* (dec.), § 32; *Dimo Dimov and Others v. Bulgaria,* § 41).

II. Grounds for inadmissibility relating to the Court's jurisdiction

Article 35 § 3 (a) of the Convention – Admissibility criteria

"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 ...;"

Article 32 of the Convention – Jurisdiction of the Court

"1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide."

HUDOC keywords

Ratione personae (35-3-a) – *Ratione loci* (35-3-a) – *Ratione temporis* (35-3-a) – Continuing situation (35-3-a) – *Ratione materiae* (35-3-a)

A. Incompatibility *ratione personae*

1. Principles

214. Compatibility *ratione personae* requires the alleged violation of the Convention to have been committed by a Contracting State or to be in some way attributable to it.

215. Even where the respondent State has not raised any objections as to the Court's jurisdiction *ratione personae*, this issue calls for consideration by the Court of its own motion (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], § 27; *Mutu and Pechstein v. Switzerland*, § 63).

216. Fundamental rights protected by international human rights treaties should be secured to individuals living in the territory of the State Party concerned, notwithstanding its subsequent dissolution or succession (*Bijelić v. Montenegro and Serbia*, § 69).

217. A State may be held responsible for debts of a State-owned company even if the company is a separate legal entity, provided that it does not enjoy sufficient institutional and operational independence from the State to absolve the latter from its responsibility under the Convention (*Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], §§ 114-115; *Kuzhelev and Others v. Russia*, §§ 93-100, 117; *Mykhaylenky and Others v. Ukraine*, §§ 43-45). This principle developed in relation to debts also applies to other acts and ommissions of these companies, such as the use of patented inventions (*Tokel v. Turkey,* §§ 58-62). Acts and omissions of a private-law foundation may also be capable of engaging the respondent State's responsibility under the Convention (*Mutu and Pechstein v. Switzerland*, §§ 65-67).

218. Applications will be declared incompatible *ratione personae* with the Convention on the following grounds:

- if the applicant lacks standing as regards Article 34 of the Convention (see, for instance, *Municipal Section of Antilly v. France* (dec.); *Döşemealtı Belediyesi v. Turkey* (dec.); *Moretti and Benedetti v. Italy*, §§ 32-35; *Bulgarian Helsinki Committee v. Bulgaria* (dec.); *V.D. and*

Others v. Russia, §§ 72-76; *İhsan Doğramacı Bilkent Üniversitesi v. Turkey* (dec.), §§ 34-47; *Democratic Republic of the Congo v. Belgium* (dec.), §§ 13-21);

- if the applicant is unable to show that he or she is a victim of the alleged violation (*Kátai v. Hungary* (dec.), §§ 25-26; *Trivkanović v. Croatia*, §§ 49-51; see Introduction, point A.3 "victim status");
- if the application is brought against an individual (*X. v. the United Kingdom*, Commission decision of 10 December 1976; *Durini v. Italy*, Commission decision);
- if the application is brought directly against an international organisation which has not acceded to the Convention (*Stephens v. Cyprus, Turkey and the United Nations* (dec.), last paragraph);
- if the complaint involves a Protocol to the Convention which the respondent State has not ratified (*Horsham v. the United Kingdom*, Commission decision; *De Saedeleer v. Belgium*, § 68).

2. Jurisdiction[7]

219. A finding of lack of jurisdiction *ratione loci* will not dispense the Court from examining whether the applicants come under the "jurisdiction" of one or more Contracting States within the meaning of Article 1 of the Convention (*Drozd and Janousek v. France and Spain*, § 90). Therefore, objections that the applicants are not within the "jurisdiction" of a respondent State will more normally be raised as claims that the application is incompatible *ratione personae* with the Convention (see submissions of the respondent Governments in *Banković and Others v. Belgium and Others* (dec.) [GC], § 35; *Ilaşcu and Others v. Moldova and Russia* [GC], § 300; *Weber and Saravia v. Germany* (dec.); see also *Mozer v. the Republic of Moldova and Russia* [GC], § 79, where the Russian Government raised an objection *ratione personae* and *ratione loci*; see *M.A. and Others v. Lithuania*, § 67). "Jurisdiction" under Article 1 of the Convention is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (*Ilaşcu and Others v. Moldova and Russia* [GC], § 311; *Al-Skeini v. the United Kingdom* [GC], § 130).

220. A State's jurisdictional competence under Article 1 is primarily territorial (*Banković and Others v. Belgium and Others* (dec.) [GC], §§ 61 and 67; *Catan and Others v. the Republic of Moldova and Russia* [GC], § 104). Jurisdiction is presumed to be exercised normally throughout the State's territory (*N.D. and N.T. Spain* [GC], §§ 102-103, 105 and seq.; *Assanidze v. Georgia* [GC], § 139; *Sargsyan v. Azerbaijan* [GC], §§ 129, 139 and 150). Jurisdiction can also be exercised at the border (by way of example, the refusal by border officials to accept asylum applications and to admit the applicants into the territory of the State in *M.A. and Others v. Lithuania*, §§ 69-70; *M.K. and Others v. Poland*, §§ 126-132). The concept of "jurisdiction" must be considered to reflect the term's meaning in public international law under which the existence of a fence located some distance from the border does not authorise a State to unilaterally exclude, alter or limit its territorial jurisdiction, which begins at the line forming the border. The Court has acknowledged that States forming the external border of the Schengen area have experienced considerable difficulties in coping with the increasing influx of migrants and asylum-seekers but did not draw any inferences with regard to the jurisdiction of the States concerned (*N.D. and N.T. Spain* [GC], §§ 104-111 where the State invoked an exception to territorial jurisdiction in an illegal immigration context, §§ 107-108).

221. States may be held responsible for acts of their authorities performed, or producing effects, outside their own territory (*Drozd and Janousek v. France and Spain*, § 91; *Soering v. the United*

7. See the Guide on Article 1 of the Convention.

Kingdom, §§ 86 and 91; *Loizidou v. Turkey* (preliminary objections), § 62). However, this will occur only exceptionally (*Banković and Others v. Belgium and Others* (dec.) [GC], § 71; *Ilaşcu and Others v. Moldova and Russia* [GC], § 314), namely where a Contracting State is in effective control over an area or has at the very least a decisive influence over it (ibid., §§ 314-316 and 392; *Catan and Others v. the Republic of Moldova and Russia* [GC], §§ 106-107; *Al-Skeini v. the United Kingdom* [GC], §§ 138-140; *Medvedyev and Others v. France* [GC], §§ 63-64; *Georgia v. Russia (II)* [GC], §§ 161-175, concerning the occupation phase after the cessation of hostilities). For the concepts of "effective control" over an area and effective control through the armed forces of a State, see *Ilaşcu and Others v. Moldova and Russia* [GC], §§ 314-316; see also *Banković and Others v. Belgium and Others* [GC] (dec.), §§ 67 et seq. and 74-82; *Cyprus v. Turkey* [GC], §§ 75-81; *Loizidou v. Turkey* (merits), §§ 52-57; *Hassan v. the United Kingdom* [GC], § 75; *Ukraine v. Russia (re Crimea)* (dec.) [GC], §§ 315-335; *Georgia v. Russia (II)* [GC], §§ 126 and 165. For the concept of effective control exercised not directly but through a subordinate local administration that survives thanks to that State's support, see *Catan and Others v. the Republic of Moldova and Russia* [GC], §§ 116-122; *Chiragov and Others v. Armenia* [GC], §§ 169-186; *Georgia v. Russia (II)* [GC], §§ 166-174. For an example of effective control over an area in the context of a purported "annexation" of the territory of one Contracting State by another Contracting State, see *Ukraine v. Russia (re Crimea)* (dec.) [GC], §§ 338-349.

222. A State may be held accountable for violations of the Convention rights of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State (*Issa and Others v. Turkey*, § 71; *Sánchez Ramirez v. France*, Commission decision; *Öcalan v. Turkey* [GC], § 91; *Veronica Ciobanu v. the Republic of Moldova*, §§ 25-26; for military operations abroad, see *Al-Skeini v. the United Kingdom* [GC], § 149; *Hassan v. the United Kingdom* [GC], §§ 76-80; *Jaloud v. the Netherlands* [GC], §§ 140-152).

With regard to acts committed by troops of a Multinational Force authorised by the United Nations and attributability of those acts to the State's responsibility when the international organisation has no effective control nor ultimate authority over that conduct, see *Al-Jedda v. the United Kingdom* [GC], §§ 84-86. With regard to acts taking place in a United Nations buffer zone, see *Isaak and Others v. Turkey* (dec.). With regard to the active phase of hostilities (bombing and artillery shelling) in the context of an international armed conflict between two Contracting States, see *Georgia v. Russia (II)* [GC], §§ 125-144.

223. For territories which are legally within the jurisdiction of a Contracting State but not under the effective authority/control of that State, applications may be considered incompatible with the provisions of the Convention (*An and Others v. Cyprus*, Commission decision), but regard must be had to the State's positive obligations under the Convention (*Ilaşcu and Others v. Moldova and Russia* [GC], §§ 312-313 and 333 et seq.; see also *Stephens v. Cyprus, Turkey and the United Nations* (dec.); *Azemi v. Serbia* (dec.); *Ivanţoc and Others v. Moldova and Russia*, §§ 105-106; *Catan and Others v. the Republic of Moldova and Russia* [GC], §§ 109-10; *Mozer v. the Republic of Moldova and Russia* [GC], §§ 99-100). For disputed zones within the internationally recognised territory of a Contracting State in respect of which no other State has effective control, see *Sargsyan v. Azerbaijan* [GC], §§ 139-151. For a prison fully controlled by a Contracting State but whose electricity and water had been cut off by the municipal authority of a *de facto* entity beyond its control, see *Pocasovschi and Mihaila v. the Republic of Moldova and Russia*, §§ 43-46. A State was not allowed to claim an exception to the jurisdiction principles where it erected three fences on its territory to prevent unauthorised entry by non-nationals and argued that an individual fell within its jurisdiction only after passing all three fences: the Court held that the State nevertheless exercised effective authority over its territory at the border (*N.D. and N.T. Spain* [GC], §§ 104-111).

224. There are exceptions to the principle that an individual's physical presence in the territory of one of the Contracting Parties has the effect of placing that individual under the jurisdiction of the State concerned, for example where a State hosts the headquarters of an international organisation

against which the applicant's complaints are directed. The mere fact that an international criminal tribunal has its seat and premises in the Netherlands is not a sufficient ground for attributing to that State any alleged acts or omissions on the part of the international tribunal in connection with the applicant's conviction (*Galić v. the Netherlands* (dec.); *Blagojević v. the Netherlands* (dec.); *Djokaba Lambi Longa v. the Netherlands* (dec.)). For an application against the respondent State as the permanent seat of an international organisation, see *Lopez Cifuentes v. Spain* (dec.), §§ 25-26; *Klausecker v. Germany* (dec.), §§ 80-81. For the acceptance of an international civil administration in the respondent State's territory, see *Berić and Others v. Bosnia and Herzegovina* (dec.), § 30.

225. The mere participation of a State in proceedings brought against it in another State does not in itself amount to an exercise of extraterritorial jurisdiction (*McElhinney v. Ireland and the United Kingdom* (dec.) [GC]; *Treska v. Albania and Italy* (dec.); *Manoilescu and Dobrescu v. Romania and Russia* (dec.), §§ 99-111). However, once a person brings a civil action in the courts or tribunals of a State, there indisputably exists a "jurisdictional link" between that person and the State, in spite of the extraterritorial nature of the events alleged to have been at the origin of the action (*Markovic and Others v. Italy* [GC], §§ 49-55, concerning Article 6 of the Convention; see similarly *Arlewin v. Sweden*, §§ 65-74, concerning the jurisdiction of a Contracting State in respect of defamation proceedings brought in respect of a television programme broadcast from a foreign country; see, by contrast, *M. N. and Others v. Belgium* (dec.) [GC], §§ 121-125, with regard to proceedings brought in Belgium with a view to obtaining authorisation to enter that country to claim asylum and avoid treatment in breach of Article 3 of the Convention). Similarly, if investigative or judicial authorities of a Contracting State institute their own criminal investigation or proceedings concerning a death – even if that death occurred outside the jurisdiction of that State – the institution of that investigation or those proceedings is sufficient to establish a "jurisdictional link" for the purposes of Article 1 of the Convention between that State and the victim's relatives who later bring a complaint under the procedural limb of Article 2 before the Court (*Güzelyurtlu and Others v. Cyprus and Turkey* [GC], §§ 188-189 and 191; *Aliyeva and Aliyev v. Azerbaijan*, § 57; see, by contrast, *Hanan v. Germany* [GC], §§ 134-135, concerning deaths occurred in the context of an extraterritorial military operation outside the territory of the Contracting Parties to the Convention). In the absence of an investigation or proceedings in the Contracting State concerned, "special features"in a given case may trigger the existence of a "jurisdictional link" in relation to the procedural obligation under Article 2 to investigate a death occurred under a different jurisdiction or which did not necessarily fall within that State's jurisdiction (*Güzelyurtlu and Others v. Cyprus and Turkey* [GC], §§ 190 and 192-196, where the suspects of the murder had fled to the part of the Cypriot territory which was under the effective control of Turkey, therefore preventing Cyprus from pursuing its own criminal investigation in respect of those suspects; *Georgia v. Russia (II)* [GC], §§ 331-332, with regard to alleged war crimes committed during the active phase of the hostilities which the Russian Federation was obliged to investigate under international humanitarian law and domestic law; *Hanan v. Germany* [GC], §§ 136-142, where Germany retained exclusive jurisdiction over its troops with respect to serious crimes which it was obliged to investigate under international and domestic law). The Court has applied the "special features" approach and found a "jurisdictional link" also in relation to the procedural obligation to continue the enforcement of a prison sentence commenced in another Contracting State (*Makuchyan and Minasyan v. Azerbaijan and Hungary*, §§ 49-51, concerning a murder committed in Hungary by an Azerbaijani officer convicted and later transferred to his home country).

226. The Court has also laid down principles governing extraterritorial responsibility for arrest and detention executed in a third State in the context of an extradition procedure set in motion by the respondent State (*Stephens v. Malta (no. 1)*, § 52; *Vasiliciuc v. the Republic of Moldova*, §§ 22-25).

227. Other recognised instances of the extraterritorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad (*M. v. Denmark*, Commission decision; see, by contrast, *M. N. and Others v. Belgium* (dec.) [GC], §§ 106 and 117-119) and those

involving the activities on board aircraft and ships registered in, or flying the flag of, that State (*Hirsi Jamaa and Others v. Italy* [GC], §§ 70-75 and 79-81; *Medvedyev and Others v. France* [GC], § 65; *Bakanova v. Lithuania*, § 63).

3. Responsibility and imputability

228. Compatibility *ratione personae* with the Convention additionally requires the alleged violation to be imputable to a Contracting State (*Gentilhomme, Schaff-Benhadji and Zerouki v. France*, § 20; *M.A. and Others v. Lithuania*, § 70). However, recent cases have considered questions of imputability/responsibility/ attribution without explicitly referring to compatibility *ratione personae* (*Assanidze v. Georgia* [GC], §§ 144 et seq.; *Hussein v. Albania and 20 Other Contracting States* (dec.); *Isaak and Others v. Turkey* (dec.); *Stephens v. Malta (no. 1)*, § 45; *Jaloud v. the Netherlands* [GC], §§ 154-155). In *Georgia v. Russia (II)* [GC], § 162, the Court has noted that the question whether the facts complained of fall within the jurisdiction of the respondent State and whether they are attributable to that State and engage its responsibility are separate matters, the latter two having to be determined on an examination of the merits.

229. The liability of Contracting States for the acts of private persons, while traditionally considered under the heading of compatibility *ratione personae*, may also depend on the terms of the individual rights in the Convention and the extent of the positive obligations attached to those rights (see, for example, *Söderman v. Sweden* [GC], § 78; *Aksu v. Turkey* [GC], § 59; *Siliadin v. France*, §§ 77-81; *Beganović v. Croatia*, §§ 69-71). The State's responsibility may be engaged under the Convention as a result of its authorities' acquiescence or connivance in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction (*Ilaşcu and Others v. Moldova and Russia* [GC], § 318; see, by contrast, *Makuchyan and Minasyan v. Azerbaijan and Hungary,* §§ 111-120, concerning crimes committed abroad by an officer in its private capacity, without clear and unequivocal "acknowledgment" and "adoption" by the State) or even when those acts are performed by foreign officials on its territory (*El-Masri v. the former Yugoslav Republic of Macedonia* [GC], § 206; *Al Nashiri v. Poland*, § 452; *Nasr and Ghali v. Italy*, § 241; *Al Nashiri v. Romania*, §§ 594 and 600-602).

230. The responsibility of States for judicial decisions concerning disputes between private persons can be engaged on the basis of the existence of an interference with a Convention right (*Zhidov v. Russia*, §§ 71 and 95, concerning judicial orders to demolish unlawfully constructed buildings following requests by private companies operating gas and oil pipelines, where the Court considered that such orders amounted to an interference by the authorities with the applicants' right to the peaceful enjoyment of their possessions, dismissing therefore the Government's preliminary objection of incompatibility *ratione personae*).

4. Questions concerning the possible responsibility of States Parties to the Convention on account of acts or omissions linked to their membership of an international organisation

231. The Convention cannot be interpreted in a manner which would subject to the Court's scrutiny acts and omissions of Contracting Parties which are covered by United Nations Security Council Resolutions and occur prior to or in the course of United Nations missions to secure international peace and security. To do so would be to interfere with the fulfilment of a key United Nations mission (*Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], §§ 146-152; contrast with *Al-Jedda v. the United Kingdom* [GC], §§ 74-85, concerning acts of national troops within a multinational force over which the United Nations Security Council had no authority and control and which were attributable to the Contracting State). However, the Court adopts a different approach in respect of the national acts implementing the United Nations Security Council

Resolutions, which are not directly attributable to the United Nations and may therefore engage the State's responsibility (*Nada v. Switzerland* [GC], §§ 120-122; *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], §§ 93-96).

232. As regards decisions of international courts, the Court has by extension ruled that it had no jurisdiction *ratione personae* to deal with applications concerning actual proceedings before the International Criminal Tribunal for the former Yugoslavia, which was set up by virtue of a United Nations Security Council resolution (*Galić v. the Netherlands* (dec.); *Blagojević v. the Netherlands* (dec.)). For the dismissal of public officials by decision of the High Representative for Bosnia and Herzegovina, whose authority derives from United Nations Security Council resolutions, see *Berić and Others v. Bosnia and Herzegovina* (dec.), §§ 26 et seq.

233. An alleged violation of the Convention cannot be attributed to a Contracting State on account of a decision or measure emanating from a body of an international organisation of which that State is a member, where it has not been established or even alleged that the protection of fundamental rights generally afforded by the international organisation in question is not "equivalent" to that ensured by the Convention and where the State concerned was not directly or indirectly involved in carrying out the impugned act (*Gasparini v. Italy and Belgium* (dec.); *Klausecker v. Germany* (dec.), § 97).

234. Thus, the Court has held that it had no jurisdiction *ratione personae* to deal with complaints directed against individual decisions given by the competent body of an international organisation in the context of a labour dispute falling entirely within the internal legal order of such an organisation with a legal personality separate from that of its member States, where those States at no time intervened directly or indirectly in the dispute and no act or omission on their part engaged their responsibility under the Convention (individual labour dispute with Eurocontrol: *Boivin v. 34 member States of the Council of Europe* (dec.); disciplinary proceedings within the International Olive Council: *Lopez Cifuentes v. Spain* (dec.), §§ 28-29; disciplinary proceedings within the Council of Europe: *Beygo v. 46 member States of the Council of Europe* (dec.)). For alleged violations of the Convention resulting from the dismissal of a European Commission official and the procedures before the EU courts, see *Connolly v. 15 Member States of the European Union* (dec.); *Andreasen v. the United Kingdom and 26 other member States of the European Union* (dec.), §§ 71-72.

It is instructive to compare those findings with the Court's examination of allegations of a structural deficiency in an internal mechanism of an international organisation to which the States Parties concerned had transferred part of their sovereign powers, where it was argued that the organisation's protection of fundamental rights was not "equivalent" to that ensured by the Convention (*Gasparini v. Italy and Belgium* (dec.); *Klausecker v. Germany* (dec.), §§ 98-107).

235. The Court adopts a different approach to cases involving direct or indirect intervention in the dispute in issue by the respondent State, whose international responsibility is thus engaged: see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], § 153; *Michaud v. France*, §§ 102-104; *Nada v. Switzerland* [GC], §§ 120-122; *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], §§ 93-96; compare with *Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], § 151. See also the following examples:

- decision not to register the applicant as a voter on the basis of a treaty drawn up within the European Union (*Matthews v. the United Kingdom* [GC]);
- enforcement against the applicant of a French law implementing a European Union Directive (*Cantoni v. France*);
- denial of access to the German courts on account of jurisdictional immunities granted to international organisations (*Beer and Regan v. Germany* [GC]; *Waite and Kennedy v. Germany* [GC]; *Klausecker v. Germany* (dec.), § 45);

- impounding in the respondent State's territory by its authorities by order of a minister, in accordance with its legal obligations under European law (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC] - a European Union Regulation which was itself issued following a United Nations Security Council resolution - see §§ 153-54);
- request by a domestic court to the Court of Justice of the European Union to give a preliminary ruling (*Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (dec.));
- decision of the Swiss authorities to return the applicants to Italy under the Dublin II Regulation establishing the criteria and mechanisms for determining the member State responsible for examining an asylum application lodged in one of the member States by a third-country national, applicable to Switzerland by virtue of an association agreement with the EU (*Tarakhel v. Switzerland* [GC], §§ 88-91).

236. As regards the European Union, applications against individual member States concerning their application of EU law will not necessarily be inadmissible on this ground (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], § 137; *Matthews v. the United Kingdom* [GC], §§ 26-35).

237. As regards applications brought directly against institutions of the European Union, which is not a Party to the Convention, there is some older authority for declaring them inadmissible for incompatibility *ratione personae* (*Confédération française démocratique du travail v. the European Communities*, Commission decision; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], § 152 and the references cited therein; *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (dec.)).

This position has also been adopted for the European Patent Office (*Lenzing AG v. Germany*, Commission decision) and other international organisations, such as the United Nations (*Stephens v. Cyprus, Turkey and the United Nations* (dec.)).

238. As to whether a State's responsibility may be engaged on account of its Constitution, which is an annex to an international treaty, see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], § 30.

B. Incompatibility *ratione loci*[8]

1. Principles

239. Compatibility *ratione loci* requires the alleged violation of the Convention to have taken place within the jurisdiction of the respondent State or in territory effectively controlled by it (*Cyprus v. Turkey* [GC], §§ 75-81; *Drozd and Janousek v. France and Spain*, §§ 84-90).

240. Where applications are based on events in a territory outside the Contracting State and there is no link between those events and any authority within the jurisdiction of the Contracting State, they will be dismissed as incompatible *ratione loci* with the Convention.

241. Where complaints concern actions that have taken place outside the territory of a Contracting State, the Government may raise a preliminary objection that the application is incompatible *ratione loci* with the provisions of the Convention (*Loizidou v. Turkey* (preliminary objections), § 55; *Rantsev v. Cyprus and Russia*, § 203; *Mozer v. the Republic of Moldova and Russia* [GC], §§ 79 and 111; *Güzelyurtlu and Others v. Cyprus and Turkey*, §§ 170-174; *Hanan v. Germany* [GC], §§ 104-113). Such an objection will be examined under Article 1 of the Convention[9] (for the scope of the concept of "jurisdiction" under this Article, see for instance, *N.D. and N.T. Spain* [GC], §§ 102-103; *Banković and*

[8] See section Jurisdiction.
[9] See the Guide on Article 1 of the Convention.

Others v. Belgium and Others (dec.) [GC], § 75; *Güzelyurtlu and Others v. Cyprus and Turkey*, §§ 178-197; *Hanan v. Germany* [GC], §§ 132-142; see also point II.A.2 above). Even if the Government do not raise an objection, the Court can of its own motion examine the matter (*Vasiliciuc v. the Republic of Moldova*, § 22; *Stephens v. Malta* (no. 1), § 45).

242. Objections are sometimes raised by the respondent Government that an application is inadmissible as being incompatible *ratione loci* with the provisions of the Convention on the ground that, during the proceedings, the applicant was resident in another Contracting State but instituted proceedings in the respondent State because the regulations were more favourable. The Court will also examine such applications from the standpoint of Article 1 (*Haas v. Switzerland* (dec.)).

243. It is clear, however, that a State will be responsible for acts of its diplomatic and consular representatives abroad and that no issue of incompatibility *ratione loci* may arise in relation to diplomatic missions (*X. v. Germany*, Commission decision of 25 September 1965; *Al-Skeini v. the United Kingdom* [GC], § 134; *M. v. Denmark*, Commission decision, § 1 and the references cited therein; see, by contrast, *M. N. and Others v. Belgium* (dec.) [GC], §§ 106 and 117-119) or to acts carried out on board aircraft and vessels registered in, or flying the flag of, that State (*Banković and Others v. Belgium and Others* (dec.) [GC], § 73; *Hirsi Jamaa and Others v. Italy* [GC], §§ 77 and 81; *Bakanova v. Lithuania*, § 63).

244. Lastly, a finding of lack of jurisdiction *ratione loci* will not dispense the Court from examining whether the applicants come under the jurisdiction of one or more Contracting States for the purposes of Article 1 of the Convention (*Drozd and Janousek v. France and Spain*, § 90).

Therefore, objections that the applicants are not within the jurisdiction of a respondent State will more normally be raised as claims that the application is incompatible *ratione personae* with the Convention (see submissions of the respondent Governments in *Banković and Others v. Belgium and Others* (dec.) [GC], § 35; *Ilaşcu and Others v. Moldova and Russia* [GC], § 300; *Weber and Saravia v. Germany* (dec.)).

2. Specific cases

245. As regards applications concerning dependent territories, if the Contracting State has not made a declaration under Article 56 extending the application of the Convention to the territory in question, the application will be incompatible *ratione loci* (*Gillow v. the United Kingdom*, §§ 60-62; *Bui Van Thanh and Others v. the United Kingdom*, Commission decision; *Yonghong v. Portugal* (dec.); *Chagos Islanders v. the United Kingdom* (dec.), §§ 60-76). By extension, this also applies to the Protocols to the Convention (*Quark Fishing Limited v. the United Kingdom* (dec.)).

Where the Contracting State has made such a declaration under Article 56, no such incompatibility issue will arise (*Tyrer v. the United Kingdom*, § 23).

246. If the dependent territory becomes independent, the declaration automatically lapses. Subsequent applications against the metropolitan State will be declared incompatible *ratione personae* (*Church of X. v. the United Kingdom*, Commission decision).

247. When the dependent territory becomes part of the metropolitan territory of a Contracting State, the Convention automatically applies to the former dependent territory (*Hingitaq 53 and Others v. Denmark* (dec.)).

C. Incompatibility *ratione temporis*

1. General principles

248. In accordance with the general rules of international law (principle of non-retroactivity of treaties), the provisions of the Convention do not bind a Contracting Party in relation to any act or

fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention in respect of that Party (*Blečić* v. *Croatia* [GC], § 70; *Šilih v. Slovenia* [GC], § 140; *Varnava and Others v. Turkey* [GC], § 130).

249. Jurisdiction *ratione temporis* covers only the period after the ratification of the Convention or the Protocols thereto by the respondent State. However, the Convention imposes no specific obligation on Contracting States to provide redress for wrongs or damage caused prior to that date (*Kopecký v. Slovakia* [GC], § 38).

250. From the ratification date onwards, all the State's alleged acts and omissions must conform to the Convention or its Protocols, and subsequent facts fall within the Court's jurisdiction even where they are merely extensions of an already existing situation (*Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, § 43). The Court may, however, have regard to facts prior to ratification inasmuch as they could be considered to have created a situation extending beyond that date or may be relevant for the understanding of facts occurring after that date (*Hutten-Czapska v. Poland* [GC], §§ 147-153; *Kurić and Others v. Slovenia* [GC], §§ 240-241).

251. The Court is obliged to examine its competence *ratione temporis* of its own motion and at any stage of the proceedings, since this is a matter which goes to the Court's jurisdiction rather than a question of admissibility in the narrow sense of the term (*Blečić* v. *Croatia* [GC], § 67; *Petrović v. Serbia*, § 66; *Hoti v. Croatia*, § 84 – compare *Agrotexim and Others v. Greece*, § 58).

2. Application of these principles

a. Critical date in relation to the ratification of the Convention or acceptance of the jurisdiction of the Convention institutions

252. In principle, the critical date for the purposes of determining the Court's temporal jurisdiction is the date of the entry into force of the Convention and Protocols in respect of the Party concerned (for an example, see *Šilih v. Slovenia* [GC], § 164).

253. However, the 1950 Convention made the competence of the Commission to examine individual applications (Article 25) and the jurisdiction of the Court (Article 46) dependent on specific declarations by the Contracting States to that effect. These declarations could be subject to limitations, in particular temporal limitations. As regards the countries which drafted such declarations after the date of their ratification of the Convention, the Commission and the Court have accepted temporal limitations of their jurisdiction with respect to facts falling within the period between the entry into force of the Convention and the relevant declaration (*X. v. Italy*, Commission decision; *Stamoulakatos v. Greece (no. 1)*, § 32; see also *Chong and Others v. the United Kingdom* (dec.), §§ 84-90, where the Court clarified that the "critical date" was the date on which the United Kingdom had recognised the right of individual petition – 1966 – and not when the Convention had entered into force with respect to that State - 1953).

254. Where there is no such temporal limitation in the Government's declaration (see France's declaration of 2 October 1981), the Convention institutions have recognised the retrospective effect of the acceptance of their jurisdiction (*X. v. France*, Commission decision).

The temporal restrictions included in these declarations remain valid for the determination of the Court's jurisdiction to receive individual applications under the current Article 34 of the Convention by virtue of Article 6 of Protocol No. 11 (*Blečić* v. *Croatia* [GC], § 72). The Court, taking into account the previous system as a whole, has considered that it had jurisdiction as from the first declaration recognising the right of individual petition to the Commission, notwithstanding the lapse of time between the declaration and the recognition of the Court's jurisdiction (*Cankoçak v. Turkey*, § 26; *Yorgiyadis v. Turkey*, § 24; *Varnava and Others v. Turkey* [GC], § 133).

b. Instantaneous facts prior or subsequent to entry into force or declaration

255. The Court's temporal jurisdiction must be determined in relation to the facts constituting the alleged interference. To that end it is essential to identify, in each specific case, the exact time of the alleged interference. In doing so the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated (*Blečić v. Croatia* [GC], § 82; *Varnava and Others v. Turkey* [GC], § 131; Nešić v. Montenegro, §§ 36-38).

256. When applying this test to different judicial decisions prior and subsequent to the critical date, the Court has regard to the final judgment which was by itself capable of violating the applicant's rights (the Supreme Court's judgment terminating the applicant's tenancy in *Blečić v. Croatia* [GC], § 85; or the County Court's judgment in *Mrkić v. Croatia* (dec.)), despite the existence of subsequent remedies which only resulted in allowing the interference to subsist (the subsequent Constitutional Court decision upholding the Supreme Court's judgment in *Blečić v. Croatia* [GC], § 85; or both decisions by the Supreme Court and the Constitutional Court in *Mrkić v. Croatia* (dec.)).

The subsequent failure of remedies aimed at redressing that interference cannot bring it within the Court's temporal jurisdiction (*Blečić v. Croatia* [GC], §§ 77-79). The Court has reiterated that domestic courts are not compelled to apply the Convention retroactively to interferences that occurred before the critical date (*Varnava and Others v. Turkey* [GC], § 130).

257. Examples of cases include:

- interferences occurring prior to the critical date and final court decisions delivered after that date (*Meltex Ltd v. Armenia* (dec.));
- interferences occurring after the critical date (*Lepojić v. Serbia*, § 45; *Filipović v. Serbia*, § 33);
- use of evidence obtained as a result of ill-treatment occurring prior to the critical date in judicial decisions delivered after that date (*Harutyunyan v. Armenia*, § 50);
- action for the annulment of title to property instituted prior to the critical date but concluded afterwards (*Turgut and Others v. Turkey*, § 73);
- date of final annulment of title to property (*Fener Rum Patrikliği (Ecumenical Patriarchy) v. Turkey* (dec.)).

258. See also:

- conviction of the applicant in absentia by the Greek courts prior to Greece's declaration under Article 25, despite the ultimately unsuccessful appeals lodged against the conviction after that date (*Stamoulakatos v. Greece (no. 1)*, § 33);
- implicit decision of the Central Electoral Commission, prior to ratification, refusing the applicant's request to sign a petition without having a stamp affixed to his passport, whereas the proceedings instituted on that account were conducted after that date (*Kadiķis v. Latvia* (dec.));
- dismissal of the applicant from his job and civil action brought by him prior to ratification, followed by the Constitutional Court's decision after that date (*Jovanović v. Croatia* (dec.));
- ministerial order transferring the management of the applicants' company to a board appointed by the Minister for the Economy, thus depriving them of their right of access to a court, whereas the Supreme Court's judgment dismissing the applicants' appeal was given after the critical date (*Kefalas and Others v. Greece*, § 45);
- conviction of the applicant after the relevant declaration under Article 46 on account of statements made to journalists before that date (*Zana v. Turkey*, § 42);

- search of the applicant's company's premises and seizure of documents, although the subsequent proceedings took place after ratification (*Veeber v. Estonia (no. 1)*, § 55; see also *Kikots and Kikota v. Latvia* (dec.)).

259. However, if the applicant makes a separate complaint as to the compatibility of the subsequent proceedings with an Article of the Convention, the Court may declare that it has jurisdiction *ratione temporis* with regard to the remedies in question (cassation appeal to the Supreme Court against the first-instance court's order to terminate the production and distribution of a newspaper in *Kerimov v. Azerbaijan* (dec.); unlawful distribution of bank assets occurred prior to the critical date and tort claim lodged after that date in *Kotov v. Russia* [GC], §§ 68-69).

260. The test and criteria established in *Blečić* v. *Croatia* [GC] are of a general character; the special nature of certain rights, such as those laid down in Articles 2 and 3 of the Convention, must be taken into consideration when applying those criteria (*Šilih v. Slovenia* [GC], § 147).

3. Specific situations

a. Continuing violations

261. The Convention institutions have accepted the extension of their jurisdiction *ratione temporis* to situations involving a continuing violation which originated before the entry into force of the Convention but persists after that date (*De Becker v. Belgium*, Commission decision).

262. The Court has followed this approach in several cases concerning the right of property:

- continuing unlawful occupation by the navy of land belonging to the applicants, without compensation (*Papamichalopoulos and Others v. Greece*, § 40);
- denial of access to the applicant's property in Northern Cyprus (*Loizidou v. Turkey* (merits)), §§ 46-47);
- failure to pay final compensation for nationalised property (*Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, § 43);
- continued impossibility for the applicant to regain possession of her property and to receive an adequate level of rent for the lease of her house, stemming from laws which were in force before and after ratification of Protocol No. 1 by Poland (*Hutten-Czapska v. Poland* [GC], §§ 152-153);
- continued non-enforcement of a domestic decision in the applicant's favour against the State (*Krstić v. Serbia*, §§ 63-69).

263. Limits: The mere deprivation of an individual's home or property is in principle an "instantaneous act" and does not produce a continuing situation of "deprivation" in respect of the rights concerned (*Blečić* v. *Croatia* [GC], § 86 and the references cited therein). In the specific case of post-1945 deprivation of possessions under a former regime, see the references cited in *Preussische Treuhand GmbH & Co. KG a.A. v. Poland* (dec.), §§ 55-62.

264. The continuing nature of a violation can also be established in relation to any other Article of the Convention (for Article 2 and the death sentence imposed on the applicants before the critical date, see *Ilaşcu and Others v. Moldova and Russia* [GC], §§ 406-408; for Article 8 and the failure to regulate the residence of persons who had been "erased" from the Register of Permanent Residents before the critical date, see *Kurić and Others v. Slovenia* [GC], §§ 240-241; see also for Article 8 and the impossibility to regularise the residence status of the applicant, *Hoti v. Croatia*, § 84).

b. "Continuing" procedural obligation to investigate disappearances that occurred prior to the critical date

265. A disappearance is not an "instantaneous" act or event. On the contrary, the Court considers a disappearance a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred. Furthermore, the subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation to investigate will potentially persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation, even where death may, eventually, be presumed (*Varnava and Others v. Turkey* [GC], §§ 148-149). For an application of the *Varnava* case-law, see *Palić v. Bosnia and Herzegovina*, § 46.

c. Procedural obligation under Article 2 to investigate a death: proceedings relating to facts outside the Court's temporal jurisdiction

266. The Court makes a distinction between the obligation to investigate a suspicious death or homicide and the obligation to investigate a suspicious disappearance.

Thus, it considers that the positive obligation to carry out an effective investigation under Article 2 of the Convention constitutes a detachable obligation capable of binding the State even when the death took place before the critical date (*Šilih v. Slovenia* [GC], § 159 – the case concerns a death which occurred before the critical date, whereas the shortcomings or omissions in the conduct of the investigation occurred after that date). Its temporal jurisdiction to review compliance with such obligations is exercised within certain limits it has established, having regard to the principle of legal certainty (ibid., §§ 161-163). Firstly, only procedural acts and/or omissions occurring after the critical date can fall within the Court's temporal jurisdiction (ibid., § 162). Secondly, the Court emphasises that in order for the procedural obligations to come into effect there must be a genuine connection between the death and the entry into force of the Convention in respect of the respondent State. Thus, for such connection to be established, two criteria must be met: firstly, the lapse of time between the death and the entry into force of the Convention must have been reasonably short (not exceeding ten years) and, secondly, it must be established that a significant proportion of the procedural steps – including not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account – were or ought to have been carried out after the ratification of the Convention by the State concerned (*Janowiec and Others v. Russia* [GC], §§ 145-148; *Mocanu and Others v. Romania* [GC], §§ 205-206). For a subsequent application of the "genuine connection" test, see, for example, *Şandru and Others v. Romania*, § 57; *Çakir and Others v. Cyprus* (dec.); *Jelić v. Croatia*, §§ 55-58; *Melnichuk and Others v. Romania*, §§ 72-75; *Ranđelović and Others v. Montenegro*, §§ 92-94; *Chong and Others v. the United Kingdom* (dec.), §§ 84-90; *Jurica v. Croatia*, §§ 67-72 (application of the test to the procedural requirements under Article 8 in a case of medical negligence).

267. In *Tuna v. Turkey*, concerning a death as a result of torture, the Court for the first time applied the principles established in the *Šilih* judgment by examining the applicants' procedural complaints under Articles 2 and 3 taken together. The Court reiterated the principles regarding the "detachability" of procedural obligations, in particular the two criteria applicable in determining its jurisdiction *ratione temporis* where the facts concerning the substantive aspect of Articles 2 and 3 occurred, as in this case, outside the period covered by its jurisdiction, whereas the facts concerning the procedural aspect – that is, the subsequent procedure – occurred, at least in part, within that period.

For a subsequent application to procedural complaints under Article 3, see, for example, *Yatsenko v. Ukraine* and *Mocanu and Others v. Romania* [GC], §§ 207-211.

268. However, the Court would not rule out that in certain extraordinary circumstances, which do not satisfy the "genuine connection" standard, the connection might also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner (*Šilih v. Slovenia* [GC], § 163). This "Convention values" test, which operates as an exception to the general rule thus allowing a further extension of the Court's jurisdiction into the past, may be applied only if the triggering event has a larger dimension which amounts to a negation of the very foundations of the Convention (such as in cases of serious crimes under international law), but only to events which occurred after the adoption of the Convention, on 4 November 1950. Hence a Contracting Party cannot be held responsible under the Convention for not investigating even the most serious crimes under international law if they predated the Convention (*Janowiec and Others v. Russia* [GC], §§ 149-151, the case concerning the investigations into the massacres of Katyn in 1940, which accordingly fell outside the Court's jurisdiction *ratione temporis*; *Chong and Others v. the United Kingdom* (dec.), § 91, concerning the killing of twenty-four unarmed civilians by British soldiers in Malaya in 1948).

d. Consideration of prior facts

269. The Court takes the view that it may "have regard to the facts prior to ratification inasmuch as they could be considered to have created a situation extending beyond that date or may be relevant for the understanding of facts occurring after that date" (*Broniowski v. Poland* (dec.) [GC], § 74; *Hoti v. Croatia*, § 85).

e. Pending proceedings or detention

270. A special situation results from complaints concerning the length of judicial proceedings (Article 6 § 1 of the Convention) which were brought prior to ratification but continue after that date. Although its jurisdiction is limited to the period subsequent to the critical date, the Court has frequently taken into account the state of the proceedings by that date for guidance (for example, *Humen v. Poland* [GC], §§ 58-59; *Foti and Others v. Italy*, § 53).

The same applies to cases concerning pre-trial detention under Article 5 § 3 (*Klyakhin v. Russia*, §§ 58-59) or conditions of detention under Article 3 (*Kalashnikov v. Russia*, § 36).

271. As regards the fairness of proceedings, the Court may examine whether the deficiencies at the trial stage can be compensated for by procedural safeguards in an investigation conducted before the critical date (*Barberà, Messegué and Jabardo v. Spain*, §§ 61 and 84). In doing so the Strasbourg judges consider the proceedings as a whole (see also *Kerojärvi v. Finland*, § 41).

272. A procedural complaint under Article 5 § 5 cannot fall within the Court's temporal jurisdiction where the deprivation of liberty occurred before the Convention's entry into force (*Korizno v. Latvia* (dec.)).

f. Right to compensation for wrongful conviction

273. The Court has declared that it has jurisdiction to examine a complaint under Article 3 of Protocol No. 7 where a person was convicted prior to the critical date but the conviction was quashed after that date (*Matveyev v. Russia*, § 38).

g. Right not to be tried or punished twice

274. The Court has declared that it has temporal jurisdiction to examine a complaint under Article 4 of Protocol No. 7 where a person was tried or punished in a second set of proceedings after the critical date, even though the first set of proceedings was concluded prior to that date. The right not to be tried or punished twice cannot be excluded in respect of proceedings conducted before

ratification where the person concerned was convicted of the same offence after ratification of the Convention (*Marguš v. Croatia* [GC], §§ 93-98).

D. Incompatibility *ratione materiae*

275. The compatibility *ratione materiae* with the Convention of an application or complaint derives from the Court's substantive jurisdiction. Since the question of applicability is an issue of the Court's jurisdiction *ratione materiae*, as a general rule the relevant analysis should be carried out at the admissibility stage, unless there is a particular reason to join this question to the merits (see the principles set forth in *Denisov v. Ukraine* [GC], § 93 and, as an example, see *Studio Monitori and Others v. Georgia*, § 32).

276. For a complaint to be compatible *ratione materiae* with the Convention, the right relied on by the applicant must be protected by the Convention and the Protocols thereto that have come into force. For example, applications are inadmissible where they concern the right to be issued with a driving licence (*X. v. Germany*, Commission decision of 7 March 1977), the right to self-determination (*X. v. the Netherlands*, Commission decision), the right of foreign nationals to enter and reside in a Contracting State (*Peñafiel Salgado v. Spain* (dec.)) or an alleged universal individual right to the protection of a specific cultural heritage (*Ahunbay and Others v. Turkey* (dec.), §§ 21-26), since those rights do not, as such, feature among the rights and freedoms guaranteed by the Convention.

277. A "right to nationality" similar to that in Article 15 of the Universal Declaration of Human Rights, or a right to acquire or retain a particular nationality, is also not guaranteed (*Petropavlovskis v. Latvia*, §§ 73-74). Nevertheless, the Court has not excluded the possibility that an arbitrary denial of nationality might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual (*Slivenko and Others v. Latvia* (dec.) [GC], § 77; *Genovese v. Malta*, § 30). The same principles have to apply to the revocation of citizenship already obtained since this might lead to a similar – if not greater – interference with the individual's right to respect for family and private life (*Ramadan v. Malta*, §§ 84-85; *K2 v. the United Kingdom* (dec.), §§ 49-50; *Ghoumid and Others v. France*, §§ 41-44). Likewise, the Court has ruled that no right to renounce citizenship is guaranteed by the Convention or its Protocols; but it cannot exclude that an arbitrary refusal of a request to renounce citizenship might in certain very exceptional circumstances raise an issue under Article 8 of the Convention if such a refusal has an impact on the individual's private life (*Riener v. Bulgaria*, §§ 153-154).

278. Although the Court is not competent to examine alleged violations of rights protected by other international instruments, when defining the meaning of terms and notions in the text of the Convention it can and must take into account elements of international law other than the Convention (see, for example, *N.D. and N.T. v. Spain* [GC], §§ 172, 174-183 and the references cited therein; *Demir and Baykara v. Turkey* [GC], § 85; *Hassan v. the United Kingdom* [GC], §§ 99 et seq.; *Blokhin v. Russia* [GC], § 203).

279. According to *Blečić v. Croatia* [GC], § 67, any question affecting the Court's jurisdiction is determined by the Convention itself, in particular by Article 32 (*Slivenko and Others v. Latvia* (dec.) [GC], §§ 56 et seq.), and not by the parties' submissions in a particular case and the mere absence of a plea of incompatibility cannot extend that jurisdiction. As a result, the Court is obliged to examine whether it has jurisdiction *ratione materiae* at every stage of the proceedings, irrespective of whether or not the Government is estopped from raising such an objection (*Tănase v. Moldova* [GC], § 131). The Court can therefore address this issue of its own motion (*Studio Monitori and Others v. Georgia*, § 32).

280. Applications concerning a provision of the Convention in respect of which the respondent State has made a reservation are declared incompatible *ratione materiae* with the Convention (*Benavent*

Díaz v. Spain (dec), § 53; *Kozlova and Smirnova v. Latvia* (dec.)), provided that the issue falls within the scope of the reservation (*Göktan v. France*, § 51) and that the reservation is deemed valid by the Court for the purposes of Article 57 of the Convention (*Grande Stevens and Others v. Italy*, §§ 206 et seq.). For an interpretative declaration deemed invalid, see *Belilos v. Switzerland*. For a reservation in respect of prior international treaty obligations, see *Slivenko and Others v. Latvia* (dec.) [GC], §§ 60-61.

281. In addition, the Court has no jurisdiction *ratione materiae* to examine whether a Contracting Party has complied with the obligations imposed on it by one of the Court's judgments. Complaints of a failure either to execute the Court's judgment or to redress a violation already found by the Court fall outside its competence *ratione materiae* (*Bochan v. Ukraine (no. 2)* [GC], § 34 (citing *Egmez v. Cyprus* (dec.)) and 35). The Court cannot entertain complaints of this nature without encroaching on the powers of the Committee of Ministers of the Council of Europe, which supervises the execution of judgments by virtue of Article 46 § 2 of the Convention. However, the Committee of Ministers' role in this sphere does not mean that measures taken by a respondent State to remedy a violation found by the Court cannot raise a new issue undecided by the judgment and, as such, form the subject of a new application that may be dealt with by the Court (*Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], § 62). In other words, the Court may entertain a complaint that the reopening of proceedings at domestic level by way of implementation of one of its judgments gave rise to a new breach of the Convention (ibid.; *Lyons and Others v. the United Kingdom* (dec.)). The Court may be competent to examine a complaint about the refusal by a domestic court to reopen civil or criminal proceedings following an earlier finding of a violation of Article 6 by the Court, as long as the complaint relates to a "new issue" undecided by the first judgment, for instance the alleged unfairness of the subsequent proceedings before the domestic court at issue (*Bochan v. Ukraine (no. 2)* [GC], §§ 35-39, in a civil context, *Moreira Ferreira v. Portugal (no. 2)* [GC], §§ 52-58, in a criminal context). Similarly, the Court may have jurisdiction to examine the alleged lack of effectiveness of a fresh investigation following a previous judgment finding a violation of the procedural limb of Article 3 (*V.D. v. Croatia (no. 2)*, §§ 46-54.

282. It is to be noted that the vast majority of decisions declaring applications inadmissible on the ground of incompatibility *ratione materiae* pertain to the limits of the scope of the Articles of the Convention or its Protocols, in particular Article 2 of the Convention (right to life), Article 3 (prohibition of torture), Article 4 of the Convention (prohibition of slavery and forced labour), Article 5 of the Convention (right to liberty and security), Article 6 of the Convention (right to a fair hearing), Article 7 (no punishment without law), Article 8 (right to respect for private and family life; see for instance, *Denisov v. Ukraine* [GC], § 134), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression), Article 11 (freedom of assembly and association) and Article 1 of Protocol No. 1 (protection of property) and other Articles. The scope of application of these Articles is examined in the relevant Case-Law Guide (available on the Court's website: www.echr.coe.int – Case-law – Case-law analysis):

- Guide on Article 2 of the Convention;
- Guide on Article 4 of the Convention;
- Guide on Article 5 of the Convention;
- Guide on Article 6 (civil limb) of the Convention;
- Guide on Article 6 (criminal limb) of the Convention;
- Guide on Article 7 of the Convention;
- Guide on Article 8 of the Convention;
- Guide on Article 9 of the Convention;
- Guide on Article 10 of the Convention;
- Guide on Article 11 of the Convention;

- Guide on Article 13 of the Convention;
- Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention;
- Guide on Article 1 of Protocol No. 1;
- Guide on Article 2 of Protocol No. 1;
- Guide on Article 3 of Protocol No. 1;
- Guide on Article 4 of Protocol No. 4;
- Guide on Article 4 of Protocol No. 7.

III. Inadmissibility based on the merits

A. Manifestly ill-founded

Article 35 § 3 (a) of the Convention – Admissibility criteria

"3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is ... manifestly ill-founded ...;"

HUDOC keywords

Manifestly ill-founded (35-3-a)

1. General introduction

283. Even where an application is compatible with the Convention and all the formal admissibility conditions have been met, the Court may nevertheless declare it inadmissible for reasons relating to the examination on the merits. By far the most common reason is that the application is considered to be manifestly ill-founded. It is true that the use of the term "manifestly" in Article 35 § 3 (a) may cause confusion: if taken literally, it might be understood to mean that an application will only be declared inadmissible on this ground if it is immediately obvious to the average reader that it is far-fetched and lacks foundation. However, it is clear from the settled and abundant case-law of the Convention institutions (that is, the Court and, before 1 November 1998, the European Commission of Human Rights) that the expression is to be construed more broadly, in terms of the final outcome of the case. In fact, any application will be considered "manifestly ill-founded" if a preliminary examination of its substance does not disclose any appearance of a violation of the rights guaranteed by the Convention, with the result that it can be declared inadmissible at the outset without proceeding to a formal examination on the merits (which would normally result in a judgment).

284. The fact that the Court, in order to conclude that an application is manifestly ill-founded, sometimes needs to invite observations from the parties and enter into lengthy and detailed reasoning in its decision does nothing to alter the "manifestly" ill-founded nature of the application (*Mentzen v. Latvia* (dec.)).

285. The majority of manifestly ill-founded applications are declared inadmissible *de plano* by a single judge or a three-judge committee (Articles 27 and 28 of the Convention). However, some complaints of this type are examined by a Chamber or even - in exceptional cases - by the Grand Chamber (*Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], §§ 78-86, concerning Article 6 § 1; *Demopoulos and Others v. Turkey* (dec.) [GC], §§ 130-138, concerning Article 8; *Hanan v. Germany* [GC], § 152, concerning the alleged lack of independence of the investigation undertaken in Germany).

286. The term "manifestly ill-founded" may apply to the application as a whole or to a particular complaint within the broader context of a case. Hence, in some cases, part of the application may be rejected as being of a "fourth-instance" nature, whereas the remainder is declared admissible and may even result in a finding of a violation of the Convention. It is therefore more accurate to refer to "manifestly ill-founded complaints".

287. In order to understand the meaning and scope of the notion of "manifestly ill-founded", it is important to remember that one of the fundamental principles underpinning the whole Convention

system is the principle of subsidiarity. In the particular context of the European Court of Human Rights, this means that the task of securing respect for implementing and enforcing the rights enshrined in the Convention falls first to the authorities of the Contracting States rather than to the Court. Only where the domestic authorities fail in their obligations may the Court intervene (*Scordino v. Italy (no. 1)* [GC], § 140). It is therefore best for the facts of the case to be investigated and the issues examined in so far as possible at the domestic level, so that the domestic authorities, who by reason of their direct and continuous contact with the vital forces of their countries are best placed to do so, can act to put right any alleged breaches of the Convention (*Dubská and Krejzová v. the Czech Republic* [GC], § 175).

288. Manifestly ill-founded complaints can be divided into four categories: "fourth-instance" complaints, complaints where there has clearly or apparently been no violation, unsubstantiated complaints and, finally, confused or far-fetched complaints.

2. "Fourth instance"[10]

289. One particular category of complaints submitted to the Court comprises what are commonly referred to as "fourth-instance" complaints. This term - which does not feature in the text of the Convention and has become established through the case-law of the Convention institutions (*Kemmache v. France (no. 3)*, § 44) - is somewhat paradoxical, as it places the emphasis on what the Court is not: it is not a court of appeal or a court which can quash rulings given by the courts in the States Parties to the Convention or retry cases heard by them, nor can it re-examine cases in the same way as a Supreme Court. Fourth-instance applications therefore 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.

290. Despite its distinctive features, the Convention remains an international treaty which obeys the same rules as other inter-State treaties, in particular those laid down in the Vienna Convention on the Law of Treaties (*Demir and Baykara v. Turkey* [GC], § 65). The Court cannot therefore overstep the boundaries of the general powers which the Contracting States, of their sovereign will, have delegated to it. These limits are defined by Article 19 of the Convention, which provides:

> "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights ..."

291. Accordingly, the Court's powers are limited to verifying the Contracting States' compliance with the human rights engagements they undertook in acceding to the Convention (and the Protocols thereto). Furthermore, in the absence of powers to intervene directly in the legal systems of the Contracting States, the Court must respect the autonomy of those legal systems. That means that it is not its task 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], § 28; *De Tommaso v. Italy* [GC], § 170).

292. In the light of the above considerations, the Court may not, as a general rule, question the findings and conclusions of the domestic courts as regards:

- the establishment of the facts of the case;
- the interpretation and application of domestic law;
- the admissibility and assessment of evidence at the trial;

10. For more information, see the Case-Law Guides on the civil and criminal aspects of Article 6 of the Convention.

- the substantive fairness of the outcome of a civil dispute;
- the guilt or innocence of the accused in criminal proceedings.

293. The only circumstance in which the Court may, as an exception to this rule, question the findings and conclusions in question is where the latter are flagrantly and manifestly arbitrary, in a manner which flies in the face of justice and common sense and gives rise in itself to a violation of the Convention (*De Tommaso v. Italy* [GC], § 170; Kononov v. Latvia [GC], § 189).

294. Fourth-instance complaints may be lodged under any substantive provision of the Convention and irrespective of the legal sphere to which the proceedings belong at domestic level. The fourth-instance doctrine is applied, for instance, in the following cases:

- cases concerning detention (*Thimothawes v. Belgium*, § 71);
- civil cases (*García Ruiz v. Spain* [GC], § 28; *Hasan Tunç and Others v. Turkey*, §§ 54-56);
- criminal cases (*Perlala v. Greece*, § 25; *Khan v. the United Kingdom*, § 34);
- cases concerning *praeter delictum* preventive measures (*De Tommaso v. Italy* [GC], §§ 156-173);
- taxation cases (*Dukmedjian v. France*, §§ 71-75; *Segame SA v. France*, §§ 61-65);
- cases concerning social issues (*Marion v. France*, § 22; *Spycher v. Switzerland* (dec.), §§ 27-32);
- administrative cases (*Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], §§ 196-199);
- cases on State liability (*Schipani and Others v. Italy*, §§ 59-61);
- disciplinary cases (*Pentagiotis v. Greece* (dec.));
- cases concerning voting rights (*Ādamsons v. Latvia*, § 118);
- cases concerning the entry, residence and removal of non-nationals (*Sisojeva and Others v. Latvia* (striking out) [GC], § 89; *Ilias and Ahmed v. Hungary* [GC], §§ 147, 150);
- cases concerning assemblies (*Mushegh Saghatelyan v. Armenia*, § 241);
- cases concerning Article 1 of Protocol No. 1 (*Anheuser-Busch Inc. v. Portugal* [GC],§§ 83-86).

295. However, 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. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court (*Star Cate – Epilekta Gevmata and Others v. Greece* (dec.)).

296. Accordingly, a fourth-instance complaint under Article 6 § 1 of the Convention will be rejected by the Court on the grounds that the applicant had the benefit of adversarial proceedings; that he was able, at the various stages of those proceedings, to adduce the arguments and evidence he considered relevant to his case; that he had the opportunity of challenging effectively the arguments and evidence adduced by the opposing party; that all his arguments which, viewed objectively, were relevant to the resolution of the case were duly heard and examined by the courts; that the factual and legal reasons for the impugned decision were set out at length; and that, accordingly, the proceedings taken as a whole were fair (*García Ruiz v. Spain* [GC]; *De Tommaso v. Italy* [GC], § 172).

3. Clear or apparent absence of a violation

297. An applicant's complaint will also be declared manifestly ill-founded if, despite fulfilling all the formal conditions of admissibility, being compatible with the Convention and not constituting a

fourth-instance complaint, it does not disclose any appearance of a violation of the rights guaranteed by the Convention. In such cases, the Court's approach will consist in examining the merits of the complaint, concluding that there is no appearance of a violation and declaring the complaint inadmissible without having to proceed further. A distinction can be made between three types of complaint which call for such an approach.

a. No appearance of arbitrariness or unfairness

298. In accordance with the principle of subsidiarity, it is in the first place for the domestic authorities to ensure observance of the fundamental rights enshrined in the Convention. As a general rule, therefore, the establishment of the facts of the case and the interpretation of the domestic law are a matter solely for the domestic courts and other authorities, whose findings and conclusions in this regard are binding on the Court. However, the principle of the effectiveness of rights, inherent in the entire Convention system, means that the 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).

299. 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 following conditions (in the absence of evidence to the contrary):

- the proceedings were conducted before bodies empowered for that purpose by the provisions of domestic law;
- the proceedings were conducted in accordance with the procedural requirements of domestic law;
- the interested party had the opportunity of adducing his or her arguments and evidence, which were duly heard by the authority in question;
- the competent bodies examined and took into consideration all the factual and legal elements which, viewed objectively, were relevant to the fair resolution of the case;
- the proceedings resulted in a decision for which sufficient reasons were given.

b. No appearance of a lack of proportionality between the aims and the means

300. Where the Convention right relied on is not absolute and is subject to limitations which are either explicit (expressly enshrined in the Convention) or implicit (defined by the Court's case-law), the Court is frequently called upon to assess whether the interference complained of was proportionate.

301. Within the group of provisions which set forth explicitly the restrictions authorised, a particular sub-group of four Articles can be identified: Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association). All these Articles have the same structure: the first paragraph sets out the fundamental right in question, while the second paragraph defines the circumstances in which the State may restrict the exercise of that right. The wording of the second paragraph is not wholly identical in each case, but the structure is the same. For example, in relation to the right to respect for private and family life, Article 8 § 2 provides:

> "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 2 of Protocol No. 4 (freedom of movement) also belongs to this category, as its third paragraph follows the same model.

302. When the Court is called upon to examine interference by the public authorities with the exercise of one of the above-mentioned rights, it always analyses the issue in three stages. If there has indeed been "interference" by the State (and this is a separate issue which must be addressed first, as the answer is not always obvious), the Court seeks to answer three questions in turn:

- Was the interference in accordance with a "law" that was sufficiently accessible and foreseeable?
- If so, did it pursue at least one of the "legitimate aims" which are exhaustively enumerated (the list of which varies slightly depending on the Article)?
- If that is the case, was the interference "necessary in a democratic society" in order to achieve that aim? In other words, was there a relationship of proportionality between the aim and the restrictions in issue?

303. Only if the answer to each of these three questions is in the affirmative is the interference deemed to be compatible with the Convention. If this is not the case, a violation will be found. In examining the third question, the Court must take into account the State's margin of appreciation, the scope of which will vary considerably depending on the circumstances, the nature of the right protected and the nature of the interference (*Paradiso and Campanelli v. Italy* [GC], §§ 179-182; *Mouvement raëlien suisse v. Switzerland* [GC], §§ 59-61).

304. The same principle applies not just to the Articles mentioned above, but also to most other provisions of the Convention – and to implicit limitations not spelled out in the Article in question. For instance, the right of access to a court secured by Article 6 § 1 of the Convention is not absolute, but 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. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce 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 of the right of access to a court will not be compatible with Article 6 § 1 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 (*Cudak v. Lithuania* [GC], § 55; *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], § 129).

305. If, following a preliminary examination of the application, the Court is satisfied that the conditions referred to above have been met and that, in view of all the relevant circumstances of the case, there is no clear lack of proportion between the aims pursued by the State's interference and the means employed, it will declare the complaint in question inadmissible as being manifestly ill-founded. The reasons given for the inadmissibility decision in such a case will be identical or similar to those which the Court would adopt in a judgment on the merits concluding that there had been no violation (*Mentzen v. Latvia* (dec.)).

c. Other relatively straightforward substantive issues

306. In addition to the situations described above, the Court will declare a complaint manifestly ill-founded if it is satisfied that, for reasons pertaining to the merits, there is no appearance of a violation of the Convention provision relied on. There are two sets of circumstances in particular in which this occurs:

- where there is settled and abundant case-law of the Court in identical or similar cases, on the basis of which it can conclude that there has been no violation of the Convention in the case before it (*Galev and Others v. Bulgaria* (dec.));
- where, although there are no previous rulings dealing directly and specifically with the issue, the Court can conclude on the basis of the existing case-law that there is no appearance of a violation of the Convention (*Hartung v. France* (dec.)).

307. In either set of circumstances, the Court may be called upon to examine the facts of the case and all the other relevant factual elements at length and in detail (*Collins and Akaziebie v. Sweden* (dec.)).

4. Unsubstantiated complaints: lack of evidence

308. The proceedings before the Court are adversarial in nature. It is therefore for the parties – that is, the applicant and the respondent Government – to substantiate their factual arguments (by providing the Court with the necessary factual evidence) and also their legal arguments (explaining why, in their view, the Convention provision relied on has or has not been breached).

309. The relevant parts of Rule 47 of the Rules of Court, which governs the content of individual applications, provide as follows:

> "1. An application under Article 34 of the Convention shall be made on the application form provided by the Registry, unless the Court decides otherwise. It shall contain all of the information requested in the relevant parts of the application form and set out
>
> ...
>
> (d) a concise and legible statement of the facts;
>
> (e) a concise and legible statement of the alleged violation(s) of the Convention and the relevant arguments; and
>
> ...
>
> 2. (a) All of the information referred to in paragraph 1 (d) to (f) above that is set out in the relevant part of the application form should be sufficient to enable the Court to determine the nature and scope of the application without recourse to any other document.
>
> ...
>
> 3.1 The application form shall be signed by the applicant or the applicant's representative and shall be accompanied by
>
> (a) copies of documents relating to the decisions or measures complained of, judicial or otherwise;
>
> (b) copies of documents and decisions showing that the applicant has complied with the exhaustion of domestic remedies requirement and the time-limit contained in Article 35 § 1 of the Convention;
>
> ...
>
> 5.1 Failure to comply with the requirements set out in paragraphs 1 to 3 of this Rule will result in the application not being examined by the Court, unless
>
> (a) the applicant has provided an adequate explanation for the failure to comply;
>
> ...
>
> (c) the Court otherwise directs of its own motion or at the request of an applicant.
>
> ..."

310. In addition, under Rule 44C § 1 of the Rules of Court:

> "Where a party fails to adduce evidence or provide information requested by the Court or to divulge relevant information of its own motion or otherwise fails to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate."

311. Where the above-mentioned conditions are not met, the Court may declare the application inadmissible as being manifestly ill-founded. There are two sets of circumstances in particular where this may occur:

- where the applicant simply cites one or more provisions of the Convention without explaining in what way they have been breached, unless this is obvious from the facts of the case (*Trofimchuk v. Ukraine* (dec.); *Baillard v. France* (dec.));
- where the applicant omits or refuses to produce documentary evidence in support of his allegations (in particular, decisions of the courts or other domestic authorities), unless there are exceptional circumstances beyond his control which prevent him from doing so (for instance, if the prison authorities refuse to forward documents from a prisoner's case file to the Court) or unless the Court itself directs otherwise.

5. Confused or far-fetched complaints

312. The Court will reject as manifestly ill-founded complaints which are so confused that it is objectively impossible for it to make sense of the facts complained of by the applicant and the grievances he or she wishes to submit to the Court. The same applies to far-fetched complaints, that is, complaints concerning facts which are objectively impossible, have clearly been invented or are manifestly contrary to common sense. In such cases, the fact that there is no appearance of a violation of the Convention will be obvious to the average observer, even one without any legal training.

B. No significant disadvantage

Article 35 § 3 (b) of the Convention – Admissibility criteria

"3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

...

(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"

HUDOC keywords

No significant disadvantage (35-3-b) – Continued examination not justified (35-3-b) – Case duly considered by a domestic tribunal (35-3-b)

1. Background to the new criterion

313. A new admissibility criterion was added to the criteria laid down in Article 35 with the entry into force of Protocol No. 14 on 1 June 2010. In accordance with Article 20 of the Protocol, the new provision will apply to all applications pending before the Court, except those declared admissible. Accordingly, in *Vistiņš and Perepjolkins v. Latvia* [GC], § 66, the Government's preliminary objection raising no significant disadvantage was dismissed because the application was declared admissible in 2006, before the entry into force of Protocol No. 14.

The introduction of this criterion was considered necessary in view of the ever-increasing caseload of the Court. It provides the Court with an additional tool which should assist it in concentrating on cases which warrant an examination on the merits. In other words, it enables the Court to reject cases considered as "minor" pursuant to the principle whereby judges should not deal with such cases ("*de minimis non curat praetor*").

314. The "*de minimis*" notion, while not formally being part of the European Convention on Human Rights until 1 June 2010, nevertheless has been evoked in several dissenting opinions of members of

the Commission (see Commission reports in *Eyoum-Priso v. France*; *H.F. K-F v. Germany*; *Lechesne v. France*) and of judges of the Court (see, for example, *Dudgeon v. the United Kingdom*; *O'Halloran and Francis v. the United Kingdom* [GC]; *Micallef v. Malta* [GC]), and also by Governments in their observations to the Court (see, for example, *Koumoutsea and Others v. Greece* (dec.)).

315. Protocol No. 15 to the Convention, entered into force on 1 August 2021, amended Article 35 § 3 (b) of the Convention to delete the proviso that the case has been duly considered by a domestic tribunal. This amendment was intended to give greater effect to the maxim "*de minimis non curat praetor*" (see the Explanatory Report to Protocol No.15, § 23). It is applicable as of the date of the entry into force of the Protocol. This change applies also to applications on which the admissibility decision was pending at the date of entry into force of the Protocol.

2. Scope

316. Article 35 § 3 (b) is composed of two distinct elements. Firstly, the admissibility criterion itself: the Court may declare inadmissible any individual application where the applicant has suffered no significant disadvantage. Next comes the safeguard clause: the Court may not declare such an application inadmissible where respect for human rights requires an examination of the application on the merits. Where the two conditions of the inadmissibility criterion are satisfied, the Court declares the complaint inadmissible under Article 35 §§ 3 (b) and 4 of the Convention.

317. Before the entry into force of Protocol No. 15, no case could be rejected under this new criterion if it had not been duly considered by a domestic tribunal (see, for instance, *Varadinov v. Bulgaria*, § 25; compare and contrast *Çelik v. the Netherlands* (dec.)). Following the entry into force of Protocol No. 15 amending the Convention, this second safeguard clause has been removed.[11] For the first application of the new wording of Article 35 § 3 (b), see *Bartolo v. Malta* (dec.).

318. In *Shefer v. Russia* (dec.), the Court noted that while no formal hierarchy exists between the different elements of Article 35 § 3 (b), the question of "significant disadvantage" is at the core of the new criterion. In most of the cases, a hierarchical approach is therefore taken, where each element of the new criterion is dealt with in turn (*Kiril Zlatkov Nikolov v. France*; *C.P. v. the United Kingdom* (dec.); *Borg and Vella v. Malta* (dec.)). However, the Court has also in some cases considered it unnecessary to determine whether the first element of this admissibility criterion is in place (*Finger v. Bulgaria*; *Daniel Faulkner v. the United Kingdom*; *Turturica and Casian v. the Republic of Moldova and Russia*; *Varadinov v. Bulgaria*, § 25).

319. The Court alone is competent to interpret this admissibility requirement and decide on its application. During the first two years following entry into force, application of the criterion was reserved to Chambers and the Grand Chamber (Article 20 § 2 of Protocol No. 14). From 1 June 2012 the criterion has been used by all of the Court's judicial formations.

320. The Court may raise the new admissibility criterion of its own motion (for example in the cases of *Vasyanovich v. Russia* (dec.); *Ionescu v. Romania* (dec.); *Magomedov and others v. Russia*, § 49) or in response to an objection raised by the Government (*Gaglione and Others v. Italy*). In some cases, the Court looks at the new criterion before the other admissibility requirements (*Korolev v. Russia* (dec.); *Rinck v. France* (dec.); *Gaftoniuc v. Romania* (dec.); *Burov v. Moldova* (dec.); *Shefer v. Russia* (dec.). In other cases, it moves on to addressing the new criterion only after having excluded others (*Ionescu v. Romania* (dec.); *Holub v. the Czech Republic* (dec.)).

11. Article 5 of Protocol No. 15: "In Article 35, paragraph 3, sub-paragraph b, of the Convention, the words "and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal" shall be deleted."

321. The application of the no significant disadvantage criterion is not limited to any particular right protected under the Convention. However, the Court has found it difficult to envisage a situation in which a complaint under Article 3, which would not be inadmissible on any other grounds and which would fall within the scope of Article 3 (which means that the minimum level of severity test would be fulfilled), might be declared inadmissible because the applicant has not suffered significant disadvantage (*Y v. Latvia*, § 44). Similarly, the Court has rejected the application of the the new criterion in relation to an Article 2 complaint, stressing that the right to life is one of the most fundamental provisions of the Convention (*Makuchyan and Minasyan v. Azerbaijan and Hungary*, §§ 72-73). In relation to complaints under Article 5, the Court has so far rejected the application of the "no significant disadvantage" admissibility criterion in the light of the prominent place that the right to liberty has in a democratic society (*Zelčs v. Latvia*, § 44 and the references cited therein). The Court has also stated that in cases concerning freedom of thought, conscience and religion (Article 9) or freedom of expression (Article 10), the application of the no significant disadvantage criterion should take due account of the importance of these freedoms and be subject to careful scrutiny by the Court (for Article 9, see *Stavropoulos and Others v. Greece*, §§ 29-30). In the context of Article 10, such scrutiny should encompass elements such as the contribution made to a debate of general interest and whether the case involves the press or other news media (*Margulev v. Russia*, §§ 41-42; *Sylka v. Poland* (dec.), § 28; *Panioglu v. Romania,* §§ 72-76). As regards cases concerning freedom of assembly and freedom of association (Article 11), the Court should take due account of the importance of these freedoms for a democratic society and carry out a careful scrutiny (*Obote v. Russia*, § 31; *Yordanovi v. Bulgaria,* §§ 49-52).

3. Whether the applicant has suffered a significant disadvantage

322. The main element contained in the criterion is the question of whether the applicant has suffered a "significant disadvantage". "Significant disadvantage" hinges on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. Violations which are purely technical and insignificant outside a formalistic framework do not merit European supervision (*Shefer v. Russia* (dec.)). The assessment of this minimum level is relative and depends on all the circumstances of the case. The severity of a violation should be assessed by taking into account both the applicant's subjective perception and what is objectively at stake in a particular case (*Korolev v. Russia* (dec.)).

However, the applicant's subjective perception cannot alone suffice to conclude that he or she suffered a significant disadvantage. The subjective perception must be justified on objective grounds (*Ladygin v. Russia* (dec.)). A violation of the Convention may concern important questions of principle and thus cause a significant disadvantage regardless of pecuniary interest (*Korolev v. Russia* (dec.); *Biržietis v. Lithuania*; *Karelin v. Russia*). In *Giuran v. Romania*, §§ 17-25, the Court found that the applicant had suffered a significant disadvantage because the proceedings concerned a question of principle for him, namely his right to respect for his possessions and for his home. This was despite the fact that the domestic proceedings which were the subject of the complaint were aimed at the recovery of stolen goods worth 350 euros (EUR) from the applicant's own apartment. Similarly, in *Konstantin Stefanov v. Bulgaria*, §§ 46-47, the Court took into account the fact that the fine concerned a question of principle for the applicant, namely the respect for his position as a lawyer in the exercise of his professional activities.

323. Moreover, in evaluating the subjective significance of the issue for the applicant, the Court can take into account the applicant's conduct, for example in being inactive in court proceedings during a certain period which demonstrated that in this case the proceedings could not have been significant to her (*Shefer v. Russia* (dec.)). In *Giusti v. Italy*, §§ 22-36, the Court introduced certain new elements to take into account when determining the minimum threshold of seriousness to justify examination by an international court, namely the nature of the right allegedly violated, the seriousness of the claimed violation and/or the potential consequences of the violation on the

personal situation of the applicant. In evaluating these consequences, the Court will examine, in particular, what is at stake or the outcome of the national proceedings.

a. Lack of significant financial disadvantage

324. In a number of cases, the level of severity attained is assessed in light of the financial impact of the matter in dispute and the importance of the case for the applicant. The financial impact is not assessed merely in light of the non-pecuniary damages claimed by the applicant. In *Kiousi v. Greece* (dec.), the Court held that the amount of non-pecuniary damages sought, namely EUR 1,000, was not relevant for calculating what was really at issue for the applicant. This was because non-pecuniary damages are often calculated by applicants themselves on the basis of their own speculation as to the value of the litigation.

325. As far as insignificant financial impact is concerned, the Court has thus far found a lack of "significant disadvantage" in the following cases where the amount in question was equal or inferior to roughly EUR 500:

- in a case concerning proceedings in which the amount in dispute was EUR 90 (*Ionescu v. Romania* (dec.));
- in a case concerning a failure by the authorities to pay to the applicant a sum equivalent to less than one euro (*Korolev v. Russia* (dec.));
- in a case concerning a failure by the authorities to pay to the applicant a sum roughly equal to EUR 12 (*Vasilchenko v. Russia*, § 49);
- in a case concerning a traffic fine of EUR 150 and the endorsement of the applicant's driving licence with one penalty point (*Rinck v. France* (dec.));
- delayed payment of EUR 25 (*Gaftoniuc v. Romania* (dec.));
- failure to reimburse EUR 125 (*Ştefănescu v. Romania* (dec.));
- failure by the State authorities to pay the applicant EUR 12 (*Fedotov v. Moldova* (dec.));
- failure by the State authorities to pay the applicant EUR 107 plus costs and expenses of 121, totalling EUR 228 (*Burov v. Moldova* (dec.));
- in a case concerning a fine of EUR 135, EUR 22 of costs and one penalty point on the applicant's driving licence (*Fernandez v. France* (dec.));
- in a case where the Court noted that the amount of pecuniary damages at issue was EUR 504 (*Kiousi v. Greece* (dec.));
- in a case where the initial claim of EUR 99 made by the applicant against his lawyer was considered in addition to the fact that he was awarded the equivalent of EUR 1,515 for the length of the proceedings on the merits (*Havelka v. the Czech Republic* (dec.));
- in the case of salary arrears of a sum equivalent to approximately EUR 200 (*Guruyan v. Armenia* (dec.));
- in a case concerning EUR 227 in expenses (*Šumbera v. the Czech Republic* (dec.));
- in the case concerning enforcement of a judgment for EUR 34 (*Shefer v. Russia* (dec.));
- in a case concerning non-pecuniary damages of EUR 445 for cutting off an electricity supply (*Bazelyuk v. Ukraine* (dec.));
- in a case concerning administrative fines of EUR 50 (*Boelens and Others. v. Belgium* (dec.);
- where claims related to remuneration of between EUR 98 and 137, plus default interest (*Hudecová and Others v. Slovakia* (dec.));
- failure to enforce decisions of relatively small awards, between EUR 29 and 62 (*Shtefan and Others v. Ukraine*; *Shchukin and Others v. Ukraine*);

- in a case concerning administrative fines of EUR 35 and 31 (Şimşek, Andiç and Boğatekin v. Turkey (dec.), §§ 26-29).

326. In *Havelka v. the Czech Republic* (dec.), the Court took into consideration the fact that while the award of EUR 1,515 could not strictly speaking be considered to provide adequate and sufficient redress under the Court's case-law, the sum did not differ from the appropriate just satisfaction to such an extent as to cause the applicant a significant disadvantage.

327. In *Magomedov and others v. Russia*, the applicants had been awarded increases in various allowances and additional benefits in their capacity as participants in the emergency operations on the site of the Chernobyl nuclear power plant. As the national authorities had not appealed within the statutory deadlines, the judgments became final. However, the authorities were granted leave to lodge a late appeal and the judgments were later quashed. The applicants complained under Article 6 and Article 1 of Protocol 1. For some of the applicants, the first instance decision had been annulled before it could be executed. The Court rejected the Government's claim that these applicants had not suffered a significant disadvantage (§§ 47-48). However, applications from those that had received payments under the initial judgment were considered inadmissible under this criterion. The Court noted that these applicants were not required to reimburse the money they had received; that the Convention does not gurantee a right to a pension or social benefit of a particular amount; that the sums in question did not constitute the applicants' main source of income; that their right to allowances and benefits was not itself called into question since only the method of calculating the amounts owed had been corrected; and that the delay caused by the Government's late appeal had been beneficial to the applicants since they had continued to receive benefits calculated according to the original judgments in the intervening period (§§ 50-52).

328. Finally, the Court is conscious that the impact of a pecuniary loss must not be measured in abstract terms; even modest pecuniary damage may be significant in the light of the person's specific condition and the economic situation of the country or region in which he or she lives. Thus, the Court looks at the effect of the financial loss taking into account the individual's situation. In *Fernandez v. France* (dec.), the fact that the applicant was a judge at the administrative appeal court in Marseille was relevant for the court finding that the fine of EUR 135 was not a significant amount for her.

b. Significant financial disadvantage

329. Conversely, where the Court considers that the applicant has suffered significant financial disadvantage, then the criterion may be rejected. This has been so in the following examples of cases:

- in a case where delays were found of between nine and forty-nine months in enforcing judgments awarding compensation for length of proceedings where the sums involved ranged from EUR 200 to 13,749.99 (*Gaglione and Others v. Italy*);
- in a case concerning delays in the payment of compensation for expropriated property and amounts running to tens of thousands of euros (*Sancho Cruz and other "Agrarian Reform" cases v. Portugal*, §§ 32-35);
- in a case concerning disputed employment rights with the claim being approximately EUR 1,800 (*Živić v. Serbia*);
- in a case concerning length of civil proceedings of fifteen years and five months and the absence of any remedy with the claim being "an important amount" (*Giusti v. Italy*, §§ 22-36);
- in a case concerning length of civil proceedings where the sum in question concerned disability allowances which were not insignificant (*De Ieso v. Italy*);

- in a case where the applicant was required to pay court fees which exceeded, by 20 per cent, her monthly income (*Piętka v. Poland*, §§ 33-41);
- in a case where the applicants were obliged to pay a recurrent standing charge, although the highest single monthly instalment payable by them did not exceed 30 euros, as the overall amount could not be said to have been insignificant in the overall context in which the payment requirement operated and in the light of the standard of living in the respondent State (*Strezovski and Others v. North Macedonia*, §§ 47-49).

c. Lack of significant non-financial disadvantage

330. However, the Court is not exclusively concerned with cases of insignificant financial sums, when applying the no significant disadvantage criterion. The actual outcome of a case at national level might have repercussions other than financial ones. In *Holub v. the Czech Republic* (dec.), *Bratři Zátkové, A.S., v. the Czech Republic* (dec.)), *Matoušek v. the Czech Republic* (dec.), *Čavajda v. the Czech Republic* (dec.) and *Hanzl and Špadrna v. the Czech Republic* (dec.)), the Court based its decisions on the fact that the non-communicated observations of the other parties had not contained anything new or relevant to the case and the decision of the Constitutional Court in each case had not been based on them. In *Liga Portuguesa de Futebol Profissional v. Portugal* (dec.), the Court followed the same reasoning as that set out in *Holub v. the Czech Republic* (dec.). The prejudice in question was the fact that the applicant had not been sent the prosecutor's opinion, and not the sum of 19 million euros which the company could have been forced to pay. The Court found that the applicant company had not been prejudiced by the non-communication of the opinion in question.

331. Similarly, in *Jančev v. the former Yugoslav Republic of Macedonia* (dec.), the complaint concerned the non-pronouncement in public of a first-instance court decision. The Court concluded that the applicant had not suffered any significant disadvantage since he was not the aggrieved party. The Court also took into account that the obligation to demolish the wall and remove the bricks, which was a result of the applicant's unlawful behaviour, did not impose a significant financial burden on him. Another case in which no financial sum was directly invoked by the applicant was *Savu v. Romania* (dec.). In that case, the applicant complained of the non-enforcement of certain judgments in his favour, including the obligation to issue a certificate.

332. In *Gagliano Giorgi v. Italy*, the Court for the first time dealt with a complaint concerning the length of *criminal* proceedings. Looking at the fact that the applicant's sentence was reduced as a result of the length of the proceedings, the Court concluded that this reduction compensated the applicant or particularly reduced any prejudice which he would encounter as a result of the lengthy proceedings. Accordingly, the Court held that he had not suffered any significant disadvantage. In *Galović v. Croatia* (dec.), the Court found that the applicant had actually benefited from the excessive length of *civil* proceedings because she remained in her property for another six years and two months. Two further Dutch cases have also dealt with the length of criminal proceedings and the lack of an effective remedy, namely *Çelik v. the Netherlands* (dec.) and *Van der Putten v. the Netherlands* (dec.). The applicants' complaints concerned solely the length of the proceedings before the Supreme Court as a consequence of the time taken by the Court of Appeal to complete the case file. However, in both, the applicants lodged an appeal on points of law to the Supreme Court without submitting any ground of appeal. Finding that no complaint was made about the judgment of the Court of Appeal or about any aspect of the prior criminal proceedings, the Court considered in both cases that the applicants suffered no significant disadvantage.

333. In *Kiril Zlatkov Nikolov v. France*, the Court found that there was no indication of any significant impact on the exercise of the applicant's right not to be discriminated against and his right to a fair trial in the context of the criminal proceedings against him, or even, more broadly, on his personal

situation. Thus, the Court concluded that in any event, the discrimination alleged by the applicant in the enjoyment of his right to a fair trial did not cause him a "significant disadvantage".

334. In *Zwinkels v. the Netherlands* (dec.), the only interference with the right to respect to home under Article 8 concerned the unauthorised entry of labour inspectors into a garage, and accordingly the Court dismissed such a complaint as having "no more than a minimal impact" on the applicant's right to home or private life. Similarly, in *Borg and Vella v. Malta* (dec.), § 41, the fact that the applicants' relatively small piece of land had been expropriated for a period of time did not appear to have had any particular consequence on them.

335. In *C.P. v. the United Kingdom* (dec.) the applicant claimed that his temporary exclusion from school for three months had breached his right to education. The Court stated that "in most instances a three-month exclusion from school will constitute a "significant disadvantage" for a child". However, in the present case there were several factors diminishing the significance of any enduring "disadvantage" suffered by the applicant. Any prejudice sustained by the applicant regarding his right to education in substantive terms was thus speculative.

336. In *Vasyanovich v. Russia* (dec.) the Court concluded that the most substantial element of the applicant's claim had been his inability to redeem beer tokens and that this claim had been successful. The remainder of the applicant's claim, and the appeal, related to bets which he had lost and a claim for non-pecuniary damage, were largely speculative. In Grozdanić and Gršković-Grozdanić v. Croatia, §§ 127-132, the Court noted that the access-to-court complaint submitted by the applicant under Article 6 § 1 of the Convention concerned the refusal to hear an appeal on points of law that lacked any prospect of success (on the merits), and therefore concluded that the applicant had not suffered a significant disadvantage.

337. The first time the Court applied the no significant disadvantage criterion in a freedom of expression case was in *Sylka v. Poland* (dec.), § 35. The case concerned an unfortunate verbal confrontation between the applicant and a police officer, with no wider implications or public interest undertones which might raise real concerns under Article 10 (contrary to *Eon v. France*).

d. Significant non-financial disadvantage

338. Turning to the cases where the Court has rejected the new criterion, in *3A.CZ s.r.o. v. the Czech Republic*, § 34, the Court found that the non-communicated observations could have contained some new information of which the applicant company was not aware. Distinguishing the *Holub v. the Czech Republic* (dec.) line of cases, the Court could not conclude that the company had not suffered a significant disadvantage. The same reasoning was used in *BENet Praha, spol. s r.o., v. the Czech Republic*, § 135; and *Joos v. Switzerland*, § 20.

339. In *Luchaninova v. Ukraine*, §§ 46-50, the Court observed that the outcome of the proceedings, which the applicant claimed had been unlawful and conducted in an unfair manner, had a particularly negative effect on her professional life. In particular, the applicant's conviction was taken as a basis for her dismissal from work. Therefore, the applicant had suffered a significant disadvantage. In *Diacenco v. Romania*, § 46, the question of principle for the applicant was his right to be presumed innocent under Article 6 § 2.

340. Another Article 6 example is *Selmani and Others v. the former Yugoslav Republic of Macedonia*, §§ 28-30 and 40-41, which concerned the lack of an oral hearing in the proceedings before the Constitutional Court. The Government argued that an oral hearing would not have contributed to the establishment of new or different facts and that the relevant facts regarding the applicants' removal from the Parliament gallery had been undisputed between the parties and could have been established on the basis of written evidence submitted in support of the applicants' constitutional complaint. The Court considered that the Government's objection was at the very heart of the complaint, for which reason it examined it at the merits stage. The Court noted that the applicants'

case was examined only before the Constitutional Court, which acted as a court of first and only instance. It also found that, although the applicants' removal from the Parliament gallery, as such, was not disputed between the parties, the Constitutional Court's decision was based on facts which the applicants contested and which were relevant for the outcome of the case. Those issues were neither technical nor purely legal. The applicants were therefore entitled to an oral hearing before the Constitutional Court. Thus, the Court dismissed the Government's objection.

341. In *Schmidt v. Latvia*, §§ 72-75, the applicant had separated from her husband, with whom she had been living in Latvia, and moved to the couple's former residence in Germany. Unbeknown to the applicant, her husband had subsequently brought divorce proceedings in Latvia. He had informed the divorce court that he did not know her current address. After an initial failed attempt to serve the divorce papers on the applicant at the couple's Latvian address, the divorce court had published two notifications in the Latvian Official Gazette. Unaware of the proceedings, the applicant had not attended the hearing and the divorce had been pronounced in her absence. She had learned that her marriage had been dissolved and that her husband had remarried only when she came to what she thought was her husband's funeral. The applicant complained that the divorce proceedings breached Article 6. The Court held that there were no grounds for concluding that the applicant had suffered no significant disadvantage, noting, *inter alia,* that the importance of the case for the applicant and its effects on her private and family life could not be underestimated.

342. The Court has on several occasions stated the importance of personal liberty in a democratic society and has not yet applied the no significant disadvantage criterion to an Article 5 case. In *Čamans and Timofejeva v. Latvia*, §§ 80-81, the Government submitted that the alleged restrictions on the applicants' rights not to be deprived of their liberty had lasted for only a few hours. The Court concluded that the applicants had suffered a disadvantage which could not be considered as insignificant. Another example of the importance of personal liberty, in connection to Article 6, is *Hebat Aslan and Firas Aslan v. Turkey*. In that case the subject matter and outcome of the appeals had been of crucial importance for the applicants, as they sought a court decision on the lawfulness of their detention and in particular the termination of that detention if it were to be found unlawful. In view of the importance of the right to liberty in a democratic society, the Court could not conclude that the applicants had not suffered a "significant disadvantage" in the exercise of their right to participate appropriately in the proceedings concerning the examination of their appeals.

343. In *Van Velden v. the Netherlands*, §§ 33-39, the applicant complained under Article 5 § 4 of the Convention. The Government argued that the applicant had not suffered any significant disadvantage since the entire period of pre-trial detention had been deducted from his prison sentence. However, the Court found that it was a feature of the criminal procedure of many contracting Parties to set periods of detention prior to final conviction and sentencing off against the eventual sentence; for the Court to hold generally that any harm resulting from pre-trial detention was thereby *ipso facto* nugatory for Convention purposes would remove a large proportion of potential complaints under Article 5 from the scope of its scrutiny. The Government's objection under the no significant disadvantage criterion was therefore rejected. Another Article 5 case in which the Government's objection under the present criterion was rejected was *Bannikov v. Latvia*, §§ 54-60. In that case, the period of pre-trial detention was one year, eleven months and eighteen days.

344. In interesting cases involving complaints under Articles 8, 9, 10 and 11, the Government's objections on the basis of no significant disadvantage were also rejected. In *Biržietis v. Lithuania*, §§ 34-37, internal regulations of the prison prohibited the applicant from growing a beard and he contended that the prohibition had caused him mental suffering. The Court considered that the case raised issues concerning restrictions on prisoners' personal choices as to their desired appearance, which was arguably an important matter of principle. In *Brazzi v. Italy*, §§ 24-29, a case concerning a house search devoid of any financial implications, the Court took into account the subjective importance of the matter for the applicant (his right to the peaceful enjoyment of his possessions

and his home) as well as what was objectively at stake, namely the existence under domestic law of effective judicial supervision in respect of a search. In *Cordella and Others v. Italy*, §§ 135-139, a case concerning the alleged lack of reaction by the State to air pollution by a steelworks, to the detriment of the surrounding population's health, the Court took into account the nature of the complaints brought by the applicants (under Article 8) and the existence of scientific studies showing the polluting effects of the emissions from the steelworks on the environment and on the health of the persons living in the affected areas. In *Vartic v. Romania (no. 2)*, §§ 37-41, the applicant complained that by refusing to provide him with the vegetarian diet required by his Buddhist convictions, the prison authorities had infringed his right to manifest his religion under Article 9. The Court concluded that the subject matter of the complaint gave rise to an important matter of principle (see also *Stavropoulos and Others v. Greece*, §§ 29-30, concerning a birth certificate revealing the parents' choice not to christen their child in relation to the right not to manifest their beliefs). In *Eon v. France*, § 34, the complaint under Article 10, turned on whether insulting the head of State should remain a criminal offence. Rejecting the Government's objection, the Court concluded that the issue was subjectively important to the applicant and objectively a matter of public interest. Another Article 10 case, *Jankovskis v. Lithuania*, §§ 59-63, concerned a prisoner's right to receive information. The applicant was denied access to a website containing information about learning and study programmes. Such information was directly relevant to the applicant's interest in obtaining education, which was in turn of relevance for his rehabilitation and subsequent reintegration into society. Having regard to the consequences of that interference for the applicant, the Court dismissed the Government's objection that the applicant had not suffered significant disadvantage. In Panioglu v. Romania, §§ 75-76, the Court also dismissed the Government's objection and considered that the alleged violation of Article 10 (code-of-conduct proceedings against a judge for publishing allegations calling into question the moral and professional integrity of the President of the Court of Cassation) concerned "important questions of principle", having regard to the applicant's subjective perception that it had affected her prospects of career advancement and had penalised her for participating in a debate of general interest on the reform and the functioning of the justice system. In *Berladir and Others v. Russia*, § 34, the Court did not find it appropriate to dismiss the complaints under Articles 10 and 11 with reference to Article 35 § 3 (b) of the Convention, given that they arguably concerned a matter of principle. In *Akarsubaşı and Alçiçek v. Turkey*, §§ 16-20, the applicants, who were members of a trade union, had been fined for attaching a banner stating "Workplace on Strike" to a fence in front of a secondary school on a day of national mobilisation. They complained under Article 11 of the Convention. The Court rejected the Government's objection that the applicants had not suffered a significant disadvantage. It emphasized the crucial importance of the right to peaceful assembly and noted that the alleged violation was likely to have a considerable impact on the applicants' exercise of this right, since the fines could discourage them from participating in other assemblies as part of their trade union activities. The Court also relied on the crucial importance of the freedom of peaceful assembly in rejecting the Government's objection under Article 35 § 3 (b) of the Convention in *Öğrü and Others v. Turkey*, §§ 53-54 (concerning human rights activists). See, as regards freedom of association, *Yordanovi v. Bulgaria,* §§ 49-52 (concerning criminal proceedings for attempting to set up a political party).

345. Two examples where the Court has rejected governments' objections involving complaints under Article 1 of Protocol No. 1 are *Siemaszko and Olszyński v. Poland* and *Statileo v. Croatia*. The first case concerned detainees complaining about an obligation to place sums of money, intended to constitute a savings fund to be handed over to them on their release, in a savings account with an interest rate so low that the value of their reserve diminished. The second case concerned the legislation on housing in Croatia. The applicant complained that he was unable to use or sell his flat, rent it to the person of his choice or charge the market rent for its lease.

4. The safeguard clause: whether respect for human rights requires an examination of the case on the merits.

346. Once the Court has determined, in line with the outlined approach, that no significant disadvantage has been caused, it proceeds to check whether the safeguard clause contained in Article 35 § 3 (b) would nevertheless oblige it to consider the complaint on the merits.

347. The second element is a safeguard clause (see the Explanatory Report to Protocol No. 14, § 81) to the effect that the application will not be declared inadmissible if respect for human rights as defined in the Convention or the Protocols thereto requires an examination on the merits. Such questions of a general character would arise, for example, where there is a need to clarify the States' obligations under the Convention or to induce the respondent State to resolve a structural deficiency affecting other persons in the same position as the applicant (*Savelyev v. Russia* (dec.), § 33).

The wording of this element is drawn from the second sentence of Article 37 § 1 of the Convention where it fulfils a similar function in the context of decisions to strike applications out of the Court's list of cases. The same wording is used in Article 39 § 1 as a basis for securing a friendly settlement between the parties.

348. The Convention organs have consistently interpreted those provisions as compelling them to continue the examination of a case, notwithstanding its settlement by the parties or the existence of any other ground for striking the case out of its list. Thus, even when other criteria for rejecting the complaint under Article 35 § 3 (b) of the Convention are met, respect for human rights could require the Court's examination of a case on the merits (*Maravić Markeš v. Croatia*, §§ 50-55). In *Daniel Faulkner v. the United Kingdom*, § 27, the Court did not feel the need to determine whether the applicant could be said to have suffered a "significant disadvantage", as his complaint raised a novel issue of principle under Article 5, an issue which warranted consideration by the Court.

349. Precisely this approach was taken in *Finger v. Bulgaria*, §§ 67-77, where the Court considered it unnecessary to determine whether the applicant had suffered a significant disadvantage because respect for human rights required an examination of the case on the merits (concerning a potential systemic problem of unreasonable length of civil proceedings and the alleged lack of an effective remedy).

350. In *Živić v. Serbia*, §§ 36-42, the Court also found that even assuming that the applicant had not suffered a significant disadvantage the case raised issues of general interest which required examination. This was due to the inconsistent case-law of the District Court in Belgrade as regards the right to fair wages and equal pay for equal work, that is, payment of the same salary increase granted to a certain category of police officers.

351. Similarly, in *Nicoleta Gheorghe v. Romania*, the Court rejected the new criterion despite the insignificant financial award at stake (EUR 17), because a decision of principle on the issue was needed for the national jurisdiction (the case concerned a question of presumption of innocence and equality of arms in criminal proceedings and was the first judgment after the change of national law). In *Juhas Đurić v. Serbia* (revision), the applicant complained of the payment of fees to police-appointed defence counsel in the course of a preliminary criminal investigation. The Court concluded that the issues complained of could not be considered trivial, or, consequently, something that did not deserve an examination on the merits, since they related to the functioning of the criminal justice system. Hence, the Government's objection based on the new admissibility criterion was rejected because respect for human rights required an examination on the merits. In *Strezovski and Others v. North Macedonia*, the Court rejected the Government's objection because, *inter alia*, the case raised questions of general importance (there were 12,000 households in the same position as the applicants) and there were more than 120 similar cases pending before the Court (§ 49).

352. As noted in paragraph 39 of the Explanatory Report to Protocol No. 14, the application of the admissibility requirement should ensure avoiding the rejection of cases which, notwithstanding their trivial nature, raise serious questions affecting the application or the interpretation of the Convention or important questions concerning national law (*Maravić Markeš v. Croatia*, § 51).

353. The Court has already held that respect for human rights does not require it to continue the examination of an application when, for example, the relevant law has changed and similar issues have been resolved in other cases before it (*Léger v. France* (striking out) [GC], § 51; *Rinck v. France* (dec.); *Fedotova v. Russia*). Nor where the relevant law has been repealed and the complaint before the Court is of historical interest only (*Ionescu v. Romania* (dec.)). Similarly, respect for human rights does not require the Court to examine an application where the Court and the Committee of Ministers have addressed the issue as a systemic problem, for example non-enforcement of domestic judgments in the Russian Federation (*Vasilchenko v. Russia*) or Romania (*Gaftoniuc v. Romania* (dec.); *Savu v. Romania* (dec.)) or indeed the Republic of Moldova (*Burov v. Moldova* (dec.)) or Armenia (*Guruyan v. Armenia* (dec.)). Moreover, where the issue involves length of proceedings cases in Greece (*Kiousi v. Greece* (dec.)) or the Czech Republic (*Havelka v. the Czech Republic* (dec.)), the Court has had numerous opportunities to address the issue in previous judgments. This applies equally with respect to the public pronouncement of judgments (*Jančev v. the former Yugoslav Republic of Macedonia* (dec.)) or the opportunity to have knowledge of and to comment on observations filed or evidence adduced by the other party (*Bazelyuk v. Ukraine* (dec.)).

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The case-law cited in this Guide refers to judgments or decisions delivered by the Court and to decisions or reports of the European Commission of Human Rights ("the Commission").

Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation "(dec.)" indicates that the citation is of a decision of the Court and "[GC]" that the case was heard by the Grand Chamber.

Chamber judgments that were not final within the meaning of Article 44 of the Convention when this update was published are marked with an asterisk (*) in the list below. Article 44 § 2 of the Convention provides: "The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43". In cases where a request for referral is accepted by the Grand Chamber panel, it is the subsequent Grand Chamber judgment, not the Chamber judgment, that becomes final.

The hyperlinks to the cases cited in the electronic version of the Guide are directed to the HUDOC database (http://hudoc.echr.coe.int) which provides access to the case-law of the Court (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note) and of the Commission (decisions and reports), and to the resolutions of the Committee of Ministers.

The Court delivers its judgments and decisions in English and/or French, its two official languages. HUDOC also contains translations of many important cases into more than thirty non-official languages, and links to around one hundred online case-law collections produced by third parties.

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