PATIENTS' RIGHTS

IN THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

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VOLUME II

Selected case law

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VOLUME II

Chapter 1 Prohibition of torture. Selected case law.

1.1. Prohibition of torture

According to the Article 3 of the European Convention no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

1.2. Case of Mikhaniv v. Ukraine[1]

Having deliberated in private on 20 May 2008 and on 7 October 2008,

Delivers the following judgment, which was adopted on the last mentioned date:

1.2.1. The procedure

398. The case originated in an application (no. 75522/01) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian and a Russian national, Mr Andrey Antonovich Mikhaniv ("the applicant"), on 26 February 2001.

399. The applicant was represented by Mr D.A. Koutakh, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agents, represented by their Agents, Ms V. Lutkovska, Ms Z. Bortnovska and Mr Y. Zaytsev.

400. The applicant alleged, in particular, that he had not received the appropriate medical treatment in the Zhytomyr SIZO, that his detention on remand had been unlawful and unreasonably long, and that the length of the criminal proceedings against him was excessive.

401. By a decision of 20 May 2008, the Court declared the application partly admissible.

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[1] Case Of Mikhaniv V. Ukraine; *(Application No. 75522/01)*; Judgment Strasbourg; 6 November 2008; Final *06/04/2009*

402. In accordance with Article 36 § 1^1 of the Convention, the Russian Government were invited to exercise their right to intervene in the proceedings, but they declined to do so.

403. The applicant, but not the Government, filed further written observations (Rule 59 § 1^2). The Chamber have decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3^3 in fine).

1.2.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

404. The applicant was born in 1966 and lives in Kyiv.

405. The applicant is a former vice-president of the Khlib Ukrainy Company (ДАК Хліб України), a State-owned company trading in grain.

A. Criminal proceedings against the applicant

406. On 11 January 2000 the General Prosecutor's Office (the "GPO") opened a criminal investigation in respect of the applicant and another employee of Khlib Ukrainy on charges of aggravated embezzlement of public funds by means of fraudulent transactions for the amount of approximately 44,000 euros (EUR) via the private company Ukrzovnishtorg ("the Ukrzovnishtorg case"). The applicant was also accused of producing a copy of a forged university degree certificate when applying in 1996 for a position in the civil service.

407. The applicant was arrested on 17 January 2000.

408. On 19 January 2000 the investigator appointed to deal with his case formally charged the applicant with aggravated embezzlement of public funds and forgery.

409. On 20 January 2000 the Deputy Prosecutor General ordered the applicant's detention on remand for two months on the grounds that the charges were serious and that the applicant might abscond and pervert the course of justice. The applicant appealed against his detention to the Pechersky District Court of Kyiv ("the Pechersky Court").

410. On 14 March 2000 the GPO extended the applicant's detention to five months.

411. On 15 March 2000 the GPO opened two more criminal cases against the applicant for aggravated embezzlement of public funds by means of fraudulent transactions via the Internova Trading Company and the Anmikh-Rossiya Company (respectively "the Internova case" and "the Anmikh case"). These cases were joined to the Ukrzovnishtorg case.

412. On 27 March 2000 the Pechersky Court, on the applicant's appeal, revoked the detention order of 20 January 2000. The court found that there was no evidence that the applicant would abscond or pervert the course of justice if released. In particular, the applicant had his permanent residence in Ukraine and financially supported his wife and a child living in Kyiv. He had never failed to respond to a summons or attempted to obstruct the investigation. Moreover, the court found that, when ordering the applicant's detention, the prosecution had not taken into account the fact that the applicant suffered from a number of serious illnesses.

413. On the same day, without releasing him from the Kyiv SIZO[4], the investigator placed him under arrest again, this time on suspicion of involvement in the Internova case. The Deputy General Prosecutor, on that same date, ordered the applicant's detention on remand for a period of two months on the ground that he was suspected of a serious offence and that he might abscond or pervert the course of justice.

414. On 28 March 2000 the applicant was officially charged with embezzlement of public funds in the Internova case.

415. On 30 March 2000 the Deputy Prosecutor General lodged a request for supervisory review (protest) with the Kyiv City Court against the Pechersky Court's decision of 27 March 2000.

416. On 10 April 2000 the Presidium of the Kyiv City Court quashed the Pechersky Court's decision of 27 March 2000 and upheld the detention order of 20 January 2000. It found that the applicant's wife and two children lived in Estonia. In Ukraine the applicant lived with his partner and their son in Kyiv whilst being registered in Dnipropetrovs'k. He had two registered addresses (in Ukraine and Estonia), three international passports (one Russian and two Ukrainian: ordinary and official) and had an account with an Estonian bank, and was therefore likely to abscond if released. Moreover, the Kyiv City Court held that the first-instance court had overlooked the fact that the applicant in his appeal had requested the "replacement of the preventive measure" rather than the "annulment of the detention order" and, therefore, this appeal fell outside the scope of judicial review at the investigation stage.

417. On 29 May and 29 August 2000 the GPO prolonged the applicant's pre-trial detention respectively to eight months and eleven months.

418. On 27 October 2000 the investigator, with a view to preventing any communication between the applicant and his co-accused, ordered the applicant's transfer from the Kyiv SIZO to the Zhytomyr Regional Pre-trial Detention Centre no. 8 (Житомирський обласний слідчий ізолятор № 8 "the Zhytomyr SIZO") for the period from 30 October to 30 November 2000.

419. The applicant was transferred to the Zhytomyr SIZO on 1 November 2000.

420. On 27 November 2000 the GPO prolonged the applicant's detention to twelve months.

421. On 14 December 2000 the investigator ordered the applicant's transfer back to the Kyiv SIZO.

422. Meanwhile, on an undetermined date in December 2000, the applicant's lawyer appealed against the prosecutor's detention orders of 20 January 2000 and 27 March 2000.

423. On 27 December 2000 the appeal was examined by the Pechersky Court in the presence of the prosecutor and the applicant's lawyer. The court held that, although the domestic law allowed the detention of a defendant charged with aggravated embezzlement of public funds on the sole basis of the gravity of the charges, the other grounds provided for by the law should also be taken into account. The Pechersky Court found, in particular, that there was no compelling evidence that if released the applicant would abscond or pervert the course of justice. The applicant had permanent residence in Ukraine and could not lawfully leave it since his international passport had expired. The applicant lived with his wife and two children in Ukraine. He also financially supported his father and mother-in-law, who lived in Ukraine. Moreover, the applicant suffered from serious health problems. The Pechersky Court considered the medical experts' report produced by the prosecution, to the effect that the applicant was fit for detention in the remand facilities, unreliable in the light of the fact that during his detention in the Zhytomyr SIZO the applicant had not been administered any of the drugs prescribed for him. On the basis of the above findings the Pechersky Court quashed the detention orders of 20 January 2000 and 27 March 2000. On the same day the Deputy Prosecutor General lodged a request for supervisory review against this decision.

424. On 28 December 2000 the applicant, while still detained in the Kyiv SIZO, was arrested by the investigator on suspicion of involvement in the Anmikh case. On the same day the applicant was officially charged with the said offence.

425. On 5 January 2001 the GPO extended the applicant's pre-trial detention to fifteen months.

426. On 15 January 2001 the Presidium of the Kyiv City Court, following the prosecution's request for supervisory review, quashed the Pechersky Court's decision of 27 December 2000, citing essentially the same arguments as in its decision of 10 April 2000. The court also stated that there was no reason why the applicant could not be detained on the sole basis of the gravity of the charges, as provided for by Article 155 of the CCP.

427. On 5 April 2001 the GPO extended the applicant's detention up to eighteen months.

428. On 31 May 2001 the GPO instituted another criminal case against the applicant and Mr L. respectively for giving and taking bribes. This case was joined to the criminal case against the applicant.

429. On 18 June 2001 the applicant and his lawyer were granted access to the 120-volume case file. The applicant, however, refused to study the case file, alleging that the relevant formalities had not been completed. On the same day the investigator rejected this complaint as unsubstantiated.

430. On 16 July 2001 the prosecution lodged the bill of indictment with the Kyiv City Court of Appeal (the former Kyiv City Court).

431. On an unknown date the applicant requested and was granted access to the case file, a right which he and his lawyer exercised from 20 July to 26 September 2001.

432. On an unknown date in September 2001 the Kyiv City Court of Appeal referred the applicant's case file to the Radyansky District Court of Kyiv for examination.

433. On 11 October 2001 the Deputy Prosecutor General decided that only the Ukrzovnishtorg case was ready for trial and withdrew the remainder of the charges because they required further pre-trial investigation.

434. On 12 October 2001 an amended bill of indictment was lodged with the Svyatoshynsky District Court ("the Svyatoshynsky Court").

435. On 1 November 2001 a preparatory hearing was held before a judge of the Svyatoshynsky Court. The judge considered that the case was ready for trial and decided that the applicant was to remain in detention on remand. The applicant's request for release was rejected on the ground that, although he had already spent a total of 21 months in detention, the period of his detention during the investigation had not exceeded 18 months and thus was in compliance with Article 156 of the CCP. The judge considered that the applicant's transfer to the Zhytomyr SIZO was necessary for the proper conduct of the investigation and that there was no indication of ill-treatment. He concluded that there were no medical or other special circumstances warranting the applicant's release.

436. The proceedings before the trial court started on 26 November 2001.

437. At a hearing on 18 January 2002 the Svyatoshynsky Court dismissed the applicant's request for release, stating that there were no new circumstances warranting a re-evaluation of the preventive measure imposed. The court also granted the prosecution's motion to adjourn the hearing until 1 February 2002 to allow the new prosecutor to familiarise himself with the case file.

438. On 1 February 2002 the Svyatoshynsky Court of its own motion decided that further pre-trial investigation was necessary. The court also ordered the applicant's release on an undertaking not to abscond.

439. On 2 February 2002 the applicant tried to leave Ukraine for Russia by train but was stopped on the border and sent back to Kyiv.

440. On an unspecified date the prosecution appealed against the remittal of the case for further investigation, considering that it was ready for examination on the merits. The applicant also challenged the remittal, stating that it was motivated by the court's reluctance to acquit him. On 18 April 2002 the Kyiv City Court of Appeal granted the appeals, quashed the decision of 1 February 2002 and ordered that the trial proceedings in the applicant's case be resumed.

441. The hearings before the Svyatoshynsky Court resumed on 30 April 2002. On 14 August 2002 the trial court ordered that by 19 September 2002 the GPO was to carry out additional enquiries in order to collect further evidence. However, it was not until 24 December 2002 that the authorities produced the requested evidence in court and the trial could resume.

442. On 11 February 2003 the Svyatoshynsky Court acquitted the applicant of the charges brought against him. The prosecution appealed. On 28 June 2003 the Kyiv City Court of Appeal upheld the applicant's acquittal.

443. On 13 July 2004 the Supreme Court, following the appeal of the GPO, reversed the decisions of the lower courts and remitted the case for further investigation.

444. The case file was received by the GPO on an unknown date in October 2004. On 28 October 2004 the investigator amended the applicant's charges in accordance with the new 2001 Criminal Code. On the same day the applicant was summoned to give evidence but failed to appear. Since then, according to the Government's submissions, the GPO has carried out a number of forensic examinations, questioned witnesses and seized documentary evidence. Further documents have been requested and received from Swiss authorities.

445. On an unknown date the applicant made use of the recent amendments to the CCP by challenging the initial decision of the GPO of 11 January 2000 to institute criminal proceedings against him. On 24 November 2005 the Pechersky Court allowed this application and revoked the impugned decision. The prosecution appealed.

446. On 2 February 2006 the Kyiv City Court of Appeal reversed the Pechersky Court's decision and rejected the applicant's application.

447. On 29 March and 22 June 2007 the applicant requested the investigator for termination of the criminal proceedings as time-barred. In reply the investigator informed the applicant that his requests would be examined and the decision would be adopted in accordance with the relevant law.

448. On 13 May 2008 the applicant was charged with abuse of power and forgery and ordered not to leave his place of residence.

449. The investigation in the applicant's case is still pending.

B. Administrative proceedings concerning lawfulness of detention

450. On 18 July 2001 the applicant's lawyer, referring to Article 29 § 1^5 of the Constitution, filed an administrative complaint about the inactivity of the administration of the Kyiv SIZO, namely for their failure to release the applicant after 17 July 2001, when the overall term of his detention had reached eighteen months. On 20 August 2001 the Shevchenkivsky District Court of Kyiv refused to entertain this complaint on the ground that the lawyer's authority to

act issued by the applicant was limited to the criminal proceedings before the Kyiv Court of Appeal. This decision was not appealed against by the applicant.

451. The applicant's similar administrative complaint against the GPO was declared inadmissible on 26 October 2001 by the Pechersky Court on the ground that such complaints fell to be examined in the criminal proceedings which at that time were pending before the Radyansky Court.

C. Medical treatment

452. After the applicant's arrest in January 2000 his health started to deteriorate. According to the Pechersky Court's decision of 27 March 2000 the applicant started to receive medical treatment in the Kyiv SIZO for his illnesses as early as March 2000.

453. On 15 June 2000, in response to the applicant's numerous requests, the investigator dealing with his case ordered that a forensic medical report on the applicant's state of health be obtained. In its report no. 83 of 16 June 2000, a commission of the Kyiv City Bureau of Forensic Medical Examinations (Київське міське бюро судово-медичних експертиз) stated that the applicant suffered from a post-traumatic encephalopathy, duodenal ulcer with reflux and heart pathology. The applicant was prescribed a diet and heart drugs. In conclusion the experts suggested that the applicant's encephalopathy be examined in a specialised neurological institution.

454. On 29 August 2000 an expert commission of the Kyiv City Centre of Forensic Psychiatric Examinations (Київський центр судово-психіатричних експертиз), with the participation of a neuropathologist from the district hospital, drew up a forensic report (no. 957) at the request of the investigator. The commission found that the applicant suffered from post-traumatic encephalopathy (after a head injury suffered at the age of fifteen). According to the applicant this disease caused him severe headaches and hand tremor. The applicant was prescribed the relevant drugs. He was found fit for detention on remand subject to the prescribed treatment.

455. On 1 November 2000 the applicant was transferred to the Zhytomyr SIZO.

456. On 20 December 2000 the applicant's lawyer asked the Governor of the Zhytomyr SIZO whether they had provided the applicant with the medicines prescribed for him.

457. On 25 December 2000 the Governor of the Zhytomyr SIZO issued a letter, stating that on his admission the applicant had been examined by the prison doctors, who had diagnosed

him as suffering from encephalopathy. Subsequently he had been examined by the cardiologist who confirmed the above heart pathology diagnosis of the Kyiv experts. The Governor stated that, although the content of the above medical experts' reports had been made known to the prison authorities, the drugs prescribed in those reports were not in the possession of the Zhytomyr SIZO and thus could not be administered to the applicant.

458. On 11 January 2001, after the applicant's transfer from the Kyiv ITU, he was examined by a doctor from the medical department of the Kyiv SIZO, who found that he suffered from headaches, heart and stomach pains. The applicant was prescribed fifteen drugs, including those specified in the experts' reports.

II. RELEVANT DOMESTIC LAW

459. The relevant domestic law is summarised in the judgment of Nevmerzhitsky v. Ukraine (no. 54825/00, §§ 53-56, ECHR 2005 II).

1.2.3. The law

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

460. The applicant complained that the lack of medical assistance in the Zhytomyr SIZO amounted to inhuman and degrading treatment contrary to Article 3 of the Convention, which provides as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

461. The Government maintained that, although the applicant did suffer from several insignificant illnesses, the very fact that expert examinations of his medical condition had been conducted pointed to the authorities' care for his health. They stated that after 11 January 2001 the applicant had been prescribed and had received the relevant treatment in the Kyiv SIZO. Moreover, the applicant had refused on two occasions to undergo examinations by independent doctors without giving any reason.

462. The applicant stated that the medical treatment he had received during his detention was inadequate. In particular, while he was held in the Zhytomyr SIZO he did not receive any proper care.

463. The Court's case-law in relation to Article 3 of the Convention, as applicable to the instant case, is summarised in the judgments of Koval (cited above, § 79) and Melnik (cited above, § 93).

464. In view of the applicant's complaints, the Court will concentrate on his medical situation while in detention at the Zhytomyr SIZO during the period of approximately six weeks from 1 November until 14 December 2000.

465. In the Court's opinion, the issue before it is not whether the pains which the applicant may have endured on account of the various health problems attained the level of inhuman and degrading treatment according to Article 3 of the Convention. Rather, the Court must examine whether, in view of the applicant's health, he was afforded the medical treatment required by Article 3 of the Convention while in detention. Thus, according to this provision, a State becomes responsible for the welfare of persons in detention, and the authorities have a duty to afford such persons the required protection (see, among other authorities, Kudła v. Poland [GC], no. 30210/96, § 94, ECHR 2000 XI, and Nevmerzhitsky v. Ukraine, cited above, § 81).

466. The evidence submitted by both parties confirms that during his detention the applicant suffered from previously acquired post-traumatic encephalopathy, a duodenal ulcer with reflux, and a heart pathology.

467. It is not the Court's task to substitute its opinion with that of the domestic experts in assessing the seriousness of the applicant's health conditions and their possible risks of aggravation (see, mutatis mutandis, Nevmerzhitsky, cited above, § 73, and Adalı v. Turkey, no. 38187/97, § 213, 31 March 2005). In the present case, it suffices to note that after being remanded in custody, the applicant was examined by various medical authorities which concluded that he was fit for detention on remand subject to the prescribed medication (see paragraph 56 above). In the Court's opinion, this provides a strong indication that the domestic medical experts themselves regarded the applicant's health condition as being sufficiently serious.

468. A further confirmation for the seriousness of the applicant's health condition can be seen in the fact that, after the applicant's return to Kyiv SIZO, he continued to be prescribed a large number of drugs (altogether fifteen), including those specified in the experts' previous reports.

469. Finally, the Court notes that the applicant failed to receive the required medication for what may qualify in these circumstances as a substantial duration, namely a period of six weeks.

470. Without doubt, the prison administration was aware of the medical experts' previous reports which considered that the applicant could only be detained if he was afforded the required medical treatment. The explanations given by the domestic authorities - the applicant was not administered the required drugs on the ground that they were not available in the prison pharmacy – do not appear satisfactory. In fact, the Government have produced no evidence of any medical care at all being provided to the applicant during his detention in the Zhytomyr SIZO.

471. In the Court's opinion, leaving a detained person without essential medical treatment as required by medical experts for his health condition over a substantial period of time and without satisfactory explanations amounts to inhuman and degrading treatment in breach of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

472. The applicant complained that his detention on remand had been unlawful and excessively long. The Court considers that these complaints are to be considered respectively under Article 5 § 1^6 (c) and Article 5 § 3^7 of the Convention., which, in so far as relevant, provides as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. Alleged violation of Article 5 § 1 (c) 6 of the Convention

473. The Government stated that the applicant was re-arrested in accordance with a procedure established by law. Moreover, the unlawful and unreasonable Pechersky Court decision to release him was quashed by a higher instance.

474. The applicant considered that his detention had been arbitrary and unlawful.

475. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, it is otherwise in relation to cases where, as under Article 5 § 1, failure to comply with that law entails a breach of the Convention. In such cases the Court can and should exercise a certain power to review whether national law has been observed.

476. However, the "lawfulness" of detention under domestic law is the primary but not always the decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1, which is to prevent persons from being deprived of their liberty in an arbitrary fashion. The Court must moreover ascertain whether the domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein.

477. On this last point, the Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see Baranowski v. Poland, no. 28358/95, §§ 50-52, ECHR 2000-III).

478. On 27 March 2000 the Pechersky Court, upon the applicant's appeal, revoked the prosecution's detention order of 20 January 2000, finding that there was no evidence that the applicant would abscond or pervert the course of justice if released. On the same day, without releasing the applicant from prison, the investigator placed him under arrest again, on suspicion of another count of aggravated embezzlement of public funds. On 10 April 2000, upon a request for supervisory review by the Deputy General Prosecutor, the Kyiv City Court quashed the decision of 27 March 2000 and upheld the detention order of 20 January 2000.

479. On 27 December 2000 the Pechersky Court revoked the prosecution's detention orders of 20 January 2000 and 27 March 2000, finding again that there was no compelling evidence that if released the applicant would abscond or pervert the course of justice. On the next day, while still in prison, the applicant was re-arrested and subsequently detained on suspicion of involvement in another count of embezzlement of public funds. On 15 January 2001 the Kyiv City Court, upon the prosecutor's request for supervisory review, quashed the Pechersky Court's decision. The applicant complained that his arrest on 28 December 2000 had been unlawful.

480. The Court notes that there is no reason to believe that the applicant's re-arrests on 27 March and on 28 December 2000 were incompatible with the domestic procedural regulations applicable at the material time. The detention was on both occasions ordered by a competent prosecutor in respect of a person who had been accused of having committed a crime punishable by a term of imprisonment of more than one year. The respective orders were issued on the same day the applicant was arrested, that is to say within the statutory three-day time-limit.

481. The Court further accepts that the relevant provisions of the CCP constituted a clear and foreseeable legal basis for the applicant's custody. Moreover, the applicant was detained on the basis of a "reasonable suspicion" that he had committed a crime and for the purpose of bringing him before a court to stand trial.

482. The Court notes that both re-arrests were ordered after decisions by a competent court ordering the applicant's release. It is true that formally different charges from those that had served as a basis for the previous, annulled detention orders were relied upon, though these charges all formed part of the same complex of investigations on several counts of aggravated embezzlement of public funds. Moreover, the charges that served as a basis for re-arresting him had been joined to the original criminal case as far back as March 2000.

483. The Court further notes that while on the first occasion the re-arrest and detention were ordered the same day, when the applicant was still detained, the second time the applicant remained in detention for a day without any reasons advances prior to the decision on his new arrest was made. In this context, the Court reiterates that administrative formalities connected with release could not have justified a delay of more than several hours (see Kucheruk v. Ukraine, no. 2570/04, § 191, 6 September 2007, and Nikolov v. Bulgaria, no. 38884/97, § 82, 30 January 2003).

484. It is not the task of this Court to assess the strategy chosen by the prosecuting authorities in the criminal proceedings, but the situation described above gives the strong appearance that, on two occasions, the authorities used the largely similar charges, which had already been part of the case against the applicant, as a pretext to secure his continued detention, thereby circumventing the effect of courts' orders on the applicant's release. It does not appear that the domestic law clearly regulated such a situation or provided sufficient guarantees against abuse.

485. In the Court's view, the conduct of the prosecuting authorities in securing the applicant's continued detention after the decisions of the Pechersky Court ordering his release, in the light of all these elements taken together, is incompatible with the principle of legal certainty and arbitrary, and runs counter to the principle of the rule of law.

486. The Court finds, therefore, that the applicant's re-arrests, on two occasions, and subsequent detention by the investigating authorities after court decisions revoking the detention orders were in breach of Article 5 § 1 [6] of the Convention.

B. Alleged violation of Article 5 § 3[7] of the Convention

487. The applicant claimed that that the length of his detention on remand had been unreasonable.

1. Parties' submissions

488. The Government argued that a period of twenty-four and a half months for the applicant's detention on remand was reasonable in the circumstances. They pointed out that in extending the time-limits of the applicant's detention the prosecutors had referred, inter alia, to the risk of his absconding or perverting the course of justice. In this connection the Government stated that those submissions were justified by the fact that the applicant had three international passports (one Russian and two Ukrainian, including an official passport), that his family lived in Estonia, that he had several accounts in foreign banks and that he was accused of committing offences in collaboration with certain persons who were at large at the material time.

489. The Government further maintained that the length of the applicant's detention had been justified by the complexity of the case: the applicant was charged with four distinct offences, three of which involved complex economic fraud and international transactions. The authorities had to carry out a number of time-consuming investigations, involving several

examinations by accountancy experts and ordering and processing financial documents from foreign law-enforcement agencies. After the case was referred to the court for trial, the applicant requested access to the case file, which was granted. Therefore the State could not bear responsibility for the period between 20 July and 26 September 2001 when the applicant and his lawyers were studying the case file. The trial proceedings lasted for three months, during which period the Svyatoshynsky Court held nine hearings, questioned witnesses, examined five motions from the applicant's lawyers and issued three orders for the compulsory appearance of witnesses.

490. The applicant challenged the authorities' failure to bring him promptly before a judge for examination of the lawfulness of his detention on remand. He further contested the reasonableness of the length of his detention on remand, stating that in the subsequent trial it had become apparent that the eighteen-month pre-trial investigation had not produced any compelling evidence of his guilt.

2. Court's assessment

491. The applicant's detention on remand lasted from 17 January 2000 to 1 February 2002. The period to be taken into consideration is therefore two years and fifteen days.

492. The Court notes that the domestic authorities advanced three principal reasons for continuation of the applicant's detention, namely that the applicant remained under strong suspicion of having committed the serious offences of which he stood accused and that he was likely to abscond or pervert the course of justice if released. The Court recalls in this connection that the existence of strong suspicion of the involvement of a person in serious offences, while constituting a relevant factor, cannot alone justify a long period of pre-trial detention (see, inter alia, Scott v. Spain, judgment of 18 December 1996, Reports of Judgments and Decisions 1996 VI, § 78). It will therefore proceed to ascertain whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty.

493. The national courts disagreed on the question whether there were reasons to justify the applicant's detention. The Pechersky Court considered that there was no risk that the accused might pervert the course of justice or attempt to abscond, whereas the Kyiv City Court affirmed such a risk. The risk that the applicant would abscond if released was inferred from the fact that he had double citizenship (Russian and Ukrainian) and, consequently, several international passports, lived in Kyiv whilst having a registered address in Dnepropetrovsk and had a family and bank accounts in Estonia.

494. The Court, assuming that the above circumstances were initially relevant and sufficient, notes that the risk of the applicant's absconding diminished over the duration of his detention on remand (see Calleja v. Malta, no. 75274/01, § 108, 7 April 2005). Moreover, as the proceedings progressed and the collection of evidence neared completion, the risk of his tampering with evidence would also have become less relevant (see Nevmerzhitsky, cited above, § 136).

495. However, after the Kyiv City Court's decision of 15 January 2001 the applicant's detention was extended without any reference to any concrete factual circumstances capable of showing that the risks relied on actually persisted during the relevant period (see Trzaska v. Poland, no. 25792/94, § 65, 11 July 2000). The Court further notes that in the above decision the City Court had already stated that there was no reason why the applicant could not be detained on the sole basis of the gravity of the charges against him. This suspicion that the applicant had committed the imputed offences was the only ground on which the Svyatoshynsky Court based its decision of 1 November 2001 to detain the applicant pending trial. In these circumstances the Court finds that the authorities have failed to show that the grounds justifying the applicant's detention persisted throughout the whole period of his deprivation of liberty (compare and contrast Gevizovic v. Germany, no. 49746/99, § 40, 29 July 2004).

496. Lastly, the Court notes that no alternative measures were effectively considered by the domestic authorities to ensure the applicant's appearance at trial (see Nevmerzhitsky, cited above, § 137). Indeed, on 10 April 2000 the Kyiv City Court found that the fact that the applicant's appeal against the prosecutor's detention order suggested the possibility of its replacement with another preventive measure rendered it inadmissible as falling outside the scope of the courts' jurisdiction at the investigation stage of criminal proceedings (see paragraph 19 above).

497. In sum, the Court finds that the reasons relied on by the authorities to justify the applicant's continued detention for more than two years, although possibly relevant and sufficient initially, lost these qualities as time passed. In these circumstances it is not necessary to examine whether the proceedings were conducted with due diligence.

498. There has accordingly been a violation of Article 5 § 3^7 of the Convention.

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

499. The applicant maintained that his right to a "hearing within a reasonable time" had not been respected and that there had accordingly been a violation of Article 6 § 1 of the Convention, the relevant part of which provides:

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

500. There was no dispute over the fact that the proceedings started on 11 January 2000, when the criminal investigation was instituted against the applicant. The proceedings in issue are still pending before the General Prosecutor's Office. The Court accordingly finds that the proceedings have lasted for over eight years.

501. The Government repeated their submissions with regard to Article 5 § 3. In particular the Government pointed out that the applicant's case was one of a certain complexity in that it concerned complex financial issues and international transactions, which had led the investigators to order a number of accounting and other expert examinations and to seek assistance from foreign law-enforcement authorities. These circumstances could explain the prolonged pre-trial investigation into the alleged offences. Once the case was set down for trial the courts dealt with it in a timely manner and without undue delay. After the Supreme Court had ordered the re-investigation, the authorities had carried out several expert examinations, questioned witnesses and seized documents. The General Prosecutor's Office had also requested certain documents from the Swiss authorities.

502. In sum, the Government contended that there had been no significant periods of inactivity in the proceedings for which the judicial authorities could be held responsible and that, accordingly, there had been no violation of Article 6 § 1.

503. The applicant maintained that his right to a hearing within a reasonable time had been infringed.

504. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, Frydlender v. France [GC], no. 30979/96, § 43, ECHR 2000-VII).

505. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see, for example, Merit v. Ukraine, cited above, §§ 72-76).

506. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

There has accordingly been a breach of Article 6 § 1.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

507. 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

508. The applicant claimed compensation for the pecuniary damage caused by his suspension from the post of Deputy Minister of Agriculture in an amount of 30,000 to 65,000 euros (EUR). He also claimed compensation for the seizure of jewellery and the attachment of his property, including two cars, a flat in Kyiv, five shops in Dnipropetrovsk, shares in the private company Prokholoda and his account with the Crédit Lyonnais bank. The applicant claimed non-pecuniary damage in the amount of EUR 155,520.

509. The Government considered that the pecuniary damage thus claimed was not related to the subject matter of the case. Moreover, the applicant had failed to prove that he had ever occupied the post of Deputy Minister of Agriculture. The jewellery was seized and the account attached in accordance with the law, to ensure the enforcement of a possible civil judgment in the criminal case. The cars and the flat had been attached for the same reason and remained in the possession of the applicant or members of his family. There was no information that the applicant owned any property in Dnipropetrovsk.

The Government considered that the sum claimed by the applicant for non-pecuniary damage was exorbitant.

510. The Court, like the Government, does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore dismisses this claim. As regards the non-pecuniary damage, the Court points to its above findings of violations of Articles 3, 5, and 6 of the Convention in the present case. Having regard to comparable applications in its case-law, and deciding on an equitable basis, the Court awards the applicant EUR 5,000 in compensation for non-pecuniary damage, plus any tax that may be chargeable on that amount. (cf. Nevmerzhitsky, cited above, § 145; Koval, cited above, § 130; and Khokhlich, cited above, § 228).

B. Costs and expenses

511. The applicant also claimed EUR 130,000 for the costs and expenses incurred in proceedings before the domestic courts and EUR 9,415 for those incurred in the proceedings before the Court.

512. The Government stated that the costs claimed were exaggerated. Moreover, there was no indication that the applicant had actually incurred those costs in the domestic proceedings.

513. The Court reiterates that in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see Nilsen and Johnsen v. Norway [GC], no. 23118/93, § 62, ECHR 1999-VIII). In the present case the Court notes that the applicant's complaints were partly declared inadmissible. On the whole it finds excessive the total amount which the applicant claimed in respect of his legal costs and expenses and considers that it has not been demonstrated that they were necessarily and reasonably incurred.

514. In these circumstances, the Court is unable to award the totality of the amount claimed; deciding on an equitable basis, it awards the applicant the sum of EUR 3,000 in respect of costs and expenses, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

515. 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.

1.2.4. The Court's decision

1. Holds by five votes to two that there has been a violation of Article 3 of the Convention;

2. Holds unanimously that there has been a violation of Article 5 § 1[6] of the Convention;

3. Holds unanimously that there has been a violation of Article 5 § 3[7] of the Convention;

4. Holds unanimously that there has been a violation of Article 6 § 1[8] of the Convention in respect of the applicant's right to a "hearing within a reasonable time";

5. Holds unanimously

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2[9] of the Convention, the following amounts:

(i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable on this amount;

(ii) EUR 3,000 (three thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant on this amount;

(b) that the above amounts shall be converted into the national currency of the respondent State at the rate applicable at the date of settlement;

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

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

1.3. Case of Pakhomov v Russia[2]

Having deliberated in private on 9 September 2010,

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

1.3.1. The procedure

516. The case originated in an application (no. 44917/08) against the Russian Federation lodged with the Court under Article 34[10] of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Anton Valeryevich Pakhomov ("the applicant"), on 21 July 2008.

517. The applicant, who had been granted legal aid, was represented by Mr S. Onishchenko, a lawyer practising in Vladivostok. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

518. The applicant alleged, in particular, that his conviction for drug trafficking had been based on statements by an anonymous witness and prosecution witnesses whom he had been unable to confront in open court. In addition, in a letter of 9 June 2009 requesting priority treatment for his application, the applicant complained of serious deterioration of his health in view of the absence of adequate medical assistance.

519. Further to the applicant's request, on 16 June 2009 the Court granted priority to the application (Rule 41[11] of the Rules of Court).

520. On 23 September 2009 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1[12]).

[2] Case Of Pakhomov V. Russia; (Application No. 44917/08); Judgment Strasbourg; 30 September 2010; Final 30/12/2010

1.3.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

521. The applicant was born in 1980 and lives in the town of Artyom, Primorye Region.

A. Criminal proceedings against the applicant

522. On 27 April 2007 a group of police officers entered the applicant's flat, intending to search it. The applicant, who had been offered the opportunity to hand over any illegal substances before the search, handed the police officers 2.5 grams of tobacco and marijuana compound. No other illegal substances or money were found during the subsequent search of the flat carried out by the police. The applicant was arrested and taken to the Artyom town temporary detention centre, where a police investigator, Mr S., informed him that he had been arrested on suspicion of selling drugs to an anonymous person, whom the police called Mr I., during a police controlled purchase on 27 February 2007. The investigator also notified the applicant of an identification parade scheduled for the following day, in which Mr I. was to participate.

523. On 28 April 2007 the applicant was taken to the Artyom Town Department of the Federal Service for Drug Control where he remained handcuffed to a heating device for several hours. The identification parade did not take place.

524. On the same day the Artyom Town Court authorised the applicant's placement in custody for two months. He was transferred to temporary detention facility no. IZ-25/1 in Vladivostok.

525. In the middle of May 2007 the applicant was notified of another charge brought against him. The prosecution authorities accused him of selling drugs to Mr I. on another occasion, namely 9 March 2007.

526. On 11 June 2007 the police investigator, Mr S., served the applicant and his lawyer with a bill of indictment. The investigation offered the following version of events on which the charges against the applicant were grounded. According to the investigating authorities, on an unspecified date an anonymous person, whose personal data could not be disclosed and who was called “Mr I.”, approached a police officer, Mr Za., and informed the latter that he could buy drugs from the applicant. The police officer Za. decided to act on the information received from Mr I. and organised a police-controlled purchase of drugs. He invited two

soldiers serving in the local military unit, Mr K. and Mr M., to act as lay witnesses during the purchase. On 27 February 2007 police officer Za., accompanied by another police officer, Mr G., two lay witnesses, Mr K. and Mr M., and Mr I., drove to the applicant's house. On arrival to the applicant's block of flats, officer Za. gave Mr I. money to purchase drugs from the applicant. Serial numbers of the bills were recorded in advance. Mr I., accompanied by Mr K., left the car and went to the applicant's flat. Mr K. did not enter the flat, waiting for Mr I. on the ground floor. Mr I. spent approximately fifteen minutes in the applicant's flat. After he had returned to the car, Mr I. handed the police officers a package containing 2.08 grams of a substance, later identified by forensic experts as a compound of tobacco and cannabis, and stated that he had bought drugs from the applicant. The investigating authorities also insisted that the same sequence of events, albeit with the participation of other lay witnesses, Mr Se. and Mr B., occurred on 9 March 2007.

527. On 16 October 2007 the applicant's lawyer recorded a conversation with a Mr A., who insisted that he could identify Mr I. According to Mr A., in the middle of March 2007 he had met with the person identified as Mr I. The latter had told Mr A. that he had framed the applicant in a drug case. According to Mr I., the police had arrested him when he was carrying drugs and as a result he had been forced to participate in two police-controlled drug purchases. Mr I. allegedly explained that he had kept the money which the police officers had given him for drug purchases and in return he had allegedly given the police officers drugs which he had hidden in advance behind a heating device in the hall near the applicant's flat.

528. On 14 December 2007 the Artyom Town Court found the applicant guilty of two counts of attempted drug trafficking and one count of drug possession, and sentenced him to eight years' imprisonment. The conviction was based on the following evidence:

- statements by Mr I., given during the pre-trial investigation and read out in open court, despite the applicant's objection. In those statements Mr I. gave a detailed description of the events on 27 February and 9 March 2007 pertaining to his participation in the police-controlled purchases of drugs from the applicant. As follows from the Town Court's judgment, Mr I.'s personal data were not disclosed to the applicant. Mr I.'s absence from trial hearings had been considered “exceptional”. Having cited no reasons which could justify Mr I.'s absence from the court hearing, the Town Court held that the absence was prompted by “exceptional circumstances”. On a number of occasions the defence unsuccessfully asked the Town Court to disclose Mr I.'s identity.

- statements made in open court by Ms M. and Ms D., lay witnesses who had assisted the police officers during the search of the applicant's flat on 27 April 2007. Both Ms M. and Ms D. confirmed that the applicant had voluntarily turned over to the police officers a small package of a substance containing marijuana.

- statements made in a trial hearing by Mr Se., who had acted as a lay witness during the police-controlled purchase of drugs from the applicant on 9 March 2007. Mr Se. explained that on a request from a police officer he had followed Mr I. to the door of the applicant's flat. Mr I. had spent several minutes in the flat. After Mr I. left the flat he had a small package, which he gave to the police officers.

- statements given by another lay witness, Mr B., during the pre-trial investigation and read out in open court with the parties' consent. Mr B.'s statements were similar to those given by Mr Se.

- statements by Mr K., a lay witness who had participated in the police-controlled purchase of drugs from the applicant on 27 February 2007. Those statements were given by Mr K. during an interview with an investigator and read out in a trial hearing. The Town Court, without providing any further details, held that reasons for Mr K.'s absence from the trial were “exceptional”. In his statements Mr K. provided a detailed description of events on 27 February 2007 and corroborated the prosecution's version.

- statements by police officer Za., made in open court. The police officer set out an account of events on 27 February, 9 March and 27 April 2007, insisting that on the first two dates Mr I. had purchased drugs from the applicant during the police-controlled operations and that on the later date drugs had been found in the applicant's flat during the search.

- report on a body search of Mr I. on 27 February 2007 showing that Mr I. had had no illegal substances or money on him before he took part in the police-controlled purchase of drugs from the applicant.

- report drawn up by police officer Za. on 27 February 2007 showing that the latter had given Mr I. four 100-rouble bills to purchase drugs from the applicant;

- report of 27 February 2007 indicating that on his return from the applicant's flat Mr I. had handed the police officers a package containing a phytogenous substance.

- an expert report confirming that the substances which Mr I. had handed to the police officers during the police-controlled operations on 27 February and 9 March 2007 contained cannabis.

- an expert report, according to which cannabis handed over by Mr I. to the police on 27 February and 9 March 2007 most probably had the same origin. However, the cannabis which the applicant voluntarily turned over to the police during the search of his flat was from a different batch.

529. On request by the defence the Town Court heard a number of witnesses and rejected their testimony as unreliable. Two defence witnesses testified that they had visited the applicant on 9 March 2007 and had been in his flat at the time when the police had allegedly performed the controlled drug purchase. They insisted that no one had visited the applicant's flat when they had been there and that the applicant had not sold drugs to anyone. Another witness testified that she had been in the applicant's flat with her brother on 27 February 2007 at the time of the alleged drug purchase. She stressed that there had been no other visitors. The Town Court interviewed Mr So., the head of the military unit where lay witnesses Mr K. and Mr P. had been performing military service. Mr So. stated that, on a written request from the applicant's lawyer, he had had a conversation with Mr K., who had insisted that he had not seen Mr I. entering the applicant's flat. The Town Court also studied a statement written by Mr K. at the end of that conversation. Mr K. confirmed that after Mr I. had approached the door of the applicant's flat he had ordered Mr K. to go down to the ground floor and thus Mr K. had been unable to observe Mr I. entering the flat. The Town Court refused to call Mr A., whom the applicant had asked to be questioned about Mr I.'s identity.

530. The applicant's lawyer appealed against the conviction, arguing, inter alia, that the Town Court had read out statements by Mr I. and Mr K., disregarding the objection by the defence to that effect, and that it had refused to hear Mr A.

531. On 3 March 2008 the Primorye Regional Court upheld the judgment of 14 December 2007, endorsing the reasons given by the Town Court. As regards the applicant's argument concerning the statements by Mr I. and Mr K., the Regional Court held as follows:

"The [Town] court read out the statements by Mr I. and Mr K. in open court, complying with the requirements of Article 281 of the Russian Code of Criminal Procedure, because the [Town] court found that the reasons for their absence from the hearings were exceptional and [it] issued a reasoned judgment to that effect."

The Regional Court also concluded that the Town Court had rightfully dismissed the applicant's and his lawyer's requests for the disclosure of Mr I.'s identity.

532. On 15 January 2010 the Presidium of the Primorye Regional Court, by way of a supervisory review, quashed the judgments of 14 December 2007 and 3 March 2008 in the part concerning the applicant's conviction for drug trafficking, and upheld the conviction for possession of drugs found in his flat during the search. It stressed that having based, to a substantial degree, the applicant's conviction for drug trafficking on statements by witnesses whom the applicant had been unable to confront in open court, including the anonymous witness I. and a lay witness K., the domestic courts had violated Article 6 § 3 (d)[13] of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Presidium concluded that there was no evidence that the applicant was guilty of drug trafficking. Having acquitted the applicant of that charge, the Presidium reduced his sentence to two years' imprisonment and authorised his immediate release, as he had already served the entire sentence. The Presidium also confirmed the applicant's right to rehabilitation.

B. Medical assistance during imprisonment

533. The following account has been drawn up from the medical records submitted by the Government.

534. In 2003 the applicant was diagnosed with pulmonary tuberculosis. He underwent treatment in a tuberculosis hospital in Artyom.

535. On 28 April 2007, on his admission to temporary detention facility no. IZ-25/1, the applicant informed an attending prison doctor that he had tuberculosis and complained of a cough and general fatigue. The doctor noted in the admission record that an examination by a tuberculosis specialist was required.

536. Three days later the applicant underwent an X-ray examination which revealed the presence of a tuberculoma, measuring two centimetres in width and three centimetres in length, in the upper lobe of the left lung and dense foci in the right lung. On the basis of the X-ray examination the tuberculosis specialist recorded the following diagnosis in the applicant's medical history: “large residual changes in the form of a tuberculoma on the left and dense foci on the right after the recent tuberculosis; “D” control is not required; R-control should be carried out twice a year”. The next X-ray exam was prescribed for a month later.

537. On 29 June 2007 the applicant received the second chest X-ray examination, which showed no relapse.

538. On 13 July 2007 the applicant requested to see a prison doctor to whom he complained of fatigue, a high temperature in the evenings and excessive sweating. The doctor diagnosed the applicant with acute viral respiratory infection, authorised a number of analyses, including general blood and urine tests, sputum analysis and a survey X-ray exam, and prescribed treatment with floracyd, a cough medicine and multivitamins.

539. A survey X-ray examination performed on 16 July 2007 revealed the reactivation of the tuberculosis and the need for in-patient treatment for the applicant. The doctor's diagnosis was "infiltrative tuberculosis on the right side".

540. On 17 July 2007 the applicant was transferred to the pulmonary tuberculosis ward of the medical department in the detention facility, where he remained until 3 April 2008. On 19, 20 and 23 July 2007 bacteriological sputum tests were performed by way of bacterioscopy, and showed no mycobacterium tuberculosis ("MBT"). Subsequently similar tests were performed once a month, each time producing negative results. On 23 July 2007 a sputum sample taken for culture turned out positive. At the same time results of the applicant's drug susceptibility testing ("DST") were made available to the facility medical personnel, guiding the choice of the applicant's treatment regimen. Between 17 July 2007 and 25 March 2008 the applicant was subjected to an intensive chemotherapy regimen, comprising a number of drugs: isoniazid, pyrazinamide, rifampicin, ethambutol, streptomycin, phosphoglif and multivitamins. During the initial stage of the treatment the applicant adhered to a strict medication regime, having received ninety doses of anti-bacteriological medicines. An intake of every dose was observed by the facility medical staff. Attending tuberculosis specialists examined the patient once in three or four days in view of identifying whether a correction of the drug regimen was necessary. Monthly clinical blood and urine analyses were also carried out. Every two months the applicant received chest radiography. Liver examinations were conducted regularly.

541. After a sputum culture testing had showed that the applicant was no longer smear positive and similar results had been received by way of sputum smear bacterioscopy at completion of the intensive phase of the treatment, the continuation phase of the therapy commenced, comprising treatment with isoniazid, rifampicin and ethambutol ("HRE regimen").

542. The applicant's medical history contained a number of entries made by attending tuberculosis specialists, recording the applicant's negative attitude towards the treatment and his refusal to take anti-bacteriological medicines on at least five occasions. The attending doctors had conversations with the applicant, persuading him to continue the treatment and warning about a possible relapse of the illness or development of severe multi-drug-resistant tuberculosis. In addition, during examinations doctors occasionally reminded him of the negative effects of treatment interruption.

543. Following the applicant's final conviction on 3 March 2008, on 3 April 2008 the applicant was discharged from the medical department of the detention facility with a final diagnosis of infiltrative tuberculosis of the right lung in the resolution and consolidation phase and recommendations to continue treatment on an HRE regimen with a daily special dietary food ration. He was sent for subsequent treatment to Specialised Medical Establishment no. 47 (“the tuberculosis hospital”) for prisoners suffering from tuberculosis, located in the Primorye Region.

544. On 7 April 2008, on admission to the tuberculosis hospital, the applicant was examined by a tuberculosis specialist. A clinical blood analysis and sputum smear bacterioscopy were performed. It was decided to continue the extension phase of the medicine regimen as prescribed by medical specialists of the detention facility. A chest X-ray examination and sputum culture testing were scheduled to be performed at the end of the extension phase. The applicant was also assigned a special diet.

545. Once a month the applicant received a full medical examination. Each time the attending tuberculosis specialists recorded the total number of doses of anti-bacteriological medicines taken by the applicant. Clinical blood and urine tests were performed every three months. A sputum smear was regularly taken for bacterioscopy testing, revealing no presence of MBT. The applicant's medical record also showed that medical personnel discussed with the applicant the necessity of the treatment and adherence to a strict medical regimen.

546. On 25 February 2009 the applicant was examined by a medical panel comprising a number of medical specialists. Having studied his medical records, including results of three most recent X-ray examinations, blood and urine analysis and sputum smear tests, the panel issued the following diagnosis: “clinical recovery from infiltrative pulmonary tuberculosis accompanied by the presence of extensive post-tuberculosis changes in the form of foci and fibrous foci... in both lungs”. A schedule showing future medical procedures and their

frequency was developed. The applicant was also prescribed seasonal retreatment courses with isoniazid, ethambutol and vitamins, to prevent relapse of the illness.

547. On 7 April 2009 the applicant was transferred to correctional colony no. 20. On arrival he was examined by a colony physician, who diagnosed the applicant with acute maxillary sinusitis for which he received treatment between 7 and 20 April 2009. As follows from the applicant's medical history, the correctional colony medical staff complied fully with the recommendations issued by the specialists of the tuberculosis hospital in respect of medical tests and anti-relapse treatment for the applicant.

II. RELEVANT DOMESTIC LAW

A. Health care of detainees

1. Federal Law of 18 June 2001 no. 77-FZ "On Prevention of Dissemination of Tuberculosis in the Russian Federation"

Section 7. Organisation of anti-tuberculosis aid

"1. Provision of anti-tuberculosis aid to individuals suffering from tuberculosis is guaranteed by the State and is performed on the basis of principles of legality, compliance with the rights of an individual and citizen, [and] general accessibility in the amount determined by the Programme of State guarantees for provision of medical assistance to citizens of the Russian Federation, free of charge.

2. Anti-tuberculosis aid is provided to citizens when they voluntarily apply [for such aid] or when they consent [to such aid], safe for cases indicated in Sections 9 and 10 of the present Federal law and other federal laws..."

Section 8. Provision of anti-tuberculosis aid

"1. Individuals suffering from tuberculosis who are in need of anti-tuberculosis aid receive such an aid in medical anti-tuberculosis facilities, licensed to provide [that aid].

2. Individuals who are or have been in contact with an individual suffering from tuberculosis should undergo an examination for detection of tuberculosis in compliance with requirements of law of the Russian Federation..."

Section 9. Regular medical examinations

1. Regular medical examinations of persons suffering from tuberculosis is performed in compliance with the procedure laid down by a respective federal executive body...

2. Regular medical examinations of persons suffering from tuberculosis is performed irrespective of the patients' or their representatives' consent.

3. A medical commission appointed by the head of a medical anti-tuberculosis facility... takes a decision authorising regular medical examinations or terminating them and records such a decision in medical documents...; an individual in respect of whom such a decision has been issued, is informed in writing about the decision taken."

Section 10. Mandatory examinations and treatment of persons suffering from tuberculosis

"2. Individuals suffering from contagious forms of tuberculosis who... intentionally avoid medical examinations aimed at detection of tuberculosis or avoid treating it, should be admitted, by a court decision, to specialised medical anti-tuberculosis establishments for mandatory examinations and treatment."

Section 12. Rights of individuals.... suffering from tuberculosis

"2. Individuals admitted to medical anti-tuberculosis facilities for examinations and (or) treatment, have a right to:

receive information from the administration of the medical anti-tuberculosis facilities on the progress of treatment, examinations...

have meetings with lawyers and clergy in private;

take part in religious ceremonies, if they do not have a damaging impact on the state of their health;

continue their education...

3. Individuals... suffering from tuberculosis have other rights provided for by the laws of the Russian Federation on health care..."

Section 13. Obligations of individuals... suffering from tuberculosis

"Individuals... suffering from tuberculosis must;

submit to medical procedures authorised by medical personnel;

comply with the internal regulations of medical anti-tuberculosis facilities when they stay at those facilities;

comply with sanitary and hygiene conditions established for public places when persons suffering from tuberculosis [visit them].”

Section 14. Social support for individuals... suffering from tuberculosis

“4. Individuals... suffering from tuberculosis should be provided with medication free of charge for out-patient treatment of tuberculosis by federal specialised medical facilities in compliance with the procedure established by the Government of the Russian Federation...”

2. Regulation on Medical Assistance to Detainees

548. Russian law gives detailed guidelines for provision of medical assistance to detained individuals. These guidelines, found in the joint Decree of the Ministry of Health and Social Development and the Ministry of Justice no. 640/190 on Organisation of Medical Assistance to Individuals Serving Sentences or Detained (“the Regulation”), enacted on 17 October 2005, are applicable without exception to all detainees. In particular, section III of the Regulation sets out the procedure for initial steps to be taken by medical personnel of a detention facility on admission of a detainee. On arrival at a temporary detention facility all detainees should be subjected to preliminary medical examination before they are placed in cells shared by other inmates. The examination is performed with the aim of identifying individuals suffering from contagious diseases and those in need of urgent medical assistance. Particular attention should be paid to individuals suffering from contagious conditions. No later than three days after the detainee's arrival at the detention facility he should receive an in-depth medical examination, including X-ray. During the in-depth examination a prison doctor should record the detainee's complaints, study his medical and personal history, record injuries if present, and recent tattoos and schedule additional medical procedures, if necessary. A prison doctor should also authorise laboratory analyses to identify sexually transmitted diseases, HIV, tuberculosis and other illnesses.

549. Subsequent medical examinations of detainees are performed at least twice a year or on detainees' complaints. If a detainee's state of health has deteriorated, medical examinations and assistance should be provided by medical personnel of the detention facility. In such cases a medical examination should include a general medical check-up and additional methods of testing, if necessary, with the participation of particular medical specialists. The

results of the examinations should be recorded in the detainee's medical history. The detainee should be comprehensively informed about the results of the medical examinations.

550. Section III of the Regulation also sets the procedure for cases of refusals by detainees to undergo a medical examination or treatment. In each case of refusal, a respective entry should be made in the detainees' medical record. A prison doctor should comprehensively explain the detainee consequences of his refusal to undergo the medical procedure.

551. Detainees take prescribed medicines in the presence of a doctor. In a limited number of cases the head of the medical department of the detention facility may authorise his medical personnel to hand over a daily dose of medicines to the detainee for unobserved intake.

552. Section X of the Regulation regulates medical examinations, monitoring and treatment of detainees suffering from tuberculosis. It lays down a detailed account of medical procedures to be employed, establishes their frequency, regulates courses of treatment for new tuberculosis patients and previously treated ones (relapsing or defaulting detainees). In particular, it provides that when a detainee exhibits signs of a relapse of tuberculosis, he or she should immediately be removed to designated premises (infectious unit of the medical department of the facility) and should be sent for treatment to an anti-tuberculosis establishment. The prophylactic and anti-relapse treatment of tuberculosis patients should be performed by a tuberculosis specialist. Rigorous checking of the intake of anti-tuberculosis drugs by the detainee should be put in place. Each dose should be recorded in the detainee's medical history. A refusal to take anti-tuberculosis medicine should also be noted in the medical record. A discussion of the negative impacts of the refusal should follow. Detainees suffering from tuberculosis should also be transferred to a special dietary ration.

3. Anti-Tuberculosis Decree

553. On 21 March 2003 the Ministry of Health adopted Decree no. 109 on Improvement of Anti-Tuberculosis Measures in the Russian Federation (“the Anti-Tuberculosis Decree” or “Decree”). Having acknowledged a difficult epidemic situation in the Russian Federation in connection with a drastic increase in the number of individuals suffering from tuberculosis, particularly among children and detainees, and a substantial rise in the number of tuberculosis-related deaths, the Decree laid down guidelines and recommendations for country-wide prevention, detection and therapy of tuberculosis which conform to international standards, identifying forms and types of tuberculosis and categories of patients suffering from them, establishing types of necessary medical examinations, analyses and

testing to be performed in each case and giving extremely detailed instructions on their performance and assessment; laid down rules on vaccination; determined courses and regimens of therapy for particular categories of patients, and so on.

554. In particular, Addendum 6 to the Decree contains an Instruction on chemotherapy for tuberculosis patients. The aims of treatment, essential anti-tuberculosis drugs and their dose combinations, as well as standard regimens of chemotherapy set laid down by the Instruction for Russian tuberculosis patients conformed to those recommended by the World Health Organisation in Treatment of Tuberculosis: Guidelines for National Programs (see below).

B. Witness testimony in criminal cases

Code of Criminal Procedure of the Russian Federation of 18 December 2001, in force since 1 July 2002 ("new CCrP")

555. Article 281 of the new CCrP, in so far as relevant, reads as follows:

"1. Testimony previously given by a victim or witness during the preliminary investigation or at the trial may be read out... if the victim or witness fails to attend, subject to the parties' consent, save in cases listed in the second part of the present Article.

2. If a victim or witness fails to appear in court, the court may, at a party's request or on its own initiative, read out statements previously given by them in the following cases:

1) victim's or witness's death;

2) grave illness precluding attendance at a court hearing;

3) refusal by a victim or witness who is a national of a foreign State to attend a hearing when summoned by the court;

4) natural disaster or any other emergency case precluding attendance at a court hearing."

C. Right to rehabilitation following acquittal

556. The relevant provisions of the new CCrP read as follows:

Article 134. Acknowledgment of the right to rehabilitation

"1. A court in its judgment.... acknowledges the right to rehabilitation for an individual who has been acquitted... At the same time the rehabilitated [person] should have explained to them the procedure for compensation for damage pertaining to criminal prosecution...."

Article 135. Compensation for pecuniary damage.

“1. Compensation for pecuniary damage to a rehabilitated [person] includes:

1) salary, pension, allowances and other sources of income which he lost as a result of the criminal prosecution;

2) his property confiscated or seized by the State on the basis of the judgment by which he had been convicted...;

3) fines and legal costs and expenses which he paid in compliance with the court's judgment;

4) sums paid by him for provision of legal services...;

5) other expenses.

2. At any moment during the limitation period established by the Russian Civil Code and after the rehabilitated [person] received a copy of the judgment [by which he had been acquitted]... he has the right to apply to [the court which had issued the judgment] with a demand to compensate him damage...

...

4. No later than a month after the demand for compensation was received, the court... must determine its amount and issue a decision authorising the payment in compensation for that damage. That payment should take into account the inflation rate. ...”

Article 136. Compensation for non-pecuniary damage.

“1. A prosecutor should give an official apology in the name of the State to the rehabilitated [person] for damage caused to him.

2. An action for compensation for non-pecuniary damage should be brought within civil judicial proceedings....”

Article 138. Restoration of other rights of a rehabilitated [person].

“1. Restoration of labour, pension, housing and other rights of a rehabilitated [person] should be performed in compliance with [the CCrP] established for execution of court judgments....”

III. RELEVANT INTERNATIONAL REPORTS AND DOCUMENTS

A. General health care issues

1. Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, adopted on 11 January 2006 at the 952nd meeting of the Ministers' Deputies ("the European Prison Rules")

557. The European Prison Rules provide a framework of guiding principles for health services. The relevant extracts from the Rules read as follows:

"Health care

39. Prison authorities shall safeguard the health of all prisoners in their care.

Organisation of prison health care

40.1 Medical services in prison shall be organised in close relation with the general health administration of the community or nation.

40.2 Health policy in prisons shall be integrated into, and compatible with, national health policy.

40.3 Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.

40.4 Medical services in prison shall seek to detect and treat physical or mental illnesses or defects from which prisoners may suffer.

40.5 All necessary medical, surgical and psychiatric services including those available in the community shall be provided to the prisoner for that purpose.

Medical and health care personnel

41.1 Every prison shall have the services of at least one qualified general medical practitioner.

41.2 Arrangements shall be made to ensure at all times that a qualified medical practitioner is available without delay in cases of urgency.

...

41.4 Every prison shall have personnel suitably trained in health care.

Duties of the medical practitioner

42.1 The medical practitioner or a qualified nurse reporting to such a medical practitioner shall see every prisoner as soon as possible after admission, and shall examine them unless this is obviously unnecessary.

...

42.3 When examining a prisoner the medical practitioner or a qualified nurse reporting to such a medical practitioner shall pay particular attention to:

...

b. diagnosing physical or mental illness and taking all measures necessary for its treatment and for the continuation of existing medical treatment;

...

f. isolating prisoners suspected of infectious or contagious conditions for the period of infection and providing them with proper treatment;

...

43.1 The medical practitioner shall have the care of the physical and mental health of the prisoners and shall see, under the conditions and with a frequency consistent with health care standards in the community, all sick prisoners, all who report illness or injury and any prisoner to whom attention is specially directed.

...

Health care provision

46.1 Sick prisoners who require specialist treatment shall be transferred to specialised institutions or to civil hospitals when such treatment is not available in prison.

46.2 Where a prison service has its own hospital facilities, they shall be adequately staffed and equipped to provide the prisoners referred to them with appropriate care and treatment."

2. 3rd General Report of the European Committee for the Prevention of Torture ("the CPT Report")

558. The complexity and importance of health care services in detention facilities was discussed by the European Committee for the Prevention of Torture in its 3rd General Report (CPT/Inf (93) 12 - Publication Date: 4 June 1993). The following are the extracts from the Report:

"33. When entering prison, all prisoners should without delay be seen by a member of the establishment's health care service. In its reports to date the CPT has recommended that every newly arrived prisoner be properly interviewed and, if necessary, physically examined by a medical doctor as soon as possible after his admission. It should be added that in some countries, medical screening on arrival is carried out by a fully qualified nurse, who reports to a doctor. This latter approach could be considered as a more efficient use of available resources.

It is also desirable that a leaflet or booklet be handed to prisoners on their arrival, informing them of the existence and operation of the health care service and reminding them of basic measures of hygiene.

34. While in custody, prisoners should be able to have access to a doctor at any time, irrespective of their detention regime... The health care service should be so organised as to enable requests to consult a doctor to be met without undue delay...

35. A prison's health care service should at least be able to provide regular out-patient consultations and emergency treatment (of course, in addition there may often be a hospital-type unit with beds)... Further, prison doctors should be able to call upon the services of specialists.

As regards emergency treatment, a doctor should always be on call. Further, someone competent to provide first aid should always be present on prison premises, preferably someone with a recognised nursing qualification.

Out-patient treatment should be supervised, as appropriate, by health care staff; in many cases it is not sufficient for the provision of follow-up care to depend upon the initiative being taken by the prisoner.

36. The direct support of a fully-equipped hospital service should be available, in either a civil or prison hospital...

38. A prison health care service should be able to provide medical treatment and nursing care, as well as appropriate diets, physiotherapy, rehabilitation or any other necessary special facility, in conditions comparable to those enjoyed by patients in the outside community. Provision in terms of medical, nursing and technical staff, as well as premises, installations and equipment, should be geared accordingly.

There should be appropriate supervision of the pharmacy and of the distribution of medicines. Further, the preparation of medicines should always be entrusted to qualified staff (pharmacist/nurse, etc.). ...

39. A medical file should be compiled for each patient, containing diagnostic information as well as an ongoing record of the patient's evolution and of any special examinations he has undergone. In the event of a transfer, the file should be forwarded to the doctors in the receiving establishment.

Further, daily registers should be kept by health care teams, in which particular incidents relating to the patients should be mentioned. Such registers are useful in that they provide an overall view of the health care situation in the prison, at the same time as highlighting specific problems which may arise.

40. The smooth operation of a health care service presupposes that doctors and nursing staff are able to meet regularly and to form a working team under the authority of a senior doctor in charge of the service. ...

54. A prison health care service should ensure that information about transmittable diseases (in particular hepatitis, AIDS, tuberculosis, dermatological infections) is regularly circulated, both to prisoners and to prison staff. Where appropriate, medical control of those with whom a particular prisoner has regular contact (fellow prisoners, prison staff, frequent visitors) should be carried out."

3. Committee of Ministers Recommendation No. R (98) 7 on Health care in Prisons

559. A further elaboration of European expectations towards health care in prisons is found in the appendix to Recommendation no. R (98) 7 of the Committee of Ministers to Member States on the ethical and organisational aspects of health care in prison (adopted on 8 April 1998 at the 627th meeting of the Ministers' Deputies). Primarily restating the European Prison Rules and CPT standards, the Recommendation went beyond reiteration of the principles in some aspects to include more specific discussion of the management of certain common

problems including transmissible diseases. In particular, in respect of cases of tuberculosis, the Committee of Ministers stressed that all necessary measures should be applied to prevent the propagation of this infection, in accordance with relevant legislation in this area. Therapeutic intervention should be of a standard equal to that outside of prison. The medical services of the local chest physician should be requested in order to obtain the long-term advice that is required for this condition as is undertaken in the community in accordance with relevant legislation (Section 41).

B. Health care issues related to transmissible diseases

1. Committee of Ministers Recommendation no. R (93) 6 on Control of Transmissible Diseases in Prisons

560. The fact that transmissible diseases in European prisons have become an issue of considerable concern prompted a recommendation of the Committee of Ministers to Member States concerning prison and criminological aspects of the control of transmissible diseases and related health problems in prison (adopted on 18 October 1993 at the 500th meeting of the Ministers' Deputies). The relevant extracts from the Recommendation read as follows:

"2. The systematic medical examination carried out on entry into prison should include measures to detect intercurrent diseases, including treatable infectious diseases, in particular tuberculosis. The examination also gives the opportunity to provide health education and to give prisoners a greater sense of responsibility for their own health....

15. Adequate financial and human resources should be made available within the prison health system to meet not only the problems of transmissible diseases and HIV/Aids but also all health problems affecting prisoners."

2. 11th General Report of activities of the European Committee for the Prevention of Torture

561. An expanded coverage of the issue related to transmissible diseases in detention facilities was given by the European Committee for the Prevention of Torture in its 11th General Report (CPT/INF (2001) 16 published on 3 September 2001), a discussion prompted by findings of serious inadequacies in health provision and poor material conditions of detention which were exacerbating the transmission of the diseases. Addressing the issue, the CPT held as follows:

"31. The spread of transmissible diseases and, in particular, of tuberculosis, hepatitis and HIV/AIDS has become a major public health concern in a number of European countries.

Although affecting the population at large, these diseases have emerged as a dramatic problem in certain prison systems. In this connection the CPT has, on a number of occasions, been obliged to express serious concerns about the inadequacy of the measures taken to tackle this problem. Further, material conditions under which prisoners are held have often been found to be such that they can only favour the spread of these diseases.

The CPT is aware that in periods of economic difficulties - such as those encountered today in many countries visited by the CPT - sacrifices have to be made, including in penitentiary establishments. However, regardless of the difficulties faced at any given time, the act of depriving a person of his liberty always entails a duty of care which calls for effective methods of prevention, screening, and treatment. Compliance with this duty by public authorities is all the more important when it is a question of care required to treat life-threatening diseases.

The use of up-to date methods for screening, the regular supply of medication and related materials, the availability of staff ensuring that prisoners take the prescribed medicines in the right doses and at the right intervals, and the provision when appropriate of special diets, constitute essential elements of an effective strategy to combat the above-mentioned diseases and to provide appropriate care to the prisoners concerned. Similarly, material conditions in accommodation for prisoners with transmissible diseases must be conducive to the improvement of their health; in addition to natural light and good ventilation, there must be satisfactory hygiene as well as an absence of overcrowding.

Further, the prisoners concerned should not be segregated from the rest of the prison population unless this is strictly necessary on medical or other grounds...

In order to dispel misconceptions on these matters, it is incumbent on national authorities to ensure that there is a full educational programme about transmissible diseases for both prisoners and prison staff. Such a programme should address methods of transmission and means of protection as well as the application of adequate preventive measures.

It must also be stressed that appropriate information and counselling should be provided before and - in the case of a positive result - after any screening test. Further, it is axiomatic that patient-related information should be protected by medical confidentiality. As a matter of principle, any interventions in this area should be based on the informed consent of the persons concerned.

Moreover, for control of the above-mentioned diseases to be effective, all the ministries and agencies working in this field in a given country must ensure that they co-ordinate their efforts in the best possible way. In this respect the CPT wishes to stress that the continuation of treatment after release from prison must be guaranteed."

C. Reports on the Russian Federation

1. The CPT Report on Russia

562. The CPT report on the visit to the Russian Federation carried out from 2 to 17 December 2001 (CPT/INF (2003) 30) provides as follows:

"102. The CPT is also seriously concerned by the practice of transferring back from SIZO [temporary detention facility] to IVS [temporary detention ward in police departments] facilities prisoners diagnosed to have BK+ tuberculosis (and hence highly contagious), as well as by the interruption of TB treatment while at the IVS. An interruption of the treatment also appeared to occur during transfers between penitentiary establishments.

In the interest of combating the spread of tuberculosis within the law-enforcement and penitentiary system and in society in general, the CPT recommends that immediate measures be taken to put an end to the above-mentioned practice."

2. The World Bank Report on Tuberculosis and Aids Control Project in Russia

563. On 23 December 2009 the World Bank published the Implementation Completion and Results Report (Report no. ICR00001281, Volume I) on a loan granted to the Russian Federation for Tuberculosis and Aids Control Project. The relevant part of the Report read as follows:

"According to the World Health Organization (WHO), Russia was one of the 22 high-burden countries for TB in the world (WHO, Global Tuberculosis control: Surveillance, Planning, Financing, Geneva, 2002). The incidence of TB increased throughout the 1990s. This was due to a combination of factors, including: (i) increased poverty, (ii) under-funding of TB services and health services in general, (iii) diagnostic and therapeutic approaches that were designed for a centralized command-and-control TB system, but were unable to cope with the social mobility and relative freedom of the post-Soviet era, and (iv) technical inadequacies and outdated equipment. Migration of populations from ex-Soviet republics with high TB burdens also increased the problem. Prevalence rates were many times higher in the prison system than in the general population. Treatment included lengthy hospitalizations, variations among

clinicians and patients in the therapeutic regimen, and frequent recourse to surgery. A shrinking health budget resulted in an erratic supply of anti-TB drugs and laboratory supplies, reduced quality control in TB dispensaries and laboratories, and inadequate treatment. The social conditions favouring the spread of TB, combined with inadequate systems for diagnosis, treatment, and surveillance, as well as increased drug resistance, produced a serious public health problem.

TB control in the former Union of Soviet Socialist Republics (USSR) and in most of Russia in the 1990s was heavily centralized, with separate hospitals (TB dispensaries), TB sanatoriums, TB research institutes and TB specialists. The system was designed in the 1920s to address the challenges of the TB epidemic. Case detection relied strongly on active mass screening by X-ray (phluorography). Specificity, sensitivity, and cost-effectiveness considerations were not features of this approach. Bacille Calmette-Guerin (BCG) immunization was a key feature of the TB...

By 2000, there was more than a two-fold increase in TB incidence, and mortality from TB increased 3 times, compared with 1990. The lowered treatment effectiveness of the recent years resulted into an increase in the number of TB chronic patients, creating a permanent 'breeding ground' for the infection. At that moment, the share of pulmonary TB cases confirmed by bacterioscopy did not exceed 25%, and the share of such cases confirmed by culture testing was no more than 41% due to suboptimal effectiveness of laboratory diagnosis, which led to poor detection of smear-positive TB cases. Being a social disease, TB affected the most socially and economically marginalized populations in Russia."

D. General guidelines for tuberculosis therapy

564. The following are the extracts from Treatment of Tuberculosis: Guidelines for National Programmes, World Health Organisation, 1997, pp. 27, 33 and 41:

"Previously treated patients may have acquired drug resistance. They are more likely than new patients to harbour and excrete bacilli resistant to at least isoniazid. The re-treatment regimen consists of initially 5 drugs, with 3 drugs in the continuation phase. The patient receives at least 2 drugs in the initial phase which are still effective. This reduces the risk of selecting further resistant bacilli....

Patients with sputum smear-positive pulmonary TB should be monitored by sputum smear examination. This is the only group of TB patients for whom bacteriological monitoring is possible. It is unnecessary and wasteful of resources to monitor the patient by chest

radiography. For patients with sputum smear-negative pulmonary TB and extra-pulmonary TB, clinical monitoring is the usual way of assessing response to treatment. Under programme conditions in high TB incidence countries, routine monitoring by sputum culture is not feasible or recommended. Where facilities are available, culture surveys can be useful as part of quality control of diagnosis by smear microscopy...

Directly observed treatment is one element of the DOTS strategy, i.e. the WHO recommended policy package for TB control. Direct observation of treatment means that a supervisor watches the patient swallowing the tablets. This ensures that a TB patient takes the right drugs, in the right doses, at the right intervals...

Many patients receiving self-administered treatment will not adhere to treatment. It is impossible to predict who will or will not comply, therefore directly observed treatment is necessary at least in the initial phase to ensure adherence. If a TB patient misses one attendance to receive treatment, it is necessary to find that patient and continue treatment."

565. In the fourth edition of the Guidelines, published in 2009, the WHO recommended as follows:

"DST [a drug susceptibility testing] before or at the start of therapy is strongly recommended for all previously treated persons." (p. 11)

1.3.3. The law

I. PRELIMINARY CONSIDERATIONS

566. The Court observes at the outset that in his application to the Court the applicant complained that the criminal proceedings leading to his conviction for drug trafficking were unfair. In a subsequent letter received by the Court on 9 June 2009 he successfully requested the Court to treat his application as a priority, alleging that Russian prison authorities, although fully aware that he was suffering from tuberculosis, did not provide him with adequate medical treatment. In his observations, lodged with the Court in April 2010, the applicant, while maintaining his health-related complaint, adduced an alternative complaint. In particular, he complained that on his admission to facility no. IZ-25/1 he had been a healthy person as tuberculosis had been "completely cured" and that the Russian authorities

had failed to safeguard his health as a relapse of the illness had been caused by appalling conditions of his detention in that facility.

567. In this connection the Court reiterates that it has jurisdiction to review, in the light of the entirety of the Convention's requirements, the circumstances complained of by an applicant. In the performance of its task, the Court is free to attribute to the facts of the case, as established on the evidence before it, a characterisation in law different from that given by the applicant or, if need be, to view the facts in a different manner. Furthermore, it has to take into account not only the original application but also the additional documents intended to complete the latter by eliminating initial omissions or obscurities (see Ringeisen v. Austria, 16 July 1971, § 98, Series A no. 13, as compared with § 79 and §§ 96-97 of that judgment).

568. Turning to the present case, the Court observes that the new complaint pertaining to the conditions of the applicant's detention from 28 April 2007, when he was placed in detention facility no. IZ-25/1, to 17 July 2007, when he was transferred to the pulmonary tuberculosis ward of the medical department, was submitted after notice of the initial application had been given to the Government on 23 September 2009. In the Court's view, the new complaint raised under Article 3 of the Convention is not an elaboration of his original complaints lodged with the Court almost two years earlier, on which the parties have already commented. The Court therefore decides not to examine the new complaint within the framework of the present proceedings (see Nuray Şen v. Turkey (no. 2) judgment of 30 March 2004, no. 25354/94, § 200; Melnik v. Ukraine, no. 72286/01, §§ 61-63, 28 March 2006; Kravchenko v. Russia, no. 34615/02, §§ 26-28, 2 April 2009; and Isayev v. Russia, no. 20756/04, §§ 81-83, 22 October 2009).

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

569. The applicant complained under Article 3 of the Convention that the detention authorities had failed to take steps to safeguard his health and well-being, having failed to provide him with adequate medical assistance in respect of his tuberculosis. Article 3 reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Submissions by the parties

570. The Government submitted that the Russian authorities had taken all appropriate measures to safeguard the applicant's health. On admission to detention facility no. IZ-25/1

the applicant was examined by a prison doctor. Having studied the applicant's medical history and having learnt that he had had tuberculosis since 2003, the doctor placed the applicant under proactive medical supervision which included regular medical check-ups, X-ray examinations, clinical analysis and so on. When a relapse of the illness was recorded, the applicant was immediately moved to the pulmonary tuberculosis ward of the facility medical department. The treatment administered to the applicant by the prison doctors corresponded to that laid down by the Anti-Tuberculosis Decree (see paragraphs 553 and 554 above) which in its turn conformed to recommendations given by the World Health Organisation for treatment of tuberculosis (see paragraph 564 above). Positive elements in the progress of the applicant's illness were recorded by the medical personnel during the treatment. The treatment resulted in clinical recovery from tuberculosis. At the same time, despite the positive effect of the treatment, the doctors continued their supervision, assigning the applicant to regular medical examinations and procedures, and providing him with seasonal further courses of anti-tuberculosis treatment, to avoid a relapse. In addition, the applicant was provided with a specialised enriched food regimen.

571. The applicant stressed that he had acquired his illness in 2003. He underwent necessary treatment and the illness was rendered inactive. It was not until his arrest that his health seriously deteriorated in view of the complete absence of medical attention. As a result, he relapsed and he was forced to undergo painful and stressful treatment, including agonising chemotherapy, for almost two years. Moreover, the medical personnel of the detention facilities ignored his complaints and requests. The proper treatment was only administered after intervention by the applicant's lawyer.

B. The Court's assessment

1. Admissibility

572. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3^{14} of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) General principles

573. The Court reiterates that Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or

degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, for example, Labita v. Italy [GC], no. 26772/95, § 119, ECHR 2000-IV). Ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, Ireland v. the United Kingdom, 18 January 1978, § 162, Series A no. 25).

574. Ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 (see Pretty v. the United Kingdom, no. 2346/02, § 52, ECHR 2002-III, with further references).

575. In the context of deprivation of liberty the Court has consistently stressed that, to fall under Article 3, the suffering and humiliation involved must in any event go beyond that inevitable element of suffering and humiliation connected with the detention (see, mutatis mutandis, Tyrer v. the United Kingdom, 25 April 1978, § 30, Series A no. 26, and Soering v. the United Kingdom, 7 July 1989, § 100, Series A no. 161).

576. The State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see Kudła v. Poland [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI, and Popov v. Russia, no. 26853/04, § 208, 13 July 2006). In most of the cases concerning the detention of people who are ill the Court has examined whether or not the applicant received adequate medical assistance in prison. The Court reiterates in this respect that even if Article 3 does not entitle a detainee to be released “on compassionate grounds”, it has always interpreted the requirement to secure the health and well-being of detainees, among other things, as an obligation on the part of the State to provide detainees with the requisite medical assistance (see Kudła, cited above, § 94; Kalashnikov v. Russia, no. 47095/99, §§ 95 and 100, ECHR 2002-VI; and Khudobin v. Russia, no. 59696/00, § 96, ECHR 2006-XII (extracts)).

577. The “adequacy” of medical assistance remains the most difficult element to determine. The CPT proclaimed the principle of the equivalence of health care in prison with that in the outside community (see paragraph 558 above). However, the Court does not always adhere to this standard, at least when it comes to medical assistance for convicted prisoners (as opposed to those in pre-trial detention). While acknowledging that authorities must ensure that the diagnosis and care are prompt and accurate (see Hummatov v. Azerbaijan, nos. 9852/03 and 13413/04, § 115, 29 November 2007; Melnik, cited above, §§ 104-106; and, mutatis mutandis, Holomiov v. Moldova, no. 30649/05, § 121, 7 November 2006), and that where necessitated by the nature of a medical condition supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at curing the detainee's health problems or preventing their aggravation (see Hummatov, cited above, §§ 109, 114; Sarban v. Moldova, no. 3456/05, § 79, 4 October 2005; and Popov v. Russia, cited above, § 211), the Court has also held that Article 3 of the Convention cannot be interpreted as securing for every detained person medical assistance at the same level as “in the best civilian clinics” (see Mirilashivili v. Russia (dec.), no. 6293/04, 10 July 2007). In another case the Court went further, holding that it was “prepared to accept that in principle the resources of medical facilities within the penitentiary system are limited compared to those of civil[ian] clinics” (see Grishin v. Russia, no. 30983/02, § 76, 15 November 2007).

578. On the whole, the Court reserves sufficient flexibility in defining the required standard of health care, deciding it on a case-by-case basis. That standard should be “compatible with the human dignity” of a detainee, but should also take into account “the practical demands of imprisonment” (see Aleksanyan v. Russia, no. 46468/06, § 140, 22 December 2008).

(b) Application of the above principles to the present case

579. The Court reiterates that it was not in dispute between the parties that the applicant had contracted tuberculosis in 2003, long before his arrest and placement in detention facility no. IZ-25/1 in April 2007. According to the applicant, when he learned about the infection he underwent treatment in a tuberculosis hospital in his home town. Although the Government did not comment on the outcome of the treatment, they did not dispute the applicant's assertion that the treatment had been a success, resulting in his recovery from active tuberculosis. In any event, medical records produced by the Government confirm that no signs of reactivation of the illness were recorded on the applicant's admission to facility IZ-25/1. In this respect, the Court would like to stress already at this juncture that the medical assessment of the applicant conducted during his first days in the detention facility appear to

comply fully with international standards of tuberculosis control policy in prisons, a recognised setting for transmission of tuberculosis (see paragraphs 558- 560 above). In particular, the Court notes that the applicant was seen without delay by an attending prison doctor, who studied his medical history, recorded complaints, organised a meeting with a tuberculosis specialist and scheduled an X-ray examination. The doctor's recommendations were promptly put into practice. Subsequent X-ray exams were also performed without undue delay.

580. However, despite the steps taken by the facility administration which the Court interprets as their evident commitment to control tuberculosis, the applicant suffered a relapse of the illness less than three months after his arrival in the facility. While the cause of the reactivation of the illness is not the subject matter of the Court's examination (see paragraphs 566-568 above), it considers it necessary to reiterate its constant approach that even if an applicant had contracted tuberculosis while in detention, this in itself would not imply a violation of Article 3, provided that he received treatment for it (see Alver v. Estonia, no. 64812/01, § 54, 8 November 2005, and Pitalev v. Russia, no. 34393/03, § 53, 30 July 2009, with further references). However, the State does have a responsibility to ensure prevention and treatment for prisoners in its charge and a lack of adequate medical assistance for serious health problems not suffered from prior to detention may amount to a violation of Article 3 (see Hummatov, cited above, § 108 et seq.). This principle should certainly be extrapolated to the case of the applicant, who suffered a relapse of tuberculosis after his admission to the detention facility. Absent or inadequate treatment for tuberculosis, particularly when the disease has been contracted or reactivated in detention, is most certainly a subject of the Court's concern. The Court is therefore bound to assess the quality of medical services rendered to the applicant in the present case.

581. Having studied the applicant's medical records produced by the Government, the authenticity and reliability of which the applicant did not dispute, the Court has already established that after admission to the detention facility the applicant was under constant medical supervision. After the early symptoms of the reactivation of the disease, such as fatigue, excessive sweating and high temperature, began to manifest themselves and subsequent medical examinations, including a survey X-ray exam, revealed a relapse of the illness, the applicant was promptly transferred for in-patient treatment to the pulmonary tuberculosis ward of the medical department in the detention facility. In this respect the Court does not lose sight of the timely and active screening actions of the facility medical personnel

in identifying the reactivation of the applicant's infection, a cornerstone measure in the modern strategy of tuberculosis control and treatment.

582. The Court further observes that the quality of the treatment provided to the applicant following the detection of the tuberculosis relapse appears to be adequate. In particular, the evidence put before the Court shows that the Russian authorities employed all existing tools (sputum smear bacterioscopy, culture testing and chest X-ray exams) for correct diagnosis of the applicant, having considered the extent of the disease and determined the tuberculosis severity to prescribe appropriate therapy. In particular, it did not escape the Court's attention that a drug susceptibility test had been performed at the initial stage of the diagnostic process, in line with the WHO's most recent recommendations (see paragraph 565 above). The test not only allowed efficiently finalising diagnostic procedures and allocating the applicant's case to standardised treatment category, but also guided the choice of appropriate regimen adjustments given the results of the test. At the same time the Court is satisfied that the DST did not delay the start of the applicant's treatment.

583. Having been placed on a strict medication regime necessary for the tuberculosis therapy when the initial stage of the treatment was followed by the continuation stage as recommended by WHO for re-treatment cases, the applicant received a number of anti-tuberculosis medicines and concomitant antihistamine drugs, which were administered to him in the requisite dosage, at the right intervals and within the appropriate duration. During the entire period of his treatment the applicant was subjected to regular and systematic clinical and radiological assessment and bacteriological monitoring, which formed part of the comprehensive therapeutic strategy aimed at curing the disease. The detention authorities also effectively implemented the doctors' recommendations of a special dietary ration necessary for the applicant to improve his health (see, by contrast, Gorodnitchev v. Russia, no. 52058/99, § 91, 24 May 2007).

584. Furthermore, the Court attributes particular weight to the fact that the facility administration not only ensured that the applicant was attended by doctors, his complaints were heard and he was prescribed a trial of anti-tuberculosis medication, but they also created the necessary conditions for the prescribed treatment to be actually followed through (see Hummatov, cited above, § 116). The Court notes that the intake of medicines by the applicant was supervised and directly observed by the facility medical personnel throughout the whole re-treatment regimen as required by the DOTS strategy (see paragraph 564 above). In addition, in a situation when the authorities met with the applicant's occasional refusal to

cooperate and his resistance to the treatment they offered him psychological support and attention, having provided clear and complete explanations of medical procedures, the sought outcome of the treatment and negative side-effects of interruption of treatment or irregular medication (see, by contrast, Gorodnitchev, cited above, § 91; Testa v. Croatia, no. 20877/04, § 52, 12 July 2007; and Tarariyeva v. Russia, no. 4353/03, § 80, ECHR 2006 XV (extracts)). The authorities' actions permitted the applicant's adherence to the treatment and compliance with the prescribed regimen to be assured, a key factor in tuberculosis treatment success.

585. After conviction, which made the applicant's continued detention in facility IZ-25/1 impossible, he was transferred to the tuberculosis hospital. The medical records pronouncing the applicant's diagnosis on his discharge as "infiltrative tuberculosis of the right lung in the resolution and consolidation phase", as well as negative results of sputum smear examinations, showed positive dynamics of the applicant's treatment, meaning that he was recovering. The applicant's transfer to the tuberculosis hospital was accompanied by recommendations from doctors of the detention facility no. IZ-25/1 to continue HRE treatment regimen. The Court is particularly mindful of the fact that without bluntly accepting the recommendations of the facility medical personnel, the tuberculosis hospital specialists gave an independent assessment of the applicant's case on the basis of the clinical examinations, radiography and bacteriological tests performed in the hospital. Recommendations of the detention facility doctors having been considered valid, the applicant continued the prescribed treatment regimen. Nothing in the case file can lead the Court to the conclusion that the applicant did not receive comprehensive medical assistance during that stage of his tuberculosis treatment. The list of tests submitted by the Government included regular X-ray exams, sputum smear tests, further clinical analysis and examinations by tuberculosis specialists. The applicant did not deny that medical supervision had been provided and tests had been carried out in the tuberculosis hospital, or that the prescribed medication had been provided, as indicated in the medical records submitted by the Government. In fact, he did not indicate any defect in his medical care in the tuberculosis hospital.

586. Finally, after the completion of the treatment resulting in the applicant's "clinical recovery from infiltrative pulmonary tuberculosis" he remained under medical supervision aimed at prevention of a relapse of the illness. A detailed list of future medical procedures to follow up on the applicant's condition and effectiveness of the treatment was drawn up and seasonal retreatment courses were prescribed. As it appears from the parties' submissions, the

administration of the colony where the applicant had been sent from the tuberculosis hospital followed through with the anti-relapse recommendations.

587. To sum up, the Court considers that the Government provided sufficient evidence to enable it to conclude that the applicant received comprehensive, effective and transparent medical assistance in respect of his tuberculosis. Accordingly, there has been no violation of Article 3 of the Convention on account of the alleged failure to provide the applicant with requisite medical care during his imprisonment.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

588. The applicant complained that while finding him guilty of drug trafficking the domestic courts had relied heavily on statements by the anonymous witness, Mr I., and a prosecution witness, Mr K., whom he had been unable to confront in open court. He relied on Article 6 of the Convention, which, in so far as relevant, reads as follows:

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

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"

A. Submissions by the parties

589. The Government argued that the domestic authorities had taken steps to remedy the alleged violation. In particular, on 15 January 2010 the Presidium of the Primorye Regional Court quashed the applicant's conviction for drug trafficking and pronounced him innocent on that charge in view of the lack of evidence of criminal conduct. As a consequence, the applicant's sentence was decreased to two years and he was released, having served the entire sentence. Moreover, the applicant acquired the right to rehabilitation, enabling him, inter alia, to seek compensation for unlawful conviction and detention.

590. The applicant maintained his complaint.

B. The Court's assessment

Admissibility

591. The Court reiterates that under Article 34[10] of the Convention it is entitled to receive applications from persons, non-governmental organisations or groups of individuals "claiming to be the victim of a violation" by a High Contracting Party of the rights contained in the Convention and its Protocols. In situations where an alleged violation has already occurred, subsequent events can give rise to a loss of the status of "victim", provided that the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, among other authorities, Amuur v. France, 25 June 1996, § 36, Reports of Judgments and Decisions 1996 III).

592. Turning to the facts of the present case, the Court observes that on 15 January 2010 the Presidium of the Primorye Regional Court expressly acknowledged that the Artyom Town Court, which had heard the applicant's criminal case and had issued the judgment of 14 December 2007, and the Primorye Regional Court, which had examined the case on appeal and upheld the conviction of drug trafficking in the judgment of 3 March 2008, had committed a violation of Article 6 § 3 (d)[13] of the Convention, having grounded their findings to a substantial degree on statements by witnesses, including Mr I. and Mr K., who had never been heard in open court. The Presidium quashed the conviction for drug trafficking, having found that there was no evidence of the applicant's guilt. The effect of the proceedings which formed the basis for the applicant's complaints has thus also been quashed (see Ryabov v. Russia, no. 3896/04, § 50, 31 January 2008).

593. The Court further notes that following the judgment of 15 January 2010, when the applicant's sentence was reduced to two years in view of his remaining conviction for drug possession, the applicant was released without delay. In addition, by virtue of the Presidium's judgment he acquired the right to rehabilitation which, and it was not disputed by the applicant, enabled him to seek compensation for damages resulting from his conviction for drug trafficking and detention and to claim restoration of other rights, if they had been infringed as a result of the detention and conviction (see paragraph 556 above). While the Court notes that there is no evidence in the file that the applicant has made use of his right to rehabilitation, that legal avenue still remains open for him.

594. Having regard to the content of the judgment of 15 January 2010, the subsequent acquittal and the rehabilitation avenue which the applicant is able to effectively employ, the

Court finds that the national authorities have acknowledged, and then afforded redress for, the alleged breach of the Convention.

595. It follows that the applicant can no longer claim to be a victim of the alleged violation of Article 6 § 1[8] of the Convention within the meaning of Article 34 of the Convention (see Hans-Joachim Enders v. Germany, no. 25040/94, Commission decision of 12 April 1996; Fedosov v. Russia (dec.), no. 42237/02, 5 January 2007; and Brinzevich v. Russia (dec.), no. 6822/04, 11 December 2007; and, mutatis mutandis, Hajiyev v. Azerbaijan, no. 5548/03, 16 June 2005, and Wong v. Luxemburg (dec.), no. 38871/02, 30 August 2005) and that this complaint is to be rejected, pursuant to Articles 34 and 35 §§ 3[14] and 4[15].

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

596. The Court has examined the other complaints submitted by the applicant. However, having regard to all the material in its possession, and in so far as these complaints fall within the Court's competence, it finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

1.3.4. The Court’s decision

1. Declares the complaint concerning inadequate medical care during the applicant's imprisonment admissible and the remainder of the application inadmissible;

2. Holds that there has been no violation of Article 3 of the Convention.

1.4. Case of Jalloh v. Germany[3]

Having deliberated in private on 23 November 2005 and on 10 May 2006,

Delivers the following judgment, which was adopted on the last-mentioned date:

1.4.1. The procedure

597. The case originated in an application (no. 54810/00) against the Federal Republic of Germany lodged with the Court under Article 34[10] of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Sierra Leonean national, Mr Abu Bakah Jalloh ("the applicant"), on 30 January 2000.

598. The applicant was represented by Mr U. Busch, a lawyer practising in Ratingen. The German Government ("the Government") were represented by their Agent, Mr K. Stoltenberg, Ministerialdirigent, and, subsequently, Mrs A. Wittling-Vogel, Ministerialdirigentin.

599. The applicant alleged, in particular, that the forcible administration of emetics in order to obtain evidence of a drugs offence constituted inhuman and degrading treatment prohibited by Article 3 of the Convention. He further claimed that the use of this illegally obtained evidence at his trial breached his right to a fair trial guaranteed by Article 6 of the Convention.

600. The application was allocated to the Third Section of the Court. By a decision of 26 October 2004, it was declared partly admissible by a Chamber of that Section, composed of Ireneu Cabral Barreto, President, Georg Ress, Lucius Caflisch, Rıza Türmen, Boštjan M. Zupančič, Margarita Tsatsa-Nikolovska and Alvina Gyulumyan, judges, and Vincent Berger, Section Registrar.

601. On 1 February 2005 the Chamber relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30[16] of the Convention and Rule 72[17] of the Rules of Court).

[3] Case Of Jalloh V. Germany; (Application No. 54810/00); Judgment Strasbourg; 11 July 2006

602. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3[18] of the Convention and Rule 24 of the Rules of Court. Georg Ress, whose term of office expired on 31 October 2004, continued to sit in the case (Article 23 § 7 of the Convention and Rule 24 § 4[19]). Jean-Paul Costa, Rıza Türmen and Margarita Tsatsa-Nikolovska, who were unable to take part in the hearing, were replaced by András Baka, Giovanni Bonello and Ján Šikuta (Rule 24 § 2 (a) and § 3[20]). At the final deliberations, Snejana Botoucharova, substitute judge, replaced Ljiljana Mijović, who was unable to take part in the further consideration of the case (Rule 24 § 3).

603. The applicant and the Government each filed observations on the merits.

604. A hearing took place in public in the Human Rights Building, Strasbourg, on 23 November 2005 (Rule 59 § 3[3]).

1.4.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

605. The applicant was born in 1965 and lives in Cologne (Germany).

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

A. Investigation proceedings

607. On 29 October 1993 four plain-clothes policemen observed the applicant on at least two different occasions take a tiny plastic bag (a so called “bubble”) out of his mouth and hand it over to another person in exchange for money. Believing that these bags contained drugs, the police officers went to arrest the applicant, whereupon he swallowed another bubble he still had in his mouth.

608. The police officers did not find any drugs on the applicant. Since further delay might have frustrated the conduct of the investigation, the public prosecutor ordered that emetics (Brechmittel) be administered to the applicant by a doctor in order to provoke the regurgitation of the bag (Exkorporation).

609. The applicant was taken to a hospital in Wuppertal-Elberfeld. According to the Government, the doctor who was to administer the emetics questioned the applicant about his

medical history (a procedure known as obtaining an anamnesis). This was disputed by the applicant, who claimed that he had not been questioned by a doctor. As the applicant refused to take the medication necessary to provoke vomiting, he was held down and immobilised by four police officers. The doctor then forcibly administered to him a salt solution and the emetic ipecacuanha syrup through a tube introduced into his stomach through the nose. In addition, the doctor injected him with apomorphine, another emetic that is a derivative of morphine. As a result, the applicant regurgitated one bubble containing 0.2182 grams of cocaine. Approximately an hour and a half after being arrested and taken to the hospital, the applicant was examined by a doctor and declared fit for detention.

610. When visited by the police in his cell two hours after being given the emetics, the applicant, who was found not to speak German, said in broken English that he was too tired to make a statement about the alleged offence.

611. Pursuant to an arrest warrant that had been issued by the Wuppertal District Court, the applicant was remanded in custody on 30 October 1993.

612. The applicant maintained that for three days following the treatment to which he was subjected he was only able to drink soup and that his nose repeatedly bled for two weeks because of wounds he had received when the tube was inserted. This was disputed by the Government, who stressed that the applicant had failed to submit a medical report to prove his allegation.

613. Two and a half months after the administration of the emetics, the applicant underwent a gastroscopy in the prison hospital after complaining of continuous pain in the upper region of his stomach. He was diagnosed as suffering from irritation in the lower area of the oesophagus caused by the reflux of gastric acid. The medical report did not expressly associate this condition with the forced administration of the emetics.

614. The applicant was released from prison on 23 March 1994. He claimed that he had had to undergo further medical treatment for the stomach troubles he had suffered as a result of the forcible administration of the emetics. He did not submit any documents to confirm that he had received medical treatment. The Government, for their part, maintained that the applicant had not received any medical treatment.

B. Domestic court proceedings

615. In his submissions dated 20 December 1993 to the Wuppertal District Court, the applicant, who was represented by counsel throughout the proceedings, objected to the use at his trial of the evidence obtained through the administration of emetics, a method he considered to be illegal. By using force to provoke the regurgitation of the bubble of cocaine, the police officers and the doctor concerned were guilty of causing him bodily harm in the course of their duties (Körperverletzung im Amt). The administration of toxic substances was prohibited by Article 136a of the Code of Criminal Procedure (see paragraph 34 below). His bodily functions had been manipulated, since bodily activity had been provoked by suppressing the control reactions of the brain and the body. In any event, administering emetics was a disproportionate measure and therefore not authorised by Article 81a of the Code of Criminal Procedure (see paragraphs 33 and 35-40 below). It would have been possible to obtain evidence of the alleged offence by waiting for the bubble to pass through his system naturally. The applicant further argued that the only other method authorised by Article 81a of the Code of Criminal Procedure would have been irrigation of the stomach.

616. On 23 March 1994 the Wuppertal District Court convicted the applicant of drug trafficking and sentenced him to one year's imprisonment, suspended, and probation. It rejected the defence's argument that the administration of emetics under Article 81a of the Code of Criminal Procedure was a disproportionate means of recovering a bubble containing just 0.2 g of cocaine.

617. The applicant appealed against the judgment.

618. On 17 May 1995 the Wuppertal Regional Court upheld the applicant's conviction but reduced the length of the suspended prison sentence to six months. It further ordered the forfeiture (Verfall) of 100 German marks that had been found on the applicant at the time of his arrest on the ground that it was the proceeds of sale of two drug bubbles.

619. The Regional Court found that the evidence obtained following the public prosecutor's order to provoke the regurgitation of the bubble of cocaine was admissible. The measure had been carried out because further delay might have frustrated the conduct of the investigation. Pursuant to Article 81a of the Code of Criminal Procedure, the administration of the substances in question, even if effected against the suspect's will, was legal. The procedure had been necessary to secure evidence of drug trafficking. It had been carried out by a doctor

and in compliance with the rules of medical science. The defendant's health had not been put at risk and the principle of proportionality had been adhered to.

620. The applicant appealed against this judgment on points of law. He argued in particular that Article 81a of the Code of Criminal Procedure did not authorise the administration of emetics, as it did not permit the administration of life-threatening substances by dangerous methods. Furthermore, Article 81a prohibited measures such as the one in question that resulted in a suspect effectively being forced to contribute actively to his own conviction. He further submitted that the impugned measure had violated Articles 1 and 2 of the Basic Law (Grundgesetz – see paragraphs 31-32 below), and disregarded in particular the right to respect for human dignity.

621. On 19 September 1995 the Düsseldorf Court of Appeal dismissed the applicant's appeal. It found that the Regional Court's judgment did not contain any error of law that was detrimental to the accused.

622. The applicant lodged a complaint with the Federal Constitutional Court. He reiterated that the administration of emetics was a disproportionate measure under Article 81a of the Code of Criminal Procedure.

623. On 15 September 1999 the Federal Constitutional Court declared the applicant's constitutional complaint inadmissible under the principle of subsidiarity.

624. It considered that the administration of emetics, including apomorphine, a morphine derivative, raised serious constitutional issues with respect to the right to physical integrity (Article 2 § 2 of the Basic Law – see paragraph 32 below) and to the principle of proportionality which the criminal courts had not yet addressed.

625. The Federal Constitutional Court found that the applicant had not availed himself of all the remedies at his disposal (alle prozessualen Möglichkeiten) to contest the measure before the criminal courts in order to avoid any underestimation of the importance and scope of the fundamental right laid down in Article 2 § 2, first sentence, of the Basic Law (um eine Verkennung von Bedeutung und Tragweite des Grundrechts des Art. 2 Abs. 2 Satz 1 GG zu verhindern).

626. It further stated that the administration of emetics did not give rise to any constitutional objections of principle either with respect to human dignity protected by Article 1 § 1 of the

Basic Law or the principle against self-incrimination guaranteed by Article 2 § 1 read in conjunction with Article 1 § 1 of the Basic Law.

II. RELEVANT DOMESTIC, COMPARATIVE AND INTERNATIONAL LAW AND PRACTICE

1. Domestic law and practice

(a) The Basic Law

627. Article 1 § 1 of the Basic Law reads as follows:

"The dignity of human beings is inviolable. All public authorities have a duty to respect and protect it."

628. Article 2, in so far as relevant, provides:

"1. Everyone shall have the right to the free development of their personality provided that they do not interfere with the rights of others or violate the constitutional order or moral law [Sittengesetz].

2. Every person shall have the right to life and physical integrity. ..."

(b) The Code of Criminal Procedure

629. Article 81a of the Code of Criminal Procedure, in so far as relevant, reads as follows:

"1. A physical examination of the accused may be ordered for the purpose of establishing facts of relevance to the proceedings. To this end, blood samples may be taken and other bodily intrusions effected by a doctor in accordance with the rules of medical science for the purpose of examination without the accused's consent, provided that there is no risk of damage to his health.

2. Power to make such an order shall be vested in the judge and, in cases in which delay would jeopardise the success of the examination, in the public prosecutor's office and officials assisting it ..."

630. Article 136a of the Code of Criminal Procedure on prohibited methods of interrogation (verbotene Vernehmungsmethoden) provides:

"1. The freedom of the accused to make decisions and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, the administration of drugs,

torment, deception or hypnosis. Coercion may be used only in so far as it is permitted by the law on criminal procedure. Threatening the accused with measures that are not permitted under the law on criminal procedure or holding out the prospect of an advantage that is not contemplated by statute shall be prohibited.

2. Measures which impair the accused's memory or ability to understand and accept a given situation [Einsichtsfähigkeit] shall not be permitted.

3. The prohibition under sub-paragraphs 1 and 2 shall apply even if the accused has consented [to the proposed measure]. Statements obtained in breach of this prohibition shall not be used [in evidence], even if the accused has agreed to their use."

631. German criminal courts and legal writers disagree as to whether Article 81a of the Code of Criminal Procedure authorises the administration of emetics to a suspected drug dealer who has swallowed drugs on arrest.

632. The view taken by the majority of the German courts of appeal (see, inter alia, the decision of the Bremen Court of Appeal of 19 January 2000, NStZ-RR 2000, p. 270, and the judgment of the Berlin Court of Appeal of 28 March 2000, JR 2001, pp. 162-64) is that Article 81a of the Code of Criminal Procedure can serve as a legal basis for the administration of emetics in such circumstances.

633. For example, in its judgment cited above, the Berlin Court of Appeal had to deal with the case of a suspected drug dealer who agreed to swallow ipecacuanha syrup after being threatened with its administration through a nasogastric tube if he refused. It found:

"Pursuant to Article 81a § 1, first sentence, of the Code of Criminal Procedure, a physical examination of the accused may be ordered for the purpose of establishing facts of relevance to the proceedings. ...

(a) Contrary to the view taken by the appellant, legal commentators are almost unanimous in agreeing that the administration of emetics in order to obtain quantities of drugs the accused has swallowed involves a bodily intrusion within the meaning of that provision (see HK-Lemke, StPO, 2nd edition, § 9; Dahs in Löwe Rosenberg, StPO, 24th edition, § 16; KK-Senge, StPO, 4th edition, §§ 6, 14; see, with regard to Article 81a of the Code of Criminal Procedure, Rogall, SK StPO, Article 81a, § 48 and NStZ 1998, pp. 66-67, and Schaefer, NJW 1997, pp. 2437 et seq.; contrast Frankfurt Court of Appeal, NJW 1997, p. 1647 with note by Weßlau, StV 1997, p. 341).

This intrusion also does not violate human dignity protected by Article 1 § 1 of the Basic Law or the principle against self-incrimination contained in Article 2 § 1 read in conjunction with Article 1 § 1 of the Basic Law. Pursuant to Article 2 § 2, third sentence, of the Basic Law, interferences with these basic rights are permitted if they have a statutory basis. The Federal Constitutional Court has already found on several occasions that, as a statutory provision enacted by Parliament, Article 81a of the Code of Criminal Procedure meets this requirement ... Furthermore, it has found more specifically that the administration of emetics in reliance on that provision did not give rise to any constitutional objections of principle either (see Federal Constitutional Court, StV 2000, p. 1 – the decision in the present case). It did not, therefore, find it necessary to discuss in detail the opinion expressed by the Frankfurt (Main) Court of Appeal (NJW 1997, pp. 1647-48) which is occasionally shared by legal writers (see Weßlau, StV 1997, pp. 341-42), ... that the administration of emetics forces the accused to contribute to his own conviction and to actively do something he does not want to, namely regurgitate. This Court does not share the [Frankfurt Court of Appeal's] view either, as the right of an accused to remain passive is not affected by his or her having to tolerate an intervention which merely provokes 'involuntary bodily reactions'. ...

(e) ... this Court does not have to decide whether the evidence obtained by the administration of emetics may be used if the accused has refused to comply with his duty to tolerate the measure and his resistance to the introduction of a tube though the nose has been overcome by physical force. That point is not in issue in the present case ... The Regional Court ... stated that [on the facts of] the case decided by the Frankfurt (Main) Court of Appeal it too would have excluded the use of the evidence obtained because of the clearly disproportionate nature of the measure. It did, however, expressly and convincingly demonstrate that the facts of the present case were different."

634. In its judgment of 11 October 1996, however, the Frankfurt (Main) Court of Appeal held that Article 81a of the Code of Criminal Procedure did not authorise the administration of emetics. The case concerned the administration of an overdose of ipecacuanha syrup to a suspected drug dealer by force through a nasogastric tube and his injection with apomorphine. The court found:

"The forced administration of emetics was not covered by the Code of Criminal Procedure. Even Article 81a does not justify the administration of an emetic by force. Firstly, the administration of an emetic constitutes neither a physical examination nor a bodily intrusion carried out by a doctor for examination purposes within the meaning of that provision. It is

true that searching for foreign objects may be justified by Article 81a ... However, the emetic was used not to search for foreign objects, but to retrieve objects – whose presence was at least probable – in order to use them in evidence ... This aim was more akin to searching for or seizing an object within the meaning of Articles 102, 94 et seq. of the Code of Criminal Procedure than to a physical examination ... – although those provisions do not, on the face of it, include forcible interference with a person's physical integrity as a possible measure. ...

Secondly, an accused is not the object of criminal proceedings ... The forced administration of emetics violates the principle of passivity [Grundsatz der Passivität], since its purpose is to force the accused actively to do something that he is unwilling to do, namely regurgitate. This is neither permitted under Article 81a of the Code of Criminal Procedure nor compatible with the position of the accused in criminal proceedings. ...

Consequently, the conduct of the prosecuting authorities constitutes unlawful interference with the accused's physical integrity (Article 2 § 1, first sentence, of the Basic Law). ...

The forcible administration of emetics in the absence of any legal basis therefor also violates the duty to protect human dignity and the accused's general personality rights (Articles 1 § 1 and 2 § 1 of the Basic Law). ...

The prohibition on obtaining the evidence [in that manner] and the other circumstances of the case prevent this evidence from being used in court. ..."

635. According to many legal writers, Article 81a of the Code of Criminal Procedure authorises the administration of emetics to suspected drug dealers in order to obtain evidence (see also the authors cited above at paragraph 37). This view is taken, for example, by Rogall (NStZ 1998, pp. 66-68 and Systematischer Kommentar zur Strafprozeßordnung und zum Gerichtsverfassungsgesetz, München 2005, Article 81a StPO, § 48) and by Kleinknecht and Meyer-Goßner (StPO, 44th edition, Article 81a, § 22 – administration of emetics permitted for the investigation of serious offences).

636. A considerable number of legal writers, however, take the view that the Code of Criminal Procedure, Article 81a in particular, does not permit the administration of emetics. This opinion is held, for example, by Dallmeyer (StV 1997, pp. 606-10, and KritV 2000, pp. 252-59), who considers that Article 81a does not authorise a search – as opposed to an examination – of the interior of a defendant's body. Vetter (Problemschwerpunkte des § 81a StPO – Eine Untersuchung am Beispiel der Brechmittelvergabe im strafrechtlichen Ermittlungsverfahren, Neuried 2000, pp. 72-82, 161) considers that the forcible

administration of emetics through a nasogastric tube is irreconcilable with the rules of medical science, disproportionate and liable to damage the defendant's health.

(c) Medical expert opinions on the forced administration of emetics to suspected drug dealers

637. Medical experts disagree as to whether the forcible administration of emetics through the insertion of a nasogastric tube is advisable from a medical point of view. While some experts consider that emetics should be administered to a suspect in order to protect his health even if he resists such treatment, others take the view that such a measure entails serious health risks for the person concerned and should not therefore be carried out.

638. The medical experts who argue in favour of the forcible administration of emetics stress that even if this measure is not primarily carried out for medical reasons, it may nevertheless serve to prevent a possibly life-threatening intoxication. As the packaging of drugs swallowed on arrest is often unreliable, it is preferable from a medical standpoint for emetics to be administered. This measure poses very few risks, whereas there is a danger of death if the drugs are allowed to pass through the body naturally. Drugs can be extracted from the stomach up to one hour, in some cases two, after being swallowed. Administering emetics is a safe and fast method (the emetic usually takes effect within 15 to 30 minutes) of retrieving evidence of a drugs offence, as it is rare for them not to work. Even though the forcible introduction of a tube through the nose can cause pain, it does not pose any health risks as the act of swallowing can be induced by the mechanical stimulus of the tube in the throat (see, inter alia, Birkholz, Kropp, Bleich, Klatt and Ritter, "Exkorporation von Betäubungsmitteln – Erfahrungen im Lande Bremen", Kriminalistik 4/97, pp. 277-83).

639. The emetic ipecacuanha syrup has a high margin of safety. Side effects to be expected merely take the form of drowsiness, diarrhoea and prolonged vomiting. Rare, more serious complications include Mallory-Weiss syndrome or aspiration pneumonia. These may occur if the person concerned has sustained previous damage to his or her stomach or if the rules governing the administration of emetics, notably that the patient is fully alert and conscious, are not observed (see, for example, Birkholz, Kropp, Bleich, Klatt and Ritter, cited above, pp. 278-81, and American Academy of Clinical Toxicology/European Association of Poisons Centres and Clinical Toxicologists, "Position Paper: Ipecac Syrup", Journal of Toxicology, Clinical Toxicology, vol. 42, no. 2, 2004, pp. 133-43, in particular, p. 141).

640. Those medical experts who argue against the administration of emetics by force point out in particular that the forcible introduction of emetics through a nasogastric tube entails

considerable health risks. Even though it is desirable for drugs to be eliminated from the suspect's body as quickly as possible, the use of a nasogastric tube or any other invasive method can be dangerous because of the risk of perforation of the drug packaging with potentially fatal consequences. Furthermore, if the tube is badly positioned liquid may enter the lungs and cause choking. Forced regurgitation also involves a danger of vomit being inhaled, which can lead to choking or a lung infection. The administration of emetics cannot therefore be medically justified without the consent of the person concerned, and, without this consent, this method of securing evidence will be incompatible with the ethics of the medical profession, as has been illustrated in particular by the death of a suspect following such treatment (see, inter alia, Odile Diamant-Berger, Michel Garnier and Bernard Marc, Urgences Médico Judiciaires, 1995, pp. 24-33; Scientific Committee of the Federal Medical Council, report dated 28 March 1996 in response to the Federal Constitutional Court's request to assess the dangers involved in the forcible administration of emetics; and the resolution adopted by the 105th German Medical Conference, Activity Report of the Federal Medical Association, point 3).

(d) Practice concerning the administration of emetics by force in Germany

641. There is no uniform practice on the use of emetics to secure evidence of a drugs offence in the German Länder. Since 1993, five of the sixteen Länder (Berlin, Bremen, Hamburg, Hesse and Lower Saxony) have used this measure on a regular basis. Whereas some Länder discontinued its use following the death of a suspect, others are still resorting to it. In the vast majority of cases in which emetics have been used, the suspects chose to swallow the emetic themselves, after being informed that it would otherwise be administered forcibly. In other Länder, emetics are not forcibly administered, partly because, on the basis of medical advice, it is regarded as a disproportionate and dangerous measure, and partly because it is not considered a necessary means of combating drugs offences.

642. There have been two fatalities in Germany as a result of the forcible administration of ipecacuanha syrup to suspected drug dealers through a tube introduced through the nose into the stomach. In 2001 a Cameroonian national died in Hamburg. According to the investigation, he had suffered a cardiac arrest as a result of stress caused by the forcible administration of emetics. He was found to have been suffering from an undetected heart condition. In 2005 a Sierra Leonean national died in Bremen. The investigation into the cause of his death has not yet been completed. The emergency doctor and a medical expert suggested that the applicant had drowned as a result of a shortage of oxygen when water

permeated his lungs. Criminal investigations for homicide caused by negligence have been launched against the doctor who pumped the emetic and water into the suspect's stomach and against the emergency doctor called to attend to him.

643. As a consequence of the fatality in Bremen, the Head of the Bremen Chief Public Prosecutors (Leitender Oberstaatsanwalt) has ordered the forcible administration of emetics to be discontinued in Bremen for the time being. Pending the outcome of the investigation, a new procedure has been set up by the Senators for Justice and the Interior. Under this procedure, a person suspected of swallowing drugs must be informed by a doctor about the risks to his health if the drugs remain in his body. The suspect can choose to take emetics or a laxative if a medical examination discloses that it poses no risks to his health. Otherwise, he is detained in a specially equipped cell until the drug packages are passed naturally.

2. Public international law, comparative law and practice

(a) United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

644. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as adopted by the United Nations General Assembly on 10 December 1984 (resolution 39/46), provides:

Article 1 § 1

"For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Article 15

"Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

Article 16 § 1

"Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment."

(b) Case-law of United States courts

645. In Rochin v. California (342 US 165 (1952)), the United States Supreme Court reversed the petitioner's conviction for unlawful possession of drugs. On the basis of information that the petitioner was selling narcotics, three state officers entered his home and forced their way into his bedroom. They unsuccessfully attempted to extract by force drug capsules which the petitioner had been observed to put into his mouth. The officers then took him to a hospital, where an emetic was forced through a tube into his stomach against his will. He regurgitated two capsules which were found to contain morphine. These were admitted in evidence in the face of his objection. The Supreme Court held on 2 January 1952 that the conviction had been obtained by methods in violation of the Due Process Clause in the Fourteenth Amendment.

646. Mr Justice Frankfurter, delivering the opinion of the Court, found:

"Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents – this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. ... It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold

that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.

To attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society."

647. In State of Ohio v. Dario Williams (2004 WL 1902368 (Ohio App. 8 Dist.)), the Ohio Court of Appeals held on 26 August 2004 that the pumping of the defendant's stomach in the face of his objections was not an unreasonable search and seizure. The defendant was observed engaging in a hand-to-hand transaction typical of drug dealing. When police officers ordered the defendant to their vehicle, he put something in his mouth and ran off. In the opinion of the court, flushing out the defendant's stomach by gastric lavage by a physician in a hospital setting was not an unreasonable measure, even though the defendant violently objected to the procedure and had to be sedated. Swallowing the cocaine, which had been seen in the defendant's mouth, put his life in jeopardy and he was destroying evidence.

648. Mr Justice T.E. McMonagle, delivering the Court of Appeals' opinion, found:

"19. Williams directs us to Rochin v. California, 342 US 165 (1952), ... one of the prominent cases on intrusive searches.

...

21. Rochin is not dispositive, however. After Rochin, the United States Supreme Court decided Schmerber v. California, 384 US 757 (1966), 86 S.Ct. 1826, 16 L.Ed.2d 908, in which a police officer ordered an individual suspected of driving while intoxicated to submit to a blood test at the hospital where he was being treated for injuries sustained in an automobile collision. The Supreme Court noted that 'the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner'. ... Finding no Fourth Amendment violation, the Court set forth several criteria to be considered in

determining the reasonableness of an intrusive search: 1) the government must have a clear indication that incriminating evidence will be found; 2) the police officers must have a warrant, or, there must be exigent circumstances, such as the imminent destruction of evidence, to excuse the warrant requirement; and 3) the method used to extract the evidence must be reasonable and must be performed in a reasonable manner.

...

23. Applying the Schmerber factors to the facts of this case, it is apparent that the pumping of Williams' stomach was a lawful search and seizure. First, the officers observed Williams in an area known for illegal drug activity engage in a hand-to-hand transaction indicative of drug activity. When he saw the officers, he put whatever was in his hand in his mouth and then ran away. This behavior was a 'clear indication' to the officers that Williams had secreted drugs in his mouth. Moreover, it was reasonable for the officers to conclude that Williams' life could be in jeopardy after they observed crack cocaine in his mouth and saw him trying to chew it and swallow it. Furthermore, Williams was destroying the evidence necessary to convict him of drug possession. Accordingly, this case falls within the exigent circumstances exception to the warrant requirement.

24. Finally, it is apparent that the method and manner of the search were not unreasonable. The facts indicate that a physician administered Williams' medical treatment in a hospital setting, according to accepted medical procedures ...

25. In Schmerber, the United States Supreme Court expressed an acceptance of a search conducted in a reasonable manner by a physician. The physician is certainly more qualified than a police officer to determine the extent to which a procedure is life threatening.

26. Assuming that [a defendant] swallowed the cocaine, if the drugs were packaged in such a way as to be impervious to intestinal processes, the physician would certainly be in a position to pump the stomach of the [defendant], which is a reasonable medical procedure less traumatic than the forced emetic in Rochin. Again, this is the kind of conduct that Schmerber finds more reasonable because it is done in the confines of a hospital with appropriate medical supervision."

(c) Practice concerning the administration of emetics in the member States of the Council of Europe

649. The Government submitted a survey based on information obtained from the governments of the member States of the Council of Europe via their Agents or, if the government concerned had not provided information, from the German Embassy in the country concerned. According to the survey, emetics are forcibly administered to suspected drug dealers in practice in four countries (Luxembourg, Norway, "the former Yugoslav Republic of Macedonia" and Germany). In thirty-three countries emetics are not used against a suspect's will to retrieve drug bubbles that have been swallowed (Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Malta, Moldova, the Netherlands, Portugal, Romania, Russia, Serbia and Montenegro, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom). In three countries (Croatia, Poland and Slovenia) there is a legal basis for the use of emetics, but no information was supplied as to whether this measure is applied in practice. No information with respect to the use of emetics in practice was obtained from six member States (Andorra, Azerbaijan, Bulgaria, Liechtenstein, San Marino and Monaco).

650. The applicant partly contested the Government's findings. He noted that the Government had said that three countries other than Germany (Luxembourg, "the former Yugoslav Republic of Macedonia" and Norway) permitted the administration of emetics to suspected drug dealers and used the measure in practice. However, he said that the Government had failed to adduce any evidence of emetics being administered by force against the accused's will in those member States. With respect to Norway in particular, the applicant disputed that the forcible introduction of a nasogastric tube as in his case was legal. As regards the administration of emetics in Croatia, Poland and Slovenia, he contested the existence of any legal basis for such a measure in those countries, irrespective of the position in practice. Consequently, Germany was the only Contracting State which was proven to actually resort to the impugned measure. In all the other member States the authorities waited for the drugs to pass through the body naturally.

651. Other materials before the Court confirm the parties' findings that emetics are not forcibly administered in practice in several Convention States examined (Belgium, Estonia, France, Ireland, the Netherlands, Spain and the United Kingdom). In these States, the authorities wait for the drugs to pass through the body naturally. Use is routinely made of special toilets to recover and clean drugs that have been swallowed. The materials further indicated that in Norway special toilets (so-called Pacto 500 toilets) are generally used in order to recover ingested drugs. However, during its visit to Norway in 1993, the European

Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) witnessed the administration of an emetic (brine) to a detainee in Oslo police headquarters (see the CPT report on its visit to Norway in 1993, § 25). With respect to Poland, it has not been confirmed whether emetics are administered by force in practice.

1.4.3. The law

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

652. The applicant claimed that he had been subjected to inhuman and degrading treatment as a result of having been forcibly administered emetics. He relied on Article 3 of the Convention, which provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

653. The Government contested this allegation.

A. The parties' submissions

1. The applicant

654. According to the applicant, the administration of emetics by force had constituted a serious interference with his physical integrity and posed a serious threat to his health, and even life, since the emetics used – ipecacuanha syrup and apomorphine – could have provoked life threatening side effects. The insertion of a tube by force through the nose of a suspect who did not cooperate in the procedure could have caused damage to the nose, throat and gullet and even burst drug bubbles in the stomach. The danger of administering emetics by force was illustrated by the fact that it had already resulted in the deaths of two suspects in Germany. The vast majority of the member States of the Council of Europe as well as the United States considered this method to be illegal. The interference could not be justified on grounds of medical assistance. On the contrary, it merely increased the risk of the suspect being poisoned by the drugs he had swallowed. A suspect's express opposition to undergoing medical treatment had to be respected in a democratic society as part of the individual's right to self-determination.

655. The applicant further argued that the administration of emetics had been aimed at intimidating and debasing him in disregard of his human dignity. The manner in which he had

been forced to undergo a life threatening medical intervention had been violent, agonising and humiliating. He had been degraded to the point of having to vomit while being observed by several police officers. Being in police custody, he had found himself in a particularly vulnerable position.

656. Moreover, the applicant maintained that no anamnesis to establish his medical history and physical condition had been obtained by a doctor prior to the execution of the impugned measure. Nor had he been given any medical care and supervision in prison afterwards.

657. The applicant also stressed that he had sustained bodily injury, notably to his stomach, as was proved by a gastroscopy that had been performed in the prison hospital. Furthermore, he had been subjected to intense physical and mental suffering during the process of the administration of the emetics and by the chemical effects of the substances concerned.

2. The Government

658. According to the Government, the forcible administration of emetics entailed merely negligible risks to health. Ipecacuanha syrup was not a dangerous substance. In fact, it was given to children who had been poisoned. The introduction of a very flexible tube through the applicant's nose had not put him at risk, even though he had resisted the procedure. The injection of apomorphine had not been dangerous either. The side effects and dangers described by the applicant could only be caused by chronic abuse or misuse of the emetics in question. The fact that two suspected drug dealers had died following the forcible administration of emetics in Hamburg and Bremen did not warrant the conclusion that the measure in general posed health risks. The method had been used on numerous occasions without giving rise to complications. The authorities resorted to the administration of emetics in those Länder where drug trafficking was a serious problem. In the vast majority of cases suspects chose to swallow the emetics after being informed that force would be used if they refused to do so. In the Hamburg case the defendant had suffered from an undetected heart condition and would have been equally at risk if he had resisted a different kind of enforcement measure. In the Bremen case the possibility that the defendant was poisoned by the drugs he had swallowed could not be excluded.

659. The Government pointed out that there had been a real, immediate risk that the drug bubble, which had not been packaged for long-term transport inside the body, would leak and poison the applicant. Even though the emetics had been administered primarily to obtain evidence rather than for medical reasons, the removal of the drugs from the applicant's

stomach could still be considered to be required on medical grounds. It was part of the State's positive obligation to protect the applicant by provoking the regurgitation of the drugs. Awaiting the natural excretion of the drugs would not have been as effective a method of investigation or any less humiliating and may, in fact, have posed risks to his health. It was significant in this connection that the administration of emetics to a juvenile was only considered an option if he or she was suspected of selling drugs on a commercial basis.

660. In the Government's view, the impugned measure had not gone beyond what had been necessary to secure evidence of the commission of a drugs offence. The applicant had been administered harmless emetics in a hospital by a doctor acting lege artis. Such a measure could not be considered humiliating in the circumstances.

661. The Government further maintained that the emetics were administered to the applicant only after an anamnesis had been obtained by a doctor at the hospital. The same doctor had duly supervised the administration of the emetics to the applicant.

662. The Government stressed that there was no evidence that the applicant had suffered any injuries or lasting damage as a result of the administration of the emetics. He had merely been tired for several hours after the execution of the measure, either because of the effects of the apomorphine or because of the resistance he had put up. In the proceedings before the Court the applicant had claimed for the first time that he had suffered further damage to his health. However, he had not produced any documentary evidence to support his allegations.

B. The Court's assessment

1. Relevant principles

663. According to the Court's well-established case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, inter alia, Price v. the United Kingdom, no. 33394/96, § 24, ECHR 2001-VII; Mouisel v. France, no. 67263/01, § 37, ECHR 2002-IX; and Naumenko v. Ukraine, no. 42023/98, § 108, 10 February 2004). Allegations of ill-treatment must be supported by appropriate evidence (see, mutatis mutandis, Klaas v. Germany, 22 September 1993, § 30, Series A no. 269). To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of

fact (see Ireland v. the United Kingdom, 18 January 1978, § 161 in fine, Series A no. 25, and Labita v. Italy [GC], no. 26772/95, § 121, ECHR 2000-IV).

664. Treatment has been held by the Court to be "inhuman" because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see Labita, cited above, § 120). Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (see Hurtado v. Switzerland, 28 January 1994, opinion of the Commission, § 67, Series A no. 280), or when it was such as to drive the victim to act against his will or conscience (see, for example, Denmark, Norway, Sweden and the Netherlands v. Greece (the "Greek case"), nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12, p. 186, and Keenan v. the United Kingdom, no. 27229/95, § 110, ECHR 2001-III). Furthermore, in considering whether treatment is "degrading" within the meaning of Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (see Raninen v. Finland, 16 December 1997, § 55, Reports of Judgments and Decisions 1997 VIII; Peers v. Greece, no. 28524/95, §§ 68 and 74, ECHR 2001-III; and Price, cited above, § 24). In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see Labita, cited above, § 120).

665. With respect to medical interventions to which a detained person is subjected against his or her will, Article 3 of the Convention imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. The persons concerned nevertheless remain under the protection of Article 3, whose requirements permit of no derogation (Mouisel, cited above, § 40, and Naumenko, cited above, § 112). A measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading (see, in particular, Herczegfalvy v. Austria, 24 September 1992, § 82, Series A no. 244, and Naumenko, cited above, § 112). This can be said, for instance, about force feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Court must nevertheless satisfy itself that a medical necessity has been convincingly shown to exist and that procedural guarantees for the decision, for example to

force-feed, exist and are complied with (see Nevmerzhitsky v. Ukraine, no. 54825/00, § 94, ECHR 2005-II).

666. Even where it is not motivated by reasons of medical necessity, Articles 3 and 8[21] of the Convention do not as such prohibit recourse to a medical procedure in defiance of the will of a suspect in order to obtain from him evidence of his involvement in the commission of a criminal offence. Thus, the Convention institutions have found on several occasions that the taking of blood or saliva samples against a suspect's will in order to investigate an offence did not breach these Articles in the circumstances of the cases examined by them (see, inter alia, X v. the Netherlands, no. 8239/78, Commission decision of 4 December 1978, Decisions and Reports (DR) 16, pp. 187-89, and Schmidt v. Germany (dec.), no. 32352/02, 5 January 2006).

667. However, any recourse to a forcible medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case. This is especially true where the procedure is intended to retrieve from inside the individual's body real evidence of the very crime of which he is suspected. The particularly intrusive nature of such an act requires a strict scrutiny of all the surrounding circumstances. In this connection, due regard must be had to the seriousness of the offence in issue. The authorities must also demonstrate that they took into consideration alternative methods of recovering the evidence. Furthermore, the procedure must not entail any risk of lasting detriment to a suspect's health (see, mutatis mutandis, Nevmerzhitsky, cited above, §§ 94 and 97, and Schmidt, cited above).

668. Moreover, as with interventions carried out for therapeutic purposes, the manner in which a person is subjected to a forcible medical procedure in order to retrieve evidence from his body must not exceed the minimum level of severity prescribed by the Court's case-law on Article 3 of the Convention. In particular, account has to be taken of whether the person concerned experienced serious physical pain or suffering as a result of the forcible medical intervention (see Peters v. the Netherlands, no. 21132/93, Commission decision of 6 April 1994, DR 77-B; Schmidt, cited above; and Nevmerzhitsky, cited above, §§ 94 and 97).

669. Another material consideration in such cases is whether the forcible medical procedure was ordered and administered by medical doctors and whether the person concerned was placed under constant medical supervision (see, for example, Ilijkov v. Bulgaria, no. 33977/96, Commission decision of 20 October 1997, unreported).

670. A further relevant factor is whether the forcible medical intervention resulted in any aggravation of his or her state of health and had lasting consequences for his or her health (see

Ilijkov, cited above, and, mutatis mutandis, Krastanov v. Bulgaria, no. 50222/99, § 53, 30 September 2004).

2. Application of those principles to the present case

671. At the outset the Court notes that in the Government's view the removal of the drugs from the applicant's stomach by the administration of emetics could be considered to be required on medical grounds, as he risked death through poisoning. However, it is to be observed that the domestic courts all accepted that, when ordering the administration of emetics, the authorities had acted on the basis of Article 81a of the Code of Criminal Procedure. This provision entitles the prosecuting authorities to order a bodily intrusion to be effected by a doctor without the suspect's consent in order to obtain evidence, provided that there is no risk of damage to the suspect's health. However, Article 81a does not cover measures taken to avert an imminent danger to a person's health. Furthermore, it is undisputed that the emetics were administered in the absence of any prior assessment of the dangers involved in leaving the drug bubble in the applicant's body. The Government also stated that emetics are never administered to juvenile dealers unless they are suspected of selling drugs on a commercial basis. Juvenile dealers are, however, in no less need of medical treatment than adults. Adult dealers, for their part, run the same risks to their health as juvenile dealers when administered emetics. Consequently, the Court is not satisfied that the prosecuting authorities' decision to order the impugned measure was based on and required by medical reasons, that is, the need to protect the applicant's health. Instead, it was aimed at securing evidence of a drugs offence.

672. This finding does not by itself warrant the conclusion that the impugned intervention contravenes Article 3. As noted above (see paragraph 70 above), the Court has found on several occasions that the Convention does not, in principle, prohibit recourse to a forcible medical intervention that will assist in the investigation of an offence. However, any interference with a person's physical integrity carried out with the aim of obtaining evidence must be the subject of rigorous scrutiny, with the following factors being of particular importance: the extent to which forcible medical intervention was necessary to obtain the evidence, the health risks for the suspect, the manner in which the procedure was carried out and the physical pain and mental suffering it caused, the degree of medical supervision available and the effects on the suspect's health (compare and contrast also the criteria established by the United States courts in similar cases – see paragraphs 51-52 above). In the light of all the circumstances of the individual case, the intervention must not attain the

minimum level of severity that would bring it within the scope of Article 3. The Court will now examine each of these elements in turn.

673. As regards the extent to which the forcible medical intervention was necessary to obtain the evidence, the Court notes that drug trafficking is a serious offence. It is acutely aware of the problem confronting Contracting States in their efforts to combat the harm caused to their societies through the supply of drugs (see, in particular, D. v. the United Kingdom, 2 May 1997, § 46, Reports 1997-III). However, in the present case it was clear before the impugned measure was ordered and implemented that the street dealer on whom it was imposed had been storing the drugs in his mouth and could not, therefore, have been offering drugs for sale on a large scale. This is reflected in the sentence (a six-month suspended prison sentence and probation), which is at the lower end of the range of possible sentences. The Court accepts that it was vital for the investigators to be able to determine the exact amount and quality of the drugs that were being offered for sale. However, it is not satisfied that the forcible administration of emetics was indispensable in the instant case to obtain the evidence. The prosecuting authorities could simply have waited for the drugs to pass through his system naturally. It is significant in this connection that many other member States of the Council of Europe use this method to investigate drugs offences.

674. As regards the health risks attendant on the forcible medical intervention, the Court notes that it is a matter of dispute between the parties whether and to what extent the administration of ipecacuanha syrup through a tube introduced into the applicant's nose and the injection of apomorphine posed a risk to his health. Whether or not such measures are dangerous is, as has been noted above (see paragraphs 41-44), also a matter of dispute among medical experts. While some consider it to be entirely harmless and in the suspect's best interest, others argue that in particular the use of a nasogastric tube to administer emetics by force entails serious risks to life and limb and should therefore be prohibited. The Court is not satisfied that the forcible administration of emetics, a procedure that has to date resulted in the deaths of two people in the respondent State, entails merely negligible health risks. It also observes in this respect that the actual use of force – as opposed to the mere threat of force – has been found to be necessary in the respondent State in only a small proportion of the cases in which emetics have been administered. However, the fatalities occurred in cases in which force was used. Furthermore, the fact that in the majority of the German Länder and in at least a large majority of the other member States of the Council of Europe the authorities refrain from forcibly administering emetics does tend to suggest that such a measure is considered to pose health risks.

675. As to the manner in which the emetics were administered, the Court notes that, after refusing to take the emetics voluntarily, the applicant was pinned down by four police officers, which shows that force verging on brutality was used against him. A tube was then fed through his nose into his stomach to overcome his physical and mental resistance. This must have caused him pain and anxiety. He was subjected to a further bodily intrusion against his will through the injection of another emetic. Account must also be taken of the applicant's mental suffering while he waited for the emetics to take effect. During this time he was restrained and kept under observation by police officers and a doctor. Being forced to regurgitate under these conditions must have been humiliating for him. The Court does not share the Government's view that waiting for the drugs to pass through his body naturally would have been just as humiliating. Although it would have entailed some invasion of privacy because of the need for supervision, such a measure nevertheless involves a natural bodily function and so causes considerably less interference with a person's physical and mental integrity than forcible medical intervention (see, mutatis mutandis, Peters, cited above, and Schmidt, cited above).

676. As regards the medical supervision of the administration of the emetics, the Court notes that the impugned measure was carried out by a doctor in a hospital. In addition, after the measure was executed the applicant was examined by a doctor and declared fit for detention. However, it is a matter of dispute between the parties whether an anamnesis of the applicant was obtained prior to the execution of the measure in order to ascertain whether his health might be at risk if emetics were administered to him against his will. Since the applicant violently resisted the administration of the emetics and spoke no German and only broken English, the assumption must be that he was either unable or unwilling to answer any questions that were put by the doctor or to submit to a prior medical examination. The Government have not submitted any documentary or other evidence to show otherwise.

677. As to the effects of the impugned measure on the suspect's health, the Court notes that the parties disagree about whether the applicant has suffered any lasting damage to his health, notably to his stomach. Having regard to the material before it, it finds that it has not been established that either his treatment for stomach troubles in the prison hospital two and a half months after his arrest or any subsequent medical treatment he received was caused by the forcible administration of the emetics. This conclusion does not, of course, call into question the Court's above finding that the forcible medical intervention was not without possible risk to the applicant's health.

678. Having regard to all the circumstances of the case, the Court finds that the impugned measure attained the minimum level of severity required to bring it within the scope of Article 3. The authorities subjected the applicant to a grave interference with his physical and mental integrity against his will. They forced him to regurgitate, not for therapeutic reasons, but in order to retrieve evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Furthermore, the procedure entailed risks to the applicant's health, not least because of the failure to obtain a proper anamnesis beforehand. Although this was not the intention, the measure was implemented in a way which caused the applicant both physical pain and mental suffering. He has therefore been subjected to inhuman and degrading treatment contrary to Article 3.

679. Accordingly, the Court concludes that there has been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

680. In the applicant's submission, the administration of emetics by force also amounted to a disproportionate interference with his right to respect for his private life. He relied on Article 8 of the Convention, the relevant parts of which read:

"1. Everyone has the right to respect for his private ... life ...

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

681. The Government disagreed with that submission.

682. The Court has already examined the applicant's complaint concerning the forcible administration of emetics to him under Article 3 of the Convention. In view of its conclusion that there has been a violation of that provision, it finds that no separate issue arises under Article 8.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

683. The applicant further considered that his right to a fair trial guaranteed by Article 6 of the Convention had been infringed by the use at his trial of the evidence obtained by the administration of the emetics. He claimed in particular that his right not to incriminate himself had been violated. The relevant part of Article 6 provides:

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

684. The Government contested this view.

A. The parties' submissions

1. The applicant

685. In the applicant's view, the administration of the emetics was illegal and violated Articles 3 and 8[21] of the Convention. As the evidence thereby obtained had formed the sole basis for his conviction, the criminal proceedings against him had been unfair.

686. The applicant further argued that by forcing him against his will to produce evidence of an offence the authorities had violated his right not to incriminate himself and therefore his right to a fair trial. The principle against self-incrimination was not limited to statements obtained by coercion, but extended to objects so obtained. Moreover, the facts of his case were distinguishable from those in Saunders v. the United Kingdom (17 December 1996, Reports 1996-VI). Unlike the cases of blood or DNA testing referred to by the Court in its judgment in that case, the administration of emetics entailed the use of chemical substances that provoked an unnatural and involuntary activity of the body in order to obtain the evidence. His refusal to swallow the emetics was overcome by the use of considerable force. Therefore, the evidence that had been obtained had not existed independently of his will and he had been forced to contribute actively to his own conviction. The administration of emetics was comparable to the administration of a truth serum to obtain a confession, a practice which was expressly forbidden by Article 136a of the Code of Criminal Procedure. He referred to the judgment of the Frankfurt (Main) Court of Appeal of 11 October 1996 in support of his contention.

2. The Government

687. In the Government's view, the administration of the emetics to the applicant had not contravened either Article 3 or Article 8 of the Convention. Consequently, the use of the drug bubble thereby obtained as evidence in the criminal proceedings against the applicant had not rendered his trial unfair. Determining the exact nature, amount and quality of the drugs being sold by the applicant had been a crucial factor in securing the applicant's conviction and passing sentence.

688. The Government further submitted that the right not to incriminate oneself only prohibited forcing a person to act against his or her will. Provoking an emesis was a mere reaction of the body which could not be controlled by a person's will, and was therefore not prohibited by the principle against self-incrimination. The suspect was not thereby forced to contribute actively to securing the evidence. The accused's initial refusal to take the emetics could not be relevant, as otherwise all investigative measures aimed at breaking a suspect's will to conceal evidence, such as taking blood samples by force or searching houses, would be prohibited.

689. Moreover, the Government argued that according to the Court's judgment in Saunders, cited above, drugs obtained by the forcible administration of emetics were admissible in evidence. If it was possible to use bodily fluids or cells as evidence, then a fortiori it had to be possible to use objects which were not part of the defendant's body. Furthermore, the administration of emetics, which the applicant merely had to endure passively, was not comparable to the administration of a truth serum as prohibited by Article 136a of the Code of Criminal Procedure, which broke the suspect's will not to testify.

B. The Court's assessment

1. General principles established under the Court's case-law

690. The Court reiterates that its duty, according to Article 19[22] of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6[23] guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see Schenk v. Switzerland, 12 July 1988, §§ 45-46, Series A no. 140, and Teixeira de Castro v. Portugal, 9 June 1998, § 34, Reports 1998-IV).

691. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where violation of another Convention right is concerned, the nature of the violation found (see, inter alia, Khan v. the United Kingdom, no. 35394/97, § 34, ECHR 2000-V; P.G. and J.H. v. the United Kingdom, no. 44787/98, § 76, ECHR 2001-IX; and Allan v. the United Kingdom, no. 48539/99, § 42, ECHR 2002-IX).

692. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, inter alia[24], Khan, cited above, §§ 35 and 37, and Allan, cited above, § 43).

693. The general requirements of fairness contained in Article 6[23] apply to all criminal proceedings, irrespective of the type of offence in issue. Nevertheless, when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and be weighed against the individual interest that the evidence against him be gathered lawfully. However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention (see, mutatis mutandis, Heaney and McGuinness v. Ireland, no. 34720/97, §§ 57-58, ECHR 2000-XII).

694. As regards, in particular, the examination of the nature of the Convention violation found the Court observes that notably in the cases of Khan (cited above, §§ 25-28) and P.G. and J.H. v. the United Kingdom (cited above, §§ 37-38) it has found the use of covert listening devices to be in breach of Article 8 since recourse to such devices lacked a legal basis in domestic law and the interferences with those applicants' right to respect for private

life were not "in accordance with the law". Nonetheless, the admission in evidence of information obtained thereby did not in the circumstances of the cases conflict with the requirements of fairness guaranteed by Article 6 § 1[8].

695. However, different considerations apply to evidence recovered by a measure found to violate Article 3. An issue may arise under Article 6 § 1[8] in respect of evidence obtained in violation of Article 3 of the Convention, even if the admission of such evidence was not decisive in securing the conviction (see İçöz v. Turkey (dec.), no. 54919/00, 9 January 2003, and Koç v. Turkey (dec.), no. 32580/96, 23 September 2003). The Court reiterates in this connection that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2[25] even in the event of a public emergency threatening the life of the nation (see, inter alia, Chahal v. the United Kingdom, 15 November 1996, § 79, Reports 1996-V, and Selmouni v. France [GC], no. 25803/94, § 95, ECHR 1999-V).

696. As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court observes that these are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, inter alia, Saunders, cited above, § 68; Heaney and McGuinness, cited above, § 40; J.B. v. Switzerland, no. 31827/96, § 64, ECHR 2001-III; and Allan, cited above, § 44).

697. In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will have regard, in particular, to the following elements: the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put (see, for example, Tirado

Ortiz and Lozano Martin v. Spain (dec.), no. 43486/98, ECHR 1999 V; Heaney and McGuinness, cited above, §§ 51-55; and Allan, cited above, § 44).

698. The Court has consistently held, however, that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood, urine, hair or voice samples and bodily tissue for the purpose of DNA testing (see Saunders, cited above, § 69; Choudhary v. the United Kingdom (dec.), no. 40084/98, 4 May 1999; J.B. v. Switzerland, cited above, § 68; and P.G. and J.H. v. the United Kingdom, cited above, § 80).

2. Application of those principles to the present case

699. In determining whether in the light of these principles the criminal proceedings against the applicant can be considered fair, the Court notes at the outset that the evidence secured through the administration of emetics to the applicant was not obtained "unlawfully" in breach of domestic law. It recalls in this connection that the national courts found that Article 81a of the Code of Criminal Procedure permitted the impugned measure.

700. The Court held above that the applicant was subjected to inhuman and degrading treatment contrary to the substantive provisions of Article 3 when emetics were administered to him in order to force him to regurgitate the drugs he had swallowed. The evidence used in the criminal proceedings against the applicant was thus obtained as a direct result of a violation of one of the core rights guaranteed by the Convention.

701. As noted above, the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. The Court has not found in the instant case that the applicant was subjected to torture. In its view, incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the United States Supreme Court's judgment in the Rochin case (see

paragraph 50 above), to "afford brutality the cloak of law". It notes in this connection that Article 15[26] of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that statements which are established to have been made as a result of torture shall not be used in evidence in proceedings against the victim of torture.

702. Although the treatment to which the applicant was subjected did not attract the special stigma reserved to acts of torture, it did attain in the circumstances the minimum level of severity covered by the ambit of the Article 3 prohibition. It cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair, irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial.

703. In the present case, the general question whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders a trial unfair can be left open. The Court notes that, even if it was not the intention of the authorities to inflict pain and suffering on the applicant, the evidence was obtained by a measure which breached one of the core rights guaranteed by the Convention. Furthermore, it was common ground between the parties that the drugs obtained by the impugned measure were the decisive element in securing the applicant's conviction. It is true that, as was equally uncontested, the applicant was given the opportunity, which he took, of challenging the use of the drugs obtained by the impugned measure. However, any discretion on the part of the national courts to exclude that evidence could not come into play as they considered the administration of emetics to be authorised by domestic law. Moreover, the public interest in securing the applicant's conviction cannot be considered to have been of such weight as to warrant allowing that evidence to be used at the trial. As noted above, the measure targeted a street dealer selling drugs on a relatively small scale who was eventually given a six-month suspended prison sentence and probation.

704. In these circumstances, the Court finds that the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair.

705. This finding is of itself a sufficient basis on which to conclude that the applicant was denied a fair trial in breach of Article 6[23]. However, the Court considers it appropriate to address also the applicant's argument that the manner in which the evidence was obtained and the use made of it undermined his right not to incriminate himself. To that end, it will

examine, firstly, whether this particular right was relevant to the circumstances of the applicant's case and, in the affirmative, whether it has been breached.

706. As regards the applicability of the principle against self-incrimination in this case, the Court observes that the use at the trial of "real" evidence – as opposed to a confession – obtained by forcible interference with the applicant's bodily integrity is in issue. It notes that the privilege against self-incrimination is commonly understood in the Contracting States and elsewhere to be primarily concerned with respecting the will of the defendant to remain silent in the face of questioning and not to be compelled to provide a statement.

707. However, the Court has on occasion given the principle of self-incrimination as protected under Article 6 § 1[8] a broader meaning so as to encompass cases in which coercion to hand over real evidence to the authorities was in issue. In Funke v. France (25 February 1993, § 44, Series A no. 256-A), for instance, the Court found that an attempt to compel the applicant to disclose documents, and thereby to provide evidence of offences he had allegedly committed, violated his right not to incriminate himself. Similarly, in J.B. v. Switzerland (cited above, §§ 63-71) the Court considered the State authorities' attempt to compel the applicant to submit documents which might have provided information about tax evasion to be in breach of the principle against self-incrimination (in its broader sense).

708. In Saunders, the Court considered that the principle against self-incrimination did not cover "material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing" (cited above, § 69).

709. In the Court's view, the evidence in issue in the present case, namely, drugs hidden in the applicant's body which were obtained by the forcible administration of emetics, could be considered to fall into the category of material having an existence independent of the will of the suspect, the use of which is generally not prohibited in criminal proceedings. However, there are several elements which distinguish the present case from the examples listed in Saunders. Firstly, as with the impugned measures in Funke and J.B. v. Switzerland, the administration of emetics was used to retrieve real evidence in defiance of the applicant's will. Conversely, the bodily material listed in Saunders concerned material obtained by coercion for forensic examination with a view to detecting, for example, the presence of alcohol or drugs.

710. Secondly, the degree of force used in the present case differs significantly from the degree of compulsion normally required to obtain the types of material referred to in the Saunders case. To obtain such material, a defendant is requested to endure passively a minor interference with his physical integrity (for example when blood or hair samples or bodily tissue are taken). Even if the defendant's active participation is required, it can be seen from Saunders that this concerns material produced by the normal functioning of the body (such as, for example, breath, urine or voice samples). In contrast, compelling the applicant in the instant case to regurgitate the evidence sought required the forcible introduction of a tube through his nose and the administration of a substance so as to provoke a pathological reaction in his body. As noted earlier, this procedure was not without risk to the applicant's health.

711. Thirdly, the evidence in the present case was obtained by means of a procedure which violated Article 3. The procedure used in the applicant's case is in striking contrast to procedures for obtaining, for example, a breath test or a blood sample. Procedures of the latter kind do not, unless in exceptional circumstances, attain the minimum level of severity to contravene Article 3. Moreover, though constituting an interference with the suspect's right to respect for private life, these procedures are, in general, justified under Article 8 § 2 as being necessary for the prevention of criminal offences (see, inter alia, Tirado Ortiz and Lozano Martin, cited above).

712. Consequently, the principle against self-incrimination is applicable to the present proceedings.

713. In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.

714. As regards the nature and degree of compulsion used to obtain the evidence in the present case, the Court reiterates that forcing the applicant to regurgitate the drugs significantly interfered with his physical and mental integrity. The applicant had to be immobilised by four policemen, a tube was fed through his nose into his stomach and chemical substances were administered to him in order to force him to surrender up the evidence sought by means of a pathological reaction of his body. This treatment was found to be inhuman and degrading and therefore to violate Article 3.

715. As regards the weight of the public interest in using the evidence to secure the applicant's conviction, the Court observes that, as noted above, the impugned measure targeted a street dealer who was offering drugs for sale on a comparatively small scale and who was eventually given a six-month suspended prison sentence and probation. In the circumstances of the instant case, the public interest in securing the applicant's conviction could not justify recourse to such a grave interference with his physical and mental integrity.

716. Turning to the existence of relevant safeguards in the procedure, the Court observes that Article 81a of the Code of Criminal Procedure prescribed that bodily intrusions had to be carried out lege artis by a doctor in a hospital and only if there was no risk of damage to the defendant's health. Although it can be said that domestic law did in general provide for safeguards against arbitrary or improper use of the measure, the applicant, relying on his right to remain silent, refused to submit to a prior medical examination. He could only communicate in broken English, which meant that he was subjected to the procedure without a full examination of his physical aptitude to withstand it.

717. As to the use to which the evidence obtained was put, the Court reiterates that the drugs obtained following the administration of the emetics were the decisive evidence in his conviction for drug trafficking. It is true that the applicant was given and took the opportunity to oppose the use at his trial of this evidence. However, and as noted above, any possible discretion the national courts may have had to exclude the evidence could not come into play, as they considered the impugned treatment to be authorised by national law.

718. Having regard to the foregoing, the Court would also have been prepared to find that allowing the use at the applicant's trial of evidence obtained by the forcible administration of emetics infringed his right not to incriminate himself and therefore rendered his trial as a whole unfair.

719. Accordingly, there has been a violation of Article 6 § 1[8] of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

720. 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."

721. The applicant claimed compensation for pecuniary and non pecuniary damage and the reimbursement of his costs and expenses.

A. Damage

722. The applicant claimed a total of 51.12 euros (EUR) in pecuniary damage, this being the amount he had forfeited as a result of the judgment of the Wuppertal Regional Court. He also sought compensation for non pecuniary damage. He made reference to his physical injuries and the mental distress and feelings of helplessness he had suffered as a result of the lengthy administration of emetics, which he considered to have been life threatening and obviously illegal. Furthermore, he had been remanded in custody for five months before being convicted and given a six-month suspended prison sentence and probation because of this illegal measure. He claimed a minimum amount of EUR 30,000 under this head.

723. The Government did not comment on the applicant's claim for pecuniary damage, but maintained that the sum claimed by him for non pecuniary damage was excessive. As regards the damage allegedly sustained due to the applicant's pre-trial detention, his prosecution and conviction, an award of compensation was not required since full reparation could be made under German law. Should the Court find violations of the applicant's Convention rights, he would be entitled to request the reopening of the criminal proceedings and could, if acquitted, claim damages, notably for the period he had spent in custody.

724. As regards the pecuniary damage claimed, the Court notes that the Wuppertal Regional Court ordered the forfeiture of 100 German marks (approximately EUR 51.12), this being the proceeds of the offence of which he had been found guilty. However, it cannot speculate as to what the outcome of the proceedings might have been if the violation of the Convention had not occurred (see, inter alia, Schmautzer v. Austria, 23 October 1995, § 44, Series A no. 328-A, and Findlay v. the United Kingdom, 25 February 1997, § 85, Reports 1997-I). The drug bubble obtained by the impugned measure was a decisive factor in the applicant's conviction. However, since that evidence could have been obtained without any breach of Article 3 (by waiting for the drug bubble to be passed naturally) and, therefore, used without any breach of Article 6, the Court finds that there is insufficient proof of a causal connection between the violation of those provisions and the pecuniary damage sustained by the applicant. There is, therefore, no ground for an award under this head.

725. As to the non-pecuniary damage claimed, the Court notes that according to the Government, it would be possible for the applicant to seek compensation in the national

courts if he was acquitted following a reopening of the criminal proceedings against him. It considers, however, that if, having exhausted domestic remedies without success before complaining in Strasbourg of a violation of his rights, then doing so a second time, successfully, to secure the setting aside of the conviction, and finally going through a new trial, the applicant was required to exhaust domestic remedies a third time in order to be able to obtain just satisfaction from the Court, the total duration of the proceedings would hardly be consistent with the effective protection of human rights and would lead to a situation incompatible with the aim and object of the Convention (see, for example, Barberà, Messegué and Jabardo v. Spain (Article 50), 13 June 1994, § 17, Series A no. 285-C, and Papamichalopoulos and Others v. Greece (Article 50), 31 October 1995, § 40, Series A no. 330-B). Consequently, it may make an award.

726. Having regard to all the elements before it, the Court finds that the applicant suffered non-pecuniary damage in the form of pain and mental distress as a result of the treatment to which he was subjected to obtain the evidence that was later used against him at the trial. Ruling on an equitable basis, it therefore awards the applicant EUR 10,000 under this head.

B. Costs and expenses

727. The applicant claimed a total of EUR 5,868.88 for costs and expenses. These comprised the costs of legal representation before the Federal Constitutional Court in an amount of EUR 868.88, calculated pursuant to the Federal Regulation on Lawyers' Fees (Bundesrechtsanwalts-gebührenordnung). Furthermore, he claimed EUR 5,000 for costs incurred in the Convention proceedings. He did not submit any separate documentary evidence in support of his claims.

728. The Government did not comment on this claim.

729. According to the Court's case-law, to be awarded costs and expenses the injured party must have incurred them in order to seek prevention or rectification of a violation of the Convention, to have the same established by the Court and to obtain redress therefor. It must also be shown that the costs were actually and necessarily incurred and are reasonable as to quantum (see, among other authorities, Nikolova v. Bulgaria [GC], no. 31195/96, § 79, ECHR 1999-II, and Venema v. the Netherlands, no. 35731/97, § 117, ECHR 2002-X).

730. In the present case, regard being had to the information in its possession and the above criteria, the Court is satisfied that both the costs of legal representation in the proceedings before the Federal Constitutional Court and in the Convention proceedings were incurred in

order to establish and redress a violation of the applicant's Convention rights. Having regard to its case-law and making its own assessment, the Court finds the amount claimed to be reasonable as to quantum. It therefore awards the applicant EUR 5,868.88, plus any value-added tax that may be chargeable.

C. Default interest

731. 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.

1.4.4. The Court's decision

1. Holds by ten votes to seven that there has been a violation of Article 3 of the Convention;

2. Holds by twelve votes to five that no separate issue arises under Article 8[21] of the Convention;

3. Holds by eleven votes to six that there has been a violation of Article 6 of the Convention;

4. Holds by eleven votes to six

(a) that the respondent State is to pay the applicant, within three months, the following amounts:

(i) EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage;

(ii) EUR 5,868.88 (five thousand eight hundred and sixty-eight euros eighty-eight cents) in respect of costs and expenses;

(iii) any tax that may be chargeable on the above amounts;

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

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

1.5. Case of Artyomov v. Russia[4]

Having deliberated in private on 6 May 2010,

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

1.5.1. The procedure

1. The case originated in an application (no. 14146/02) against the Russian Federation lodged with the Court under Article 34[10] of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Sergey Gennadyevish Artyomov ("the applicant"), on 6 February 2002.

2. The applicant, who was granted legal aid, was represented by Ms O. Preobrazhenskaya and Ms O. Mikhaylova, lawyers with the International Protection Centre in Moscow. The Russian Government ("the Government") were represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had been detained in appalling conditions in detention facility no. IZ-39/1 in Kaliningrad, that he had been severely beaten up in a correctional colony on three occasions, that there had been no effective investigation of his complaints of ill-treatment and that he had not been afforded an effective opportunity to argue his civil claims before domestic courts.

4. On 13 October 2005 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3[27]). On 20 May 2009 the Court put additional questions to the parties.

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

[4] Case Of Artyomov V. Russia; (Application No. 14146/02); Strasbourg 27 May 2010; Final 04/10/2010

1.5.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1973 and lived until his arrest in the town of Gvardeysk, Kaliningrad Region.

A. Convictions

7. On 8 September 1999 the Gvardeyskiy District Court of the Kaliningrad Region found the applicant guilty of aggravated blackmail and sentenced him to five years' imprisonment.

8. In separate proceedings, on 16 November 2000 the Supreme Court of the Russian Federation, in the final instance, convicted the applicant of disruption of order in a detention facility and sentenced him to ten years' imprisonment.

B. Detention in facility no. IZ-39/1 in Kaliningrad

1. Detention from 16 August 1998 to 14 April 1999

(a) Conditions of detention

9. From 16 August 1998 to 14 April 1999 the applicant was detained in Kaliningrad no. IZ-39/1 detention facility. According to the applicant, that detention facility was built in 1929 and no construction works to the cells have been carried out since.

10. According to certificates issued on 20 December 2005 by the director of the facility and produced by the Government, the applicant was kept in twenty-two different cells which measured 7.8, 14 and 31.1 square metres. The Government submitted that the information on the exact number of inmates detained together with the applicant was not available. They noted that the cells could have occasionally been overcrowded, but at all times the applicant had had an individual bunk and bedding. Relying on the information provided by the director of the facility, the Government further argued that the sanitary conditions in the cells were satisfactory.

11. The applicant did not dispute the cell measurements. However, he alleged that the cells which measured 14 square metres had had ten sleeping places and usually had housed from 24 to 30 inmates. The smaller cells had either six or eight sleeping places and accommodated

from 14 to 22 detainees. Given the lack of beds, inmates had slept in shifts. The applicant further submitted that the sanitary conditions had been appalling.

(b) Proceedings for compensation for damage

12. On 12 June 2002 the applicant lodged an action against facility no. IZ-39/1 and the Ministry of Finance, seeking compensation for damage. He described the conditions of his detention in minute detail and claimed that his detention had amounted to torture. He also sought leave to appear before the court.

13. On 17 June 2002 the Tsentralniy District Court of the Kaliningrad Region refused leave to appear because the domestic law did not require the applicant's presence. A month later the applicant again unsuccessfully sought leave to appear and asked to be assisted by legal aid counsel, arguing that he had no means to pay for legal assistance.

14. On 15 July 2002 the Tsentralniy District Court dismissed the action because the applicant had failed to prove that the facility administration had been liable for damage allegedly caused to him and he had not produced evidence showing that his rights had been violated. That judgment was quashed by the Kaliningrad Regional Court on 13 November 2002. The case was remitted for fresh examination.

15. On 21 January 2003 the applicant received a letter from a judge of the Tsentralniy District Court informing him that he could not be granted leave to appear as the law did not allow a transfer of detainees from facilities where they are serving their sentence to enable them to take part in civil proceedings. The judge noted that the District Court had no right to bring the applicant to the hearing, as his regime of detention would be violated. The judge further informed the applicant that he could appoint a representative or authorise the District Court to examine the action in his absence.

16. On 28 February 2003 the Tsentralniy District Court, in the applicant's absence, dismissed the action. The relevant part of the judgment read as follows:

"[The applicant] was not brought to the hearing because the law on civil procedure does not prescribe the transport of prisoners who serve sentence in detention facilities to court hearings to allow them to take part in examination of civil cases. [The applicant] did not want to make use of his right to issue a power of authority to a representative to ensure his participation in the examination of the case; he was duly informed about the date and time of the hearing.

...

As it follows from information presented on 27 February 2003 by the administration of detention facility no. IZ-39/1, cell no. 4/19 [where the applicant was detained] measures 14 square metres; it is impossible to establish how many inmates were detained in the cell as such data were not recorded. Mr S. [who was detained together with the applicant] indicates in his claim that the cells in which he had been detained had been overcrowded. As it follows from [the applicant's] detention record he was detained in 22 different cells during his detention.

The above-mentioned circumstances attest to the fact that there is no objective, true and sufficient evidence corroborating [the applicant's] statement that two square metres [of personal space] were afforded to each three inmates. Moreover, funds were not provided from the federal budget for the construction of the second building of the detention facility between 1998 and 2000.

According to certificate no. 1397 issued on 2 July 2002 by the Department for Execution of Sentences, due to lack of funds reconstruction and major repair works were not carried out in the detention facility in 1998 and 1999.

By virtue of Article 1069 of the Civil Code of the Russian Federation, damage caused to an individual by unlawful actions (omissions) of State authorities, municipal authorities or their officials is to be compensated and is compensated at the expense of the Treasury of the Russian Federation, treasuries of the constitutive entities of the Russian Federation or treasuries of the municipal authorities respectively.

Taking into account the above-mentioned circumstances, the court concludes that having regard to the lack of funds in the federal budget for the reconstruction and major repair works of the detention facility and to the fact that [the applicant's] arrest was authorised by a prosecutor, the actions of the administration of detention facility no. IZ-39/1 pertaining to [the applicant's] placement and detention in the facility had a lawful character and complied with requirements of the law; thus, the respondents do not bear responsibility under Article 1069 of the Civil Code of the Russian Federation.

...

By virtue of Article 151^{28} of the Civil Code of the Russian Federation, if an individual sustained non-pecuniary damage (physical and moral sufferings) as a result of actions which violated his personal non-pecuniary rights or which encroached on his other non-pecuniary

interests or in other cases which are prescribed by law, a court may order that the adversary should compensate non-pecuniary damage.

As it was indicated above, the respondents are not those who caused damage due to the overcrowding in the detention facility cells; lack of repair works; [the applicant] contracting a skin rash; the deterioration of [the applicant's] eyesight; as to [the applicant's] allegations of insufficient food, lighting and provision of essentials, they were refuted by the case file materials; accordingly, the court dismisses [the applicant's] action."

17. The applicant lodged an appeal statement, complaining, inter alia, that he had not been afforded an opportunity to attend the hearings before the District Court and thus he had been unable to argue his case effectively. The applicant sought leave to appear before the appeal court.

18. On 4 June 2003 the Kaliningrad Regional Court upheld the judgment of 28 February 2003, endorsing the reasons given by the District Court. The relevant part of the judgment read as follows:

"As to [the applicant's] claims of overcrowding in the cells in which he was detained and inability to shower at least once a week, as prescribed by the Rules on Internal Order, those allegations were confirmed; at the same time, those violations of the detention rules did not have a gross and malicious character amounting, as [the applicant] claimed, to torture. For instance, [the applicant] could shower every ten days in view of the throughput capacity of the bathhouse; that fact cannot be considered a serious violation of [the applicant's] rights.

As it follows from a certificate submitted by the facility administration to the court, during the period indicated by [the applicant] from 1,600 to 1,800 persons were detained in the facility, while the maximum permitted number of inmates was 1,015. In such circumstances, the cells in fact occasionally accommodated more inmates than was permitted, however the [permitted] number was not exceeded threefold as [the applicant] claimed. At the same time the [District] Court rightfully considered that there was no guilt on the part of the detention facility in such circumstances, as the facility did not have the right not to admit the detainees when the maximum capacity of the facility had been exceeded. The [District] Court lawfully found that there were no grounds for accepting [the applicant's] action for compensation for non-pecuniary damage as the responsibility under Article 1069[29] of the Civil Code of the Russian Federation only arises on the condition of guilt on the part of the State authorities, which is absent in the present case.

...

The court cannot accept [the applicant's] argument that his right to defence was violated. Norms of the Code of Civil Procedure (in force at the material time) do not require transport of detainees to courts which examine civil cases. The [District] Court informed [the applicant] of his right to participate in a court hearing through his representative, however, [the applicant] did not want to make use of that right. His requests for appointment of legal aid counsel also could not be granted by the [District] Court because there is no norm in the Code of Civil Procedure which requires Bar Associations to represent interests of such persons in civil cases. At the same time, nothing precluded [the applicant] from asking a Bar Association to represent him."

The applicant was not brought to the appeal hearing.

2. Detention from 19 April to 26 September 2000

(a) Conditions of detention

19. On 19 April 2000 the applicant was transferred from a colony where he was serving his sentence pursuant to the judgment of 8 September 1999 to facility no. IZ-39/1 to take part in the trial on the charge of disruption of order in the colony. He remained in facility no. IZ-39/1 until 26 September 2000.

20. According to the applicant, he was detained in a number of cells. He provided description of the two cells: cell no. 79 which measured 17 square metres, had 10 sleeping places and accommodated 18 to 24 inmates, and cell no. 29, which measured 10 square metres, had six sleeping places and accommodated 15 inmates. The inmates took turns to sleep. The applicant argued that the sanitary conditions in the cells had been unsatisfactory. The ventilation system did not function, making the heat in summer unbearable. The cells were permanently lit by 40-watt bulbs. The toilet was not separated by a partition from the living area. At no time did the applicant have complete privacy. Anything he happened to be doing – using the toilet, sleeping – was subject to observations by the guard. He could shower twice a month. Of the ten shower heads only five worked and a large group of inmates had to fight for a place to shower within the afforded fifteen minutes. The cells were dirty, damp and full of insects.

21. The Government, relying on certificates issued by the director of the detention facility on 15 July 2009, argued that the applicant had been detained in eight different cells, of which six cells measured between 7.7 and 7.9 square metres and had two sleeping places and the

remaining two cells measured 13.4 and 16.7 square metres and were fit to accommodate three inmates. The Government submitted that the number of inmates in the cells had always corresponded to the number of bunks. As follows from a certificate issued by the facility director, the information on the exact number of inmates detained together with the applicant was unavailable as the registration logs had been destroyed.

22. The Government further submitted that each cell had a glazed window 1.2 metre high and 0.9 metre wide, which was covered by thick bars with so-called "eyelashes", that is, slanted plates approximately two centimetres apart welded to a metal screen, which gave no access to natural air or light. In compliance with the recommendations of the Russian Ministry of Justice issued on 25 November 2002, the latter construction was removed from the windows before March 2003. According to the Government the sanitary conditions were satisfactory. The cells were ventilated and had a central heating system, water supply, sewerage, natural and electric lighting and sanitary equipment. The applicant had free access to drinking water. The toilet was separated by a one-metre-high partition from the living area of the cell. The electric lighting was constantly on for surveillance and safety reasons. At night lower-voltage bulbs were used. The cells were disinfected at least once a month. The applicant was afforded an opportunity to shower every ten days for no less than fifteen minutes. He was provided with an individual bed, mattress, pillow and bed linen.

(b) Proceedings for compensation for damage

23. On 9 June 2003 the applicant sued facility no. IZ-39/1 and the Kaliningrad Regional Department of the Federal Treasury for compensation for damage. In his statement of claim he gave a detailed account of the conditions of his detention from 19 April to 26 September 2000.

24. On 23 June 2003 the Tsentralniy District Court stayed the adjudication of the action and asked the applicant to indicate possible evidence showing that the alleged violations had in fact occurred. On 6 August 2003 the Kaliningrad Regional Court upheld that decision. There is no indication that the applicant sought resumption of the proceedings.

3. Detention from 19 December 2003 to 12 January 2004

(a) Conditions of detention

25. On 19 December 2003 the applicant was taken from the colony to facility no. IZ-39/1 to attend an appeal hearing pertaining to one of his actions. He was sent back to the colony on 12 January 2004.

26. The Government, relying on a certificate issued on 20 December 2005 by the director of facility no. IZ-39/1, submitted that during that period the applicant had been detained in two different cells, each measuring 7.8 square metres. The Government further noted that the sanitary norm of personal space per inmate had not always been complied with, but the applicant had had an individual sleeping place at all times. According to the Government, the applicant was detained with three other detainees in the first cell. They were unable to indicate the exact number of inmates in the second cell. However, as it follows from the above-mentioned director's certificate, the facility did not have any information on the number of inmates in either of the cells in which the applicant had been detained.

27. Citing the information provided by the director of the facility, the Government further submitted that the cells received natural light and ventilation through a large window, which was double-glazed and measured 1.2 square metres. The windows had a casement. Inmates could request warders to open the casement to bring in fresh air. The windows were covered with latticed partitions to ensure "sound and visual insulation". The cells had ventilation shafts. The cells were equipped with lamps which functioned day and night. Each cell was equipped with a lavatory pan, a sink and a tap for running water. The pan was separated from the living area by a one-metre-high partition. Inmates were allowed to take a shower once in ten days. Each inmate was afforded at least fifteen minutes to take a shower. The cells were disinfected. The Government, relying on the information provided by the director of the facility, further stated that the applicant was given food "in accordance with the established norms". According to the Government, detainees, including the applicant, were provided with medical assistance. They had regular medical check-ups, including X-ray examinations, blood tests, and so on. The applicant did not ask for particular medical services. The Government furnished a copy of the applicant's medical record and medical certificates.

28. The applicant did not contest the cell measurements. However, he insisted that the cells had been severely overcrowded and he had had less than two square metres of living surface. Inmates had to take turns to sleep. The applicant further submitted that the sanitary conditions had been appalling. The cells were infested with insects but the administration did not provide any insecticide. The windows were covered with metal blinds which blocked access to natural light and air. It was impossible to take a shower as inmates were afforded only fifteen minutes

and two to three men had to use one shower head at the same time. That situation was further aggravated by the fact that inmates could only take a shower once in ten days. Inmates had to wash and dry their laundry indoors, creating excessive humidity in the cells. Inmates were also allowed to smoke in the cells. The lavatory pan was not separated from the living area by any partition. Thus, inmates were afforded no privacy. No toiletries were provided. The food was of poor quality and in scarce supply. The applicant further argued that medical assistance had been unavailable.

(b) Proceedings for compensation

29. The applicant complained to various authorities, including the Secretariat of the President of the Russian Federation, the State Duma, the Governor of the Kalinigrad Region, various prosecutors and the USA Embassy in the Russian Federation, about the conditions of his detention. The complaints were to no avail.

30. On 16 January 2004 the applicant lodged an action against facility no. IZ-39/1, seeking compensation for damage caused as a result of his detention in appalling conditions from 19 December 2003 to 12 January 2004. He also sought leave to appear before the court.

31. On 24 March 2004 the Tsentralniy District Court dismissed the action, relying on the same grounds as were cited in the judgment of 28 February 2003. In particular, the District Court noted that Article 1069 of the Russian Civil Code renders authorities amenable to responsibility for causing damage to individuals only if there has been fault in their actions or omissions. As there was no fault on the part of the domestic authorities for "mental and emotional sufferings or other damage" caused to the applicant, his action could not be accepted.

32. The applicant lodged an appeal statement, complaining, among other things, that the District Court had not granted him leave to appear. The applicant asked to be brought to the appeal hearing.

33. On 12 May 2004 the Kaliningrad Regional Court, in the applicant's absence, upheld the judgment, endorsing the reasons given by the District Court. As to the applicant's complaints that he could not attend the hearings before the District Court, the Regional Court noted that the applicant was serving his sentence in a correctional colony and thus it had been impossible to transport him to the hearings. The Regional Court pointed out that the applicant was aware of his procedural rights as a claimant.

C. Ill-treatment in colony no. OM-216/13

1. Events on 23 October 2001

34. At the material time the applicant was serving a prison sentence in correctional colony no. OM-216/13 in the village of Slavyanonvka, Bagrationovskiy District, Kaliningrad Region (also known as facility no. OM-216/13, hereinafter "the colony").

35. In October 2001 a group of officers of a special-purpose unit of the Kaliningrad Regional Directorate for Execution of Sentences (отдел специального назначения Управления Исполнения Наказаний Минюста России по Калининградской области) arrived at the colony for the purpose of "performing searches in the living quarters of the colony".

36. The applicant submitted that on 23 October 2001, at approximately 10.00 a.m., several officers had entered cell no. 22 where he had been detained. The officers wore balaclava masks. Without warning or any apparent reason they started hitting the applicant and his nine inmates with rubber truncheons and fists. The applicant fell to the floor but was forced to stand up. The officers, hitting and kicking the inmates, forced them to leave the cell.

37. The inmates were lined up in a corridor with their faces to the wall and were ordered to spread their legs, put their hands against the wall and to remain spread-eagled for ten minutes. The beatings continued. Subsequently the applicant and his inmates were taken to the entrance door where they saw two rows of officers wearing balaclava masks. The applicant was told to run between these rows to a car. While he was running, he received several blows to his back and his head with rubber truncheons. On the way back the applicant and other inmates again had to pass between the rows of masked officers, who subjected them to the beatings with rubber truncheons.

38. The applicant and the inmates were lined up with their hands against the wall and their legs wide apart. After three to four minutes of maintaining that position the applicant started feeling dizzy and his legs and arms swelled up. An officer hit the applicant with his fist on the left side of the back. Then several wardens in balaclava masks approached the inmates and started beating them up. The applicant was hit several times on the head, back and legs. He had been pushed strongly against the wall and his forehead was cut and bleeding. The beatings continued for another ten minutes.

39. During the following three days the applicant unsuccessfully requested the colony director to be examined by a doctor. On 26 October 2001 the applicant was visited by a

colony doctor, who refused to record his injuries but ordered him to be confined to bed. According to the applicant, that fact was recorded in register no. 29 of the penal ward (журнал учета № 29 ПКТ-ШИЗО).

40. The Government disputed the applicant's description of events. They relied on a handwritten report by the head of the special-purpose unit, Mr M., who stated that no force or special measures had been used on 23 October 2001.

41. The Government submitted that on 23 October 2001 inmates in cell no. 22 had broken the sewage system and had begun "demanding to be detained in satisfactory conditions". The officers of the special-purpose unit and the colony administration ordered the detainees to leave cell no. 22 and to move to cell no. 3. After the inmates had been body searched, they complied with the order. The unit officers searched the cell and found several forbidden objects, such as a metal pipe and a shaver. The Government noted that the colony doctor present during the search had recorded that the inmates had not had any complaints. The Government did not produce a copy of the relevant part of register no. 29 of the penal ward alleging its destruction in April 2005.

2. Events on 7 November 2001

42. In his numerous letters to the Court and complaints to domestic authorities, the applicant provided accounts of events which had occurred on 7 November 2001. Inconsistencies abounded in those various accounts, but, in general, the applicant's version was as follows. He alleged that on 7 November 2001 he had complained to an officer on duty, Mr L., that the injuries sustained by him on 23 October 2001 had not still been properly recorded. Mr L. quickly looked through written complaints given to him by the applicant and started insulting and threatening the applicant. Following a quick argument, Mr L. took the applicant to his office and hit him several times in the hip area. The applicant fell down and the officer hit him twice in the face with his fist. Before placing the applicant back in his cell, the officer again hit him several times on the side of the back and pushed him into the cell. The latter episode was witnessed by six inmates detained together with the applicant in the cell and two warders.

43. The Government, relying on a report written by the officer on duty, Mr L., on 7 November 2001, submitted that the applicant had disobeyed a lawful order by the duty officer and force had been used to suppress the disobedience. The report read as follows:

"[I] report that on 7 November 2001, at 8.50 a.m., during a check-up and examination of cells in the penal ward [I] made a remark to an inmate, [the applicant], as he was dressed improperly ([he] was standing in his underwear). [He] started explaining that he had washed his trousers. He was told to put on clean trousers. In response he began talking in a loud voice. Subsequently he was informed that he would be reported to [the facility administration]. In response he said: "Write twenty of those. ...[obscene language]"). [The applicant] was instructed to go to the duty room for a discussion concerning his dishonourable behaviour. When accompanied to the duty room, he tried to offer resistance. Having pushed me, [he] tried to run to his cell. Subsequently [I] used physical force, put [the applicant] on the floor using a fight method, and [I] gripped his arm, using a fight method."

44. The applicant was examined by a doctor on the same day. The doctor recorded an abrasion on the side of the applicant's back. The applicant alleged that the doctor had refused to record other injuries. On the following day the applicant applied to the head of the colony seeking a thorough medical examination and asking for his injuries to be properly recorded. According to the applicant, that complaint brought no response.

3. Events of 21 January 2002

45. According to the Government, on 18 January 2002 approximately 260 inmates, including the applicant, went on hunger strike. Approximately forty inmates performed acts of self-mutilation. Three days later a group of officers of a special-purpose unit of the Kaliningrad Regional Directorate for Execution of Sentences arrived at the colony to give assistance in "performing searches in the living quarters of the colony" as the hunger strike and self-mutilations continued.

46. The Government further submitted that on 21 January 2002, at about 4.30 p.m., a group of officers had entered cell no. 3, where the applicant had been detained, with the intention of searching it. The applicant refused to leave the cell, used offensive language, insulted warders and pulled their clothes. Following the applicant's refusal to stop his unlawful behaviour, an officer was forced to "use a rubber truncheon" against him. The applicant was taken out of the cell and body searched. A razor from a disposable shaver was seized. Relying on a certificate issued by the head of the colony medical division, the Government noted that the applicant had not applied for medical assistance between 21 January and 20 March 2002.

47. The applicant disputed the Government's version of events, arguing that after he had made known to the colony administration his intention to go on hunger strike, on 21 January

2002 a group of officers wearing balaclava masks had stormed into his cell and had taken inmates, apart from him, into a corridor. Then they hit him twice in the chest and head. The officers accompanied the beating with questions about the applicant's refusal to eat. Afraid for his life, the applicant promised to renounce his intention to take part in the collective hunger strike. He was taken to a corridor where some forty officers in balaclava masks stood. They intimidated and beat the applicant and his inmates. The applicant unsuccessfully asked the colony administration to record injuries sustained as a result of the beating.

4. Requests for institution of criminal proceedings

48. The applicant submitted several detailed complaints to the Kaliningrad Regional Prosecutor about the events of 23 October and 7 November 2001 and 21 January 2002. He referred to Article 3 of the Convention, urging the prosecutor to institute criminal proceedings against the officers involved in the beatings, and identified witnesses who could have corroborated his complaints. It appears that a number of inmates lodged similar complaints of ill-treatment before the Kaliningrad Regional Prosecutor.

49. On 20 March 2002 the Kalinigrad Regional Prosecutor refused to institute criminal proceedings upon the applicant's and his inmates' complaints, finding no prima facie case of ill-treatment. That decision was based exclusively on statements by warders and officers of the special-purpose unit.

50. On 21 October 2002 the Tsentralniy District Court of Kaliningrad upheld the prosecutor's decision. That decision was quashed on appeal on 24 December 2002 by the Kaliningrad Regional Court on the ground that the applicant had not been allowed to attend the hearing before the District Court or to present his version of events.

51. On 17 March 2003 the Tsentralniy District Court again upheld the prosecutor's decision of 20 March 2002. The District Court's decision was quashed on appeal on 27 May 2003 because the District Court had not examined the complaints pertaining to the events on 7 November 2001.

52. On 25 June 2003 the Tsentralniy District Court quashed the prosecutor's decision and remitted the case for a fresh inquiry. The District Court reasoned that the prosecutor had not addressed the applicant's complaints of ill-treatment which had allegedly occurred on 7 November 2001.

53. Two weeks later, on 9 July 2003, the Kalinigrad Regional Prosecutor dismissed the applicant's ill-treatment complaints, refusing to institute criminal proceedings. The decision, based on the statements by the colony administration, warders and officers of the special-purpose unit, indicated that on 23 October 2001 no force had been applied to the applicant and his inmates because there had been no need to use force and that the applicant had not complained to a doctor about his state of health.

In respect of the events on 7 November 2001 the prosecutor found that the use of force had been necessary because the applicant had disobeyed lawful orders of the officer on duty and had tried to run in the corridor. The applicant had been examined by a prison doctor, who had not recorded any injuries, save for an abrasion on his back which could have been sustained for some other reasons.

As to the events on 21 January 2002, the prosecutor established that the applicant had refused to leave his cell, had sworn obscenely, had threatened wardens and pulled their clothing. The applicant had been hit with a rubber truncheon to stop his unlawful behaviour. The prosecutor concluded that the use of force had been lawful.

54. The applicant appealed against the prosecutor's decision to the Tsentralniy District Court. He furnished a list of inmates who could have corroborated his description of events, asked for them to be heard and also sought leave to appear before the court.

55. On 23 September 2003 the Tsentralniy District Court dismissed the complaint. The relevant part of the decision read as follows:

"[The applicant] was duly informed about the place and time of the hearing; it was explained to him that it was impossible to transport him to the hearing; his absence could not preclude the examination of the complaints by the court.

Having examined the case file materials, the decision of 9 July 2003, materials pertaining to [the applicant's] complaints to supervisory review instances, similar complaints by inmates, Mr B., Mr G., Mr M., and by a lawyer, Mr Me., and having heard the prosecutor who had insisted that the decision of 9 July 2003 and the prosecutor's actions were lawful and well-founded, the court finds as follows.

... The [prosecutor] carried out an inquiry into the three episodes [on 23 October and 7 November 2001 and 21 January 2002] and the court considers it lawful that while examining

[the applicant's] new complaints, which did not contain any new information or facts pertaining to those episodes, [the prosecutor] used the findings of the previous inquiry.

... Thus, while carrying out an inquiry a prosecutor has the right to assess the necessity (or its absence) to question an applicant or witnesses, or to take other investigative measures.

The Kaliningrad Regional Prosecutor, Mr Ko., examined [the applicant's] request of 14 July 2003 concerning the necessity to interrogate inmates of detention facility no. OM-216/13, and informed [the applicant] about it.

The court did not establish, and [the applicant] did not present any evidence concerning a violation of his constitutional rights and freedoms or his right of access to a court by the contested decision of 9 July 2003 by which the institution of criminal proceedings had been refused or by other actions (omissions) of the prosecutor.

Having regard to the above-mentioned circumstances, the court dismisses [the applicant's] complaint...

The court does not grant [the applicant's] request for witnesses to be heard, because Article 125 of the Code of Criminal Procedure indicates the exhaustive list of persons who can take part in an examination of a complaint against a prosecutor's decision not to institute criminal proceedings or against other decisions and actions of a prosecutor. Those whose appearance before the court [the applicant] sought are not included in that list; a number of [witnesses] are inmates serving sentences in detention facilities and therefore they may not be transported to the courthouse to take part in the proceedings. [The applicant] was informed that it was impossible for witnesses to be heard."

56. The applicant appealed, complaining, inter alia, that neither the prosecutor nor the District Court had heard him or other detainees who could have confirmed his statements, that they had not taken medical evidence and had limited their inquiry to statements by the colony officers.

57. On 18 November 2003 the Kaliningrad Regional Court upheld the decision of 23 September 2003, endorsing the reasons given by the District Court. The Regional Court noted that the applicant's presence at the hearings before the courts had not been necessary and that the District Court had rightfully refused to hear witnesses.

58. On 13 February 2006 the Presidium of the Kaliningrad Regional Court, by way of a supervisory review, quashed the decisions of 23 September and 18 November 2003, noting a violation of the applicant's right to take part in the hearings before the courts.

59. On 29 March 2006 the Tsentralniy District Court quashed the prosecutor's decision of 9 July 2003 and ordered a fresh inquiry into the applicant's ill-treatment complaints. The relevant part of the decision read as follows:

"... during an inquiry into a complaint concerning a criminal offence committed, a prosecutor must thoroughly and objectively investigate all circumstances pertaining to the facts indicated in that complaint; this means that he must question all interested parties, in [the applicant's] case [he] must order an independent medical examination of the detainee, following which and having analysed all established circumstances and having performed an evaluation, [he] should issue one of the decisions indicated in Article 145^{30} of the Code of Criminal Procedure of the Russian Federation.

As it appears from the investigation file presented by the prosecutor and from the materials of the supervisory review, the inquiry into [the applicant's] complaints was not performed consistently, it was chaotic, [the applicant] himself and the eyewitnesses, indicated by [the applicant] in his complaints, were not questioned; [the prosecutor] received merely formal explanations from the officers; it is clear from those explanations that the prosecutor himself did not interrogate those officers; an independent medical examination of [the applicant] for a purpose of establishing injuries was not performed.

In such circumstances, [the court] considers that the prosecutor's inquiry into [the applicant's] complaint was performed formally and subjectively, and that the contested decision by which the institution of criminal proceedings was refused is unsubstantiated.

However, it is necessary to take into account that more than four years have passed since the events complained of by [the applicant] and it will be difficult to remedy the insufficiency of the prosecutor's inquiry into the complaints about the crime."

The applicant attended the hearing.

60. It appears that the investigation is now pending.

5. Proceedings for compensation for damage

61. On 21 February 2002 the applicant and another inmate, Mr B., lodged actions against colony no. OM-216/13 and the Kaliningrad Regional Department of the Federal Treasury, seeking compensation for damage caused by beatings on 23 October and 7 November 2001 and 21 January 2002.

62. In May and June 2002 the applicant submitted several motions to the court, seeking leave to appear, asking to summon witnesses on his behalf and to obtain certain medical documents from the respondents.

63. On 26 April 2004 the Bagrationovskiy District Court, Kaliningrad Region, held a hearing in colony no. OM-216/13. The District Court heard the applicant, his co-plaintiff, the representative of the colony, and a number of witnesses. Both the applicant and his co-plaintiff insisted that the beatings had taken place. The representative of the colony confirmed that on 23 October 2001 physical force and rubber truncheons had been used against the applicant. However, he stressed that the use of the force and special means had been lawful. The head of the medical department of the colony and a prison doctor did not remember examining the applicant after the beatings. Having heard the parties and witnesses, the District Court dismissed the actions, holding, in so far as relevant, as follows:

"At the plaintiffs' request the court heard, as witnesses, inmates who are serving sentences in that colony. Thus, witness T. confirmed that [the applicant] had been beaten by officers of the special-purpose unit on his way to the penal ward and in the walking area, while witnesses Kh. and Ga. (warders in the colony) did not confirm that allegation in the court hearing.

An extract from [the applicant's] medical record confirms that on 26 October 2001 [the applicant] consulted a prison doctor, and an extract from register no. 29 of the penal ward corroborates the fact that the prison doctor, Mr G., had ordered that [the applicant] should be confined to bed until 29 October 2001.

A witness, [the prison doctor], Mr G. stated in the court hearing that there is no information in the [applicant's] medical record pertaining to his applying for medical assistance on 23 October 2001. On 26 October 2001 he ordered [the applicant] to be confined to bed at the latter's request, as [the applicant] claimed that he was tired. [Mr G.] never refused to examine inmates, and in January 2002 he was on leave.

Witnesses Mr Gr., Mr K., Mr Gu. and Mr Ta. testified that in the morning of 7 November 2001 there had been a loud argument between [the applicant], who was not dressed properly, and the officer on duty, Mr L., [and] stated that [the applicant] had been taken out of the cell

and that Mr L. had twice hit [the applicant] with his fist on the back when the latter was brought back to the cell.

As it follows from the statements by Mr L., [the applicant] responded rudely to Mr L.'s remark about his clothes; he was taken to the duty room to provide an explanation about the incident. However, [the applicant] pushed Mr L. aside and began running to his cell, screaming that he had been beaten up. Due to such disobedience, physical force in the form of a fight method was applied to [the applicant]. The testimony of this witness is confirmed by his report to the director of colony no. 216/13 made on 7 November 2001.

An act was drawn up on 7 November 2001 as a confirmation of a use of force against [the applicant], on the same day a medical assistant, Ms Lo., recorded an abrasion on the left side of the small of [the applicant's] back.

[The applicant] applied to a Justice of the Peace of the 1st Court Circuit with a complaint, seeking institution of criminal proceedings against Mr L., the warder in colony no. 216/13, alleging that he had committed libel by writing that report.

The above-mentioned Justice of the Peace, in his decision of 20 October 2003, acquitted Mr L. of the charge of libel brought against him by [the applicant]... Thus, the court, in the course of the examination of the case, established that there had existed circumstances caused by [the applicant's] behaviour which had prompted the use of force against [the applicant], and that Mr L.'s report had described the events of 7 November 2001 correctly. The decision of 20 October 2003 was upheld on appeal by the decision of the appellate court on 11 February 2004 and became final on 13 April 2004.

An extract from [the applicant's] medical record certifies that he did not apply for medical assistance between 26 October and 4 December 2001.

On 21 January 2002, on an order of the head of the Kaliningrad Regional Department for Execution of Sentences, officers of the special-purpose unit arrived to colony no. OM-216/13 to give assistance to the colony administration in searching the living quarters and cells, having regard to an ongoing collective hunger strike and self-mutilations. At the same time a number of forbidden objects were seized from the penal ward, where [the applicant and his co-plaintiff] were detained.

A rubber truncheon was used against [the applicant] who tried to resist an officer from the special-purpose unit, which is confirmed by the report and act of application of a rubber truncheon issued on 21 January 2002.

As it follows from [the applicant's] medical record, medical assistance was not provided to him between 17 January and 11 March 2002.

The Kaliningrad Regional Prosecutor's Office carried out an inquiry pertaining to the three episodes of beatings of which [the applicant] complained; as a result of the inquiry the prosecutor issued a decision on 9 July 2003 refusing to institute criminal proceedings as there was no criminal conduct in the actions.

[The applicant] appealed against that decision in compliance with Article 125^{31} of the Code of Criminal Procedure. The Tsentralniy District Court of Kaliningrad, by its decision of 23 September 2003, dismissed [the applicant's] complaint, finding that the disputed decision of the prosecutor was lawful and well-founded. The court decision became final on 18 November 2003.

...

The Court does not have any grounds to doubt the above-mentioned court decisions. [The court] did not establish any instances of unlawful use of physical force against the plaintiffs in the course of the present proceedings, which allows the court to conclude that [the applicant's]... claim is unsubstantiated."

64. The applicant appealed, also requesting the appeal court to ensure his presence at the hearing.

65. On 13 October 2004 the Kaliningrad Regional Court upheld the judgment of 26 April 2004, endorsing the reasons given by the District Court. Neither the applicant nor the representative of the respondents was present.

D. Detention in colony no. OM-216/9 together with HIV-positive detainees

66. On 19 May 1999 six HIV-positive detainees arrived at the colony, where they stayed until 26 May 1999. The Government, relying on the information provided by the colony director, submitted that the HIV-positive detainees had been accommodated in a separate colony unit. The colony administration assigned a day when only those detainees could take showers and allocated separate medical equipment to them. Bedding provided for those detainees was

changed and washed separately from that of the rest of the detainees. The tableware given to the HIV-positive detainees was also washed and disinfected separately. The colony administration, assisted by medical specialists, organised a meeting with the detainees and lectured them on AIDS and on how the virus could be transmitted. They also warned the HIV-positive detainees that knowingly transmitting HIV was a criminal offence. The Government submitted that the colony administration had taken every necessary precaution to prevent the spread of the disease in the colony. In particular, they prevented the use of drugs, sexual contact between inmates and tattooing. They also provided contraceptives to inmates who were allowed to have long-term meetings with relatives. The Government stressed that as a result of those actions no detainee had contracted HIV.

1. Criminal proceedings against the colony administration

67. In 2000 and 2003 the applicant unsuccessfully sought institution of criminal proceedings against the colony administration because the HIV-positive detainees had been admitted to the colony.

68. On 20 March 2003 the Kaliningrad Regional Prosecutor sent a letter to the applicant informing him that his request had already been dismissed in 2000.

69. The applicant complained to a court that the prosecutor had failed to discharge his duties by refusing to reconsider his request.

70. On 29 July 2003 the Kaliningrad Regional Court, in the final instance, dismissed the complaint and discontinued the proceedings because an appeal should have been lodged against the decision of 2000 rather than against the letter of 20 March 2003.

2. Tort proceedings

71. On 1 March 2002 the applicant lodged an action against the Kaliningrad Regional Prosecutor and the Kaliningrad Regional Department for Execution of Sentences, seeking compensation for non-pecuniary damage. He claimed that he had feared for his life because the HIV-positive detainees had stayed in the colony. He also sought leave to appear.

72. On 20 March 2002 the Tsentralniy District Court informed the applicant that the hearing had been listed for 5 April 2002. The District Court also noted that the law did not provide a detainee with the right to attend a hearing in a civil case and that the applicant could appoint a representative or allow the District Court to adjudicate the action in his absence.

73. On 5 April 2002 the District Court dismissed the action, holding that the colony administration had taken the necessary steps to prevent the risk of HIV contagion and that no-one in the colony had contracted HIV. The administration provided the HIV-positive detainees with separate kitchenware. The detainees took showers separately and medical assistance was provided to them in a separate facility and with separate equipment. The colony administration organised meetings with detainees and lectured them on how AIDS could be transmitted. At the same time the District Court noted that the applicant could not contract HIV by taking showers or eating in the same premises as the HIV-positive detainees.

74. On 24 July 2002 the Kaliningrad Regional Court upheld the judgment. The applicant was not present.

E. Proceedings against the police department and colony

75. On 26 February and 6 March 2002 the applicant lodged two tort actions against the Gvardeyskiy District police department and colony no. OM-216/13. In the first action the applicant claimed that in August 1998 police officers of the Gvardeyskiy District police department had seized his personal belongings and had not returned them to him. He further argued that he had been placed in the facility of that police department, where he had been detained in poor conditions and had only been provided with food once a day. In the second action he complained that the administration of colony no. OM-216/13 had not arranged screenings of films, as provided for by the domestic law.

76. On 13 May 2002 the Gvardeyskiy District Court dismissed the first action, finding that the applicant's allegations of insufficient food were false, and that his personal belongings had been seized lawfully.

77. On 7 August 2002 the Bagrationovskiy District Court dismissed the second action, holding that the domestic law did not provide detainees, including the applicant, with the right to see films.

78. On 21 August and 4 December 2002 the Kaliningrad Regional Court upheld the judgments of 13 May and 7 August 2002 respectively. The applicant was not brought to either the first-instance or the appeal hearings despite his requests.

F. Proceedings concerning refusal to provide medical data

79. On 31 January 2003 the applicant asked the colony administration to provide him with his medical records. On 5 March 2003 the administration provided him with general information about the state of his health and refused to give him the full record.

80. On 14 March 2003 the applicant unsuccessfully asked a prosecutor to institute criminal proceedings against the administration. On 23 September 2003 the Kaliningrad Regional Court, acting on an appeal by the applicant against the prosecutor's decision, discontinued the proceedings.

G. Request for institution of criminal proceedings against a judge

81. On 17 February and 25 April 2003 the applicant unsuccessfully asked various prosecutors to institute criminal proceedings against a judge who had determined one of his claims. Subsequently, the applicant complained to a court that the prosecutors had failed to discharge their duties. On 29 June and 29 July 2004 the Kaliningrad Regional Court, in the final instance, disallowed the complaints and discontinued the proceedings.

H. Proceedings concerning a transfer to another colony

82. On 1 February 2004 the applicant asked for a transfer to another colony. On 17 August 2004 the Kaliningrad Regional Court, in the final instance, granted the request and held that the applicant should stay in a lower security colony.

II. RELEVANT DOMESTIC LAW

A. Conditions of detention

83. Section 22 of the Detention of Suspects Act (Federal Law no. 103-FZ of 15 July 1995) provides that detainees should be given free food sufficient to maintain them in good health according to standards established by the Government of the Russian Federation. Section 23 provides that detainees should be kept in conditions which satisfy sanitary and hygienic requirements. They should be provided with an individual sleeping place and given bedding, tableware and toiletries. Each inmate should have no less than four square metres of personal space in his or her cell.

B. Use of force and special measures in detention facilities

Penitentiary Institutions Act (no. 5473-I of 21 July 1993)

84. When using physical force, special means or weapons, the penitentiary officers must:

(1) state their intention to use them and afford the detainee(s) sufficient time to comply with their demands unless a delay would imperil life or limb of the officers or detainees;

(2) ensure the least possible harm to detainees and provide medical assistance;

(3) report every incident involving the use of physical force, special means or weapons to their immediate superiors (section 28).

85. Rubber truncheons may be used for

(1) putting an end to assaults on officers, detainees or civilians;

(2) repressing mass disorders or group violations of public order by detainees, as well as for apprehension (задержание) of offenders who persistently disobey or resist the officers (section 30).

C. Investigation of criminal offences

86. The RSFSR Code of Criminal Procedure (in force until 1 July 2002, "the CCrP") established that a criminal investigation could be initiated by an investigator on a complaint by an individual or on the investigative authorities' own initiative, where there were reasons to believe that a crime had been committed (Articles 108[32] and 125[31]). A prosecutor was responsible for overall supervision of the investigation (Articles 210 and 211[33]). He could order specific investigative actions, transfer the case from one investigator to another or order an additional investigation. If there were no grounds to initiate or continue a criminal investigation, the prosecutor or investigator issued a reasoned decision to that effect which had to be notified to the interested party. The decision was amenable to appeal to a higher prosecutor or to a court of general jurisdiction (Articles 113[34] and 209[35]).

87. On 1 July 2002 the old Code was replaced by the Code of Criminal Procedure of the Russian Federation ("the new CCP"). Article 125[31] of the new CCP provides for judicial review of decisions by investigators and prosecutors that might infringe the constitutional rights of participants in proceedings or prevent access to a court.

D. Civil law remedies against illegal acts by public officials

88. Article 1064 § 1 of the Civil Code of the Russian Federation provides that the damage caused to the person or property of a citizen shall be compensated in full by the tortfeasor. Pursuant to Article 1069[29], a State agency or a State official shall be liable to a citizen for damage caused by their unlawful actions or failure to act. Such damage is to be compensated

at the expense of the federal or regional treasury. Articles 151[28] and 1099-1101 of the Civil Code provide for compensation for non-pecuniary damage. Article 1099 states, in particular, that non-pecuniary damage shall be compensated irrespective of any award for pecuniary damage.

E. Detention of persons with HIV

89. Limitation of a citizen's rights and freedoms because of his or her HIV status may be authorised only by federal law (section 5 of the Law on Prevention of Propagation of HIV infection, 38-FZ of 30 March 1995). Detainees are subject to a compulsory medical examination (section 9 of the Law). A person who has tested HIV-positive must be informed thereof, be informed of the need to take precautions for preventing transmission of HIV and warned that contamination of others or exposing others to a risk of contamination is a criminal offence (section 13 of the Law; Article 122 of the Criminal Code).

90. According to the Rules on Compulsory Testing of Prisoners for HIV infection (adopted by the Russian Government on 28 February 1996), the prison administration must take measures preventing transmission of HIV; medical and other staff must not disclose information relating to a detainee's HIV status (Rules 11 and 13).

91. Section 101 § 2 of the Penitentiary Code provided that medical penitentiary establishments should be organised for treatment and detention of drug addicts, alcoholics, HIV and tuberculosis infected prisoners. Federal Law No. 25-FZ of 9 March 2001 repealed that provision in so far as it related to HIV-positive prisoners.

F. Provisions on attendance at hearings

92. The Code of Civil Procedure of the Russian Federation provides that individuals may appear before a court in person or act through a representative (Article 48 § 1[36]). A court may appoint an advocate to represent a defendant whose place of residence is not known (Article 50). The Advocates Act (Law no. 63-FZ of 31 May 2002) provides that free legal assistance may be provided to indigent plaintiffs in civil disputes concerning alimony or pension payments or claims for health damage (section 26 § 1).

93. The Penitentiary Code provides that convicted persons may be transferred from a correctional colony to a temporary detention facility if their participation is required as witnesses, victims or suspects in connection with certain investigative measures (Article

77.1). The Code does not mention the possibility for a convicted person to take part in civil proceedings, whether as a plaintiff or defendant.

94. On several occasions the Constitutional Court has examined complaints by convicted persons whose requests for leave to appear in civil proceedings had been refused by courts. It has consistently declared the complaints inadmissible, finding that the contested provisions of the Code of Civil Procedure and the Penitentiary Code did not, as such, restrict the convicted person's access to court. It has emphasised, nonetheless, that the convicted person should be able to make submissions to the civil court, either through a representative or in any other way provided by law. If necessary, the hearing may be held at the location where the convicted person is serving the sentence or the court hearing the case may instruct the court having territorial jurisdiction over the correctional colony to obtain the applicant's submissions or carry out any other procedural steps (decisions no. 478-O of 16 October 2003, no. 335-O of 14 October 2004, and no. 94-O of 21 February 2008).

III. RELEVANT INTERNATIONAL DOCUMENTS

A. General conditions of detention

95. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited the Russian Federation from 2 to 17 December 2001. The section of its Report to the Russian Government (CPT/Inf (2003) 30) dealing with the conditions of detention in temporary holding facilities and remand establishments and the complaints procedure read as follows:

“b. temporary holding facilities for criminal suspects (IVS)

26. According to the 1996 Regulations establishing the internal rules of Internal Affairs temporary holding facilities for suspects and accused persons, the living space per person should be 4 m². It is also provided in these regulations that detained persons should be supplied with mattresses and bedding, soap, toilet paper, newspapers, games, food, etc. Further, the regulations make provision for outdoor exercise of at least one hour per day.

The actual conditions of detention in the IVS establishments visited in 2001 varied considerably.

...

45. It should be stressed at the outset that the CPT was pleased to note the progress being made on an issue of great concern for the Russian penitentiary system: overcrowding.

When the CPT first visited the Russian Federation in November 1998, overcrowding was identified as the most important and urgent challenge facing the prison system. At the beginning of the 2001 visit, the delegation was informed that the remand prison population had decreased by 30,000 since 1 January 2000. An example of that trend was SIZO No 1 in Vladivostok, which had registered a 30% decrease in the remand prison population over a period of three years.

...

The CPT welcomes the measures taken in recent years by the Russian authorities to address the problem of overcrowding, including instructions issued by the Prosecutor General's Office, aimed at a more selective use of the preventive measure of remand in custody. Nevertheless, the information gathered by the Committee's delegation shows that much remains to be done. In particular, overcrowding is still rampant and regime activities are underdeveloped. In this respect, the CPT reiterates the recommendations made in its previous reports (cf. paragraphs 25 and 30 of the report on the 1998 visit, CPT (99) 26; paragraphs 48 and 50 of the report on the 1999 visit, CPT (2000) 7; paragraph 52 of the report on the 2000 visit, CPT (2001) 2).

...

125. As during previous visits, many prisoners expressed scepticism about the operation of the complaints procedure. In particular, the view was expressed that it was not possible to complain in a confidential manner to an outside authority. In fact, all complaints, regardless of the addressee, were registered by staff in a special book which also contained references to the nature of the complaint. At Colony No 8, the supervising prosecutor indicated that, during his inspections, he was usually accompanied by senior staff members and prisoners would normally not request to meet him in private “because they know that all complaints usually pass through the colony's administration”.

In the light of the above, the CPT reiterates its recommendation that the Russian authorities review the application of complaints procedures, with a view to ensuring that they are operating effectively. If necessary, the existing arrangements should be modified in order to guarantee that prisoners can make complaints to outside bodies on a truly confidential basis.”

B. Detention of persons with HIV

96. The relevant extracts from the 11th General Report [CPT/Inf (2001) 16] prepared by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) concerning transmissible diseases read as follows:

"31. The spread of transmissible diseases and, in particular, of tuberculosis, hepatitis and HIV/AIDS has become a major public health concern in a number of European countries....

...[T]he act of depriving a person of his liberty always entails a duty of care...

The use of up-to date methods for screening, the regular supply of medication...constitute essential elements of an effective strategy...to provide appropriate care to the prisoners concerned.

...[T]he prisoners concerned should not be segregated from the rest of the prison population unless this is strictly necessary on medical or other grounds. In this connection, the CPT wishes to stress in particular that there is no medical justification for the segregation of prisoners solely on the grounds that they are HIV-positive.

...[I]t is incumbent on national authorities to ensure that there is a full educational programme about transmissible diseases for both prisoners and prison staff. Such a programme should address methods of transmission and means of protection as well as the application of adequate preventive measures. More particularly, the risks of HIV or hepatitis B/C infection through sexual contacts and intravenous drug use should be highlighted and the role of body fluids as the carriers of HIV and hepatitis viruses explained..."

97. The relevant parts of the Appendix to Recommendation no. R (98) 7 of the Committee of Ministers to Member States concerning the ethical and organisational aspects of health care in prison read as follows:

"13. Medical confidentiality should be guaranteed and respected...

38. The isolation of a patient with an infectious condition is only justified if such a measure would also be taken outside the prison environment for the same medical reasons.

39. No form of segregation should be envisaged in respect of persons who are HIV antibody positive, subject to the provisions contained in paragraph 40.

40. Those who become seriously ill with Aids-related illnesses should be treated within the prison health care department, without necessarily resorting to total isolation. Patients, who need to be protected from the infectious illnesses transmitted by other patients, should be isolated only if such a measure is necessary for their own sake to prevent them acquiring intercurrent infections...”

98. The relevant part of the Appendix to Recommendation no. R (93) 6 of the Committee of Ministers to Member States concerning prison and criminological aspects of the control of transmissible diseases including Aids and related health problems in prison reads as follows:

“9. As segregation, isolation and restrictions on occupation, sport and recreation are not considered necessary for seropositive people in the community, the same attitude must be adopted towards seropositive prisoners.”

99. Detention of HIV-positive persons was also examined in the following Recommendations of the Committee of Ministers to Member States: no. R (89) 14 on the ethical issues of HIV infection in the health care and social settings; and no. R (98) 7 concerning the ethical and organisational aspects of health care in prison.

100. Similar recommendations were made by the 1993 World Health Organisation in the Guidelines on HIV infection and AIDS in prisons:

“27. Since segregation, isolation and restrictions on occupational activities, sports and recreation are not considered useful or relevant in the case of HIV-infected people in the community, the same attitude should be adopted towards HIV-infected prisoners. Decisions on isolation for health conditions should be taken by medical staff only, and on the same grounds as for the general public, in accordance with public health standards and regulations. Prisoners' rights should not be restricted further than is absolutely necessary on medical grounds, and as provided for by public health standards and regulations...

28. Isolation for limited periods may be required on medical grounds for HIV-infected prisoners suffering from pulmonary tuberculosis in an infectious stage. Protective isolation may also be required for prisoners with immunodepression related to AIDS, but should be carried out only with a prisoner's informed consent. Decisions on the need to isolate or segregate prisoners (including those infected with HIV) should only be taken on medical grounds and only by health personnel, and should not be influenced by the prison administration....

32. Information regarding HIV status may only be disclosed to prison managers if the health personnel consider...that this is warranted to ensure the safety and well-being of prisoners and staff...”

1.5.3. The law

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF THE CONDITIONS OF THE APPLICANT'S DETENTION FROM 16 AUGUST 1998 TO 14 APRIL 1999 AND FROM 19 APRIL TO 26 SEPTEMBER 2000

101. The applicant complained that the conditions of his detention from 16 August 1998 to 14 April 1999 and from 19 April to 26 September 2000 in detention facility no. IZ-39/1 in Kaliningrad were in breach of Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Submissions by the parties

102. The Government commented on the conditions of the applicant's detention. In particular, they submitted that the applicant had been detained in satisfactory sanitary conditions. Relying on certificates issued by the facility director, they pointed out that the applicant had occasionally been detained in overcrowded cells during the first period. However, at all times he had had an individual sleeping place. The Government stressed that overcrowding in detention facilities was objectively justifiable. In particular, it was caused by the high crime rate, insufficient financial resources and the limited capacity of detention facilities. During the second period of the applicant's detention the number of inmates in the cells had always corresponded to the number of sleeping places.

103. The Government pointed out that the applicant had had effective domestic remedies at his disposal of which he had effectively made use. For instance, he had lodged an action against the administration of the detention facility seeking compensation for damage allegedly caused to him as a result of his detention. The domestic courts had thoroughly examined his complaints and had taken lawful decisions.

104. The applicant challenged the Government's description of the conditions of his detention as factually inaccurate. He insisted that the cells had at all times been severely overcrowded.

He further submitted that he had lodged tort actions against the detention facility; however, he had had no hopes that such an action could be effective as he had always known about the ineffectiveness of the domestic remedies.

B. The Court's assessment

105. The Court observes from the outset that the applicant complained about the conditions of his detention during the two separate periods. The first period ended on 14 April 1999 and the second one came to an end on 26 September 2000, which is more than two and a half years and more than a year, respectively, before he lodged his application with the Court on 6 February 2002. However, in 2002 and 2003 the applicant lodged actions against the detention facility and domestic financial authorities seeking compensation for damage allegedly caused to him during his detention. The two actions resulted in the final decisions of the Kaliningrad Regional Court issued on 4 June and 6 August 2003, respectively, by which the applicant's actions were either dismissed or adjourned.

106. The Court considers it appropriate first to determine whether the applicant has complied with the admissibility requirements defined in Article 35 § 1[37] of the Convention, which stipulates:

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

The Court reiterates the applicant's argument about the non-existence of domestic remedies for his complaints about the conditions of his detention (see paragraph 104 above). Taking into account that argument and having regard to the fact that both periods of the applicant's detention ended more than six months before the application was lodged with the Court, the issue arises whether the applicant complied with the six-month requirement imposed by Article 35 of the Convention.

107. The Court notes in the first place that the purpose of the six months' rule is to promote security of law and to ensure that cases raising issues under the Convention are dealt with within a reasonable time. Furthermore it ought to protect the authorities and other persons concerned from being under any uncertainty for a prolonged period of time. It marks out the temporal limits of supervision carried out by the Court and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see Varnava and Others v. Turkey [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90,

16070/90, 16071/90, 16072/90 and 16073/90, § 156, ECHR 2009-...). The rule 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 (see, for example, Worm v. Austria, 29 August 1997, §§ 32-33, Reports of Judgments and Decisions 1997-V). Finally, the rule should ensure that it is possible to ascertain the facts of the case before that possibility fades away, making a fair examination of the question at issue next to impossible (see Kelly v. the United Kingdom, no. 10626/83, Commission decision of 7 May 1985, Decisions and Reports (DR) 42, p. 205, and Baybora and Others v. Cyprus (dec.), no. 77116/01, 22 October 2002).

108. Normally, the six-month period runs from the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset however that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of. Article 35 § 1^{37} cannot be interpreted however in a manner which would require an applicant to seize the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level. Where, therefore, an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, the Court considers that it may be appropriate for the purposes of Article 35 § 1 to take the start of the six month period from the date when the applicant first became or ought to have become aware of those circumstances (see Varnava, cited above, § 157).

109. Turning to the facts of the present case, the Court thus has to ascertain whether there existed an effective remedy before the Russian courts in respect of the detention conditions, in particular whether a complaint concerning general conditions of detention could be the subject of an action for damages capable of providing redress under the Russian law of tort. The Court observes that it may only deal with the merits of the present complaint:

(a) if such an action is considered a remedy within the meaning of Article 35 § 1^{37} of the Convention, in which case the six-month period provided for in that Article should be calculated from the date of the final decisions by the Kaliningrad Regional Court; or

(b) if such a judicial avenue is not considered to provide the applicant with adequate and sufficient redress, when the Court finds that the applicant, unaware of circumstances which rendered the remedy ineffective, still complied with the six-month rule for the purpose of Article 35 § 1 of the Convention by availing himself of that apparently existing remedy.

1. Whether an action for damages can be considered an effective remedy

110. As to the effectiveness of the remedy, the Court reiterates that in other relevant cases regarding the conditions of detention it has found that the Russian Government had not demonstrated what redress could have been afforded to the applicant by a prosecutor, a court, or another State agency, bearing in mind that the problems arising from the conditions of the applicant's detention were apparently of a structural nature and did not concern the applicant's personal situation alone (see, for example, Buzychkin v. Russia, no. 68337/01, § 49, 14 October 2008, Moiseyev v. Russia (dec.), no. 62936/00, 9 December 2004, and Kalashnikov v. Russia (dec.), no. 47095/99, 18 September 2001). At the same time, the Court observes that it has jurisdiction in every case to assess in the light of the particular facts whether any given remedy appears to offer the possibility of effective and sufficient redress within the meaning of the generally recognised rules of international law concerning the exhaustion of domestic remedies (see Denisov v. Russia (dec.), no. 33408/03, 6 May 2004). Thus, without prejudice to its findings in earlier similar cases, the Court may examine whether in the particular circumstances of the present case an action for damages could have been regarded as an effective remedy for the purpose of Article 35 § 1^{37} of the Convention.

111. In the light of the information before it, the Court observes that Article 1069 of the Russian Civil Code provides for compensation for any unlawful act or omission by State authorities (see paragraph 88 above) which could in principle provide a remedy in respect of the applicant's allegations of appalling conditions of his detention. However, in the instant case, having established, among other things, that the applicant had been detained in overcrowded cells, the domestic courts dismissed his action and refused compensation on the sole ground that the domestic authorities, in particular, the facility administration, had not been liable for damage arising out of the conditions of his detention (see paragraphs 16 and 18 above). The courts' finding was apparently based on the underlying proposition that the authorities were only accountable for damage caused by culpable conduct or omission. In the particular case, they considered that the lack of financial resources excluded the liability of the domestic authorities for unsatisfactory conditions of the applicant's detention, which were amply proven. They did not consider that it was not open to the State authorities to cite lack of funds or limited capacity of the detention facility as an excuse for not honouring their obligation to ensure satisfactory conditions of detention.

112. Bearing in mind the Government's argument that the problem of overcrowding in Russian detention facilities is derived from, inter alia, the lack of financial resources (see paragraph 102 above) which rendered the overcrowding a structural problem, and having regard to the subject matter of the applicant's claim, the approach adopted by the Russian

courts is unacceptable. It allows a large number of cases, such as the applicant's, where the unsatisfactory conditions of detention result from lack of funds or limited capacity of detention facilities, to be dismissed. Thus, as a result of that stance of the courts, the remedy under the Russian Civil Code offers no prospect of success and could be considered theoretical and illusory rather than adequate and effective in the sense of Article 35 § 1^{37} of the Convention. The Court is not satisfied that in the present state of the Russian law of tort claimants could reasonably expect to recover damages on proof of their allegations unless there were to be a change or at least a material development in the existing interpretation of the domestic legal provisions on tort by the Russian courts (see Aleksandr Makarov v. Russia, no. 15217/07, §§ 82-91, 12 March 2009).

2. Date from which the six-month period starts to run

113. Having found that the tort action brought by the applicant under Article 1069 of the Russian Civil Code is not a remedy within the meaning of Article 35 § 1 of the Convention and cannot be taken into account for the purpose of the six-month rule, the Court has now to decide when the applicant first became or ought to have become aware that the action for damages was not an effective remedy, that is when the six-month period started to run.

114. The Court reiterates that the applicant alleged appalling conditions of his detention during two periods, the most recent of which ended on 26 September 2000. On 6 February 2002, that is more than sixteen months later, he introduced his application to the Court. In June 2002 the applicant lodged his first action with the Tsentralniy District Court seeking compensation for damage arising out of the conditions of his detention during the first period from 16 August 1998 to 14 April 1999. In June 2003 he brought another action complaining about the conditions of detention during the second period, which had ended on 26 September 2000.

115. It is apparent that since August 1998, when the applicant found himself for the first time in the allegedly unsatisfactory conditions of detention, at least in theory an action lay under the Russian Civil Code for compensation for damages for pain and suffering experienced by him during his detention. However, it was not until June 2002 that he made use of that judicial avenue for the first time. The Court is also mindful of the fact that the second action was only brought a year later. The lapse of time in this case is striking. As stated above, the six-month rule enshrines the basic principle that complaints of breaches of Convention rights be brought with the expedition necessary to ensure effective and fair examination of the case. There are no exceptions and no possibility of waiver. The Court has held on a number of

occasions that applicants must act with reasonable expedition in bringing their cases before it for examination and have sufficient explanation, consonant with the purpose of Article 35 § 1[37] of the Convention and the effective implementation of the Convention guarantees, for long periods of delay.

116. In the circumstances of the present case the Court sees no reason which could have forced the applicant to choose to wait for so long before applying to a domestic court, save for his own belief that such an action would be meaningless. It appears that he only decided to sue the detention facility after he had received the first letter from the Court by which he had been notified of the admissibility criteria as set out in Articles 34[10] and 35 of the Convention and informed that the six-month period for the purpose of Article 35 § 1 runs from the date of the final decision by a domestic authority. The Court also does not lose sight of the applicant's assertion that he had been aware all along that there were no effective domestic remedies for his complaints about the conditions of his detention.

117. In view of these various elements, the Court is accordingly driven to the conclusion that the present complaint has been introduced at least sixteen months out of time. An examination of the case does not disclose the existence of any special circumstances which might have interrupted or suspended the running of that period. The applicant had been aware of the ineffectiveness of the judicial avenue he had made use of, long before he lodged his application with the Court. The intervening events, in particular the final disposal of the tort actions, cannot be relied on in the circumstances of this case as starting a fresh time-limit for complaints against Russia, the essence of which had been already known to the applicant in September 2000 at the latest. The complaints to the Court should therefore have been introduced no later than 14 October 1999, in respect of the first period of detention, and no later than 26 March 2001 in respect of the second period of detention (see Laçin v. Turkey, no. 23654/94, Commission decision of 5 May 1995, and Edwards v. the United Kingdom (dec.), no. 46477/99, 7 June 2001).

118. It follows that this complaint is inadmissible for non-compliance with the six-month rule set out in Article 35 § 1[37] of the Convention, and must be rejected pursuant to Article 35 § 4[15].

II. ALLEGED VIOLATION OF ARTICLES 3 AND 13 OF THE CONVENTION IN RELATION TO CONDITIONS OF THE APPLICANT'S DETENTION FROM 19 DECEMBER 2003 TO 12 JANUARY 2004

119. The applicant complained that his detention from 19 December 2003 to 12 January 2004 in appalling conditions had been in breach of Article 3 of the Convention. Without relying on any Convention provision he further complained that he had not had at his disposal an effective remedy to obtain an improvement in the conditions of his detention. The Court considers that the applicant's complaints fall to be examined under Articles 3 and 13 of the Convention. Article 3 is cited above. Article 13 reads as follows:

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

A. Submissions by the parties

120. The Government pointed out that the fact that the applicant had occasionally been detained in overcrowded cells could not serve as the basis for finding a violation of Article 3 of the Convention because the remaining aspects of the detention conditions (availability of an individual sleeping place, bedding, compliance with sanitary norms, etc.) had been satisfactory. The Government further noted that the problem of overcrowding exists in the detention facilities of many member States of the Council of Europe. The Government submitted that the applicant had actively used available domestic remedies, in particular by lodging a number of tort actions against the administration of the detention facility.

121. The applicant insisted that the detention in overcrowded cells had been unbearable. It was further exacerbated by unsatisfactory sanitary conditions, inability to take a shower regularly, insufficient lighting, etc. He stressed that he had raised an issue of the appalling conditions of detention before various domestic and foreign authorities. The complaints were to no avail.

B. The Court's assessment

1. Admissibility

122. The Court notes that the applicant's complaints under Articles 3 and 13 of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that they are not inadmissible on any other grounds. They must therefore be declared admissible.

2. Merits

(a) Article 3 of the Convention

123. The Court notes that the parties have disputed certain aspects of the conditions of the applicant's detention in facility no. IZ-39/1 in Kaliningrad. However, there is no need for the Court to establish the veracity of each and every allegation, because it finds a violation of Article 3 on the basis of facts presented to it which the respondent Government did not refute.

124. The focal point for the Court's assessment is the living space afforded to the applicant in the detention facility. The main characteristic which the parties did agree upon was the size of the two cells in which the applicant had been detained. The applicant claimed that the cell population severely exceeded their design capacity. The Government accepted that the cells had occasionally been overpopulated. They noted that the applicant had been detained with three other inmates in the first cell and did not provide any information on the number of inmates in another cell.

125. The Court notes that the Government, in their plea concerning the number of detainees, relied on the statements by the facility's director. Despite the fact that the director alleged that it was impossible to provide any information on the number of the applicant's fellow inmates (see paragraph 26 above), the Government, without giving any explanation, submitted that the applicant had been detained with three other detainees in one of the cells. In this respect, the Court observes that the Government did not refer to any source of information on the basis of which that assertion could be verified. It was open to the Government to submit copies of registration logs showing names of inmates detained with the applicant. However, no such documents were presented. The Court is, therefore, not convinced by the Government's submission.

126. In this connection, the Court reiterates that Convention proceedings, such as those arising from the present application, do not in all cases lend themselves to a rigorous application of the principle affirmanti incumbit probatio (he who alleges something must prove that allegation), as in certain instances the respondent Government alone have access to information capable of corroborating or refuting allegations. A failure on a Government's part to submit such information without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations (see Ahmet Özkan and Others v. Turkey, no. 21689/93, § 426, 6 April 2004).

127. Having regard to the principle cited above, together with the fact that the Government did not submit any convincing relevant information and did not, in principle, dispute that the applicant had been detained in the overcrowded cells, and taking into account the domestic courts' findings pertaining to the applicant's tort action (see paragraphs 31 and 33 above), the Court will examine the issue concerning the number of inmates in the cells in facility no. IZ-39/1 on the basis of the applicant's submissions.

128. According to the applicant, he was usually afforded less than two square metres of personal space throughout his detention. There was a clear shortage of sleeping places and the applicant had to share a bed with other detainees, taking turns to rest. The applicant was confined to his cell day and night.

129. Irrespective of the reasons for the overcrowding, the Court reiterates that it is incumbent on the respondent Government to organise its penitentiary system in such a way as to ensure respect for the dignity of detainees, regardless of financial or logistical difficulties (see Mamedova v. Russia, no. 7064/05, § 63, 1 June 2006).

130. The Court has frequently found a violation of Article 3 of the Convention on account of a lack of personal space afforded to detainees (see Khudoyorov v. Russia, no. 6847/02, § 104 et seq., ECHR 2005-X (extracts); Labzov v. Russia, no. 62208/00, § 44 et seq., 16 June 2005; Novoselov v. Russia, no. 66460/01, § 41 et seq., 2 June 2005; Mayzit, cited above, § 39 et seq.; Kalashnikov v. Russia, no. 47095/99, §§ 97 et seq., ECHR 2002-VI; and Peers v. Greece, no. 28524/95, §§ 69 et seq., ECHR 2001-III). More specifically, the Court reiterates that it has recently found a violation of Article 3 on account of an applicant's detention in overcrowded conditions in the same detention facility (see Mayzit, cited above, §§ 34-43).

131. The Court notes that the applicant's situation created by the insufficient personal space was further exacerbated by the fact that he was not allowed to shower more than once in ten days during the entire period of his detention. Furthermore, the cells in which the applicant was held had no window in the proper sense of this word. They were covered, as the Government put it, with latticed partitions to ensure “sound and visual isolation”. This arrangement cut off fresh air and also significantly reduced the amount of daylight that could penetrate into the cells.

132. The Court observes that in the present case there is no indication that there was a positive intention to humiliate or debase the applicant. However, the Court finds that the fact that the applicant was obliged to live, sleep and use the toilet in the same cell as so many

other inmates in these unsatisfactory conditions was itself sufficient to cause distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and to arouse in him feelings of fear, anguish and inferiority capable of humiliating and debasing him.

133. The Court finds, accordingly, that there has been a violation of Article 3 of the Convention because the applicant was subjected to inhuman and degrading treatment on account of the conditions of his detention from 19 December 2003 to 12 January 2004 in facility no. IZ-39/1 in Kaliningrad.

(b) Article 13 of the Convention

134. The Court points out that Article 13[38] of the Convention guarantees the availability at national level of a remedy to enforce the substance of Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, among many other authorities, Kudła v. Poland [GC], no. 30210/96, § 157, ECHR 2000-XI). The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be effective in practice as well as in law.

135. Turning to the facts of the present case, the Court notes that the Government put special emphasis on the fact that the applicant had been able to lodge a tort action against the detention facility. According to the Government, the domestic courts had thoroughly examined the applicant's complaints. In this connection, the Court reiterates that it has already examined and dismissed that argument, finding that a tort action as the one brought by the applicant under Article 1069[29] of the Russian Civil Code could not be considered an adequate and effective remedy (see paragraph 112 above). The Court sees no reason to depart from that finding.

136. The Court further reiterates that in a number of cases against Russia it has already found a violation of Article 13[38] on account of the absence of an effective remedy in respect of inhuman and degrading conditions of detention, concluding (see, for example, Benediktov v. Russia, no. 106/02, § 29, 10 May 2007):

"[T]he Government did not demonstrate what redress could have been afforded to the applicant by a prosecutor, a court or other State agencies, taking into account that the

problems arising from the conditions of the applicant's detention were apparently of a structural nature and did not only concern the applicant's personal situation (compare Moiseyev v. Russia (dec.), no. 62936/00, 9 December 2004; Kalashnikov v. Russia (dec.), no. 47095/99, 18 September 2001; and, most recently, Mamedova v. Russia, no. 7064/05, § 57, 1 June 2006). The Government have failed to submit evidence as to the existence of any domestic remedy by which the applicant could have complained about the general conditions of his detention, in particular with regard to the structural problem of overcrowding in Russian detention facilities, or that the remedies available to him were effective, that is to say that they could have prevented violations from occurring or continuing, or that they could have afforded the applicant appropriate redress (see, to the same effect, Melnik v. Ukraine, no. 72286/01, §§ 70-71, 28 March 2006; Dvoynykh v. Ukraine, no. 72277/01, § 72, 12 October 2006; and Ostrovar v. Moldova, no. 35207/03, § 112, 13 September 2005)."

137. These findings apply a fortiori to the present case, in which the Government did not point to any domestic remedy by which the applicant could have obtained redress for the inhuman and degrading conditions of his detention or put forward any argument as to its efficiency.

138. There has been a violation of Article 13[38] of the Convention on account of the lack of an effective and accessible remedy under domestic law for the applicant to complain about the conditions of his detention.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF THE EVENTS ON 23 OCTOBER AND 7 NOVEMBER 2001 AND 21 JANUARY 2002

139. The applicant complained that on 23 October and 7 November 2001 and 21 January 2002 he had been subjected to treatment incompatible with Article 3 of the Convention and that the authorities had not carried out an effective investigation of those events, amounting to a breach of Article 13. The Court will examine this complaint from the standpoint of the State's negative and positive obligations flowing from Article 3.

A. Submissions by the parties

140. The Government argued that the applicant had not been subjected to torture or to inhuman or degrading treatment on either occasion. They submitted that no force had been used against the applicant or any other inmate on 23 October 2001 as it had not been necessary. The lawful use of force on 7 November 2001 and 21 January 2002 had been a response to the applicant's unlawful actions. In the situation of the applicant's refusal to

comply with lawful orders of the facility administration, the warders had no choice but to resort to the use of force. The Kaliningrad Regional prosecutor's office carried out a thorough investigation of his complaints and found them to be unsubstantiated. Subsequently, on a number of occasions the domestic courts thoroughly studied the prosecutor's findings and found them lawful and well-founded.

141. The applicant maintained his complaints. He also stressed that he had repeatedly asked to be examined by a prison doctor after each instance of the beatings. However, his requests were either completely disregarded or prison doctors recorded injuries selectively. The applicant insisted that the prosecutor's office had not been interested in investigating his complaints. For instance, on 9 July 2003 the prosecutor refused to institute criminal proceedings against the warders and officers, basing its decision on his own previous findings. The applicant noted that it took the investigating authorities more than a year to conduct some kind of inquiry into his complaints of ill-treatment. He further submitted that on 29 March 2006 the District Court had accepted that the prosecutor's inquiry into his ill-treatment complaints had been ineffective. It was reopened and the investigation is now pending. At the same time, the applicant noted that it would be virtually impossible to establish the truth and punish the perpetrators, as more than five years had passed since the events in question.

B. The Court's assessment

1. Admissibility

142. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3^{14} of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) General principles

i. As to the scope of Article 3

143. As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see Labita v. Italy [GC], no. 26772/95, § 119, ECHR 2000-IV, and Chahal v. the

United Kingdom, 15 November 1996, § 79, Reports of Judgments and Decisions 1996-V). Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2[25] of the Convention even in the event of a public emergency threatening the life of the nation (see Selmouni v. France [GC], no. 25803/94, § 95, ECHR 1999-V, and Assenov and Others v. Bulgaria, 28 October 1998, § 93, Reports of Judgments and Decisions 1998-VIII).

144. The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. In accordance with Article 3 of the Convention the State must ensure that a person is detained under conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention (see Kudla v. Poland [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI).

145. In the context of detainees, the Court has emphasised that persons in custody are in a vulnerable position and that the authorities are under a duty to protect their physical well-being (see Tarariyeva v. Russia, no. 4353/03, § 73, ECHR 2006-XV (extracts); Sarban v. Moldova, no. 3456/05, § 77, 4 October 2005; and Mouisel v. France, no. 67263/01, § 40, ECHR 2002-IX). In respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention (see Sheydayev v. Russia, no. 65859/01, § 59, 7 December 2006; Ribitsch v. Austria, 4 December 1995, § 38, Series A no. 336; and Krastanov v. Bulgaria, no. 50222/99, § 53, 30 September 2004).

ii. As to the establishment of facts

146. The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see Ireland v. the United Kingdom, 18 January 1978, § 161, Series A no. 25). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be

regarded as resting on the authorities to provide a satisfactory and convincing explanation (see Salman v. Turkey [GC], no. 21986/93, § 100, ECHR 2000-VII).

147. Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them (see Klaas v. Germany, 22 September 1993, § 29, Series A no. 269). Although the Court is not bound by the findings of domestic courts, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts (see Matko v. Slovenia, no. 43393/98, § 100, 2 November 2006). Where allegations are made under Article 3 of the Convention, however, the Court must apply a particularly thorough scrutiny (see, mutatis mutandis, Ribitsch, cited above, p. 24, § 32).

(b) Application of the above principles in the present case

i. Events on 23 October 2001

148. It is not in dispute between the parties that in October 2001 a group of officers of the special purpose unit of the Kaliningrad Regional Directorate for Execution of Sentences carried out certain operations in the correctional colony where the applicant was detained. Those operations included, in particular, searches of all premises within the colony and body searches of the detainees. All officers wore balaclava masks and carried rubber truncheons.

149. The applicant argued that the operation had been accompanied by repeated and severe beatings as a consequence of which a number of inmates, including him, sustained multiple injuries. He gave a detailed account of the events which had allegedly occurred on 23 October 2001, describing the chain of events, indicating the time, location and duration of the beatings, and showing methods used by the special-purpose unit officers. The Government disputed the applicant's description, insisting that the use of force had not been necessary as inmates had fully complied with orders and had not demonstrated any resistance.

150. The Court notes that the applicant did not submit any medical evidence showing that he had sustained injuries save for a medical certificate issued on 7 November 2001. According to that certificate, the applicant had an abrasion on the side of his back (see paragraph 44 above). The Court reiterates the applicant's explanation that he was not examined by a prison doctor immediately after the alleged beatings, despite his numerous requests to that effect. He also pointed out that during the examination on 7 November 2001, that is two weeks after the alleged beatings, the prison doctor had refused to record all injuries. In response to the applicant's allegations, the Government submitted that a doctor had been present at the scene

when the officers had carried out their operations and that he had not recorded any complaints (see paragraph 41 above).

151. The Court is not convinced by the Government's submissions. From materials available to the Court it appears that the applicant was one of a number of detainees who complained about having been beaten on 23 October 2001 (see paragraph 55 above). The Court has already held in a number of cases that in such circumstances the State authorities were under an obligation to conduct a medical examination of the applicant as well as of other detainees held in the premises concerned (see Mironov v. Russia, no. 22625/02, § 57, 8 November 2007, with further references). Although the effectiveness of the investigation into the applicant's ill-treatment complaints will be examined below, the Court would already stress at this juncture that it is struck by the fact that, despite the seriousness of the applicant's allegations, no medical examination was performed in the present case. The examination on 7 November 2001 does not suffice to discharge this obligation because of the time that elapsed between the events complained of and the date when it was conducted. The Court is also mindful of the District Court's decision of 29 March 2006 by which an investigation into the applicant's ill-treatment complaints was reopened. In that decision the District Court noted that an independent medical examination was indispensible for an investigation into the allegations of ill-treatment (see paragraph 59 above).

152. Furthermore, the Court does not attach any evidentiary weight to the fact that the applicant allegedly did not make any complaints to the prison doctor who had witnessed the operation. It is not surprising that the applicant did not raise his grievances to the prison doctor while still in the presence of the alleged offenders. The Court cannot rule out the possibility that the applicant felt intimidated by the persons he had accused of having ill-treated him (see Colibaba v. Moldova, no. 29089/06, § 49, 23 October 2007 and Batı and Others v. Turkey, nos. 33097/96 and 57834/00, § 100, ECHR 2004-IV (extracts)). The Court also notes that the Government did not dispute that after the special-purpose unit's operation the applicant had made a number of requests to be examined by a prison doctor.

153. The Court further notes that although medical evidence plays a decisive role in establishing the facts for the purpose of the Convention proceedings, the absence of such evidence cannot immediately lead to the conclusion that the allegations of ill-treatment are false or cannot be proven. Were it otherwise, the authorities would be able to avoid responsibility for ill-treatment by not conducting medical examinations and not recording the

use of physical force or special means (see, mutatis mutandis, Dedovskiy and Others v. Russia, no. 7178/03, § 77, 15 May 2008).

154. In assessing the applicant's allegations of ill-treatment, the Court has regard to other evidence in the case file. The Court notes that on 26 October 2001 the prison doctor had ordered the applicant's confinement to bed for three days, making an entry to that effect in register no. 29 of the penal ward (see paragraph 39 above). This fact was not disputed by the Government. It was also confirmed by the finding of the Bagrationovskiy District Court in the proceedings pertaining to the applicant's civil suit (see paragraph 63 above). The Court does not lose sight of the fact that at the hearing before the District Court the prison doctor insisted that the confinement was ordered because the applicant was tired. However, the Court finds this explanation to be superficial and concocted. Furthermore, at the hearing on 26 April 2004 before the Bagrationovskiy District Court a representative of the correctional colony stated that on 23 October 2001 physical force had been used on the applicant and that he had been hit with a rubber truncheon (see paragraph 63 above). The fact of the beating was also confirmed in open court by the applicant's fellow inmate, Mr T. The Court therefore finds it established “beyond reasonable doubt” that the applicant was hit at least once with a rubber truncheon by the officers of the special-purpose unit.

155. The Court further notes that in order to be able to assess the merits of the applicant's ill-treatment complaint and in view of the nature of the allegations, it asked the Government to submit a copy of the complete investigation file relating to the proceedings against the officers of the special-purpose unit. The Government, without giving any reasons, failed to provide the Court with the materials sought, limiting themselves to submitting copies of certain reports and decisions of domestic authorities which were already in the Court's possession. In these circumstances, the Court is prepared to draw inferences from the Government's conduct, as well as from the failure of the domestic authorities to carry out a medical examination of the applicant in the aftermath of the events on 23 October 2001. Having said that and taking into account the evidence examined in the preceding paragraph together with the consistency of the allegations of ill-treatment which the applicant maintained whenever he was able to make statements freely before various investigating authorities or domestic courts, the Court finds it established to the standard of proof required in the Convention proceedings that on 23 October 2001 the applicant was subjected to the treatment of which he complained and for which the Government bore responsibility (see Selmouni v. France [GC], no. 25803/94, § 88, ECHR 1999-V; Mehmet Emin Yüksel v. Turkey, no. 40154/98, § 30, 20 July 2004; and Mikheyev v. Russia, no. 77617/01, §§ 104-

105, 26 January 2006). The Court shall therefore proceed to an examination of the severity of the treatment to which the applicant was subjected, on the basis of his submissions and the existing elements in the file.

156. The Court reiterates that it has found it established that the applicant was beaten up by the officers of the special-purpose unit and that as a result of those beatings he was confined to bed for at least three days. The Court does not discern any circumstance which might have necessitated the use of violence against the applicant. In this connection, the Court reiterates the Government's argument that the use of force was not necessary as the detainees, including the applicant, fully complied with orders. It thus appears that the use of force was intentional, retaliatory in nature and aimed at debasing the applicant and forcing him into submission. In addition, the treatment to which the applicant was subjected must have caused him mental and physical suffering.

157. In these circumstances, the Court finds that the State is responsible under Article 3 on account of torture to which the applicant was subjected by officers of the special-purpose unit in the correctional colony on 23 October 2001 and there has thus been a violation of that provision.

ii. Events on 7 November 2001

158. The Court observes, and the parties did not dispute this fact, that on 7 November 2001 the applicant had an argument with a warder, Mr L. It was likewise uncontested that the warder L. used physical force against the applicant.

159. The Court observes that the exact circumstances and the intensity of the use of force against the applicant were disputed by the parties. The Government alleged that the force had been used lawfully in response to the unruly conduct of the applicant. The force did not exceed what was reasonable and necessary in the circumstances of the case. As it follows from the report written by the warder L., when the applicant had tried to run in the corridor, he had gripped his arm and "using a fight method" had put the applicant on the floor (see paragraph 43 above). The applicant did not dispute that he had run in the corridor and had disobeyed the order. However, he submitted that officer L. had repeatedly hit and kicked him in the hips and face. The applicant relied on the statements by his inmates that officer L. had hit him twice with his fist on the back before pushing him into the cell.

160. The Court first notes that the applicant was examined by a prison doctor immediately after the events on 7 November 2001. As it follows from a medical certificate, drawn up by

the doctor, the applicant had an abrasion on the side of his back (see paragraph 44 above). However, given the Court's findings in respect of the applicant's allegations of ill-treatment which had occurred on 23 October 2001 (see paragraph 156 above), it is not possible for the Court to conclude beyond reasonable doubt that the injury described by the prison doctor was caused by the warder L. on 7 November 2001.

161. In any event, in the Court's view, the abrasion found on the applicant's body appears to disprove the applicant's version of events. It is consistent with a minor physical confrontation which might have occurred between the applicant and the warder. The Court also cannot overlook the inconsistencies in the applicant's versions of events as recounted before the domestic authorities and to the Court. Furthermore, the Court finds it peculiar that none of the applicant's fellow inmates testified to seeing marks on the applicant's face, although the latter insisted that the warder had hit him with the fist in the face a number of times. The Court therefore concludes that nothing shows that the warder had used excessive force when in the course of his duties he had been confronted with the alleged disorderly behaviour of the applicant. The Court is not persuaded that the force used had such an impact on the applicant's physical or mental well-being as to give rise to an issue under Article 3 of the Convention.

162. Under these circumstances, the Court cannot consider it established beyond reasonable doubt that on 7 November 2001 the applicant was subjected to treatment contrary to Article 3 or that the authorities had recourse to physical force which had not been rendered strictly necessary by the applicant's own behaviour.

163. It follows that there has been no violation of Article 3 of the Convention on that account.

iii. Events on 21 January 2002

164. The Court observes that on 21 January 2002 officers from the special-purpose unit arrived at the colony, this time to render assistance in the situation of the collective hunger strike and self-mutilation by inmates. The parties advanced arguments similar to those which they had used to describe the events of 23 October 2001. However, the Government admitted that a rubber truncheon had been used against the applicant on 21 January 2002.

165. The Court does not have to deal with the particular discrepancies arising in the parties' versions of events, as the focal points for its analysis of the events on 21 January 2002 remain the same as those pertaining to the events on 23 October 2001. In particular, the Court once again notes the indiscriminate nature of the special purpose unit's operations which targeted

the entire colony population rather than specific detainees and the authorities' failure to conduct a medical examination to ascertain whether the applicant sustained any injuries as a result of the operations in the colony, which is particularly striking in the situation where the domestic authorities as well as the Government confirmed that the applicant had been beaten.

166. The Court further observes that the applicant provided a graphic and detailed description of the ill-treatment to which he had allegedly been subjected, indicating its place, time and duration, and identified the colony officials and inmates who had been present. If the Government considered these allegations untrue, it was open to them to refute them by way of, for instance, witness testimony or other evidence. The Government was also invited by the Court to produce the investigation file pertaining to the applicant's complaints about the events on 21 January 2002. However, without any explanation, they did not produce the file, merely acknowledging that the officer had been forced "to use a rubber truncheon" against the applicant in response to his disobedience. The Court will therefore again draw inferences from the Government's conduct. Bearing in mind other relevant factors discussed above, it finds it established that the applicant sustained the treatment of which he complained. Against this background, the burden rests on the Government to demonstrate with convincing arguments that the use of force was not excessive (see Zelilof v. Greece, no. 17060/03, § 47, 24 May 2007).

167. It is clear that the acts of violence against the applicant were committed by the officers in the performance of their duties. The Court notes the Government's argument that the force was used lawfully in response to the unruly conduct of detainees, including the applicant.

168. The Court is mindful of the potential for violence that exists in penitentiary institutions and of the fact that disobedience by detainees may quickly degenerate into a riot (see Gömi and Others v. Turkey, no. 35962/97, § 77, 21 December 2006). The Court accepts that the use of force may be necessary on occasion to ensure prison security, to maintain order or to prevent crime in penitentiary facilities. Nevertheless, as noted above, such force may be used only if indispensible and must not be excessive (see Ivan Vasilev v. Bulgaria, no. 48130/99, § 63, 12 April 2007, with further references). Recourse to physical force which has not been made strictly necessary by the detainee's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.

169. The Court does not discern any necessity which might have prompted the use of rubber truncheons against the applicant. On the contrary, the actions by the officers were grossly disproportionate to the applicant's imputed transgressions and manifestly inconsistent with the

goals they sought to achieve. Thus, it follows from the Government's submissions (see paragraph 46 above) that a group of officers entered cell no. 3, where the applicant was detained, intending to search it. The applicant refused to leave the cell, insulted the officers and pulled their clothes. The Court accepts that in these circumstances the officers may have needed to resort to physical force in order to take the applicant out of the cell. However, the Court is not convinced that hitting a detainee with a truncheon was conducive to the desired result, namely facilitating the search. In the Court's eyes, in that situation a truncheon blow was merely a form of reprisal or corporal punishment.

170. Furthermore, the Court notes that the applicant was beaten up not in the course of a random operation which might have given rise to unexpected developments to which the officers of the special-purpose unit might have been called upon to react without prior preparation. The Government did not dispute that the officers had planned their operations in advance and that they had had sufficient time to evaluate the possible risks and to take all necessary measures for carrying out their task. There were a group of officers involved and they clearly outnumbered the applicant, who, it appears, was alone in the cell at that time. Furthermore, the Court is not convinced that the applicant had resisted the officers' orders in a manner which could have prompted the use of rubber truncheons.

171. The Court is also mindful of the applicant's complaint that the beatings continued in the corridor even after he had complied with the order and had left the cell. In this respect, the Court notes that if the Government considered these allegations untrue, it was open to them to refute them by way of, for instance, witness testimony or other evidence. Nevertheless, at no point in the proceedings before the Court did the Government challenge that aspect of the applicant's factual submissions.

172. As noted above, the use of rubber truncheons against the applicant was retaliatory in nature. It was not, and could not be, conducive to facilitating the execution of the tasks the officers had set out to achieve. The punitive violence to which the officers deliberately resorted was intended to arouse in the applicant feelings of fear and humiliation and to break his physical or moral resistance. The purpose of that treatment was to debase the applicant and drive him into submission. In addition, the truncheon blows must have caused him intense mental and physical suffering.

173. Accordingly, the Court finds that there has therefore been a violation of Article 3 of the Convention, in that on 21 January 2002 the Russian authorities subjected the applicant to inhuman treatment in breach of that provision.

(c) Alleged inadequacy of the investigation

174. The Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. An obligation to investigate "is not an obligation of result, but of means": not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible. Thus, the investigation of serious allegations of ill-treatment must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard (see, among many authorities, Mikheyev, cited above, §§ 107 et seq., and Assenov and Others v. Bulgaria, 28 October 1998, §§ 102 et seq., Reports 1998-VIII).

175. The Court will now examine the effectiveness of the investigation into the applicant's ill-treatment complaints in the light of these principles.

176. The Court notes that the events of which the applicant complained had unfolded under the control of the authorities and with their full knowledge. The colony officials must have been aware of the magnitude of the beatings on 23 October 2001 and 21 January 2002, having regard to a number of inmates who had reported ill-treatment to the prosecution authorities (see paragraph 55 above). Furthermore, on 7 November 2001 and 21 January 2002 the authorities drew up the reports on the use of force against the applicant. Under these circumstances, the applicant had an arguable claim that he had been ill-treated and that the State officials were under an obligation to carry out an effective investigation (see Dedovskiy, cited above, § 88, and Vladimir Romanov v. Russia, no. 41461/02, § 83, 24 July 2008).

177. Turning to the facts of the present case, the Court observes that the applicant was entirely reliant on the prosecution authorities to assemble the evidence necessary for corroborating his complaint. The prosecutor had the legal powers to interview the warders and

officers, summon witnesses, visit the scene of the incidents, collect forensic evidence and take all other crucial steps for establishing the truth of the applicant's account. His role was critical not only to the pursuit of criminal proceedings against the perpetrators of the offence but also to the pursuit by the applicant of other remedies to redress the harm he had suffered (see paragraph 86 above). The Court notes that the prosecution authorities who were made aware of the applicant's alleged beatings initiated an investigation which has not yet resulted in criminal prosecutions against the perpetrators of the beatings. The investigation was closed and reopened a number of times and is currently pending. In the Court's opinion, the issue is consequently not so much whether there has been an investigation, since the parties do not dispute that there has been one, as whether it has been conducted diligently, whether the authorities have been determined to identify and prosecute those responsible and, accordingly, whether the investigation has been "effective".

178. The Court will therefore first assess the promptness of the prosecutor's investigation, as a gauge of the authorities' determination to prosecute those responsible for the applicant's ill-treatment (see Selmouni, cited above, §§ 78 and 79). In the present case the applicant brought his allegations of ill-treatment to the attention of the authorities by making a number of complaints to the Kaliningrad Regional Prosecutor (see paragraph 48 above). It appears that the prosecutor's office promptly launched an investigation after being notified of the alleged beatings. However, the Court is mindful of the fact that at no point during the investigation were attempts made to conduct a medical expert examination of the applicant. The Court reiterates in this connection that proper medical examinations are an essential safeguard against ill-treatment. The forensic doctor must enjoy formal and de facto independence, have been provided with specialised training and been allocated a mandate which is broad in scope (see Akkoç v. Turkey, nos. 22947/93 and 22948/93, § 55 and § 118, ECHR 2000-X). In this connection, the Court notes with concern that the lack of objective evidence – such as medical expert examinations could have been – was subsequently relied on as a ground for a refusal to institute criminal proceedings against the perpetrators.

179. Furthermore, although it appears that certain steps were taken by the authorities at the initial stage of the investigation, the investigation became protracted. The Court finds it striking that for a period of almost three years between 9 July 2003 and 29 March 2006 there were no further developments and the criminal proceedings remained closed until the present case was communicated to the respondent Government (see paragraphs 53 and 59 above). Since being reopened in March 2006 the investigation has remained pending. The Government failed to provide any explanation for the protraction of the proceedings. In such

circumstances the Court is bound to conclude that the authorities failed to comply with the requirement of promptness (see Kişmir v. Turkey, no. 27306/95, § 117, 31 May 2005, and Angelova and Iliev v. Bulgaria, no. 55523/00, § 103, ECHR 2007). The Court also notes the District Court's finding on 29 March 2006 that due to the protraction of the investigation, the authorities may no longer be able to investigate the applicant's ill-treatment complaints effectively.

180. With regard to the thoroughness of the investigation, the Court notes a number of significant omissions capable of undermining its reliability and effectiveness. Firstly, as it was found by the District Court in its decision on 29 March 2006 the prosecutor had not questioned in person the officers and warders who were involved or witnessed the events in question. He limited himself to a restatement of their reports written in the aftermath of the events. The applicant's right to participate effectively in the investigation was also not secured. It transpires from the same decision of 29 March 2006 that the prosecutor had not heard the applicant in person. Furthermore, the applicant was not given an opportunity to identify and confront the officers and warders who had allegedly taken part in the beatings.

181. Secondly, the Court observes a selective and somewhat inconsistent approach to the assessment of evidence by the investigating authorities. It is apparent from the decisions submitted to the Court that the prosecutor based his conclusions mainly on the reports written by the officers and warders involved in the incidents. Although excerpts from the applicant's complaints were included in the decisions on refusal to institute criminal proceedings, the prosecutor did not consider those complaints to be credible, apparently because they reflected personal opinions and constituted an accusatory tactic by the applicant. However, the prosecutor did accept the warders' and officers' reports as credible, despite the fact that their statements could have constituted defence tactics and have been aimed at damaging the applicant's credibility. In the Court's view, the prosecution inquiry applied different standards when assessing the statements, as those made by the applicant were deemed to be subjective but not those given by the warders and officers. The credibility of the latter statements should also have been questioned, as the prosecution investigation was supposed to establish whether they were liable on the basis of disciplinary or criminal charges (see Ognyanova and Choban v. Bulgaria, no. 46317/99, § 99, 23 February 2006).

182. Further, it transpires from the prosecutor's decisions that he based his conclusions solely on the statements made by the colony administration, warders and officers. The prosecutor had been provided with the names of inmates who could have seen the beatings. However, he

had not taken any steps to question them or to identify any other eyewitnesses. Furthermore, he took no meaningful steps to search the premises where the applicant had allegedly been ill-treated. The Court therefore finds that the prosecutor's failure to look for corroborating evidence and his deferential attitude to the officers and warders must be considered to be a particularly serious shortcoming in the investigation (see Aydın v. Turkey, 25 September 1997, § 106, Reports 1997-VI).

183. Finally, as regards the judicial proceedings pertaining to the applicant's appeal against the prosecutor's decision of 9 July 2003, the Court finds it striking that neither the District nor Regional courts manifested interest in identifying and personally questioning eyewitnesses to the applicant's beating and hearing the warders and officers involved in the incidents (see Zelilof, cited above, § 62, and Osman v. Bulgaria, no. 43233/98, § 75, 16 February 2006). For the Court, this unexplained shortcoming in the proceedings deprived the applicant of an opportunity to challenge effectively the alleged perpetrators' version of the events (see Kmetty v. Hungary, no. 57967/00, § 42, 16 December 2003). As to the tort proceedings, the Court does not lose sight of the fact that the domestic courts heard certain inmates. However, their statements were subject to somewhat conflicting evaluations and did not have attributed to them sufficient evidentiary weight. The courts once again based their conclusions on the reports and statements by the warders and officers. In fact, it appears that the domestic authorities did not make any meaningful attempt to bring those responsible for the ill-treatment to account.

184. Having regard to the above failings of the Russian authorities, the Court finds that the investigation carried out into the applicant's allegations of ill-treatment was not thorough, expedient or effective. There has accordingly been a violation of Article 3 of the Convention under its procedural limb.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF THE APPLICANT'S DETENTION TOGETHER WITH HIV-POSITIVE DETAINEES

185. The applicant, relying on Article 3 of the Convention, further complained that he had been exposed to a risk of contracting HIV during his detention in correctional colony no. OM-216/9.

A. Submissions by the parties

186. The Government submitted that from 19 to 26 May 1999 a group of HIV-positive detainees had been in colony no. OM-216/9 where the applicant had served his sentence.

The colony administration took every possible precaution to avoid the spread of disease. Prior to the group's arrival, the colony administration carried out explanatory work, lecturing inmates on AIDS and how it is transmitted. On their arrival in the colony the HIV-positive detainees were accommodated in separate premises and were allocated sterilised medical equipment and tableware. The administration had ensured safe sanitary conditions by assigning a separate day in the bathhouse for those detainees and washing their bedding and clothes separately. Furthermore, the use of drugs, sexual contact and tattooing, which are the means by which the virus could have been transmitted, were forbidden in the colony. The Government pointed out that there were no cases of HIV transmission and that the applicant did not argue otherwise. They further stressed that while admitting the HIV-positive detainees to a regular colony the colony administration had followed the CPT recommendations prescribing that no form of segregation should be envisaged in respect of HIV-positive detainees.

187. The applicant disputed the Government's submissions, arguing that the HIV-positive detainees had used the same premises, including the bathhouse, the kitchen, the laundry room and prison hospital, as the rest of the detainees. He confirmed that the colony administration had lectured the inmates on the means of transmitting HIV. However, he insisted that a single lecture had not been enough. The applicant was sure that his own careful actions had saved him from the virus.

B. The Court's assessment

188. The Court observes that, according to the existing international standards (see paragraphs 96-100 above), segregation, isolation and restrictions on occupational and recreational activities are considered unnecessary in the case of HIV-infected persons in the community or when they are detained (see also Enhorn v. Sweden, no. 56529/00, § 55, ECHR 2005-I). When detained, they should not be segregated from the rest of the prison population unless this is strictly necessary on medical or other relevant grounds. Adequate health care should be afforded to HIV-positive detainees, with due regard to the obligation of confidentiality. National authorities should provide all detainees with counselling on risky behaviour and modes of HIV transmission.

189. The Court notes certain discrepancies in the parties' submissions concerning the conditions in which the HIV-positive detainees were kept in the colony. However, the Court will examine the applicant's complaint on the assumption that he did share the premises with

the HIV-positive detainees. The Court need not determine the truthfulness of each and every allegation because the complaint is in any event inadmissible for the following reasons.

190. In the present case, it has not been claimed that the applicant contracted HIV or that he had been unlawfully exposed to a real risk of infection, for instance, through sexual contact or intravenous drug use. The applicant did not dispute that the colony administration had taken necessary steps to prevent sexual contact between inmates and that it had forbidden drug use and tattooing. The Court also does not overlook the fact that the colony administration employed a harm-reduction technique, namely condom distribution, together with universal precaution policies such as sterilising medical equipment for each patient. The mere fact that HIV-positive detainees use the same medical, sanitary, catering and other facilities as all other prisoners does not in itself raise an issue under Article 3 of the Convention (see Korobov and Others v. Russia (dec.), no. 67086/01, 2 March 2006). The administration provided inmates with accurate and objective information about HIV infection and AIDS, clearly identifying ways in which HIV can be transmitted. The Court attributes particular importance to the HIV risk-reduction counselling which was performed by the colony administration (see, by contrast, Salmanov v. Russia, no. 3522/04, § 53, 31 July 2008). In these circumstances the Court does not find that the authorities failed to secure the applicant's health.

191. Therefore, the Court considers that the applicant's complaint does not disclose any appearance of a violation of Article 3 of the Convention. It follows that it is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3[14] and 4[15] of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

192. The applicant complained that the courts had refused to secure his attendance at the hearings on 5 April, 13 May, 24 July, 7 and 21 August and 4 December 2002, 28 February, 4 June, 23 September and 18 November 2003, 24 March, 26 April, 12 May and 13 October 2004. He relied on Article 6 § 1 which provided in so far as relevant as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public ... hearing ... by [a] ... tribunal ...”

A. Submissions by the parties

193. The Government argued that the applicant's absence had been objectively justified by the fact that he had been serving his prison sentence in a remote correctional colony and that

it had been impossible to transport him to the hearings. However, he was informed of his procedural rights, including the right to be represented, of which he did not make use.

194. The applicant averred that he had not been brought to the hearings because the Russian law on civil procedure did not guarantee such a right. He further stated that he had been unable to retain counsel because he had limited financial resources. At the same time Russian law did not provide for free legal aid in similar cases.

B. The Court's assessment

1. Admissibility

195. The Court observes that the applicant was involved in a number of proceedings before the domestic courts. He complained of a breach of the principle of equality of arms in that in those proceedings the domestic courts examining his claims refused him leave to appear. The Court will look into the admissibility of those complaints pertaining to each separate set of the proceedings.

196. As regards the proceedings in which the applicant challenged the lawfulness of the prosecutor's decision of 9 July 2003, the Court observes that the applicant was not present at the hearings on 23 September 2002 before the Tsentralniy District Court and on 18 November 2003 before the Kaliningrad Regional Court. On 13 February 2006 the Presidium of the Kaliningrad Regional Court expressly acknowledged that the courts which had heard the case had not granted the applicant leave to appear at the hearings, in violation of Russian law. The Presidium quashed the judgments of 23 September and 18 November 2003 and ordered a re-examination of the case. The Court further notes that following the decision of 13 February 2006, on 29 March 2006 the Tsentralniy District Court re-examined the applicant's case in his presence and issued a judgment in his favour, quashing the prosecutor's decision of 9 July 2003. The Court does not lose sight of the fact that the applicant did not appeal against the judgment of 29 March 2006. Having regard to the content of the judgment of 13 February 2006, the subsequent re-examination of the case by the District Court in the applicant's presence and the quashing of the prosecutor's decision of 9 July 2003, the Court finds that the national authorities have acknowledged, and then afforded redress for, the alleged breach of the Convention. It follows that the applicant can no longer claim to be a victim of the alleged violation of Article 6 § 1 of the Convention within the meaning of Article 34 of the Convention (see Fedosov v. Russia (dec.), no. 42237/02, 25 January 2007, Hans-Joachim Enders v. Germany, no. 25040/94, Commission decision of 12 April 1996, and, mutatis

mutandis, Hajiyev v. Azerbaijan, no. 5548/03, 16 June 2005, and Wong v. Luxemburg (dec.), no. 38871/02, 30 August 2005) and that this complaint is to be rejected, pursuant to Articles 34 and 35 §§ 3 and 4.

197. The applicant further complained that he could not attend hearings on 5 April and 24 July 2002 in the tort proceedings pertaining to the presence of the HIV-positive detainees in the correctional colony. The Court reiterates that it has already examined a similar complaint in another case against Russia and found it to be inadmissible (see Skorobogatykh v. Russia (dec.), no. 37966/02, 8 June 2006). In particular, the Court held:

"According to the Court's well-established case-law, the applicability of the civil limb of Article 6 § 1 requires the existence of "a genuine and serious dispute" over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law. Thus, a claim submitted to a tribunal for determination must be presumed to be genuine and serious unless there are clear indications to the contrary which might warrant the conclusion that the claim is frivolous or vexatious or otherwise lacking in foundation (see, e.g. Benthem v. the Netherlands, judgment of 23 October 1985, Series A no. 97, § 32 and Rolf Gustafson v. Sweden, judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV, § 38).

On the facts, the Court may accept that the claim made by the applicant was, as such, civil since the applicant demanded not only to declare the actions of prison authorities unlawful but also to grant him compensation for non-pecuniary damage allegedly caused through the authorities' fault (see, e.g., Aksoy v. Turkey, judgment of 18 December 1996, Reports of Judgments and Decisions 1996-VI, § 92). As to whether the dispute was "genuine and serious", the Court notes that under the domestic law compensation for non-pecuniary damage is only payable in respect of a proven prejudice resulting from actions or omissions of authorities breaching a plaintiff's rights. The Court further notes that from the applicant's statement of claim, the case file and the court decisions in the case it clearly follows that throughout the proceedings both at first instance and on appeal the applicant did not make any specific allegations of personal prejudice or interference with his individual rights which could, at least on arguable grounds, have called for an award of compensation under the applicable domestic law. His dissatisfaction was directed solely against the mere presence of HIV-positive prisoners in that prison and the alleged unlawfulness of the related legal acts and administrative decisions. In the Court's view these circumstances provide a sufficiently clear indication that the dispute in question was not genuine and serious (see, for example, Kaukonen v. Finland, no. 24738/94, Commission decision of 8 December 1997, Decisions

and Reports (DR) 91-A, p. 14). Accordingly, Article 6 § 1[23] is not applicable in the instant case and the applicant's complaint should be rejected as incompatible ratione materiae with the provisions of the Convention within the meaning of Article 35 § 3[14] of the Convention."

The Court does not see any reason to depart from that finding in the present case and rejects the applicant's complaint as incompatible ratione materiae with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention.

198. The Court considers that the similar reasoning, as in the previous paragraph, applies to the applicant's complaint about his absence at the hearings on 7 August and 4 December 2002 in the proceedings concerning the screening of films. The Court takes note of the Bagrationovskiy District Court's finding that the applicant's claim had no basis in domestic law, since the legislation in force at the material time did not provide inmates, including the applicant, with the right to see films in prison facilities (see paragraph 77 above). Accordingly, the Court is not convinced that Article 6 applies to the proceedings at issue. However, even assuming that the applicant's action constituted "a civil claim" within the meaning of Article 6 § 1 of the Convention as he did not merely seek to find the authorities' actions unlawful but claimed compensation for the non-pecuniary damage, the Court does not find that the dispute was "genuine and serious". The Court notes that the applicant did not demonstrate either to the domestic courts or to the Court any impediments, personal prejudice or interference with his individual rights resulting from the authorities' failure to organise screenings of films which could, at least on arguable grounds, have called for an award of compensation under the applicable domestic law. The domestic courts found no direct link between the alleged failure and the alleged damage which, furthermore, was unsubstantiated. Accordingly, there was no established right that the domestic authorities failed to respect, no direct link between the alleged failure and the alleged damage, and, moreover, no evidence of any damage whatsoever (see Kunkova ad Kunkov v. Russia (dec.), no. 74690/01, 12 October 2006). The Court therefore finds that Article 6 § 1 is not applicable to the proceedings under consideration and the complaint must be rejected as incompatible ratione materiae with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention.

199. As regards the remaining complaints pertaining to the four sets of the proceedings concerning the conditions of the applicant's detention and the beatings in the colony (see paragraphs 16-18, 31-33, 63-65 and 76-78 above), the Court considers that they are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that they are not inadmissible on any other grounds. They must therefore be declared admissible.

2. Merits

200. The Court reiterates that the principle of adversarial proceedings and equality of arms, which is one of the elements of the broader concept of a fair hearing, requires that each party be given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party and to present his case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent (see Krčmář and Others v. the Czech Republic, no. 35376/97, § 39, 3 March 2000, and Dombo Beheer B.V. v. the Netherlands, 27 October 1993, § 33, Series A no. 274). The Court has previously found a violation of the right to a "public and fair hearing" in several cases against Russia, in which a party to civil proceedings was deprived of an opportunity to attend the hearing because of belated or defective service of the summons (see Yakovlev v. Russia, no. 72701/01, §§ 19 et seq., 15 March 2005; Groshev v. Russia, no. 69889/01, §§ 27 et seq., 20 October 2005; and Mokrushina v. Russia, no. 23377/02, 5 October 2006). It also found a violation of Article 6 in a case where a Russian court refused leave to appear to an imprisoned applicant who had wished to make oral submissions on his claim that he had been ill-treated by the police. Despite the fact that the applicant in that case was represented by his wife, the Court considered it relevant that his claim had been largely based on his personal experience and that his submissions would therefore have been "an important part of the plaintiff's presentation of the case and virtually the only way to ensure adversarial proceedings" (see Kovalev v. Russia, no. 78145/01, § 37, 10 May 2007).

201. The Court observes that the Russian Code of Civil Procedure provides for the plaintiff's right to appear in person before a civil court hearing his claim (see paragraph 92 above). However, neither the Code of Civil Procedure nor the Penitentiary Code make special provision for the exercise of that right by individuals who are in custody, whether they are in pre-trial detention or are serving a sentence. In the present case the applicant's requests for leave to appear were denied precisely on the ground that the domestic law did not make provision for convicted persons to be brought from correctional colonies to the place where their civil claim was being heard. The Court reiterates that Article 6 of the Convention does not guarantee the right to personal presence before a civil court but rather a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side. Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants these rights (see Steel and Morris v. the United Kingdom, no. 68416/01, §§ 59-60, ECHR 2005-II).

202. The issue of the exercise of procedural rights by detainees in civil proceedings has been examined on several occasions by the Russian Constitutional Court, which has identified several ways in which their rights can be secured (see paragraph 94 above). It has consistently emphasised representation as an appropriate solution in cases where a party cannot appear in person before a civil court. Given the obvious difficulties involved in transporting convicted persons from one location to another, the Court can in principle accept that in cases where the claim is not based on the plaintiff's personal experiences, as in the above-mentioned Kovalev case, representation of the detainee by an advocate would not be in breach of the principle of equality of arms.

203. In the instant case, given the personal nature of his claims related to the conditions of his detention in facility no. IZ-39/1 (hearings on 28 February and 4 June 2003 (see paragraphs 16 and 18 above) and hearings on 24 March and 12 May 2004 (see paragraphs 31 and 33)) and in the ward of the Gvardeyskiy District police department (hearings on 13 May and 21 August 2002 (see paragraphs 76 and 78 above)) and to the beatings in the correctional colony (hearings on 26 April and 13 October 2004 (see paragraphs 63 and 65 above)), the applicant sought leaves to appear before the civil courts, which were consistently refused to him. In the first three sets of the proceedings the courts decided to examine the applicant's civil claims, finding that there were no legal grounds to ensure the applicant's attendance. The situation was, however, different in the proceedings concerning the beatings in the colony. The Bagrationovskiy District Court held a hearing in the correctional colony and heard the applicant and his co-plaintiff (see paragraph 63 above). The applicant's leave to appear before the Kaliningrad Regional Court, acting on appeal against the judgment of the Bagrationovskiy District Court, was refused (see paragraph 65 above).

(a) Three sets of the proceedings concerning the conditions of the applicant's detention

204. The Court reiterates, and the Government did not argue otherwise, that the applicant insisted on his presence at the hearings, arguing, among other things, that he did not have means to pay for a lawyer. The Court observes that the option of legal aid was not open to the applicant (see paragraphs 18 and 92 above). In such a situation the only possibility for him was to appoint his relative, friend or an acquaintance to represent him in the proceedings. However, as it appears from the domestic courts' judgments, after they had refused the applicant leave to appear, they did not consider the means of securing his effective participation in the proceedings. They merely noted that the applicant was aware of his procedural rights and could have appointed a representative. They did not inquire whether the

applicant was able to designate a representative, in particular whether, having regard to the time which he had already spent in detention, he still had a person willing to represent him before domestic courts and, if so, whether he had been able to contact that person and provide him with a power of authority. Moreover, it appears that at least in the two sets of the proceedings the applicant learned that he had not been granted leave to attend, at the same time as he received a copy of the judgment in which his claim was dismissed on the merits. Thus, the applicant was obviously unable to decide on a further course of action for the defence of his rights until such time as the decision refusing him leave to appear was communicated to him (see Khuzhin and Others v. Russia, no. 13470/02, § 107, 23 October 2008). The appeal court did nothing to remedy that situation.

205. In any event, given the nature of the applicant's claims which were, to a major extent, based on his personal experience, the Court is not convinced that the representative's appearance before the courts could have secured the effective, proper and satisfactory presentation of the applicant's case. The Court considers that the applicant's testimony describing the conditions of his detention of which only the applicant himself had first-hand knowledge would have constituted an indispensable part of the plaintiff's presentation of the case (see Kovalev v. Russia, cited above, § 37). Only the applicant himself could describe the conditions and answer the judges' questions, if any.

206. The Court reiterates that the domestic courts refused the applicant leave to appear, relying either on the absence of a legal provision requiring his presence or alleging a direct prohibition on transport of detainees. In this connection, the Court is also mindful of another possibility which was open to the domestic courts as a way of securing the applicant's participation in the proceedings. That possibility was effectively employed by the Bagrationovskiy District Court in the proceedings pertaining to the applicant's ill-treatment complaints. The District Court in that case held a session in the applicant's correctional colony. The Court finds it unexplainable why in any of the three sets of the proceedings the domestic courts did not even examine such an option.

207. In these circumstances, the Court finds that in the proceedings concerning the conditions of the applicant's detention in facility no. IZ-39/1 and the Gvardeyskiy District police department the domestic courts deprived the applicant of the opportunity to present his case effectively.

208. There has therefore been a violation of Article 6 § 1^{23} of the Convention on account of the applicant's absence before the domestic courts in those three sets of the proceedings.

(b) Proceedings concerning the beatings in the colony

209. The Court once again reiterates that the applicant was present at the hearing before the Bagrationovskiy District Court and effectively argued his case. However, his leave to appear before the Kaliningrad Regional Court was dismissed.

210. It thus remains to be determined whether the refusal of the Kaliningrad Regional Court to secure the applicant's presence involved a breach of his rights under Article 6 § 1. In this connection the Court observes that the jurisdiction of the Kaliningrad Regional Court was not limited to matters of law but also extended to factual issues. Yet the applicant did not claim that there were any new facts which were not raised by him before the District Court and thus, not addressed in the case file materials. He also did not argue any new points of law in his grounds of appeal. It appears that in his grounds of appeal the applicant merely restated his versions of events as raised before the District Court. He did not request the Kaliningrad Regional Court to call any witnesses on his behalf and did not seek leave to adduce any additional evidence. The Court therefore considers that the appeal court could adequately resolve the issues on the basis of the case file and the applicant's detailed written submissions. It further takes into account that the applicant did not argue that his case could have been better dealt with in oral argument rather than in writing.

211. Having regard to the foregoing and taking into account the Court's finding that it is understandable that in the sphere involving participation of convicted persons in civil cases the national authorities should have regard to the demands of efficiency and economy (see paragraph 202 above), the Court finds that there were circumstances which justified dispensing with the applicant's right to attend the hearing before the Kaliningrad Regional Court (see, mutatis mutandis, Schuler-Zgraggen v. Switzerland, 24 June 1993, § 58, Series A no. 263, and Zagorodnikov v. Russia, no. 66941/01, §§ 33,34, 7 June 2007).

212. Accordingly, there has been no violation of Article 6 § 1^{8} of the Convention on account of the applicant's absence at the appeal hearing on 13 October 2004.

VI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

213. Lastly, relying on Articles 6, 8, 10, 13 and 14 of the Convention, the applicant complained of various procedural violations committed by the domestic courts in the proceedings to which he was a party, of incorrect interpretation and application of the domestic law by the courts, of unclear reasoning in their judgments, of inability to receive full information on the state of his health, and of the prosecutor's refusals to institute criminal

proceedings against the judge. He further argued that he had not had an effective remedy because all his complaints and actions had been dismissed and that he had been discriminated against by domestic authorities.

214. However, having regard to all the material in its possession, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3[14] and 4[15] of the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

215. 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

216. The applicant claimed 68,000 euros (EUR) in respect of non-pecuniary damage caused to him by violations of his rights guaranteed by Articles 3 and 13[38] of the Convention. He further claimed EUR 500 in respect of each finding of a violation of his rights under Article 6 § 1 of the Convention.

217. The Government submitted that the applicant's claims were manifestly ill-founded as they were not supported by any documents.

218. The Court reiterates, firstly, that the applicant cannot be required to furnish any proof of the non-pecuniary damage he sustained (see Gridin v. Russia, no. 4171/04, § 20, 1 June 2006). The Court further observes that it has found a combination of particularly grievous violations in the present case. The Court accepts that the applicant suffered humiliation and distress on account of the inhuman and degrading conditions of his detention, the absence of an effective remedy in respect of his complaints about the conditions of his detention and ill-treatment inflicted on him on two occasions in the correctional colony. In addition, he did not benefit from an adequate and effective investigation of his complaints about the ill-treatment and he was unable to present his case effectively in the three sets of the civil proceedings. In these circumstances, the Court considers that the applicant's suffering and frustration cannot be compensated for by a mere finding of a violation. Nevertheless, the particular amount claimed appears excessive. Making its assessment on an equitable basis, it awards the

applicant EUR 54,600 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

219. The applicant, who was represented before the Court by two lawyers from the International Protection Centre in Moscow, claimed EUR 2,490 for fees and costs involved in bringing his application to the Court. In particular, his counsel claimed to have spent more than forty hours on the case. They submitted an itemised schedule of costs and expenses that included research and drafting of legal documents submitted to the Court, at a rate of EUR 60. The applicant further claimed EUR 100 for his lawyers' postal expenses and charges for telephone communications.

220. The Government submitted that the applicant had not produced any document showing that he had had to pay legal fees to his pro bono counsel. They insisted that the applicant's claims were unsubstantiated and should not, therefore, be granted.

221. The Court reiterates that only such costs and expenses as were actually and necessarily incurred in connection with the violation or violations found, and are reasonable as to quantum, are recoverable under Article 41 of the Convention (see, for example, Sahin v. Germany [GC], no. 30943/96, § 105, ECHR 2003-VIII). The Court observes that in 2004 the applicant issued the lawyers from the International Protection Centre in Moscow with authority to represent his interests in the proceedings before the European Court of Human Rights. It is clear from the length and detail of the pleadings submitted by the applicant that a great deal of work was carried out on his behalf. Having regard to the documents submitted and the rates for the lawyers' work, the Court is satisfied that these rates are reasonable. However, the Court considers that a reduction should be applied to the amount claimed in respect of legal fees on account of the fact that some of the applicant's complaints were declared inadmissible. A further reduction is required as the applicant was granted EUR 850 in legal aid by the Court. Having regard to the materials in its possession, the Court awards EUR 1,000 to the applicant in respect of costs and expenses for his representation before the Court, together with any tax that may be chargeable to the applicant on that amount.

222. As regards the postal expenses and telephone charges, the Court notes that neither the applicant nor his lawyers submitted any evidence (bills, receipts, etc.) in support of that claim. Accordingly, the Court rejects it.

C. Default interest

223. 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.

1.5.4. The Court's decision

1. Declares unanimously the complaints concerning the inhuman and degrading conditions of the applicant's detention in facility no. IZ-39/1 from 19 December 2003 to 12 January 2004, the absence of an effective remedy in respect of his complaint about the conditions of his detention, the ill-treatment of the applicant in correctional colony no. OM-216/13, the ineffectiveness of the investigation into his ill-treatment complaints and the breach of the equality-of-arms principle in the four sets of the civil proceedings concerning the conditions of his detention and the beatings in the colony admissible and declares by a majority the remainder of the application inadmissible;

2. Holds unanimously that there has been a violation of Article 3 of the Convention on account of the conditions of the applicant's detention from 19 December 2003 to 12 January 2004 in facility no. IZ-39/1 in Kaliningrad;

3. Holds unanimously that there has been a violation of Article 13^{38} of the Convention;

4. Holds unanimously that there has been a violation of Article 3 of the Convention on account of the treatment to which the applicant was subjected on 23 October 2001 and 21 January 2002 in correctional colony no. OM-216/13;

5. Holds unanimously that there has been no violation of Article 3 of the Convention on account of the treatment to which the applicant was subjected on 7 November 2001 in correctional colony no. OM-216/13;

6. Holds unanimously that there has been a violation of Article 3 of the Convention on account of the authorities' failure to investigate effectively the applicant's ill-treatment complaints;

7. Holds unanimously that there has been a violation of Article 6 § 1^{8} of the Convention in the three sets of civil proceedings concerning the conditions of the applicant's detention;

8. Holds unanimously that there has been no violation of Article 6 § 1 of the Convention in the civil proceedings concerning the beatings in the correctional colony;

9. Holds unanimously

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2[9] of the Convention, the following amounts, to be converted into Russian roubles at the rate applicable at the date of settlement:

(i) EUR 54,600 (fifty-four thousand and six hundred euros) in respect of non-pecuniary damage;

(ii) EUR 1,000 (one thousand euros) in respect of costs and expenses incurred before the Court;

(iii) any tax that may be chargeable to the applicant on the above amounts;

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

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

Chapter 2 Prohibition of slavery and forced labour. Selected case law.

2.1. Prohibition of slavery

According to the Article 4 of The European Convention:

1 No one shall be held in slavery or servitude.

2 No one shall be required to perform forced or compulsory labour.

3 For the purpose of this article the term “forced or compulsory labour” shall not include:

a any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

b any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

c any service exacted in case of an emergency or calamity threatening the life or well being of the community;

d any work or service which forms part of normal civic obligations.

Chapter 3 Right to liberty and security. Selected case law.

3.1. Right to liberty and security.

According to the Article 5 of The European Convention:

1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a the lawful detention of a person after conviction by a competent court;

b the lawful arrest or detention of a person for non compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3 Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

3.2. Case od Dolenec v. Croatia[5]

3.2.1. The procedure

1. The case originated in an application (no. 25282/06) against the Republic of Croatia lodged with the Court under Article 34[10] of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Branko Dolenec ("the applicant"), on 19 May 2006.

[5] case of dolenec v. croatia (application no. 25282/06); judgment strasbourg; 26 november 2009; final 26/02/2010

2. The applicant, who had been granted legal aid, was represented by Mr M. Ramušćak, a lawyer practising in Varaždin. The Croatian Government ("the Government") were represented by their Agent, Mrs Š. Stažnik.

3. On 11 December 2007 and 17 December 2008 the President of the First Section decided to communicate the complaints under Article 3[39] of the Convention concerning the general conditions of the applicant's detention, the alleged lack of adequate medical care and the alleged attacks on the applicant by prison personnel; the complaints under Article 5 §§ 1 and 3 of the Convention concerning the applicant's deprivation of liberty between 2 and 30 March 2005; the complaint under Article 8 of the Convention concerning the applicant's allegations that he was placed in a cell with smokers; the complaints under Article 6 § 3 (b) and (c) concerning his inability to engage the services of a defence counsel at the hearing held on 1 April 2005 and afterwards and the alleged lack of possibility to consult the case file to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

3.2.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1967 and is at present serving a prison term in Gospić Prison.

1. Criminal proceedings against the applicant

5. On an unspecified date an investigation was opened in respect of the applicant, who was suspected of having committed a number of thefts and aggravated thefts.

6. On 20 February 2004 a Varaždin County Court investigating judge (istražni sudac Županijskog suda u Varaždinu) issued a warrant for the search of the applicant's flat. The search was carried out by the police on 23 February 2004 and a number of items were seized.

7. The applicant was arrested on 23 February 2004 at 10 p.m. but was released on 24 February 2004 at 6.00 p.m.

8. On 1 March 2004 the applicant was indicted in the Prelog Municipal Court (Općinski sud u Prelogu) on numerous counts of theft and aggravated theft. He was represented in these proceedings by an officially appointed defence counsel.

9. He was arrested again on 2 March 2004 and placed in pre-trial detention in Varaždin Prison (Zatvor Varaždin) and later on in other prison facilities (see below).

10. During the criminal proceedings against him, the applicant was examined by a psychiatrist and, in a psychiatric report of 16 May 2004, it was established that the applicant suffered from post-traumatic stress disorder (PTSD).

11. In a judgment of the Prelog Municipal Court of 26 August 2004 the applicant was found guilty of twenty counts of theft and aggravated theft and sentenced to six years and six months' imprisonment. The applicant appealed against the judgment to the Čakovec County Court (Županijski sud u Čakovcu) complaining about the outcome of the proceedings and also that his defence rights had been violated in that he had not been informed of the hearings in time to prepare his defence and that he had not had sufficient contact with the officially appointed defence counsel.

12. On 1 October 2004 the applicant was taken to the Prelog Municipal Court, where he examined the case file. His request that certain documents be copied for him was complied with.

13. The first-instance judgment of 26 August 2004 was quashed on 14 January 2005 by the Čakovec County Court which extended the applicant's detention at the same time. The first-instance judgment was quashed, inter alia, on the grounds that the applicant had not been informed of the hearings in time to prepare his defence and that he had not had sufficient contact with the officially appointed defence counsel.

14. On 30 January 2005 the applicant lodged a request with the Prelog Municipal Court seeking permission to contact his officially appointed defence counsel and some other persons. On 2 February the Municipal Court allowed the applicant unrestricted telephone communication with his defence counsel.

15. At a hearing held on 3 February 2005 the applicant challenged the presiding judge for bias. The defence counsel opposed the challenge. The hearing was adjourned pending the decision on the applicant's objection. In his submission of the same date the defence counsel requested to be relieved of his duties.

16. On 4 February 2005 the President of the Prelog Municipal Court dismissed the applicant's challenge to the presiding judge as unfounded. On the same day the presiding judge relieved the officially appointed defence counsel of his duties and the president of the court appointed

a new defence counsel. The applicant was allowed unrestricted telephone communication with his new counsel.

17. On 14 February 2005 the applicant informed the presiding judge that his attempts to contact his newly appointed defence counsel had remained unsuccessful, since there had been no answer to his calls, and requested a visit from his defence counsel in prison since the next hearing had been scheduled for 17 February 2005. On the same day the presiding judge allowed an unlimited number of visits to the applicant's sister and mother but made no decision about the request concerning the defence counsel. However, the hearing scheduled for 17 February 2005 was adjourned on the oral request of the defence counsel, in order to prepare the defence. The next hearing was scheduled for 10 March 2005.

18. In the meantime, on 11 February 2005, the Prelog Municipal Court further extended the applicant's detention. A subsequent request by the applicant that his detention be lifted was dismissed on 23 March 2005 by the Prelog Municipal Court. The applicant appealed against this decision.

19. On 7 March 2005 the applicant lodged a request with the presiding judge for leave to consult the case file. He alleged that on 1 October 2004, when he had been brought to the Prelog Municipal Court, he had not had sufficient time to consult the entire file and that not all copies he had requested had been given to him and that at that time the case file had not yet been completed. This request remained unanswered.

20. At the beginning of the hearing of 10 March 2005 the applicant insulted the presiding judge and was removed from the courtroom, followed by his defence counsel. Soon afterwards counsel returned and challenged the presiding judge, and the hearing was adjourned. On 14 March 2005 the President of the Prelog Municipal Court dismissed the challenge as unfounded.

21. Upon the appeal by the applicant against the decision of 23 March 2005, on 30 March 2005 the Čakovec County Court quashed the first-instance decision and ordered the applicant's immediate release. It found that, pursuant to the relevant provisions of the Criminal Procedure Act, the statutory time-limit for the applicant's detention had expired on 2 March 2005 and that therefore there had been no grounds for keeping him in detention after that date.

22. The applicant was released on 30 March 2005. On 31 March 2005 the presiding judge relieved the applicant's officially appointed defence counsel of his duties.

23. The next hearing before the Prelog Municipal Court was held on 1 April 2005. The applicant was present in person, but legally unrepresented. The transcript of the hearing shows that the applicant expressly stated that he did not want a defence counsel and decided to remain silent. The applicant did not sign the transcript of the hearing. In a judgment adopted on the same day, the first-instance court again found the applicant guilty of twenty counts of theft and aggravated theft and sentenced him to six years and six months' imprisonment. Immediately after the hearing the applicant was detained and placed in Varaždin Prison. On the same day the same defence counsel was officially assigned to the applicant.

24. The applicant appealed against the first-instance judgment on 4 and 22 April 2005, alleging that his defence rights had been violated in that he had not been given an opportunity to consult the case file. He alleged that on 1 October 2004 he had been brought to the Prelog Municipal Court in order to consult the case file. However, owing to the large volume of documents in the case file, the time allowed for that purpose had not permitted him to consult all the documents he had wished to. It had therefore been agreed that the requested documents would be copied and sent to him in prison. However, this request had only partially been complied with and he had never had an opportunity to read the whole case file. He further alleged that he had complained about this at the hearing held on 1 April 2005 but that his allegations had been ignored. He further complained that the search of his premises had been carried out in contravention of the relevant provisions of the Code of Criminal Procedure because the requirement that two witnesses be constantly present had not been complied with. He also complained about the qualification of some of the offences as aggravated theft instead of theft and about the severity of the sentence.

25. On 18 April 2005 the officially appointed defence counsel also lodged an appeal, referring to the factual findings of the first-instance court.

26. On an unspecified date the applicant asked the Prelog Municipal Court if he could consult the case file. In its letter of 28 April 2005 addressed to the Head of Prison Administration at the Ministry of Justice, a copy of which was also forwarded to the applicant, the president of that court allowed the applicant's request. The applicant then requested that a date be fixed for consulting the case file. The President of the Prelog Municipal Court replied that the consultation was not possible because the case had been forwarded to the Čakovec County Court upon an appeal against the first-instance judgment. In a letter of 13 May 2005 a judge

of the same court informed the applicant that his request had been granted and that the case file had been forwarded to the Čakovec County Court.

27. On 17 May 2005 the Čakovec County Court allowed the applicant's appeal in the part concerning the qualification of certain offences and reduced the sentence to six years and four months' imprisonment while dismissing the remainder of his complaints. The relevant parts of the appeal judgment read as follows:

"In his personal appeal the defendant complains of serious breaches of the provisions regulating criminal proceedings, [these being] his inability to consult the case file; reliance of the impugned judgment on evidence under Article 9, paragraph 2, of the Code of Criminal Procedure, namely, the written record of the search of his flat and other premises, and the allegation that the identification of items (as potential evidence) by the injured parties had not been carried out in accordance with Article 243 (a) of the Code of Criminal Procedure.

The officially appointed defence counsel also alleges in his appeal that there was a serious breach of the provisions regulating criminal proceedings in the reliance of the first-instance judgment on illegally obtained evidence, because the search of the defendant's premises had been carried out without the simultaneous presence of two witnesses.

The search of the defendant's flat and other premises at the address Donji Kraljevec, Gornji kraj no. 13, was carried out by the police pursuant to search warrant no. Kir-75/04-02, issued by a Varaždin County Court investigating judge on 20 February 2004 and served on the defendant beforehand, as can be seen from a receipt on page 18 of the first-instance [court] case file. The report of the search of the [defendant's] flat and other premises of 23 February 2004 shows that the search was carried out in the presence of the defendant and two witnesses. On that occasion objects, which were enumerated in the certificates on temporarily seized items, were found and temporarily seized from the defendant. The defendant's assertion that the witnesses were not simultaneously and continually present during the search is unfounded and uncorroborated, since neither the defendant nor the present witnesses put forward any objections. As the search was carried out in compliance with Articles 211 and 214 of the Code of Criminal Procedure, the report in question and the certificates regarding the items temporarily seized from the defendant constitute fully valid and legal evidence.

The defendant's assertion that the first-instance court breached the provisions of the Code of Criminal Procedure [regulating] identification of certain objects in that the injured parties were shown the objects for identification without previously being asked to describe those

objects is unfounded. Article 243(a) of the Code of Criminal Procedure requires that a defendant or a witness be asked beforehand to describe a person or an object [to be identified] and describe their distinguishing marks only when necessary; following which the person or the object [to be identified] are to be shown to the defendant or a witness, together with other persons unknown to them, or with similar objects. It follows that this provision does not oblige the court or the police authorities to present the persons identifying [objects as potential evidence] with similar objects at each instance but [this requirement applies] only where possible. In the present case, where a large number of different objects were [to be identified], the police officers were not obliged to act in the manner the defendant argued they were in his appeal and therefore, in the view of this court, the identification of objects [as potential evidence] was carried out in accordance with the law. Therefore, the reports on identification in the present case constitute valid evidence, especially since some of the injured parties emphatically stated at the main hearing that the objects they had been presented with were theirs, which in any event – save for a few of [these objects] – the defendant did not deny in his initial defence.

As regards the [alleged] inability of the defendant to consult the case file, it is to be noted that the [documents] from the case file show that the first-instance court allowed the defendant to consult the case file on 1 October 2004 (page 520) and that the requested copies of material evidence were served on the defendant in detention on 14 October 2005 (page 572).

The defendant complains that his written request of 7 March 2005 to consult the case file while he was in detention was not granted.

On the basis of the above [considerations], this court considers that in the present case there was no breach of Article 367, paragraph 3, of the Code of Criminal Procedure, since the defendant regularly attended the hearings, where he was able to consult the case file, copy the documents thereof and [examine] the objects aimed at establishing the facts of the case. Furthermore, during practically the entire first-instance proceedings the defendant had an officially appointed defence counsel. Thus, this court finds that there was no breach of his defence rights within the meaning of Article 367, paragraph 3, of the Code of Criminal Procedure.

...

As regards the [allegations] that the facts of the case were wrongly established and incomplete, both appeals allege the same fact: that the first-instance court's refusal to hear

evidence from the witnesses to the search resulted in a failure to establish whether the search of the applicant's house and adjoining courtyard had been carried out in accordance with the law.

This court considers that the first-instance court correctly and completely established all the relevant facts, including those concerning the question whether the carrying out of the search on the applicant's flat and other premises was in accordance with the law. In this connection the first-instance court gave valid reasons for its decision not to accept the above-mentioned defendant's request [that two witnesses be heard], which reasons this court entirely endorses ..."

28. The applicant then lodged a request for extraordinary review of a final judgment.

29. In response to repeated requests by the applicant to consult the case file, the President of the Municipal Court informed him in a letter of 7 November 2005 that his request could not be granted because the case file had been forwarded to the Supreme Court.

30. On 22 November 2005 the Supreme Court (Vrhovni sud Republike Hrvatske) dismissed the applicant's request for extraordinary review of a final judgment. The relevant parts of the judgment read as follows:

".. the defendant ... alleges that the impugned judgment rests on unlawfully obtained evidence, namely the report on the search of his flat, and that his defence rights were violated because he was not allowed to consult the case file before presenting his defence.

...

The report on the search of the [defendant's] flat and other premises shows that the search was carried out pursuant to Varaždin County Court search warrant no. Kir 75/04-2 of 20 February 2004; and that two witnesses were present who were instructed at the outset to observe the procedure for carrying out [the search] and informed of their right to make objections before signing the report if they considered its contents to be inaccurate. The defendant was also present. All of these persons signed the report after it had been read to them, without making any objections, thus expressing their agreement with the content of the report.

Such a report is lawful evidence because it shows that the search was carried out in accordance with Articles 213 and 214 of the Code of Criminal Procedure.

The defendant's assertion that the witnesses were not constantly present during the search is an objection to the established facts and cannot be accepted as a valid ground for lodging this extraordinary remedy.

This court may consider the veracity of decisive facts only if a suspicion in that regard arises when it examines a request lodged under Article 427 of the Code of Criminal Procedure. In the present case, bearing in mind the content of the report on the search of the [defendant's] flat and other premises, this panel does not find any reasons to suspect that the search was not carried out in accordance with Articles 213 and 214 of the Code of Criminal Procedure.

Under Article 427(3) a request for extraordinary review of a final judgment may also be lodged [on the allegation that] the defendant's rights were violated at a main hearing.

At the main hearing held on 1 April 2005, when the first-instance judgment was adopted and pronounced, the defendant's rights were not violated. The transcript of the hearing shows that the hearing started anew with a deputy State Attorney reading out the indictment. The defendant was informed of his right to a defence counsel under Article 320, paragraphs 2 and 4, of the Code of Criminal Procedure, but he decided neither to exercise that right nor to present his defence, and remained silent.

The defendant did not object to the procedure followed by the court or ask for the hearing to be adjourned in order to prepare his defence.

The defendant's allegation that the court denied him the right to consult the case file while in detention is irrelevant for the examination of this request because he was informed of his rights at the main hearing, after which he chose not to submit his defence.

..."

31. In reply to a further request to consult the case file, lodged by the applicant on 23 January 2006, the President of the Prelog Municipal Court informed the applicant that his request could not be granted because the case file had been forwarded to the Varaždin Municipal Court (Općinski sud u Varaždinu).

32. A constitutional complaint subsequently lodged by the applicant was declared inadmissible on 23 February 2006 by the Constitutional Court (Ustavni sud Republike Hrvatske) on the grounds that the impugned decision, namely the Supreme Court's judgment of 22 November 2005, had not concerned the merits of the case. The relevant part of the decision reads:

"In accordance with [section 62 of the Constitutional Court Act], only a decision in which a competent court has decided on the merits of a case, namely, on the suspicion or indictment in respect of a criminal offence committed by the applicant, is an individual act within the meaning of section 62(1) of the Constitutional Court Act in respect of which the Constitutional Court, in proceedings instituted upon a constitutional complaint, is competent to protect human rights and fundamental freedoms of the applicant guaranteed by the Constitution of the Republic of Croatia.

In the proceedings before the Constitutional Court it has been established that the impugned judgment of the Supreme Court of the Republic of Croatia no. Kr-83/05 of 22 November 2005 is not an individual act within the meaning of section 62(1) of the Constitutional Court Act in respect of which the Constitutional Court is competent to give constitutional protection to the applicant."

2. Conditions of the applicant's detention

33. The medical documentation submitted by the parties shows that the applicant has been diagnosed as suffering from PTSD[40] and a personality disorder.

The applicant's stay in Varaždin Prison

34. The applicant was arrested on 23 February 2004 at 10 p.m. and released on 24 February 2004 at 6.00 p.m. He was arrested again on 2 March 2004 and placed in pre-trial detention in Varaždin Prison. As to the latter, the applicant alleges that the cells were overcrowded, that he was placed in a smoking cell and that he was only allowed to spend fifteen to twenty minutes a day in the fresh air. On 11 June 2004 the applicant was transferred to Zagreb Prison Hospital further to his complaint that he suffered from being placed in a cell with smokers. The discharge letter of 15 June 2004 shows that no lung disease had been established. The applicant was returned to Varaždin Prison.

35. In a complaint of 7 July 2004 addressed to the Prison Administration of the Ministry of Justice (Uprava za zatvorski sustav Ministartsva pravosuđa), the applicant complained about his placement in a cell with smokers. In a letter of 12 July 2007 of the Varaždin Prison authorities, addressed to the above Administration, it was explained that, owing to overcrowded conditions in that prison, it was not possible to place the applicant in a cell with non-smokers only. This information was forwarded to the applicant in a letter of the Prison Administration of the Ministry of Justice of 16 July 2004.

36. In his complaint of 12 October 2004 addressed to the Varaždin County Court, the applicant complained, inter alia, about the conditions in detention and, in particular, that he was placed in a cell with smokers and was allowed only fifteen to twenty minutes daily outdoor exercise. The applicant's complaints remained unanswered.

37. In October 2004 the applicant was released.

38. The applicant was again detained in January 2005 and placed in Varaždin Prison until 30 March 2005, when he was released.

39. On 1 April 2005, after his conviction by the Prelog Municipal Court, the applicant was arrested and again placed in Varaždin Prison. He was placed in cell no. 15, measuring 10.26 square metres, together with one other inmate, a non-smoker.

40. On 1 May 2005 the applicant made a commotion in his cell by banging chairs and his bed and verbally insulting the prison personnel. He was taken out of his cell and strapped down in a special cell. There is no written record of this measure or its exact duration.

41. During an outdoor walk on 13 May 2005 an attempt by the applicant to hit another inmate was prevented by a prison guard. The applicant was strapped down in a special cell and returned to his regular cell the same day. There is no written record of this measure or its exact duration. The same day the applicant attempted to attack a prison guard. As a consequence, he was strapped to his bed. There is no written record of this measure or its exact duration. Furthermore, the same day the applicant was transferred to Zagreb Prison Hospital. The relevant part of the discharge letter of 25 May 2005 reads:

"The patient was brought from Varaždin Prison in reactive exacerbation of his mental condition. He was agitated on arrival, with no manifest psychotic or suicidal symptoms. He said that he had been refusing food since 12 May.

... He has continued to refuse food until 23 May, but has been taking liquids and vitamin pills. He has not received any other treatment. He is in a good general condition ... Elements of PTSD. Depressive-paranoid syndrome. Histrionic personality. ...

Recommended treatment: Apaurin ..., psychiatric supervision and more intensive engagement on the part of the treatment services."

42. He was returned to Varaždin Prison to the same cell. The medical record shows that he refused food from 12 to 23 May 2005, but did take liquids and vitamin pills.

43. On 8 June 2005, following an incident in which the applicant started breaking furniture in his cell, he was sent to the prison doctor. However, he verbally insulted the doctor and other medical personnel and was strapped down in cell no. 16. There is no written record of this measure or its exact duration.

The applicant's stay in Zagreb Prison from 13 June to 6 July 2005

44. On 13 June 2005 the applicant was transferred to Zagreb Prison, where he was placed in the Department for Diagnostics and Programming (Odjel za dijagnostiku i programiranje). A report on the general examination of the applicant, in so far as relevant, reads as follows:

"...

DIAGNOSTIC INFORMATION

In the intellectual capacity tests his results are above average. He adequately cooperates during the interview, apologising for having to go on a hunger strike in order to safeguard his rights. Actually, he is highly anxious and over-sensitive, everything bothers him. In terms of his personality, he is impulsive and emotionally unstable. He easily loses control of his behaviour and acts in an emotionally impulsive and inadequate manner. The low tolerance of frustrations is evident, which leads to irritability and accentuated touchiness. His tendency to react aggressively is marked and he has a significantly lowered capacity to maintain self-control and self-protection, which makes him prone to undertake activities involving a high level of risk. He has no insight into his motives and feelings and is uncritical. The likelihood that he will reoffend is high.

...

WORKING CAPACITY

He is capable for all types of work without restrictions.

PROPOSAL AS TO THE INDIVIDUAL PROGRAMME FOR THE ENFORCEMNT OF THE PRISON TERM

The prison term is to be continued in closed conditions. It is to be expected that his behaviour will be excessive (conflicts, disobedience, refusal of food ...). He may be assigned to a work place according to the needs of the institution. Psychiatric supervision as needed."

RECOMMENDATION OF THE INSTITUTION WHERE THE PRISON TERM IS TO BE CONTINUED

Lepoglava State Prison”

45. The relevant part of the applicant's medical record during his stay in Zagreb Prison reads:

“13 June 2005 ...

In May 2005 [he was] treated at the psychiatric ward of Zagreb Prison Hospital. Pharmacotherapy: Apaurin... At present [he is] agitated, complaining of chest pain ...

Treatment: Apaurin ..., Fluzepan ...

...”

46. On 6 July 2005 the applicant was transferred to Lepoglava State Prison.

The applicant's stay in Lepoglava State Prison from 6 July 2005 to 14 October 2006

47. From July to September 2005 the applicant was placed in cell no. 5, measuring 9.12 square metres, together with three other inmates. Adjacent to the cell and for the exclusive use of the inmates occupying the cell was a tiled area measuring 2.15 square metres. From September to December 2005 the applicant was placed in cell no. 9, measuring 9.82 square metres, together with three other inmates. He was able to use a bathroom and toilet area measuring 20.9 square metres.

48. On 1 September 2005 the applicant petitioned the Varaždin County Court judge responsible for the execution of sentences (sudac izvršenja Županijskog suda u Varaždinu), complaining about conditions in Lepoglava State Prison. He explained that he had been continually placed in a cell with smokers and that he was detained in overcrowded conditions. He further complained that he had not been receiving any treatment for his psychiatric ailments, in particular the PTSD, and that he was being given no psychiatric treatment at all. He also complained that the examination by a doctor, who had seen him on 8 July 2005 in order to establish his fitness to work in prison, had lasted two minutes. In a letter of 11 October 2005 the judge found that the applicant was allowed to use some of his personal items, that he had complained about his placement in a smoking cell, that he had adequate medical care, and that he had been on hunger strike between 2 and 14 September 2005.

49. Although upon his arrival the applicant was assigned to a non-working group, there were subsequently several attempts to include him in working activities. For a month, starting on 28 October 2005, the applicant worked in a storehouse. Since his work there was found to be unsatisfactory, on 30 November 2005 he was offered work in a therapeutic workshop and placement in a non-smoking cell. However, the applicant refused this offer.

50. On 2 December 2005 the applicant was placed in the Department with increased supervision for a period of three months.

51. From 7 to 20 December 2005 the applicant was on hunger strike. He was subsequently returned to work in a storehouse.

52. On 7 December 2005 the applicant again complained to the Varaždin County Court judge responsible for the execution of sentences about the conditions in prison. The report of the Lepoglava State Prison authorities of 13 December 2005 state, inter alia, that the applicant had been included in the programme for persons suffering from PTSD, without any further details. The applicant's complaints remained unanswered by the competent judge.

53. On an unspecified date the applicant complained about the prison conditions and in particular the lack of adequate medical treatment to the Ministry of Justice. On 2 February 2006 the Ministry asked the Lepoglava Prison authorities to submit their report on the matter. The report of 24 February 2006, in so far as relevant, reads as follows:

"Upon his arrival at the prison the inmate was assigned to a non-working group, and involved in leisure activities and the programme for persons suffering from PTSD as well as to the programme for a computer operator...

The prison doctor saw him on twenty-three occasions and he was twice examined by a psychiatrist. His diagnosis includes depression, paranoia, elements of PTSD and low tolerance towards frustrations. He has regularly been receiving sleeping pills and tranquilisers (Apaurin and Cerson)...."

It was also stated that the applicant had worked for a certain period but had stopped, owing to some conflicts. The applicant sent his reply to the report, in which he stated that he had actually seen a psychiatrist on three or even four occasions, but each time at his insistence although a discharge letter from Zagreb Prison Hospital of 25 May 2005 requested that he receive regular psychiatric supervision. He further asserted that he had not been able to attend group therapy sessions for persons suffering from PTSD because he had had no access to

information about the time of these sessions. No decision was taken upon the applicant's complaint.

54. In April and May 2006 the applicant had a number of arguments with other inmates, which culminated on 10 May 2006 in a fight with another inmate. The applicant was transferred to the Department with increased supervision, owing to which he refused to take food. He also refused a psychiatric examination scheduled for 11 May 2006.

55. In his appeal of 16 May 2006 against a decision of the Lepoglava State Prison authorities to place him in a Strict Supervision Department, addressed to the Varaždin County Court judge responsible for the execution of sentences, the applicant complained, inter alia, that he had not been regularly receiving the prescribed pharmacotherapy. He also alleged that on 8 May 2006 he had been attacked by his cellmate, who had allegedly attempted to strangle him. The applicant further complained that he had been forced to share the cell with that inmate although he had complained to the prison authorities that later on that inmate had threatened him and had been allowed to keep a knife in the cell. The applicant also alleged that on 9 May 2006 he had been denied the prescribed pharmacotherapy and had therefore asked one of the guards to take him to the medical ward. The guard, however, had refused and threatened to crush the applicant, following which the applicant had inflicted self-injuries by cutting his veins, whereupon he had been taken to the medical ward within the prison. The applicant also alleged that on 10 May 2006, during breakfast, he had been attacked by another inmate who bit his finger. In the report of 26 May 2006, addressed to the judge responsible for the execution of sentences, the Lepoglava State Prison authorities stated that the applicant had not complied with the House Rules for a longer period. A report of the incident of 10 May 2006 was enclosed. This report stated that on 10 May 2006 during breakfast the applicant had thrown a plate at inmate M.B., who had been washing the dishes, whereupon M.B. had jumped on the applicant and bit his finger. The applicant had been taken to the medical ward, while M.B. had no injuries. The report did not address any of the incidents described by the applicant. The competent judge did not answer the applicant's complaint.

56. On 30 May 2006 the applicant wrote to the Ombudsman's Office (Pučki pravobranitelj). In a letter of 6 June 2006 addressed to the Head of the Prison Administration, the Deputy Ombudsman reiterated the applicant's allegations that he had been attacked by other inmates on two occasions at the beginning of May and that no steps had been taken against the perpetrators, as well as further allegations that the applicant, although suffering from PTSD, had not received any treatment for over a month and had been placed in a smoking cell.

57. From 30 May to 21 June 2006 the applicant was transferred to Zagreb Prison Hospital. The relevant part of the discharge letter of 21 June 2006 reads:

"The patient was admitted due to the hunger strike he had started on 10 May 2006 because he had been dissatisfied with his treatment in prison.

...

During the first days of his hospitalisation the patient refused food, and [he was] hostile and manipulative; on several occasions during the interviews with a psychiatrist he requested a solution to his problems in connection with the conditions in the prison, being unwilling to correct his behaviour.

...

While in hospital the patient started to take food. He is discharged in a partially better condition ..."

58. During the period the applicant spent in Lepoglava State Prison in May and June 2006 he was placed in cell no. 4, measuring 10.13 square metres, together with one other inmate, and sharing an adjacent toilet area of 1.79 square metres. From June to September 2006 the applicant was placed in cell no. 1, measuring 13.72 square metres, together with three other inmates, also sharing an adjacent toilet area of 2.3 square metres. During this period the applicant spent two non-consecutive days in solitary confinement in a cell (no. 13) measuring 8.97 square metres.

59. On 1 August 2006 the applicant again petitioned the Varaždin County Court judge responsible for the execution of sentences, complaining about being placed in a smoking cell. The judge replied in a letter of 11 September 2006 that the applicant's transfer to another prison would be considered.

60. On 18 September 2006 an incident involving the use of force against the applicant occurred. The two guards involved in the incident gave oral statements on the same day to the Head of Security Division within the prison. These statements and several written reports of 18 and 19 September 2006 by the Lepoglava State Prison personnel, submitted to the prison governor, all concur that on 18 September 2006 at 12.50 p.m. the applicant had started to shout at some of them and requested to be immediately taken to the prison doctor. One of the prison guards had asked him to wait since the doctor had been with another inmate, but he had continued to shout and hit the walls and metal bars. After he had ignored warnings to calm

down, he had lifted a chair and thrown it at the prison guards and continued throwing objects. Another guard had arrived, whereupon one of the guards had taken the applicant by the left hand and the other by the right hand, twisted them behind the applicant's back and handcuffed him. The applicant had continued to utter shouts and threats and had therefore been taken to a special cell where he had been strapped down. He had also refused the prison doctor's attempt to examine him.

61. Further to these reports the Government submitted that the applicant had refused to be examined by the prison doctor or to give a statement about the incident. The Head of Security Division heard the two guards involved in the incident separately. In the next two days the applicant again refused to see the prison doctor. One of the guards made a report on the applicant's refusal to see the prison doctor on 19 and 20 September 2006.

62. From 20 to 29 September 2006 the applicant was placed in Zagreb Prison Hospital. The relevant part of the discharge letter of 27 September 2006 reads:

"The patient was admitted because of suicide threats.

... He expressed dissatisfaction with his treatment in the prison.

During hospitalisation he has been calm, neither suicidal nor productive. He has refused food in order to have his paramedical problems resolved. He does not consider himself as ill. He insists on being discharged.

...

Since the patient is not in vital danger, [and he is] productive, against suicide, he is to be discharged and it is recommended that he be placed in a day-care department."

63. Meanwhile, on 25 September 2006 the applicant again petitioned the Varaždin County Court judge responsible for the execution of sentences, complaining about his placement in a smoking cell. He also referred to the incident of 18 September 2006, alleging that he had been beaten up while in solitary confinement and that his request to see the prison doctor had been ignored. On 6 October 2006 the judge asked the Lepoglava State Prison authorities whether it was possible to place the applicant in another penal institution. The applicant's allegations about the attack of 18 September 2006 were ignored.

64. During the periods when the applicant did not work his daily regime was as follows:

7 a.m. – 7.30 a.m. – wake up, personal hygiene, cleaning of cells

7.30 a.m. – 7.45. a.m. – distribution of medicines

7.45 a.m. – 8.15 a.m. – breakfast

8.15 a.m. – 9.45 a.m. – outdoor exercise, stay in cells or TV-room, making telephone calls

11.30 a.m. – 11.45 a.m. – medical treatment

11.45 a.m. – 12. 15. p.m. – lunch

12.15 p.m. – 2.00 p.m. – outdoor exercise, sport activities

2.00 p.m. – 3.00 p.m. – return to cells, washing and personal hygiene

3.00 p.m. – 5.00 p.m. – stay in cell or in TV-room or making telephone calls

5.00 p.m. – 5.15 p.m. – distribution of medicines

5.15 p.m. – 5.45 p.m. – dinner

5.45 p.m. – 7.00 p.m. – stay in cell or TV-room

7.00 p.m. – line-up

7.00 p.m. – 7.30 p.m. – cleaning of corridors, stairs, sanitary facilities and disposal of garbage

8.00 p.m. – optional stay in cells

9.00 p.m. – lights out

10.45 p.m. – television sets switched off

65. During the period the applicant worked his daily regime was as follows:

6.00 a.m. – 6.30 a.m. – wake up, personal hygiene, cleaning of cells, distribution of medicines

6.30 a.m. – 6.50 – a.m. – breakfast

6.50 a.m. – 7.00 a.m. – departure for work

7.00 a.m. – 3.00 p.m. – work (with a meal break from 10.00 a.m. to 10.30 a.m.)

3.p.m. – 5.15. p.m. – lunch, outdoor exercise, optional stay in cell or TV-room, washing, making telephone calls

5.30 p.m. – 6.00 p.m. – distribution of medicines, personal hygiene

7.00 p.m. – line-up

7.00 p.m. – optional stay in TV-room

8.00 p.m. – optional stay in cell

9.00 p.m. – lights out

10.45 p.m. - television sets switched off

66. During his stay at the Department with increased supervision the applicant's daily regime was as follows:

6.00 a.m. – 8.00 a.m. – wake up, personal hygiene, cleaning of cells

8.00 a.m. – 8.15. a.m. – distribution of medicines

8.15 a.m. – 8.45 a.m. – breakfast

8.45 a.m. – 9.a.m. – personal hygiene

9.00 a.m. – 11.00 a.m. – outdoor exercise for one group while the other group stays in TV-room

11.00 a.m. – 11.45. a.m. – personal hygiene of the group that went outdoors

11.45 a.m. – noon – distribution of medicines

Noon – 12.30 p.m. – lunch

1.00 p.m. – 2.00 p.m. – personal hygiene

1.00 p.m. – 2.00 p.m. – stay in cells

2.00 p.m. – 4.00 p.m. – outdoor exercise for one group while the other group stays in TV-room

4.00 p.m. – 5.00 p.m. – personal hygiene of the group which went outdoors

5.00 p.m. – 5.45 p.m. – stay in cells

6.00 p.m. – 6.30 p.m. – dinner

6.30 p.m. – 7.00 p.m. – personal hygiene

7.00 p.m. – line up

7.00 p.m. – 7.30 p.m. – cleaning of corridors, stairs, sanitary facilities and disposal of garbage

8.00 p.m. – optional stay in cells

9.00 p.m. –lights out

10.45 p.m. – television sets switched off

67. The Government submitted that at his arrival at Lepoglava State Prison the applicant had been included in the programme for prisoners suffering from PTSD and that in addition he had been continuously monitored by a psychiatrist. Later on, owing to the applicant's ill-adapted behaviour and conflicts with other prisoners he had been offered the possibility of joining a different therapy workshop, which he had refused. The Government did not specify, however, the dates of the applicant's group or individual therapy sessions.

68. The Government submitted the Lepoglava State Prison programme of therapy for inmates suffering from PTSD. The programme included one-hour weekly meetings of three small groups (five to twelve persons) who met on their own in order to discuss their problems. Each group was led by a member of the prison personnel. The qualifications or occupation of these persons was not specified; nor was it specified whether they attended the group meetings or not. The therapists met once a month with two psychiatrists in and outside the prison clinic and once a month in the prison. Participation in therapy groups was voluntary.

69. The relevant part of the applicant's medical record during his stay in Lepoglava State Prison reads:

“1 September 2005

Psychiatric examination at the medical ward of Lepoglava State Prison. During the current examination he is neither psychotic nor suicidal. He says that he has not been taking food for a week. He asks to be placed in a non-smoking cell and to be given treatment for headaches and sleep deprivation.

Treatment: Fortevit ..., Apaurin ..., Fluzepan

...

7 December 2005

Psychiatric examination: conscious, well-orientated, no signs of psychosis, [he] is not suicidal, [he is] very tense, has very low level of tolerance towards frustrations

...

20 April 2006

He saw a psychiatrist at the medical ward of the Lepoglava State Prison.

Treatment: Apaurin ..., Sanval ...

He is currently on hunger strike.

...

10 May 2006

Alleges fight with another inmate, who allegedly bit his finger.

D[ia]g[nosis]: Vulnus morsum? [a wound by biting]? Indicis m.l.sin. [marks on middle left finger], Regio ph. Medialis [middle zone].

Alleges that he will go on hunger strike.

...

20 July 2006

Psychiatric examination: [he is] neither psychotic nor suicidal, [he is] anxious, tense with low level of tolerance, allegedly worried, asks for hospitalisation which is unfounded.

...

20 July 2006

Hospitalisation was ordered, but he refused to go to Zagreb Prison Hospital.

...

He returned to the medical ward at 5.40 p.m., revolted, wanting to go to the hospital today although at 2 p.m. he had refused it. He took out a razor blade and made a few cuts on the surface of his left forearm. ...

[He] made threats of inflicting further self-injuries if not taken to the hospital today. Hospitalisation was ordered, but there was no capacity in the hospital to admit him. ...

21 July 2006

Sent to Zagreb Prison Hospital.

24 July 2006

The admission report from Zagreb Prison Hospital of 21 July 2007: '... [the patient] is shouting, threatening to beat other patients, asking to be placed in a non-smoking room, making threats against the hospital personnel because there is only one bed available and there is no separate room for non-smokers. He does not want to stay in the hospital because he cannot get desired accommodation. He refuses to take Apaurin in his veins. He is very unpleasant, uttering threats and blackmail. Since his condition is not life-threatening and given that the patient is refusing the treatment offered, he shall be returned to prison.

Started eating so as not to be removed form Division 8 of the Prison.

...

18 September 2006

... he has been placed in solitary confinement, handcuffed to a bed. He is anxious, verbally aggressive, dissatisfied with being handcuffed, bangs on the bed with his handcuffs and asks to be released. [He] is not psychotic or suicidal ... It has not been possible to examine him because he is very restless and is banging on the bed with his handcuffs, so that it has not been possible to approach the inmate in bed.

5 October 2006

[He] refused to see a psychiatrist.

...”

70. On 14 October 2006 the applicant was transferred to Gospić Prison.

The applicant's stay in Gospić Prison from 14 October 2006 to 6 January 2007

71. The applicant was placed, together with one other inmate, in a cell measuring 13.13 square metres with an adjacent toilet area measuring 3.2 square metres. The cell was furnished with two beds, two cupboards, a table and two chairs. A bathroom was available to the applicant the whole day. He did not work.

72. During his stay in this prison the applicant did not work and did not receive any treatment for his PTSD. His daily regime was as follows:

6.30 a.m. – wake up

6.30 – 7.00 a.m. – personal hygiene

7.00 – 7.30 p.m. – breakfast

7.30 – 8.30 – possibility to see prison doctor

One hour between 8.30 a.m. and 1.00 p.m. – outdoor exercise

1.00 p.m. – 1.30 p.m. – lunch

One hour between 1.30 p.m. – 5.00 p.m. – exercise in the sports hall

3.00 p.m. – 6.00 p.m. – leisure time, one-hour outdoor exercise

6.00 p.m. – 6.30 p.m. – dinner

6.30 p.m. – 8.00 p.m. – leisure time

8.00 p.m. – 10.00 p.m. – stay in TV-room or reading

10.00 p.m. – bed-time

73. On 6 November 2006 the applicant complained to the Head of the Prison Administration about the conditions in prison. He was answered in a letter of 30 November 2006 stating that his treatment had been humane, professional and in accordance with the legislative standards.

74. On 6 January 2007 the applicant was transferred to Pula Prison

The applicant's stay in Pula Prison from 6 January to 5 November 2007

75. Initially, he was placed, together with another inmate, a non-smoker, in a cell measuring 10.2 square metres, furnished with two beds, two cupboards, a table and two chairs, with an adjacent toilet area measuring 3.98 square metres. The cell was heated by a radiator. The applicant did not work, had the possibility of spending time outdoors every day between noon and 2 p.m. and again between 6.30 p.m. and 8.30 p.m. During his leisure time the applicant was involved in the computer group.

76. On 21 January 2007 an incident occurred involving the use of force against the applicant. According to the Government, at 8 p.m. that day two prison guards, E.L. and I.O., were distributing pharmacotherapy to the inmates in their cells. The applicant had refused to take the prescribed medication. At 10 p.m. he had taken the prescribed medication but also asked

for the medicine he had refused to take at 8 p.m.. His request had been refused. After the guards in charge had left his cell the applicant had started shouting and banging. The guards had returned and the applicant had made an attempt to kick one of them. The guards had taken the applicant, pushed him to the floor and handcuffed his hands behind his back. The applicant had continued resisting, hitting and shouting. Two other guards had arrived and the applicant was tied down in a separate cell. One of the guards had noticed a laceration next to the applicant's right eye and asked if he wished to see the prison doctor, which the applicant had refused, demanding to see a psychiatrist. He also refused to sign the report on the incident and the statement that he had not wished to see the prison doctor.

77. On the same day the guard on duty, N.B., made a report on the incident, which was submitted to the Head of Security. The guards E.I. and I.O. also made their reports on the incident. On 24 January E.I. and I.O. gave their oral statements to the officer in charge.

78. On an unspecified date the applicant wrote to the Ministry of Family, War Veterans and Inter-Generational Solidarity, which forwarded his complaint about the conditions in Pula Prison to the Head of the Prison Administration on 26 January 2007. The complaint remained unanswered.

79. On 8 February 2007 the applicant was transferred to a single occupancy cell measuring 8.73 square metres, with an adjacent toilet area. According to the Government, the cell had a window measuring 0.9 square metres and was heated by a radiator. The applicant was provided with a television set. He was able to use a common bathroom on request.

80. On 17 February 2007 another incident occurred. According to the applicant, he had been placed in solitary confinement and one of the guards thumped him several times on the left side of his chest.

81. On 21 and 22 February the applicant was examined by a doctor. The relevant part of the medical report reads:

“21 February 2007

[The inmate is] complaining about pain in the left hemithorax, trauma not excluded. I have not found visible signs of trauma or haematoma. While breathing he spares left side, pain on palpation of left upper ribs. Sent for an X-ray.

Pain in the left-rib area. The X-ray examination shows that there are no signs of rib-related trauma or lung alteration. He does not present allergy to medication."

82. On 26 February 2007 the applicant was heard by a judge responsible for the execution of sentences of the Pula County Court. He stated that on 21 January 2007 at around 8 p.m. two prison guards, I.O. and E.L., had been administering pharmacotherapy to the inmates in Pula Prison. The applicant had complained that he had to take his therapy at 10 p.m. The guards had replied that they would make a note that the applicant had refused therapy. The applicant had then opened a cupboard in his cell in order to show them his medical documentation confirming his allegations. Since the guards had left, the applicant had stamped in order to make them return since there was no other way of drawing their attention. The guards had returned and opened the applicant's cell. One of them had stamped on the applicant's foot and the other had hit him in the head, while shouting at him. He further stated that, on 17 February 2007, while he had been placed in solitary confinement, four guards had arrived and strapped him to the bed, which he had not resisted. One of the guards had hit him several times on the left side of his body. The applicant had begged him to stop since he had heart problems. The same guard had also threatened to leave the applicant strapped down for twenty-four hours.

83. The Pula Prison authorities filed a report with the Pula County Court on 9 March 2007. The relevant part of the report reads:

"...

We have already examined the allegations of the said inmate about the acts of the prison guards of 21 January 2007. The guards involved made their reports and also gave their oral statements. The inmate Branko Dolenec was also interviewed.

It has been established that the guards acted in accordance with the law and that the inmate Branko Dolenec had attempted to diminish his responsibility by saying that he had not been given the prescribed treatment at the right time. He did not wish to give a written statement of the incident. Disciplinary proceedings have been instituted against the inmate Branko Dolenec for disciplinary offences under section 145(2)(8) and 145(3)(8) of the Enforcement of Prison Sentences Act in respect of which there is a reasonable suspicion that he committed them on 21 January 2007 to the detriment of the guards about whose acts he was complaining.

It is true that on 17 February 2007 a special measure of keeping order and security under section 135(6) was applied because there was a danger that he would inflict self-injuries. Beforehand, on the same day he had threatened to inflict self-injuries and repeated warnings had produced no results. In accordance with section 138(2), the applied measure lasted from 8.25 a.m. to 6 p.m. We have no information that on that occasion any of the guards used force against the inmate, or that anyone threatened to keep him tied down for twenty-four hours.

...”

84. In a letter of 23 March 2007 the judge responsible for the execution of sentences of the Pula County Court replied to the applicant that the report submitted by the prison authorities showed that on 21 January 2007 the prison guards had acted in accordance with the law and that on 17 February 2007 he had been placed in solitary confinement because he had threatened to inflict self-injuries and that neither coercive measures had been applied not any threats made against him. The relevant part of the letter reads:

“As regards the event of 21 January 2007, according to the report of the Pula Prison Administration, the guards acted in accordance with the law while you, in order to diminish your personal responsibility, asserted that you had not received the prescribed medication at the right time.

...

Furthermore, the information submitted by Pula Prison does not show any indication that on 17 February 2007 any force was used against you or that any of the prison personnel threatened to tie you down for twenty-four hours.”

85. On 27 March 2007 the applicant objected to the findings of the judge responsible for the execution of sentences and reiterated that on 17 February 2007 he had been strapped down for twelve hours in solitary confinement and beaten up by a prison guard. He further complained of lack of treatment for PTSD. On 16 May 2007 the judge replied to the applicant by letter, stating that his objections were unfounded.

86. On 24 May 2007 the applicant was assigned to work in the prison shop. According to the Government, until 6 August 2007 his comportment was fully satisfactory, when he suddenly started to verbally insult the prison personnel and other inmates. Owing to such frequent incidents and his exacerbated psychiatric condition, on 24 August 2007 he had again been assigned to a non-working group.

87. From 24 September to 3 October 2007 the applicant worked in the prison library. On the latter date he again started verbally insulting and attempting to physically attack the prison personnel because he was dissatisfied with the prospect of being placed in a cell with another inmate.

88. On 4 October 2007, owing to his worsening psychiatric condition and the self-infliction of injuries, the applicant was transferred to Zagreb Prison Hospital. The relevant part of the discharge letter of 18 October 2007 reads as follows:

"Diagnosis: Personality disorder PTSD

The patient was admitted ... because of self-inflicted injuries. On arrival he was upset and in corresponding mood, with accelerated and widened thought processes, querulous and with a number of projections but without clear psychotic indications. He did not show aggressive or further auto-aggressive drives. His complaints about his treatment in Pula Prison included allegations that he had been placed in the pre-trial detention ward in a cell with smokers. He also asserted that he had been beaten up a few days prior to his arrival at the hospital. Lacerations and older haematomas on his back and a haematoma in regression on his thigh were visible on arrival. There were no visible injuries to his head.

During his stay in the hospital he was demanding, querulous, upset, constantly insisting on the alleged injustice done to him. There were no psychotic signs or aggressive or auto-aggressive drives. Only after his treatment had been altered did he become somewhat calmer and more willing to co-operate, although still persisting in his demand for "the just".

There are no indications for hospital treatment. Placement in a calmer and non-smoking cell is recommended together with stricter supervision and stronger efforts on the part of the treatment services as well as regular pharmacotherapy: Haldol ..., Akineton ..., Fluzepan ... and Brufen ... with regular psychiatric supervision, starting in two weeks."

89. On 19 October 2007 the applicant was returned to Pula Prison and placed in a single-occupancy cell identical to the one in which he had stayed prior to his transfer to the hospital. The Government submitted that although there had been group therapy for inmates suffering from PTSD in Pula Prison since 5 October 2007, the applicant, owing to his mental condition which included impulsive behaviour, emotional instability and tendency towards aggressive behaviour, had not been included in that therapy. However, they submitted that psychiatric supervision had been carried out as needed, without any further details.

90. The relevant part of the applicant's medical record during his stay in Pula Prison reads:

“24 April 2007

An interview. [He] announces a hunger strike as of today and [expresses an intention to inflict] self-injuries. [He is] upset, communication is not possible ...

Stricter supervision measures for seven days [are recommended]. Therapy: none.

...

24 August 2007

At 4 a.m. today he was taken to a psychiatrist at Pula General Hospital ... Hospitalisation in the Psychiatric Ward of Zagreb Prison Hospital was recommended. Treatment: Apaurin ..., Fluzepan ...

He could not be admitted to Zagreb Prison Hospital owing to the lack of space. He was calm during the second interview [with a psychiatrist], there was no further indication for hospitalisation in Zagreb Prison Hospital. Placement in a separate non-smoking cell was recommended.

...

4 October 2007

Yesterday [he inflicted] self-injuries ... [there is] redness on his neck and back and several lacerations measuring approximately 2 cm, haematoma measuring 2 to 8 cm. [He is] upset, tense, anxious, expresses suicidal thoughts and intentions. Given Prazine ... and it was recommended [to take him to] the Psychiatric Ward of Zagreb Prison Hospital.

25 October 2007

[He] is not taking the treatment prescribed.

...”

91. On 5 November 2007 the applicant was transferred back to Lepoglava State Prison.

The applicant's stay in Lepoglava State Prison from 5 November 2007 to an unspecified date in 2008

92. The relevant part of the applicant's medical record during his second stay in Lepoglava State Prison reads:

“16 November 2007

Psychiatric examination in Lepoglava State Prison: [he is] conscious, well orientated, [he is] not suicidal, [there are] no signs of psychosis, [there is] low frustration tolerance, [he is] dissatisfied with his placement, treatment and other. Placement in a smaller, non-smoking cell is recommended. [He] refuses the treatment offered (Haldol). Treatment: Apaurin ..., Fluzepan ..., stronger involvement on the part of the treatment services. D[ia]g[nosis]: Personality disorder, PTSD. [Next] check in a month.

...

28 November 2007

Psychiatric examination in Lepoglava State Prison by a psychiatrist from Zagreb Prison Hospital.... Placement in a smaller non-smoking cell is recommended.... Patient [is] motivated to work. It is recommended that he works if possible, which would also be curative. Psychiatric supervision as needed. D[i]g[anosis]: the same. Treatment: the same. ...

...

4 December 2007

Psychiatric examination in Lepoglava State Prison ... Allegedly the patient is not eating because the recommendations by psychiatrists have not been followed. We request that these recommendations be followed. On examination he is neither psychotic nor suicidal. Psychiatric supervision as needed.

...

18 December 2007

Psychiatric examination in Lepoglava State Prison ... tolerance towards frustrations still low, [he is] dissatisfied with treatment, [but is] motivated to work. Placement in a smaller, non-smoking cell is recommended as well as including him in the PTSD group.

Treatment: Apaurin ..., Sanval ...

Psychiatric supervision as needed.

...

15 January 2008

Psychiatric examination in Lepoglava State Prison ... somewhat better in view of his new job and a smaller cell, which had so far been the biggest problem. Ventilation interview. Treatment: Apaurin ..., Sanval."

The applicant's further transfers

93. On an unspecified date in 2008 the applicant was transferred to Varaždin Prison where he stayed until 27 April 2009 when he was transferred to Zadar Prison. On 8 June 2009 he was transferred to Pula Prison and on 28 July 2009 to Zagreb Prison.

3. Civil proceedings instituted by the applicant against the State

94. As to the twenty-eight days of his unlawful detention between 2 and 30 March 2005, on 28 October 2005 the applicant applied to the Ministry of Justice (Ministarstvo Pravosuđa) for compensation in the sum of 500 Croatian kunas (HRK) per day and HRK 5,500 for lost earnings. Since he received no reply, the applicant brought a civil action against the State in the Prelog Municipal Court, seeking the above amounts in connection with his unlawful detention. He also complained that since 2 March 2004 he had been detained in inadequate, small and overcrowded cells and only allowed to spend fifteen to twenty minutes a day in the fresh air, and also that he had been detained with smokers, minors and convicts between 14 July and 26 September 2004. He further complained of inadequate conditions in the prison hospital and Lepoglava State Prison, as well as inadequate medical care. In this connection he alleged that he had not been provided with eye glasses and that an examination of his head had been carried out late, while an examination of his spine had not been carried out at all, and that he had not been provided with the requisite psychiatric treatment although he suffered from PTSD. He also alleged that he had been strapped to his bed and forced to spend long periods confined in the same room with smokers, all of which resulted in immense physical and mental suffering. The applicant complained in addition that he had had no opportunity to consult the case file during the criminal proceedings against him. He sought HRK 469,500 under all the above heads.

95. On 24 April 2006 the Prelog Municipal Court declared the applicant's action inadmissible on the grounds that he had failed to firstly seek compensation with the competent State Attorney's Office. The first-instance decision was quashed by the Čakovec County Court and

the case was remitted to the Municipal Court for fresh examination. On 7 November 2008 the Municipal Court again declared the applicant's claim inadmissible on the same grounds. The applicant lodged an appeal and the appeal proceedings are still pending.

II. RELEVANT DOMESTIC LAW

96. Article 23 of the Croatian Constitution (Ustav Republike Hrvatske) provides:

"No one shall be subjected to any form of ill-treatment ..."

97. The relevant part of section 62 of the Constitutional Court Act (Official Gazette no. 49/2002, of 3 May 2002, Ustavni zakon o Ustavnom sudu Republike Hrvatske) reads as follows:

Section 62

"1. Anyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which has determined his or her rights and obligations, or a suspicion or accusation of a criminal act, has violated his or her human rights or fundamental freedoms or his or her right to local and regional self-government guaranteed by the Constitution (hereinafter: constitutional right) ...

2. If there is provision for another legal remedy in respect of a violation of the constitutional rights [complained of], a constitutional complaint may be lodged only after this remedy has been exhausted.

..."

98. The relevant part of the Code of Criminal Procedure (Official Gazette nos. 62/2003 – Zakon o kaznenom postupku) provides as follows:

Article 4

"(1) The defendant shall be informed of any charge against him and the grounds thereof from the time of the first interview.

(2) The defendant shall have the opportunity to give his or her statement on all incriminating facts and evidence, as well as facts and evidence favourable to him.

(3) The defendant is obliged neither to present his or her defence nor to answer any question. It is forbidden and punishable to extort a confession or any other statement from the defendant or any other person participating in the proceedings."

Article 5

"(1) The defendant has the right to defend himself or herself in person or through legal counsel of his or her own choosing from among the members of the Bar. Where prescribed by this Code, defence counsel shall be officially appointed in order to ensure [the right to] defence of a defendant who has declined to appoint a defence counsel.

(2) Under the conditions set out in this Code, a defendant who, owing to the lack of means to pay for legal assistance, has not chosen a defence counsel shall be provided, at his or her request, with a defence counsel at the expense of the court [conducting the proceedings].

(3) The court or another authority participating in the proceedings shall inform the defendant of his or her right to a defence counsel from the time of the first interview.

(4) The defendant shall have adequate time and facilities for the preparation of his or her defence."

Article 13

"The court [conducting the criminal proceedings] shall inform a defendant ... of his or her rights guaranteed under this Code and the consequences of failure to undertake a step required therein."

Article 65

"A defendant in pre-trial detention shall have access to a defence counsel as soon as a decision [to place him or her in] detention has been adopted and as long as the detention lasts."

Article 104

"(1) Detention may be imposed only if the same purpose cannot be achieved by another [preventive] measure.

(2) Detention shall be lifted and the detainee released as soon as the grounds for detention cease to exist.

(3) When deciding on detention, in particular its duration, the court shall take into consideration the proportionality between the gravity of the offence, the sentence which ... may be expected to be imposed, and the need to order and determine the duration of detention.

(4) The judicial authorities conducting the criminal proceedings shall proceed with particular urgency when the defendant is in detention and shall review of their own motion whether the grounds and legal conditions for detention have ceased to exist, in which case the detention measure shall immediately be lifted."

Article 105

"(1) Where a reasonable suspicion exists that a person has committed an offence, that person may be placed in detention:

..."

The relevant provisions regulating the duration of detention read as follows:

Article 110 provides, inter alia, that detention ordered by an investigating judge may last one month and may be extended, for justified reasons, by a three-member judicial panel for two more months and after that for another three months. However, the maximum duration of detention during investigation shall not exceed six months.

Article 111 provides, inter alia, that following indictment detention may last until the judgment becomes final and after that until the decision imposing a prison sentence becomes final. In that period a judicial panel of three members shall assess every two months whether the conditions for detention still exist.

Article 114

"(1) Prior to adoption of the first-instance judgment pre-trial detention may last for a maximum of:

...

2. one year for offences carrying a sentence of a statutory maximum of five years' imprisonment;

...

(2) In cases where a judgment has been adopted but has not yet become operative, the maximum term of pre-trial detention may be extended for one sixth of the term referred to in subparagraphs 1 to 3 of paragraph 1 of this provision until the judgment becomes final, and for one fourth of the term referred to in subparagraphs 4 and 5 of paragraph 1 of this provision.

(3) Where the first-instance judgment has been quashed on appeal, following an application by the State Attorney and where important reasons exist, the Supreme Court may extend the term of detention referred to in subparagraphs 1 to 3 of paragraph 1 of this provision for another six months and the term referred to in subparagraphs 4 and 5 of paragraph 1 of this provision for another year.

(4) Following the adoption of the second-instance judgment against which an appeal is allowed, detention may last until the judgment becomes final, for a maximum period of three months.

(5) A defendant placed in detention and sentenced to a prison term by a final judgment shall stay in detention until he is sent to prison, but for no longer than the duration of his prison term."

Article 164

"...

(5) The defendant has the right to consult and copy the case file and items intended for the assessment of facts in the proceedings.

..."

Article 425

"(1) A defendant finally sentenced to a prison term ... may lodge a request for extraordinary review of a final judgment on account of infringements of laws in circumstances prescribed by this Act.

..."

Article 427

A request for extraordinary review of a final judgment may be lodged on account of:

...

3. infringement of the defence rights at the main hearing ...

Article 498

“Compensation may be awarded to a person who

...

3. owing to an error or unlawful action by a State authority ... has been kept in detention after the statutory time-limit had expired ...”

99. Article 217 of the Criminal Code (Osnovni krivični zakon, Official Gazette nos. 110/1997, 28/1998, 50/2000, 129/2000, 51/2001 and 111/2003), imposes, inter alia, a sentence of up to five years' imprisonment for aggravated theft.

100. The relevant part of section 186(a) of the Civil Procedure Act (Zakon o parničnom postupku, Official Gazette nos. 53/91, 91/92, 58/93, 112/99, 88/01 and 117/03 reads as follows:

“A person intending to bring a civil suit against the Republic of Croatia shall first submit a request for a settlement to the competent State Attorney's Office.

...

Where the request has been refused or no decision has been taken within three months of its submission, the person concerned may file an action with the competent court.

...”

101. The relevant provisions of the Enforcement of Prison Sentences Act (Zakon o izvršavanju kazne zatvora, Official Gazette nos. 128/1999 and 190/2003) read as follows:

PURPOSE OF A PRISON TERM

Section 2

“The main purpose of a prison term, apart from humane treatment and respect for personal integrity of a person serving a prison term ... is development of his or her capacity for life after release in accordance with the laws and general customs of society.”

PREPARATION FOR RELEASE AND ASSISTANCE AFTER RELEASE

Section 13

“During the enforcement of a prison sentence a penitentiary or prison shall, together with the institutions and other legal entities in charge of assistance after release, ensure that a prisoner is prepared for his or her release [from prison].”

COMPLAINTS

Section 15

“(1) Inmates shall have the right to complain about an act or decision of a prison employee.

(2) Complaints shall be lodged orally or in writing with a prison governor, a judge responsible for the execution of sentences or the Head Office of the Prison Administration. Written complaints addressed to a judge responsible for the execution of sentences or the Head Office of the Prison Administration shall be submitted in an envelope which the prison authorities may not open ...”

JUDICIAL PROTECTION AGAINST ACTS AND DECISIONS OF THE PRISON ADMINISTRATION

Section 17

“(1) An inmate may lodge a request for judicial protection against any acts or decisions unlawfully denying him, or limiting him in, any of the rights guaranteed by this Act.

(2) Requests for judicial protection shall be decided by the judge responsible for the execution of sentences.”

INDIVIDUAL PROGRAMME FOR THE ENFORCEMENT OF A PRISON TERM

Section 69

(1) The individual programme for the enforcement of a prison term (hereinafter “the enforcement programme”) consists of a combination of pedagogical, working, leisure, health, psychological and safety acts and measures aimed at organising the time spent during the prison term according to the character traits and needs of a prisoner and the type and facilities of a particular penitentiary or prison. The enforcement programme shall be designed with a view to fulfilling the purposes of a prison term under section 7 of this Act.

(2) The enforcement programme shall be devised by a prison governor on the proposal of a penitentiary or a prison's expert team ...

(3) The enforcement programme shall contain information on ... special procedures (... psychological and psychiatric assistance ... special security measures ...)

..."

HEALTH PROTECTION

Section 103

"(1) Inmates shall be provided with medical treatment and regular care for their physical and mental health..."

OBLIGATORY MEDICAL EXAMINATION

Section 104

"...

(2) A doctor shall examine a sick or injured inmate ... and undertake all measures necessary to prevent or cure the illness and to prevent deterioration of the inmate's health."

SPECIALIST EXAMINATION

Section 107

"(1) An inmate has the right to seek a specialist examination if such an examination has not been ordered by a prison doctor.

..."

III. RELEVANT COUNCIL OF EUROPE DOCUMENTS

102. The relevant part of the Report to the Croatian Government on the visit to Croatia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 4 to 14 May 2007 reads:

"84. The provision of adequate psychiatric care was problematic at Lepoglava Prison. Efforts to employ a full-time psychiatrist had not been successful, due to the fact that remuneration and other working conditions fell short of those offered in health establishments; instead, two psychiatrists attended the establishment for a total of six hours a week, and a third from

Zagreb Prison Hospital was involved in various programmes for different categories of patients (e.g. drug-addicts, inmates with post-traumatic-stress-disorder (PTSD), sexual offenders).

The CPT recommends that steps be taken to:

- significantly increase the hours of attendance of psychiatrists at Lepoglava Prison;

- ensure that prisoners at Lepoglava, Osijek and Rijeka Prisons benefit from the services of a psychologist."

3.2.3. The law

I. ALLEGED VIOLATIONS OF ARTICLE 3 and 8 OF THE CONVENTION

103. The applicant complained about the general conditions of his detention in various prisons and alleged that the prison authorities had failed to secure him adequate medical care for his psychiatric condition, in particular PTSD. He further complained that on several occasions he had been attacked by prison personnel and other inmates and that no steps had been taken in this respect. The applicant also complained of the fact that he had been placed in a cell with smokers. He relied on Articles 3 and 8 of the Convention, which reads as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8

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

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

104. The Government contested these arguments.

A. Admissibility

1. The applicant's stay in Varaždin Prison from March 2004 to 30 March 2005 and in Zagreb Prison from 13 June to 6 July 2005

105. The Government firstly argued that in respect of the period the applicant had spent in Varaždin Prison from March 2004 until 30 March 2005 the application had been lodged with the Court outside the six-month time-limit.

106. The applicant made no comments.

107. The Court notes that the applicant's first pre-trial detention in Varaždin Prison ended on 30 March 2005, when he was released. Thus, the six-month period in respect of the conditions of the applicant's detention in that period started to run on 31 March 2005. As regards the applicant's stay in Zagreb Prison, the Court notes that it ended on 6 July 2005.

108. However, the applicant lodged his application with the Court on 19 May 2006, more than six months later.

109. It follows that the part of the application concerning the applicant's complaints about this stay in Varaždin Prison from March 2004 to 30 March 2005 and in Zagreb Prison from 13 June to 6 July 2005 has been introduced out of time and must be rejected in accordance with Article 35 §§ 1^{37} and 4^{15} of the Convention.

2. The applicant's detention from 6 July 2005 to 5 November 2007

110. The Government requested the Court to declare the complaints under Article 3^{39} of the Convention inadmissible for failure to exhaust domestic remedies. They submitted that the 1999 Enforcement of Prison Sentences Act envisaged a number of remedies for the protection of the rights of persons deprived of liberty, including judicial protection against proceedings and decisions of the prison administration. The applicant should have firstly addressed his complaints to the prison administration. The applicant had, however, addressed only some of his complaints directly to a judge responsible for the execution of sentences.

111. The applicant argued that he had exhausted all available remedies.

112. According to the Court's established case-law, where an applicant has a choice of domestic remedies, it is sufficient for the purposes of the rule of exhaustion of domestic

remedies that that applicant make use of the remedy which is not unreasonable and which is capable of providing redress for the substance of his or her Convention complaints (see, inter alia, Hilal v. the United Kingdom (dec.), no. 45276/99, 8 February 2000, and Krumpel and Krumpelová v. Slovakia, no. 56195/00, § 43, 5 July 2005). Indeed, where an applicant has a choice of remedies and their comparative effectiveness is not obvious, the Court interprets the requirement of exhaustion of domestic remedies in the applicant's favour (see Budayeva and Others v. Russia, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, § 110, ECHR 2008-... (extracts), and the cases cited therein). Once the applicant has used such a remedy, he or she cannot also be required to have tried others that were also available but probably no more likely to be successful (see Ivan Vasilev v. Bulgaria, no. 48130/99, § 56, 12 April 2007 and the cases cited therein).

113. As to the remedies available to the applicant under the Enforcement of Prison Sentences Act, the Court notes that section 5(2) of that Act clearly provides that complaints shall be lodged orally or in writing with a prison governor, a judge responsible for the execution of sentences or the Head Office of the Prison Administration of the Ministry of Justice. It follows that the applicant could have addressed his complaints to any of these authorities (see Štitić.v. Croatia, no. 29660/03, § 27, 8 November 2007).

114. In this connection the Court notes that on 1 September and 7 December 2005 the applicant made complaints to the Varaždin County Court judge responsible for the execution of sentences about the conditions in Lepoglava State Prison and the lack of adequate psychiatric treatment. The latter complaint he repeated to the Ministry of Justice. Again, in his appeal of 16 May 2006 against the decision of the Lepoglava State Prison authorities to place him in a Strict Supervision Department, addressed to the Varaždin County Court judge responsible for the execution of sentences, the applicant complained of the lack of adequate medical treatment and his conflicts with other inmates. The applicant's complaint of 30 May 2006, addressed to the Ombudsman's Office, was forwarded to the Head of Prison Administration. In his further complaint to the Varaždin County Court judge responsible for the execution of sentences, of 25 September 2006, the applicant complained of the use of force against him on 18 September 2006.

115. During his stay in Gospić Prison, on 6 November 2006 the applicant complained to the Head of the Prison Administration.

116. A complaint about conditions in Pula Prison was sent to the Ministry of Family, War Veterans and Inter-Generational Solidarity, which forwarded it to the Head of the Prison

Administration on 26 January 2007. The applicant also complained about the incidents in Pula Prison of 21 January and 17 February 2007 in his oral statement given before the Pula County Court judge responsible for the execution of sentences.

117. It follows that the applicant did complain both to the competent judges responsible for the execution of sentences and to the Prison Administration. In the Court's view this choice was in conformity with the domestic legislation. However, the judges did not institute any proceedings upon the applicant's complaints; nor did they issue a decision on them. Instead, they replied to the applicant by letters.

118. The Court finds that the applicant, by complaining to the competent judges responsible for the execution of sentences and the Prison Administration, made adequate use of the remedies provided for in the domestic law that were at his disposal in respect of his complaints concerning the inadequate prison conditions and the lack of adequate medical assistance as well as the alleged attacks on him by the prison guards on three separate occasions. Accordingly, the complaints concerning the applicant's stay in Lepoglava State Prison from 6 July 2005 to 14 October 2006, in Gospić Prison from 14 October 2006 to 6 January 2007 and in Pula Prison from 6 January to 5 November 2007, cannot be dismissed for failure to exhaust domestic remedies (see Štitić.v. Croatia, cited above, § 30).

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

3. The applicant's further detention from 5 November 2007 on

120. As regards the applicant's stay in various detention facilities after 5 November 2007, the Court notes that the applicant has not shown that he has exhausted available domestic remedies. It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. Merits

1. The parties' submissions

121. The applicant made global complaints about his overall detention. He maintained that he had been placed in overcrowded cells, mostly with smokers, although he did not smoke. He further argued that although he had been suffering from post-traumatic stress disorder, he had not received any treatment in this connection. The applicant also alleged that on three separate

occasions, namely, on 18 September 2006 and 21 January and 17 February 2007, he had been beaten up by prison personnel and that no adequate steps had been taken by the relevant domestic authorities to investigate these allegations.

122. The Government also submitted global arguments as regards the overall period of the applicant's detention. They argued that the conditions of the applicant's detention had not amounted to inhuman treatment within the meaning of Article 3 of the Convention. They maintained that he had had adequate cell space and that he had been able to have at least two hours' fresh air daily. As regards the working opportunities and leisure activities, the Government submitted that during his detention after conviction the applicant had had a possibility to work and it had depended on him to benefit from it. He had also been able to undergo computer training, watch television or read.

123. As regards the psychiatric treatment, the Government argued that none of the experts had established that the applicant's mental condition had been incompatible with serving a prison term in a regular prison. The applicant had been under constant psychiatric and medical supervision. Whenever his condition had worsened, he had been placed in a hospital or his treatment had been adjusted. He had been administered the prescribed pharmacotherapy. He had been involved in PTSD group-therapy sessions while in Lepoglava State Prison. While in Pula Prison such group sessions had also been provided and the applicant had initially been included. However, owing to his frequent conflicts with other inmates and his general disruptive behaviour his further participation was terminated. There was no indication that his medical condition had worsened during his stay in prison.

124. As regards the alleged assaults on the applicant by the prison personnel, the Government argued that none of them reached the required level of severity under Article 3 of the Convention. On each occasion the use of force against the applicant had been necessary and undertaken solely with the aim of preventing the applicant from attacking others or inflicting self-injuries. On 18 September 2006 the force was used by the prison personnel in order to protect the prison guards from the chair thrown by the applicant at prison guards; that use of force against the applicant had been justified. Although the prison doctor had been immediately summoned, the applicant had refused to be examined. He had made no complaints about the incident. Likewise, as regards the incidents of 21 January and 17 February 2007, the applicant had refused to be examined by a doctor immediately after the incidents and subsequent medical reports showed no injuries on the applicant's body. On each occasion the guards in question were heard by the prison authorities and had made reports on

the incidents. As regards the incidents of 21 January and 17 February 2007, the competent judge responsible for the execution of sentences had heard the applicant and obtained the reports from the Pula Prison authorities and concluded that the applicant's allegations were unfounded.

2. The Court's assessment

(a) Scope of the issues for consideration

125. The Court notes that the applicant's complaints under Article 3 and 8[21] of the Convention mainly concern three issues:

- first, whether the general conditions of the applicant's detention in various prison facilities were compatible with that provision;

- second, whether adequate steps were taken in connection with the applicant's allegations of attacks on him by the prison personnel and other inmates; and

- third, whether the applicant received adequate medical care for his psychiatric condition.

126. As regards the first and the third issue, the Court notes that the period to be examined starts with the applicant's first placement in Lepoglava State Prison on 6 July 2005 and ends on 5 November 2007 when he was again transferred from Pula Prison to Lepoglava State Prison. As regards the period of the applicant's detention prior to 6 July 2005, it is to be noted, as concluded above (see paragraph 110) that that part of the application was lodged with the Court out of the six-month time-limit. As regards the period after the applicant was transferred from Pula Prison back to Lepoglava State Prison on 5 November 2007, it is to be noted that the applicant has not exhausted domestic remedies as regards any complaints concerning his detention following that transfer (see paragraph 121 above).

127. Before addressing further issues as to the applicant's above complaints, the Court notes that it is the master of the characterisation to be given in law to the facts of the case; it does not consider itself bound by the characterisation given by an applicant or a government. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see Powell and Rayner v. the United Kingdom, 21 February 1990, § 29, Series A no. 172, and Guerra and Others v. Italy, 19 February 1998, § 44, Reports 1998 I).

128. In this connection the Court stresses that its case-law does not exclude that treatment which does not reach the severity of Article 3 may nonetheless breach Article 8 in its private-

life aspect where there are sufficiently adverse effects on physical and moral integrity (see Costello-Roberts v. the United Kingdom, judgment of 25 March 1993, Series A no. 247-C, § 36). In the present case the Court will consider the applicant's complaints concerning the general conditions of his detention and the alleged attacks on him under Article 3 of the Convention, while the remaining complaints, concerning the alleged lack of adequate psychiatric treatment, will be examined under Article 8 of the Convention.

A. COMPLAINTS TO BE EXAMINED UNDER ARTICLE 3 OF THE CONVENTION

1. General principles enshrined in the case-law

129. As the Court has held on many occasions, Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see Labita v. Italy [GC], no. 26772/95, § 119, ECHR 2000-IV).

130. The Court reiterates that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see Kudła v. Poland [GC], no. 30210/96, § 91, ECHR 2000-XI, and Peers v. Greece, no. 28524/95, § 67, ECHR 2001-III). Although the purpose of such treatment is a factor to be taken into account, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3 (ibid., § 74).

2. Application in the present case

a. General conditions of the applicant's detention

131. One of the characteristics of the applicant's detention that requires examination is his allegation that the cells were overpopulated. In this connection the Court observes that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has set 4 sq. m per prisoner as an appropriate, desirable guideline for a detention cell (see, for example, the CPT Report on its visit to Latvia in 2002 – CPT/Inf (2005) 8, § 65). This approach has been confirmed by the Court's case-law. The Court notes that in the Peers case a cell of 7 sq. m for two inmates was noted as a relevant aspect in finding a violation of Article 3, albeit that in that case the space factor was coupled with an

established lack of ventilation and lighting (see Peers v. Greece, no. 28524/95, §§ 70–72, ECHR 2001-III). In the Kalashnikov case the applicant had been confined to a space measuring less than 2 sq. m. In that case the Court held that such a degree of overcrowding raised in itself an issue under Article 3 of the Convention (see Kalashnikov v. Russia, no. 47095/99, §§ 96–97, ECHR 2002-VI). The Court reached a similar conclusion in the Labzov case, where the applicant was afforded less than 1 sq. m of personal space during his 35-day period of detention (see Labzov v. Russia, no. 62208/00, §§ 41-49, 16 June 2005), and in the Mayzit case, where the applicant was afforded less than 2 sq. m during nine months of his detention (see Mayzit v. Russia, no. 63378/00, § 40, 20 January 2005).

132. By contrast, in some other cases no violation of Article 3 was found, as the restricted space in the sleeping facilities was compensated for by the freedom of movement enjoyed by the detainees during the daytime (see Valašinas, cited above, §§ 103-107, and Nurmagomedov v. Russia (dec.), no. 30138/02, 16 September 2004).

(i) Lepoglava State Prison from 6 July 2005 to October 2006

133. According to the Government from July to September 2005 the applicant shared a cell measuring 9.12 square metres with three other inmates; from September to December 2005 he shared a cell measuring 9.82 square metres with three other inmates; in May and June 2006 he shared a cell measuring 10.13 square metres with one inmate; from July to September 2006 he shared a cell measuring 13.72 square metres with three other inmates. In all cells there was a separate toiled area. No information was submitted either by the Government or the applicant for the period between December 2005 and May 2006. It follows that the applicant was confined in a space below the standards set by the CPT in the following periods: from July to September 2005 the applicant was confined to a space measuring 2.28 square metres; from September to December 2005 to 2.45 square metres; and from July to September 2006 to 3.43 square metres.

134. The applicant's daily regime during the periods when he did not work allowed for his movement out of cell during the entire day save for the period from 10.45 p.m. to 7.00 a.m. During the daytime he was allowed to either stay in the cell or in a TV-room or to make telephone calls. He was also allowed optional outdoor exercise of an hour and a half twice a day. In the periods when he worked, the applicant was allowed out of the cell from 6 a.m. to 10.45 p.m. After his work ended at 3 p.m., the applicant was allowed optional activities until 5.15 p.m., including an outdoor exercise. In the Court's view, the scarce space of the

applicant's cells was compensated for by the freedom of movement allowed. The Court finds no other aggravating circumstances of the applicant's detention in Lepoglava State Prison.

135. The fact that, during his incarceration, the applicant was at times placed in cells with smokers cannot in itself amount to treatment contrary to Article 3 of the Convention because no specific consequences have been cited, such as an established serious effect on the applicant's health.

136. The foregoing considerations are sufficient for the Court to conclude that there has been no violation of Article 3 of the Convention on account of the general conditions of the applicant's detention in Lepoglava State Prison in the period from 6 July 2005 to 14 October 2006.

(ii) Gospić Prison from 14 October 2006 to 6 January 2007

137. From 14 October 2006 to 6 January 2007 the applicant shared a cell measuring 12.12 square metres with one other inmate. Thus, he was confined to personal space measuring 6.06 square metres, which is in conformity with the standards set by the CPT. The Court finds no other aggravating circumstances of the applicant's detention in Gospić Prison.

138. The Court concludes that the information submitted by the applicant does not suffice for it to find a violation of Article 3 of the Convention on account of the general conditions of the applicant's detention in Gospić Prison in the period from 14 October 2006 to 6 January 2007.

(iii) Pula Prison from 6 January to 5 November 2007

139. From 6 January 2007 to 8 February 2007 he shared a cell measuring 10.02 square metres with one other inmate; and from 8 February 2007 to 5 November 2007 he shared one measuring 8.73 square metres with another inmate, save for the period from 4 to 19 October 2007 when he was in Zagreb Prison Hospital. Thus he was confined to personal space between 5.01 and 4.36 square metres, which is in conformity with the standards set by the CPT.

140. The Court finds no other aggravating circumstances of the applicant's detention in Pula Prison and concludes that the information submitted by the applicant does not suffice for it to find a violation of Article 3 of the Convention on account of the general conditions of the applicant's detention in Pula Prison in the period from 6 January to 5 November 2007.

(iv) Conclusion

141. In conclusion the Court finds that there has been no violation of Article 3 of the Convention as regards the general conditions of the applicant's detention from 6 July 2005 to 5 November 2007.

b. Alleged assaults on the applicant in prison

142. The Court reiterates that where an individual is taken into police custody in good health but is found to be injured at the time of his release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 (see Selmouni v. France [GC], no. 25803/94, § 87, ECHR 1999 V, and Satık and Others v. Turkey, no. 31866/96, § 54, 10 October 2000).

143. In the Court's opinion, the same principle extends to detainees in a prison having regard to the fact that they are deprived of their liberty and remain subject to the control and responsibility of the prison administration. In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see Tekin v. Turkey, 9 June 1998, Reports 1998-IV, §§ 52 and 53).

144. Where an individual raises an arguable claim that he or she has been seriously ill-treated by the state authorities in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see Assenov and Others, cited above, § 102; Labita v. Italy [GC], no. 26772/95, § 131, ECHR 2000-IV; and Muradova v. Azerbaijan, no. 22684/05, § 100, 2 April 2009). The minimum standards as to effectiveness defined by the Court's case-law also include the requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness (see, for example, Menesheva v. Russia, no. 59261/00, § 67, ECHR 2006 III).

145. The investigation into serious allegations of ill-treatment must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should

not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions (see Assenov and Others, cited above, § 103 et seq.). They must take all reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony and forensic evidence (see Tanrıkulu v. Turkey [GC], no. 23763/94, ECHR 1999-IV, § 104 et seq., and Gül v. Turkey, no. 22676/93, § 89, 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard.

(i) Incident of 18 September 2006

146. The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence. In assessing evidence, the Court has generally applied the standard of proof beyond reasonable doubt. However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see Salman v. Turkey [GC], no. 21986/93, § 100, ECHR 2000 VII, and Dedovskiy and Others v. Russia, no. 7178/03, § 74, 15 May 2008).

147. It is not disputed between the parties that on 18 September 2006 force was used against the applicant by prison guards. However, the course of the incident is differently described by the applicant and by the Government. While the applicant asserted that the prison guards had beaten him, the Government, relying on several written reports by the Lepoglava State Prison personnel submitted to the prison governor, alleged that force was used against the applicant strictly for the purposes of responding to his violent behaviour and handcuffing him and strapping him to the bed.

148. The Court notes that the prison doctor arrived immediately afterwards to examine the applicant. In the applicant's medical record the doctor described the applicant as being anxious, verbally aggressive, dissatisfied with being handcuffed and banging against the bed with the handcuffs. The doctor recorded no wounds or any other traces of physical injuries.

149. In view of the above, the Court considers that these indications are insufficient to substantiate the ill-treatment described by the applicant. Thus the Court finds that there is insufficient evidence to support the applicant's allegation that on 18 September 2007 he was beaten by prison guards. Therefore, there has been no substantive violation of Article 3 of the Convention as regards the said incident.

150. The Court reiterates that Article 3 of the Convention also requires the authorities to investigate allegations of ill-treatment when they are “arguable” and “raise a reasonable

suspicion" (see Gök and Güler v. Turkey, no. 74307/01, § 38, 28 July 2009). In the present case the Court has not found it proved, on account of lack of evidence, that the applicant was ill-treated. Nevertheless, as it has held in previous case, that does not preclude his complaint in relation to Article 3 form being "arguable" for the purposes of the positive obligation to investigate (see Böke and Kandemir v. Turkey, nos. 71912/01, 26968/02 and 36397/03, § 54, 10 March 2009).

151. The Court notes that it is undisputed that on 18 September 2006 an incident took place in Lepoglava State Prison where physical force was used against the applicant by the prison guards. Furthermore, in his complaint of 25 September 2006 addressed to the Varaždin County Court judge responsible for the execution of sentences, the applicant alleged, inter alia, that on 18 September 2006 he had been beaten up in Lepoglava State Prison by prison guards. In view of particularly vulnerable position of detained persons and the requirement that any use of physical force by the state officials must be confined to the level of strictly necessary, the Court considers that the above facts called for an investigation into the applicant's allegations of ill-treatment in order to establish all relevant circumstances of the use of physical force against the applicant. However, the applicant's allegations were ignored.

152. As to the Government's argument that the prison personnel involved in the incident made written reports to the prison governor, the Court reiterates that it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see, mutatis mutandis, Güleç v. Turkey, 27 July 1998, Reports 1998-IV, §§ 81-82; Öğur v. Turkey, [GC] no. 21954/93, ECHR 1999-III, §§ 91-92; and McShane v. the United Kingdom, no. 43290/98, § 95, 28 May 2002). This means not only a lack of hierarchical or institutional connection, but also a practical independence (see, mutatis mutandis, Ergi v. Turkey, 28 July 1998, Reports 1998-IV, §§ 83-84).

153. In the present case the written reports and oral statements of the guards involved were made within the prison and were subject to scrutiny by the prison governor, who was the hierarchical superior of the persons implicated in the incident. Furthermore, neither the prison governor nor any other official has issued any decision as to the applicant's allegations. This cannot be seen as a thorough and effective investigation into the applicant's allegations of ill-treatment by the prison personnel carried out by independent and impartial bodies. In the Court's view, the onus was primarily on the Varaždin County Court judge responsible for the execution of sentences, to whom the applicant submitted his complaint of ill-treatment, or

other independent prosecuting or judicial authority, to examine the available evidence, such as taking statements from the applicant, the officers involved and the prison doctor, and carrying out an independent assessment of the facts. However, the judge ignored the applicant's allegations.

154. Having regard to the above findings, the Court finds that the inquiry carried out into the applicant's allegations of ill-treatment was not independent, thorough, adequate or efficient. There has accordingly been a violation of Article 3 of the Convention under its procedural limb.

(ii) Incident of 21 January 2007

155. Again, it is not disputed between the parties that on 21 January 2007 force was used against the applicant by prison guards. However, the course of the incident is differently described by the applicant and by the Government. While the applicant asserted that one of the prison guards had stamped on his foot and the other had hit him on the head, the Government, relying on several written reports by the Pula Prison personnel, alleged that the force was used against the applicant strictly for the purpose of responding to his violent behaviour and handcuffing him and strapping him to the bed.

156. The Court notes that there is no medical documentation or any other evidence supporting the applicant's allegations of ill-treatment. Therefore, the Court considers that there is insufficient evidence to support the applicant's allegation that on 21 January 2007 he was ill-treated by prison guards. Therefore, there has been no substantive violation of Article 3 of the Convention as regards the said incident.

157. As to the procedural aspect of Article 3 of the Convention, and especially in the context of detained persons, the Court refers to the principles stated above in paragraphs 150 and 151. In his statement given before the Pula County Court judge responsible for the execution of sentences on 26 February 2007, the applicant alleged, inter alia, that on 21 January 2007 one of the prison guards had stamped on his foot while the other had thumped him on the head. The judge requested the report from the Pula Prison authorities, which report was filed on 9 March 2007, briefly describing the event in question. In a letter of 23 March 2007 the judge dismissed the applicant's allegations. The Court notes that the judge did not hear any of the guards involved in person. As to the report submitted by the Pula Prison authorities, the Court notes that it did not describe the details of the incident, but only briefly stated that a special

measure of maintaining order and security had been applied to the applicant because he had previously threatened to inflict self-injuries.

158. As to the Government's argument that the prison personnel involved in the incident submitted written reports to the prison governor, the Court refers to the findings as regards the incident of 18 September 2006 (see paragraphs 152 and 153 above).

159. In sum, the Court considers that there was no thorough, effective and independent investigation into the applicant's allegations of ill-treatment by the prison personnel. There has accordingly been a violation of Article 3 of the Convention under its procedural limb.

(iii) Incident of 17 February 2007

160. As regards the incident of 17 February 2007, the applicant alleged that while being strapped to the bed in solitary confinement one guard had thumped him on the left side of his chest. The Government denied that any force had been used against the applicant that day.

161. The Court notes that four days after the alleged incident, on 21 February 2007, the applicant was examined by the Pula Prison doctor who drew up a report stating that the applicant complained of pain in the left hemithorax and that trauma was not excluded, though the doctor found no visible signs of trauma or haematoma. While breathing, the applicant spared the left side and expressed pain at palpation of the left upper ribs. He was sent for an x-ray examination, which was done on 22 February 2007 and did not reveal any signs of rib-related trauma or lung alteration.

162. In the Court's view, the above medical report does not suffice to conclude beyond reasonable doubt that the applicant had been hit on the left side of his chest. While it is true that he expressed pain on being touched in that area, neither the examination by the prison doctor, nor the x-ray examination revealed any sign of injury. Therefore, the Court considers that there is insufficient evidence to support the applicant's allegation that on 17 February 2007 he was ill-treated by prison guards. Therefore, there has been no substantive violation of Article 3 of the Convention as regards the said incident.

163. As to the procedural aspect of Article 3 of the Convention, the Court first notes that in his statement given before the Pula County Court judge responsible for the execution of sentences on 26 February 2007, the applicant alleged, inter alia, that on 17 January 2007 one of the prison guards had thumped him on the left side of his chest while the applicant had been strapped to a bed in solitary confinement. It follows that the applicant duly informed the

relevant national authorities of the substance of his complaints under Article 3 of the Convention. A question now arises as to whether in the specific circumstances of the incident at issue an obligation arose for the relevant State authorities to investigate the applicant's allegations of ill-treatment. In this connection the Court observes that the judge requested the report from the Pula Prison authorities, which report was filed on 9 March 2007 stating that no force had been used against the applicant.

164. The Court finds that because of the lack of clear medical findings that the applicant had any injuries coupled with the lack of any conducive evidence that physical force was used against the applicant, his assertion of ill-treatment against him by the prison guards allegedly occurred on 17 February 2007 lacked credibility and therefore did not entail a procedural obligation under Article 3 of the Convention to investigate the applicant's allegations.

There has accordingly been no violation of Article 3 of the Convention under its procedural limb.

B. COMPLAINTS TO BE EXAMINED UNDER ARTICLE 8 OF THE CONVENTION

165. Private life" is a broad term not susceptible to exhaustive definition. The Court has already held that mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life (see Bensaid v. the United Kingdom, no. 44599/98, § 47, ECHR 2001 I).

166. The Court further reiterates that, while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private (see Van Kück v. Germany, no. 35968/97, § 70, ECHR 2003 VII). However, the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In determining whether or not such an obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual; and in both contexts the State enjoys a certain margin of appreciation (see, for instance, Keegan v. Ireland, 26 May 1994, Series A no. 290, § 49; Sheffield and Horsham v. the United Kingdom, 30 July 1998, § 52, Reports of Judgments and Decisions 1998 V and Mikulić v. Croatia, no. 53176/99, § 57, ECHR 2002 I).

167. The Court firstly notes that it has been established by appropriate experts that the applicant suffers from a personality disorder, PTSD and various other mental ailments. On 13 June 2005 the applicant was placed in the Department for Diagnostics and Programming of Zagreb Prison with a view to assessing his condition in order to decide on which prison he should be placed in and his individual programme. A report drawn up for that purpose indicated that he was impulsive and emotionally unstable, easily lost control of his behaviour, with evident low tolerance towards frustrations, a high tendency to react aggressively, a significantly reduced capacity to maintain self-control and a high likelihood that he would reoffend. Psychiatric supervision, as needed, was recommended (see § 44 above).

168. This indication was reinforced several times. Thus, the discharge letter of Zagreb Prison Hospital drawn up on 25 May 2005 recommended psychiatric supervision of the applicant as needed and more intensive engagement on the part of the treatment services (see paragraph 41 above). The report of 24 February 2006 drawn up by the Lepoglava State Prison authorities indicated that the applicant's diagnosis included depression, paranoia, elements of PTSD and low tolerance on frustrations (see paragraph 53 above). A further discharge letter of the Zagreb Prison Hospital drawn up on 18 October 2007 indicated PTSD as the applicant's diagnosis and recommended his regular psychiatric supervision (see paragraph 88 above).

169. The facts of the case also show that the applicant was prone to conflicts with other inmates and the prison personnel, that he was of aggressive behaviour and that he often went on hunger strike. On several occasions he also inflicted self-injuries. In the Court's view, the above circumstances show that the applicant was indeed in need of a psychiatric supervision.

170. The case therefore raises the question whether the State authorities have taken necessary measures to secure adequate psychiatric supervision of the applicant. In this connection the fact that the applicant is a detainee is of paramount importance since as such he is under the control of the State authorities and is not able of securing the psychiatric supervision on his own but is in that respect dependable on the actions of the relevant prison authorities. Undeniably, detained persons who suffer from a mental disorder are more susceptible to the feeling of inferiority and powerlessness. Because of that an increased vigilance is called for in reviewing whether the Convention has been complied with. While it is for the authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used to preserve the physical and mental health of patients who are incapable of deciding for themselves, and for whom they are therefore responsible, such patients nevertheless

remain under the protection of Article 8 (see, mutatis mutandis, Sławomir Musiał v. Poland, no. 28300/06, § 96, 20 January 2009).

171. As to the case at issue, the Court agrees with the Government that there was no indication in the applicant's medical record at any stage that called into question his placement in a regular penal institution. It is not for the Court to challenge this record. The Court further notes that none of the psychiatrists who examined the applicant recommended any specific treatment, save for pharmacotherapy, for the applicant's mental condition.

172. It is undisputed that the applicant was prescribed and given pharmacotherapy for his mental condition during his stay in prisons. Furthermore, there is no indication in the documents submitted by the applicant that the conditions of his detention led to a deterioration of his mental health.

173. As regards some other, optional, treatment, the Government submitted that inmates suffering from PTSD were involved in group therapy specifically tailored to their needs. As regards the three penal institutions at issue, such groups were founded in Lepoglava State Prison and Pula Prison.

174. As regards the applicant's stay in Lepoglava State prison, the Government maintained that during his stay there the applicant had initially, from the day of his arrival, been involved in a therapeutic programme for inmates suffering from PTSD. The applicant alleged that he had not been informed of the group sessions and had not attended them. The Court notes that the Government failed to provide any further information on the exact duration and frequency of any therapeutic treatment of the applicant. For that reason the Court is not able to assess whether the applicant did or did not attend any such sessions.

175. While in Pula Prison, from 6 January to 5 November 2007, the applicant initially had been included in group therapy for inmates suffering from PTSD, but was soon excluded. According to the Government, this was because of the applicant's frequent conflicts with other inmates and his disruptive behaviour at the sessions.

176. The Court does accept that, as stated in the medical documents in the file, the applicant is a person prone to conflict and aggressive behaviour (as indeed indicated in his medical record and the opinions of the psychiatrists) and that accordingly his involvement in therapeutic groups might be difficult if at all possible. The Court also observes that the psychiatrists have never specifically recommended that the applicant undergo group therapy.

177. As regards the applicant's psychiatric treatment during his stay in Lepoglava State Prison, the Court notes that during the period of one year and three months that the applicant spent there, he was seen by a psychiatrist on six occasions and once refused to see the prison psychiatrist. He was also hospitalised twice in Zagreb Prison Hospital in connection with his mental condition, first for a period of twenty days from 30 May to 21 June 2006 and then for a period of nine days from 20 to 29 September 2006. During his entire stay in Lepoglava State Prison the applicant received prescription drugs for his mental condition.

178. It transpires from the file that during his stay in Gospić Prison from 14 October 2006 to 6 January 2007 the applicant did not receive any treatment for his psychiatric condition.

179. During the applicant's stay in Pula Prison from 6 January to 5 November 2007 he received prescription drugs. He was twice seen by a psychiatrist and sent to Zagreb Prison Hospital for fourteen days from 4 to 18 October 2007.

180. The Court observes that the applicant received pharmacotherapy as prescribed and was regularly seen by a psychiatrist. He was hospitalised on three occasions, owing to the worsening of his mental condition. In the Court's view, the applicant received the treatment prescribed by the psychiatrist and was under regular and adequate psychiatric supervision. His psychiatric condition was thus adequately addressed by the relevant prison authorities.

There has accordingly been no violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 AND 5 OF THE CONVENTION

181. The applicant complained that his detention between 2 and 30 March 2005 was unlawful and that he had not obtained redress in that respect. He relied on Article 5 §§ 1 and 5 of the Convention, which, in so far as relevant, read:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

182. The Government argued that the applicant did not have victim status because, in a decision of 30 March 2005, the Pula County Court found that the applicant's detention from 2 to 30 March 2005 had been unlawful and because the applicant had the possibility of bringing a civil action against the State in order to obtain compensation for his unlawful detention. In the alternative, they argued that this part of the application had been lodged outside the six-month time-period because the applicant's detention had ended on 30 March 2005, whereas the application had been lodged with the Court on 19 May 2006. Furthermore, the applicant had failed to exhaust domestic remedies because his civil action against the State had been pending.

183. As to the applicant's victim status, the Court reiterates that an applicant may lose his victim status if two conditions are met: first, the authorities should acknowledge the alleged violations either expressly or in substance and, second, afford redress (see, for example, Eckle v. Germany, 15 July 1982, Series A no. 51, §§ 69; Dalban v. Romania [GC], no. 28114/95, § 44, ECHR 1999-VI; Guisset v. France, no. 33933/96, §§ 66-67, ECHR 2000-IX; and Stephens v. Malta (no. 1), no. 11956/07, § 58, 21 April 2009). A decision or measure favourable to the applicant is in principle not sufficient to deprive him of his status as a "victim" in the absence of such acknowledgement and redress (see Constantinescu v. Romania, no. 28871/95, § 40, ECHR 2000-VIII).

184. As to the question of exhaustion of domestic remedies, the Court has already held that where the applicant's complaint of a violation of Article 5 § 1^6 of the Convention is mainly based on the alleged unlawfulness of his or her detention under domestic law, and where this detention has come to an end, an action capable of leading to a declaration that it was unlawful and to a consequent award of compensation is an effective remedy which needs to be exhausted if its practicability has been convincingly established. To hold otherwise would mean to duplicate the domestic process with proceedings before the Court, which would be hardly compatible with its subsidiary character (see Gavril Yosifov v. Bulgaria, no. 74012/01, § 42, 6 November 2008).

185. Turning to the present case, the Court notes that the Čakovec County Court, in a decision of 30 March 2005, expressly acknowledged that, pursuant to the relevant provisions of the Criminal Procedure Act, the statutory time-limit of the applicant's detention had expired on 2 March 2005 and that there had therefore been no ground for keeping him in detention

after that date and that consequently the applicant's detention from 2 to 30 March 2005 had been contrary to the relevant law (see paragraph 20 above). Furthermore, under Article 498 of the Code of Criminal Procedure, the applicant has the right to compensation for the period he was kept in detention after the statutory time-limit had expired. The applicant is entitled to bring a civil action against the State in that respect. Under section 186(a) of the Civil Procedure Act, he is firstly required to submit a request for a settlement with the competent State Attorney's Office. In the Court's view, a civil action against the State provided for under domestic law is a remedy to be exhausted since is specifically designed to allow persons who have been unlawfully detained to obtain redress from the State. The Court notes that the applicant did lodge a civil action for damages and that these proceedings are at present pending before the appellate court.

186. It follows that this part of the application is premature and therefore must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies. In view of this conclusion, the Court considers that at this stage it absorbs any further issue as to the applicant's victim status.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 6 § 3

187. The applicant complained of a violation of his right to a fair trial in the criminal proceedings against him on account of his inability to engage the services of a defence counsel at the hearing held on 1 April 2005 and afterwards and the alleged inability to consult the case file. He also alleged that the identification of objects to be used as evidence was not carried out in compliance with the relevant procedural rules because two witnesses were not continually and simultaneously present. He relied on Article 6 §§ 1 and 3 of the Convention, the relevant parts of which read as follows:

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

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

..."

188. The Government contested that argument.

A. Admissibility

The parties' arguments

189. The Government argued that the applicant had not properly exhausted domestic remedies in that, instead of lodging a request for extraordinary review with the Supreme Court, he should have lodged a constitutional complaint against the judgment of the Čakovec County Court of 17 May 2005. Therefore, his application had also been lodged outside the six-month time-limit since the final decision in the criminal proceedings against the applicant was the above-mentioned judgment of the Čakovec County Court.

190. The applicant argued that he had properly exhausted all available remedies and that the request for extraordinary review of a final judgment was the remedy which would address the violation of which he had complained in respect of the criminal proceedings.

The Court's assessment

191. The Court observes that the requirements contained in Article 35 § 1^{37} concerning the exhaustion of domestic remedies and the six-month period are closely interrelated, since not only are they combined in the same Article, but they are also expressed in a single sentence whose grammatical construction implies such correlation (see Hatjianastasiou v. Greece, no. 12945/87, Commission decision of 4 April 1990, and Berdzenishvili v. Russia (dec.), no. 31697/03, ECHR 2004 II (extracts).

192. The Court observes further that the purpose of the six-month rule is to promote security of the law and to ensure that cases raising issues under the Convention are dealt with within a reasonable time. Furthermore, it ought also to protect the authorities and other persons concerned from being under any uncertainty for a prolonged period of time. Finally, it should ensure the possibility of ascertaining the facts of the case before that possibility fades away, making a fair examination of the question at issue next to impossible (see Kelly v. the United

Kingdom, no. 10626/83, Commission decision of 7 May 1985, Decisions and Reports (DR) 42, p. 205, and Baybora and Others v. Cyprus (dec.), no. 77116/01, 22 October 2002).

193. In the present case the Court notes that the applicant's conviction was upheld by the Čakovec County Court on 17 May 2005. The applicant subsequently lodged a request for extraordinary review of a final judgment with the Supreme Court. This request was dismissed on 22 November 2005. The applicant then lodged a constitutional complaint and on 23 February 2006 the Constitutional Court declared it inadmissible.

194. The application to the Court was introduced on 16 May 2006, that is, less than six months from the date of the decisions of the Supreme Court and the Constitutional Court, but more than six months after the date of the Čakovec County Court's judgment. It follows that the Court may only deal with the application if a request for extraordinary review of a final judgment and a constitutional complaint against the decision of the Supreme Court dismissing the applicant's request are considered remedies within the meaning of Article 35 § 1 of the Convention, in which case the six-month period provided for in that Article should be calculated from the date of the decision of the Constitutional Court.

195. The Court notes that it has jurisdiction in every case to assess in the light of the particular facts whether any given remedy appears to offer the possibility of effective and sufficient redress within the meaning of the generally recognised rules of international law concerning the exhaustion of domestic remedies and, if not, to exclude it from consideration in applying the six-month time-limit.

196. The Court reiterates that, according to its established case-law, the purpose of the domestic-remedies rule contained in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged before they are submitted to the Court. The Court notes that the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism (see Akdivar and Others v. Turkey, 16 September 1996, Reports 1996-IV, § 69).

197. The Court reiterates that an applicant is required to make normal use of domestic remedies which are effective, sufficient and accessible. It also observes that, in the event of there being a number of remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance (see Croke v. Ireland (dec.), no. 33267/96, 15 June 1999). In other words, when a remedy has been pursued, the use of

another remedy which has essentially the same objective is not required (see Moreira Barbosa v. Portugal (dec.), no. 65681/01, ECHR 2004-V, and Jeličić v. Bosnia and Herzegovina (dec.), no. 41183/02, 15 November 2005).

198. The Court firstly notes that the applicant made use of an extraordinary remedy - a request for extraordinary review of a final judgment. Under domestic law, several remedies against final judgments exist both in respect of civil and criminal proceedings. So far, the Court has dealt with a number of Croatian cases where an appeal on points of law to the Supreme Court against a final judgment adopted in the course of civil proceedings has been regarded as a remedy to be exhausted (see, for example, Blečić v. Croatia, no. 59532/00, §§ 22-24, 29 July 2004; Debelić v. Croatia, no. 2448/03, §§ 10 and 11, 26 May 2005; and Pitra v. Croatia, no. 41075/02, § 9, 16 June 2005). The same has been applied in cases against Bosnia where an identical remedy exists (see Jeličić v. Bosnia and Herzegovina, no. 41183/02, § 17, ECHR 2006 ...). As to the criminal-law remedy at issue, the Court has in a previous case (see Kovač v. Croatia (no. 503/05, 12 July 2007)) taken into consideration proceedings before the Supreme Court concerning a request for extraordinary review of a final judgment by a defendant in a criminal case.

199. A request for extraordinary review of a final judgment is available only to the defendant (the prosecution is barred from its use) and may be filed within one month following the service of the judgment on the defendant in respect of strictly limited errors of law that operate to the defendant's detriment. The applicant in the present case lodged such a request on account of, inter alia, an alleged infringement of his defence rights at the main hearing, which is, under Article 427, one of the statutory grounds for lodging such a request. The Court therefore considers that in the present case precisely this remedy afforded the applicant an opportunity to address the alleged violation at issue. The Court notes that in this case this remedy afforded the applicant an opportunity to complain of the alleged violation. Therefore, and notwithstanding the Constitutional Court's finding that the Supreme Court's decision following such a request did not concern the merits of the case, the Court considers that the applicant made proper use of the available domestic remedies and complied with the six-month rule.

200. As to the applicant's subsequent constitutional complaint, the Court notes that, under section 62 of the Constitutional Court Act, anyone who deems that an individual act of a State body determining his or rights and obligations, or a suspicion or accusation of a criminal act, has violated his or her human rights or fundamental freedoms may lodge a constitutional

complaint against such act. The applicant in the present case, both in his request for extraordinary review of a final judgment and in his constitutional complaint, alleged an infringement of his defence rights at the main hearing in the criminal proceedings against him. Without questioning the decision of the Constitutional Court as to the relevant criteria for assessing the admissibility of constitutional complaints, the Court considers that from the wording of section 62 of the Constitutional Court Act, the applicant had reason to believe that his constitutional complaint against the Supreme Court's decision dismissing his request for extraordinary review of a final judgment, whereby he complained of the violation of his right to a fair trial, was a remedy to be exhausted.

201. In view of the Court's conclusions that in the present case the request for extraordinary review of a final judgment was a remedy to be exhausted and notwithstanding the Constitutional Court's finding that the decision adopted upon such a request by the Supreme Court did not concern the merits of the case, the Court finds that the applicant made proper use of available domestic remedies and complied with the six-month rule. The Government's objections in that regard must therefore be rejected.

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

B. Merits

The parties' arguments

203. The applicant complained under Article 6 §§ 1 and 3(b) and (c)[23] of the Convention that he had not had a fair trial in the criminal proceedings against him. He maintained that although during his pre-trial detention he had been officially assigned several defence lawyers, he had had no real opportunity to communicate with them and prepare his defence. Furthermore, he had not been able to have sufficient access to his case file or to obtain a copy of all relevant documents in it. Although his requests to that effect had been formally allowed, he had actually exercised that right only once, before his conviction. He also argued that on 30 March 2005 his officially appointed defence counsel had been automatically discharged since he had been released from pre-trial detention that day. The next hearing had been held on 1 April 2005 and his request that the hearing be adjourned so that he would have time to find a new defence counsel had been denied. Although he had then stated that he would not present his defence since he had had no defence counsel, the court conducting the proceedings

had wrongly noted that the applicant had waived his right to be legally represented and had decided to remain silent. It had proceeded with the hearing and concluded the trial, finding the applicant guilty.

204. The Government argued that the applicant had been officially assigned a defence counsel throughout his pre-trial detention, as required under the relevant provisions of the Code of Criminal Procedure and had had ample time and opportunity to prepare his defence. At the hearing held on 30 March 2005 the applicant had expressly waived his right to be legally represented, as had been recorded in the record of the hearing.

The Court's assessment

205. Bearing in mind that the requirements of paragraph 3 (b) and (c) of Article 6 of the Convention amount to specific elements of the right to a fair trial guaranteed under paragraph 1, the Court will examine all the complaints under both provisions taken together (see, in particular, Hadjianastassiou v. Greece, 16 December 1992, § 31, and G.B. v. France, no. 44069/98, § 57, ECHR 2001 X).

206. The Court reiterates that Article 6 of the Convention, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. The concept of "effective participation" in a criminal trial includes the right to compile notes in order to facilitate the conduct of the defence, irrespective of whether or not the accused is represented by counsel. Indeed, the defence of the accused's interests may best be served by the contribution which the accused makes to his lawyer's conduct of the case before the accused is called to give evidence (see Matyjek v. Poland, no. 38184/03, § 59, ECHR 2007-..., and Pullicino v. Malta (dec.), no. 45441/99, 15 June 2000).

207. The Court reiterates further that, according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his or her case under conditions that do not place the individual at a substantial disadvantage vis-à-vis the opponent (see, for example, Bulut v. Austria, 22 February 1996, § 47, Reports of Judgments and Decisions 1996 II, and Foucher v. France, 18 March 1997, § 34, Reportss 1997 II). The Court further observes that, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see Doorson v. the Netherlands, 26 March 1996, § 72, Reports 1996 II, and Van Mechelen and Others v. the Netherlands, 23 April 1997, § 54, Reports 1997 III).

208. The Court points out that Article 6 § 3 (b) guarantees the accused "adequate time and facilities for the preparation of his defence" and therefore implies that the substantive defence activity on his behalf may comprise everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings (see Connolly v. the United Kingdom (dec.), no. 27245/95, 26 June 1996, and Mayzit v. Russia, no. 63378/00, § 78, 20 January 2005). Furthermore, the facilities which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself for the purposes of preparing his defence with the results of investigations carried out throughout the proceedings (see C.G.P. v. the Netherlands, (dec.), no. 29835/96, 15 January 1997; Foucher, cited above, §§ 26-38; and Galstyan v. Armenia, no. 26986/03, § 84, 15 November 2007). The issue of adequacy of time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case.

209. In the instant case, several considerations are of crucial importance. The Court notes firstly that the charges against the applicant consisted of more than twenty counts of theft and aggravated theft and that the applicant was liable to an unconditional prison sentence. The case file, a copy of which was submitted by the Government, was quite voluminous.

210. The Court observes that the judgment adopted by the Prelog Municipal Court on 26 August 2004 in the criminal proceedings against the applicant was quashed by the appellate court on 14 January 2005 on the grounds that, inter alia, the applicant's defence rights had been violated. The case was then remitted to the court of first instance. The Court will therefore examine whether the proceedings after 14 January 2005 complied with the requirements of Article 6 of the Convention.

211. The Court notes that the applicant was represented by various officially appointed defence lawyers throughout the proceedings, save from 30 March to 1 April 2005. The ground for appointing defence counsel was the fact that the applicant was detained during the trial, since under Article 65 of the Code of Criminal Procedure all detainees must be legally represented, irrespective of the gravity of the charges against them.

212. In the fresh proceedings before the Prelog Municipal Court a new defence counsel was appointed to the applicant on 4 February 2005, following the request of the previous counsel to be relieved of his duties owing to disagreements with the applicant. Although the applicant was allowed unrestricted telephone communication with his new counsel, it appears that there

was no such contact at least until 14 February 2005, when the applicant complained to the presiding judge that he had not been able to contact counsel because there had been no answer to his calls to the number given to the applicant as that of counsel. The applicant further requested permission for a visit to the prison from his counsel, but there was no answer to this request. However, it is true that the hearing scheduled for 17 February 2005 was adjourned at counsel's oral request in order to enable him to prepare the applicant's defence. There is no evidence that counsel actually visited the applicant at all. In the Court's view, bearing in mind that the applicant was in pre-trial detention, it would have been expected of the relevant authorities to keep a record of the appointed counsel's visits to the applicant in prison in order to make sure that the defence rights of the accused were respected.

213. The Court notes further that on 7 March 2005 the applicant lodged a request to consult the case file, but received no answer. The hearing of 10 March 2005 was adjourned because the applicant had insulted the presiding judge when it started. The applicant was released on 30 March 2005 since the maximum time for his detention had expired. At that time his defence counsel was relieved of his duties since, under domestic law, the ground for obligatory legal representation of the applicant in the criminal proceedings had ceased to exist. Thus, at the hearing held on 1 April 2005 before the Prelog Municipal Court the applicant was legally unrepresented. The applicant's and the Government's account of what happened at the hearing differ in some significant respects. While the Government asserted that the applicant, after having been properly informed of his rights, waived his right to be legally represented and decided to remain silent, the applicant contended that his objection to the effect that he had not been able to prepare his defence since his request to consult the case file had not been properly complied with had remained completely ignored.

214. The Court notes that on 2 April 2005, even before having received a written copy of the judgment pronounced on 1 April 2005, the applicant lodged an appeal alleging, inter alia, that his defence rights had been violated in that he had not been able to prepare his defence since he had had no real opportunity to consult the case file. In his appeal the applicant also complained that his objections to that effect at the hearing had been completely ignored. In view of such a prompt complaint by the applicant and the fact that the transcript of the hearing held on 1 April 2005 was not signed by the applicant, the Court cannot give decisive importance to the record in the transcript that the applicant had waived his right to be legally represented and decided to remain silent. While it is established that the applicant did not make any defence submissions at that hearing, it cannot be unreservedly accepted that he did so because he did not wish to defend himself. In this connection the applicant's assertion that

he could not defend himself since he had never been given proper access to the case file bears some significance.

215. As to the circumstances surrounding the applicant's request to consult the case file, the Court notes that during his entire trial, save for two days between 30 March and 1 April 2005, the applicant was in detention and thus not in a position to freely consult his case file. He was brought to the Municipal Court conducting the criminal trial against him on 1 October 2004, when he examined the case file and copied certain documents. However, the judgment adopted on 26 August 2004 was quashed on 14 January 2005 on the grounds, inter alia, that the applicant had neither had sufficient contact with his defence counsel nor sufficient time to prepare his defence. Furthermore, on 7 March 2005, in the resumed proceedings before the Municipal Court, the applicant made a further request to consult the case file. He explained that on 1 October 2004 he had had insufficient time to consult the case file – which had been voluminous – and that not all requested documents had been copied. However, his request remained unanswered. The applicant reiterated his complaints about not being given a real opportunity to consult the case file in his appeal against the first-instance judgment of 1 April 2005. Thus, the fact that the applicant did consult the case file on 1 October 2004 cannot be regarded as satisfying the requirement that the applicant be afforded adequate means and facilities for the preparation of his defence. In this connection the Court observes that the Convention "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive" (see Artico v. Italy, 13 May 1980, § 33, Series A no. 37).

216. The applicant's further request to consult the case file, made during the appellate proceedings; was allowed by the president of the Prelog Municipal Court, but when asked to fix the date for that purpose the president answered that the case file had been sent to the appellate court. It appears that no contact was made between the trial and the appellate courts in order to facilitate compliance with the applicant's request. After the appellate court upheld the first-instance judgment on 17 May 2005, the applicant made several further requests to consult the case file. In view of the possibility of using further remedies in the criminal proceedings against him, the Court considers that the applicant had a legitimate interest in studying the case file. However, his requests were denied on the grounds that the case file had been forwarded to the Supreme Court. In the Court's view, however, the fact that the case file was with the Supreme Court, does not in itself justify denying the applicant's request.

217. Even after the Supreme Court upheld the lower courts' judgment, the applicant still had the possibility of lodging a constitutional complaint, and thus his interest in consulting the case file remained. However, his further request to that effect of 23 January 2006 was again denied, this time on the grounds that the case file had been sent to the Varaždin Municipal Court. The Court cannot see how the fact that the case was at the latter court could in itself justify refusing the applicant's request.

218. The Court has already found that unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, were important guarantees of a fair trial in criminal proceedings (see Matyjek, cited above, §§ 59 and 63; Luboch v. Poland, no. 37469/05, §§ 64 and 68, 15 January 2008; and Moiseyev v. Russia, no. 62936/00, § 217, 9 October 2008). As the applicant in the present case did not have such access, he was unable to prepare an adequate defence and was not afforded equality of arms (see Foucher, cited above, § 36). Regard being had to all the circumstances of the case, the Court finds that the applicant's defence rights in the criminal proceedings against him taken as a whole were infringed to such a degree that it constitutes a violation of Article 6 § 1 of the Convention taken together with Article 6 § 3^{23}.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

219. 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

220. The applicant claimed 51,793 euros (EUR) in respect of non-pecuniary damage and EUR 7,655.17 in respect of pecuniary damage. As to the latter, he explained that the amount of EUR 758.62 referred to lost income during his unlawful incarceration from 2 to 30 March 2005 and the remaining amount referred to the value of the items taken from him during the criminal proceedings on the grounds that they had been stolen from third parties.

221. The Government deemed the applicant's request in respect of pecuniary damage unfounded and his request in respect of non-pecuniary damage excessive.

222. The Court notes that it has found that the applicant's rights guaranteed by Articles 3 and 6 of the Convention have been violated. In particular, it has found that there was no required

investigation into his allegations of ill-treatment in respect of two separate incidents and that in the criminal proceedings against him his defence rights were violated. These facts have indisputably caused him some physical and mental suffering. Consequently, ruling on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 1,000 under this head, plus any tax that may be chargeable to him. On the other hand, the Court does not discern any causal link between the violations found and the pecuniary damage alleged: it therefore rejects this claim

B. Costs and expenses

223. The applicant also claimed HRK 24,400 for his legal representation before the Court.

224. The Government deemed the claim excessive.

225. The Court considers that the amount claimed is not excessive in the light of the nature of the dispute, particularly given the complexity of the case. It therefore considers that the applicant's costs and expenses should be met in full and thus awards him EUR 3,400 less the EUR 850 already received in legal aid from the Council of Europe, plus any tax that may be chargeable to him.

C. Default interest

226. 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.

3.2.4. Court’s decision

1. Declares unanimously admissible the complaints concerning:

- the general conditions of the applicant's detention from 6 July 2005 to 5 November 2007;

- the alleged assaults on the applicant by the prison personnel and the lack of an effective and thorough investigation into those allegations;

- the lack of adequate psychiatric care during the applicant's detention; and

- the applicant's right to a fair hearing in the criminal proceedings against him; and declares

- the remainder of the application inadmissible;

2. Holds unanimously that there has been no violation of Article 3[39] of the Convention on account of the general conditions of the applicant's detention from 6 July 2005 to 5 November 2007;

3. Holds unanimously that there has been no violation of the substantive aspect of Article 3 of the Convention on account of the alleged assaults on the applicant by prison personnel;

4. Holds unanimously that there has been a violation of the procedural aspect of Article 3 of the Convention on account of the lack of an effective and thorough investigation by independent bodies in respect of the applicant's allegations that he had been assaulted by prison guards on 18 September 2006 and 21 January 2007 and no such violation in respect of the incident of 17 February 2007.

5. Holds by four votes to three that there has been no violation of Article 8[21] of the Convention on account of the lack of adequate and continuous treatment for the applicant's psychiatric condition;

6. Holds unanimously that there has been a violation of Article 6 §§ 1[8] and 3[13] of the Convention;

7. Holds

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2[9] of the Convention, the following amounts which are to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 1,000 (one thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant;

(ii) EUR 2,550 (two thousand five hundred fifty euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;

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

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

3.3. Case of Kharin v. Russia[6]

This judgment has become final under Article 44 § 2[9] of the Convention. It may be subject to editorial revision.

3.3.1. The procedure

1. The case originated in an application (no. 37345/03) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Andrey Vladimirovich Kharin ("the applicant"), on 2 September 2003.

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

3. The applicant alleged, in particular, that he had been unlawfully and arbitrarily detained in a sobering-up centre.

4. On 5 April 2005 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3[26]).

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

[6] Case of Kharin v. Russia; (application no. 37345/03); judgment strasbourg; 3 february 2011; final 03/05/2011

3.3.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1973 and lives in Arkhangelsk.

A. The applicant's detention in a sobering-up centre

7. According to the Government, in the evening of 11 October 2001 the Oktyabrskiy District police station received an emergency call from a local shop. Police officers were sent to the shop to investigate. On their arrival a shop security guard, Mr G., informed the police officers that a drunken man, who was subsequently identified as the applicant, was using offensive language and shouting in the shop, not responding to reprimands and disturbing the work of the shop. The Government provided written statements made by Mr G. and Ms V., a shop assistant, on 14 May 2005. The statements, in so far as relevant, read as follows:

Statement by Mr G.:

"In the autumn of 2001 (October) I was on duty in the shop... At approximately 9 p.m. a man, who was drunk, entered the shop and went to the department of the shop selling beverages. Subsequently he had an argument with a shop assistant, Ms V. I do not know the reason behind the argument. Ms V. asked me to calm the man down. When [the man] entered the sales area, he, being drunk, shouted loudly, using offensive language.

Handwritten by me."

Statement by Ms V.:

"In the autumn of 2001 (I do not remember the date), in the evening...., an unknown man entered the shop and, despite the fact that he was already drunk, began demanding that I sell him alcoholic beverages, and, his request being refused, he began using offensive language, offending shop assistants [and] disturbing the functioning of the shop; I applied to the guard in the shop [Mr G.] for assistance. [Mr G.] escorted the man from the shop; however, several minutes later the man returned and began harassing the shop guard [Mr G.], using offensive language, shouting that he would fire the shop staff; subsequently [Mr G.] pressed an emergency button and police officers arrived; [they] escorted the man from the shop and arrested him."

8. The applicant was taken to a sobering-up centre of the Arkhangelsk Town Police Department. An officer on duty at the sobering-up centre drew up medical report no. 22. The report, provided to the Court by the Government, consisted of a one-page printed template, in which the dates, the officer's and applicant's names, the applicant's personal data and circumstances surrounding his arrest were filled in by hand. The relevant part read as follows (the pre-printed part in roman script and the part written by hand in italics):

"The arrestee was discovered in an intoxicated state... by a police patrol at 9.20 p.m. in the street ... near the house.

The drunken [person] exhibited the following [behaviour] at the place of his arrest strong smell of alcohol, shaky walk, scrambled speech, disorientation in time.

A medical assistant, Ms S., performed a medical examination, during which a moderate state of intoxication was identified. Symptoms (which must be underlined): smell of alcohol on the breath, excited behaviour, aggressive language, blurred vision, blood pressure was not measured, pulse was not measured, shaky gait, weak legs, impaired movement coordination....

Also established during the medical examination: Conscious when admitted [to the sobering-up centre]. Mydriatic pupils. [the remaining handwritten text is illegible]"

The report was signed by the officer on duty, the two police officers who had escorted the applicant to the sobering-up centre, Mr Sa. and Mr Ve., and the medical assistant, Ms S. In addition, the two escorting police officers made a note in the report alleging that the applicant was aggressive and that he had tried to initiate a fight. The applicant refused to sign the report.

9. At the centre the applicant's hands were tied to a bed with "soft ties" because he "had behaved aggressively and gestured actively". He remained tied up for about an hour.

10. On 12 October 2001, at about 9.40 a.m., the applicant was released from the centre and brought to the Oktyabrskiy District Police Department where a report on an administrative offence was drawn up. The report indicated that the applicant had committed an offence under Article 158 of the RSFSR Code on Administrative Offences. It stated that the applicant had been arrested by the police on 11 October 2001 because he had been drunk, used foul language in a public place, thereby disturbing public order.

11. The applicant was ordered to pay 150 Russian roubles (RUB, approximately six euros) "for medical assistance provided in the sobering-up centre".

12. On 19 October 2001 the police officers, Mr Sa. and Mr Ve., wrote similar reports to the head of the sobering-up centre, describing the circumstances of the applicant's arrest and placement in the centre. According to the police officers, in response to their request to board a police car, the applicant, who had been in a moderate state of alcohol intoxication, had started waving his hands about, using offensive language and throwing his bag around. After he had been placed in the police car, he had attempted to break metal bars and had banged on the door. He had also behaved aggressively in the sobering-up centre, waving his hands about and attempting to start a fight. Soft ties had been applied to him for a short period of time. According to the report, on admission to the centre the applicant did not have any money.

13. On the same day a deputy head of the sobering-up centre drew up a report, stating that on 11 October 2001, in the street near a house, a police patrol car had found the applicant, who was in a moderate state of alcohol intoxication. The deputy head provided the following description of the subsequent events. The applicant had been brought to the sobering-up centre where a medical assistant, Ms S., confirmed that he was moderately drunk. After the applicant had been asked to go into a room he had resisted, trying to initiate a fight with an officer, had acted aggressively and had used offensive language. The applicant had been tied to a bed with soft tissues for no longer than an hour and had calmed down.

14. Two days later the medical assistant, Ms S., wrote an explanatory statement addressed to the head of the sobering-up centre. The statement read as follows:

“On 11 October 2001, at 10.30 p.m., [the applicant], who was in a state of alcohol intoxication, was brought to the duty unit of the sobering-up centre. [The state of intoxication was determined] on the following grounds: strong smell of alcohol on the breath, barely able to stand, unsteady walk. Coordination was impaired. Speech was blurred. The face and whites of the eyes were bloodshot, [the applicant] could not do coordination exercises and was unsteady in the Romberg position (standing upright with eyes closed). [The applicant] was asked to undress for a further medical examination. [He] acted aggressively, waved his hands about, attempted to start a fight, and began swinging his bag around. [He] refused to undress voluntarily and was forced to undress; [he] refused to go to a room to rest. Soft ties were applied to him from 10.30 to 11.30 p.m. to prevent damage to him and other individuals. During that [hour] the ties loosened up. On a number of occasions while he was in the sobering-up room he knocked and asked to be released and said that he was being detained unlawfully. On his release he did not make any complaints, [he] refused to sign [the report] insisting that on his admission [to the sobering-up centre] he had had money with him. He

was given back personal belongings in compliance with the list which had been drawn up on his admission."

B. Request for institution of criminal proceedings and judicial complaints

15. The applicant asked the Arkhangelsk Town Prosecutor's office to institute criminal proceedings against officials of the sobering-up centre, claiming that they had unlawfully seized more than RUB 8,000 from him.

16. On 26 October 2001 a senior assistant to the Arkhangelsk Town Prosecutor dismissed the applicant's complaint, finding that there was no case to answer. The senior assistant concluded that there was no evidence in support of the applicant's allegation that he had had money on him before his admission to the sobering-up centre.

17. The applicant lodged a complaint with the Oktyabrskiy District Court seeking annulment of the decision of 26 October 2001. In addition, he brought a complaint with the Lomonosovskiy District Court of Arkhangelsk against the sobering-up centre of the Arkhangelsk Town Police Department. While not disputing that on 11 October 2001 he had been under the influence of alcohol, the applicant claimed that he had been arbitrarily detained in the sobering-up centre on the basis of an internal regulation adopted by an order of the Ministry of Interior. He further argued that he had been ill-treated at the centre as the police officers had forced him to stay in a very painful position known as "the swallow" [ласточка]. In addition, the applicant alleged that he had been forced to pay for medical assistance although such assistance was never provided.

18. On 29 October 2002 the Lomonosovskiy District Court dismissed the applicant's complaint against the sobering-up centre. It grounded its findings on medical report no. 22 drawn up in the centre on 11 October 2001 and statements by the medical assistant, Ms S., the police officer, Mr V., who had escorted the applicant to the centre, and the head of the centre. The District Court found as follows:

"By virtue of paragraph 18 of [the Regulations on Medical Sobering-up Centres at Town (District) Police Stations], approved by Order no. 106 of the USSR Ministry of Interior on 30 May 1985, individuals in a state of alcohol intoxication (moderate or severe) who are in streets, public gardens, parks, stations, airports and other public places, are taken to medical sobering-up centres if their appearance offends human dignity and public morals.

Due to the fact that [the applicant] was in a moderate state of alcohol intoxication, and his appearance – his walk was unsteady, he had a hard time keeping himself upright, he talked incoherently, he reeked of alcohol - offended human dignity and public morals, officials of the sobering-up centre had the right to take him to the sobering-up centre and keep him there until he sobered up.

...

By virtue of paragraph 9 of [the Instruction on Provision of Medical Assistance to Persons Brought to Medical Sobering-up Centres] a medical assistant ... should determine the period necessary for an individual to sober up; however it should not exceed twenty-four hours.

As follows from the case file materials [the applicant] was detained in the medical sobering-up centre from 10.30 p.m. on 11 October to 9.40 a.m. on 12 October 2001, which is no longer than twenty-four hours. ”

The District Court also held that the payment for medical assistance had been lawful and that the applicant had paid the sum of RUB 150 voluntarily. It did not address the alleged disappearance of cash.

19. The applicant appealed against the judgment of 29 October 2002. In his statement of appeal he complained that he had been unlawfully detained against his will, that the District Court had grounded its judgment solely on statements by the officials of the sobering-up centre and that his unsteady walk and incoherent speech before his detention in the sobering-up centre had not posed a threat to anyone, including himself.

20. On 3 March 2003 the Arkhangelsk Regional Court upheld the judgment of 29 October 2002, endorsing the reasons given by the Lomonosovskiy District Court.

21. On 5 December 2003 the Oktyabrskiy District Court quashed the assistant prosecutor's decision of 26 October 2001 and sent the case for an additional inquiry, noting that the assistant prosecutor had failed to question the applicant in relation to his complaint about the money allegedly seized in the sobering-up centre.

22. Two weeks later a deputy Oktyabrskiy District Prosecutor closed the additional inquiry, noting that it was impossible to question the applicant. According to the deputy prosecutor, the applicant had not responded to summons sent by the prosecutor's office on a number of occasions. Moreover, police officers who had been sent to his place of residence could not find him. The applicant was served with a copy of the decision. No appeal followed.

II. RELEVANT DOMESTIC LAW

A. The RSFSR Code on Administrative Offences of 20 June 1984 (in force at the material time)

Article 158. Minor disorderly acts

"Minor disorderly acts, that is utterance of obscenities in public places, abusive solicitation and other similar acts that breach the public order and peace, - shall be punishable with a fine of 10 to 15 minimum wages or with correctional works for one to two months compounded with withholding of 20% of wages, or – if, under the circumstances of the case and having regard to the personality of the offender, these measures are deemed not to be adequate – with administrative detention for up to 15 days."

B. The Regulations on Medical Sobering-up Centres at Town (District) Police Stations, adopted on 30 May 1985 by Order no. 106 of the USSR Ministry of the Interior (in force at the material time)

23. The relevant provisions of the Regulations on Medical Sobering-up Centres read as follows:

"18. Persons in a state of alcohol intoxication who are in streets, public gardens, parks, stations, airports and other public places, are taken to medical sobering-up centres if their appearance offends human dignity and public morals or if they have lost the ability to walk unaided or could cause damage to others or to themselves ...

...

44. Once the person placed in a medical sobering-up centre has sobered up completely, a doctor shall examine him for the second time and give an opinion on the possibility of his release. The period for holding a person in a sobering-up centre shall, in any event, be no shorter than three hours, but no longer than twenty-four hours ..."

3.3.3. The law

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

24. The applicant complained that his detention in the sobering-up centre of the Arkhangelsk Town Police Department had been in breach of Article 5 § 1 (e)[41] of the Convention, the relevant parts of which provide:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; ..."

A. Submissions by the parties

25. The Government submitted that on 11 October 2001 the police officers had lawfully taken the applicant to a sobering-up centre of the Arkhangelsk Town Police Department. They further explained that prior to his placement in the centre the applicant had committed a minor disorderly act, which is an administrative offence under Article 158 of the RSFSR Code[42] on Administrative Offences. According to the Government, by virtue of paragraph 1 of Article 241 of the RSFSR Code on Administrative Offences the police officers could have placed the applicant under administrative arrest for no more than three hours. However, by virtue of Article 242 of the same Code the administrative arrest could only have been enforced after the applicant had sobered up.

26. At the same time the Government continued that the "lawfulness and necessity" of the applicant's admission to the sobering-up centre had been grounded on the fact that his appearance in a public place in a state of moderate alcohol intoxication had offended human dignity and public morals. His speech was incoherent, his clothes were in disorder, there was a strong smell of alcohol on his breath, he was disoriented and he was walking unsteadily. The Government stressed that the domestic courts, while ruling on the lawfulness of the applicant's detention in the sobering-up centre, had not examined whether, prior to his commitment to the centre, the applicant posed a danger to himself or other individuals.

27. The applicant maintained his complaints, noting that the domestic courts had never examined his behaviour in the shop. In particular, they had not studied whether it could have warranted his placement to the sobering-up centre. The applicant pointed out that the domestic courts had neither heard the shop assistant, Ms V., nor the shop security guard, Mr G. Those witnesses made their statements for the first time on 14 May 2005, that is after the Court had communicated the applicant's complaint to the Government. Furthermore, the domestic courts had not called any witnesses who could have observed the applicant's behaviour prior to his admission to the centre. Moreover, his behaviour in the centre also had never been the subject of examination by the domestic courts. The applicant, relying on the list of witnesses heard by the Lomonosovskiy District Court and the District Court's findings, stressed that the mere reason for his admission to the centre had been the fact that he had allegedly been drunk and that his appearance was "in disorder".

28. The applicant further stressed that there had been no objective scientific data confirming his state of alcohol intoxication as no specimen of his breath, blood or urine had been taken for analysis on 11 October 2001. The applicant pointed out that the observations of his appearance (speech, walk, and so on) by the police officers and the medical assistant in the centre could not suffice for the conclusion that he was under the influence of alcohol and that he was in a moderate state of intoxication.

B. The Court's assessment

1. Admissibility

29. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3^{14} of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) Scope of the case

30. The Court observes from the outset that, as was not disputed by the parties, the applicant's arrest and subsequent detention in the sobering-up centre of the Arkhangelsk Town Police Department from approximately 10.30 p.m. on 11 October 2001 to 9.40 a.m. on 12 October 2001 amounted to deprivation of liberty within the meaning of Article 5 § 1 of the Convention.

31. The Court further observes that Article 5 § 1 of the Convention contains an exhaustive list of permissible grounds of deprivation of liberty and that only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his liberty (see, inter alia, Giulia Manzoni v. Italy, 1 July 1997, § 25, Reports of Judgments and Decisions 1997 IV, and Vasileva v. Denmark, no. 52792/99, § 34, 25 September 2003). At the same time the Court notes that the applicability of one ground does not necessarily preclude that of another; a detention may, depending on the circumstances, be justified under more than one sub-paragraph (see Eriksen v. Norway, 27 May 1997, § 76, Reports of Judgments and Decisions 1997 III, and Enhorn v. Sweden, no. 56529/00, § 34, ECHR 2005 I).

32. Both parties agreed that the applicant's detention was imposed pursuant to paragraph 18 of the Regulations on Medical Sobering-up Centres ("the Regulations", see paragraph 23 above). The Government maintained that the applicant's detention should be examined under Article 5 § 1 (e^{41}) in that the applicant had been in a state of alcohol intoxication in a public place and his appearance offended human dignity and public morals. It is therefore common ground that the deprivation of liberty in issue was not covered by sub-paragraphs (a), (b), (c), (d) or (f). The Court sees no reason to hold otherwise. It must accordingly ascertain whether or not the applicant's confinement was justified under sub paragraph (e), that is whether it can be regarded as a form of "lawful detention of ... alcoholics" within the meaning of that provision.

(b) General principles

33. Before embarking on an analysis of the justification for the applicant's detention under sub-paragraph (e) of Article 5 § 1 of the Convention, the Court considers it necessary to reiterate the principles which govern the authorities' obligations under that Convention provision.

34. The Court reiterates that Article 5 § 1 (e) of the Convention should not be interpreted as only allowing the detention of "alcoholics" in the limited sense of persons in a clinical state of "alcoholism". There is nothing in the text of Article 5 to suggest that this provision prevents that measure from being applied by the State to an individual abusing alcohol, in order to limit the harm caused by alcohol to himself and the public, or to prevent dangerous behaviour after drinking. On this point, the Court observes that there can be no doubt that the harmful use of alcohol poses a danger to society and that a person who is in a state of intoxication may pose a danger to himself and others, regardless of whether or not he is addicted to alcohol.

Therefore, under Article 5 § 1 (e) of the Convention, persons who are not medically diagnosed as “alcoholics”, but whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves, can be taken into custody for the protection of the public or their own interests, such as their health or personal safety. At the same time, it means that Article 5 § 1 (e) of the Convention does not permit detention of an individual merely because of his alcohol intake (see Witold Litwa v. Poland, no. 26629/95, §§ 61-64, ECHR 2000 III, and Hilda Hafsteinsdóttir v. Iceland, no. 40905/98, § 42, 8 June 2004).

35. The Court further reiterates that under Article 5 of the Convention any deprivation of liberty must be “lawful”, which includes a requirement that it must be effected “in accordance with a procedure prescribed by law”. On this point, the Convention essentially refers back to national law and states an obligation to comply with its substantive and procedural provisions. It also requires that any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness (see K.-F. v. Germany, 27 November 1997, § 63, Reports of Judgments and Decisions 1997 VII). The detention of an individual is such a serious measure that it is only justified where other, less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it must also be necessary in the circumstances (see Witold Litwa, cited above, § 78, and Enhorn, cited above, § 42).

(c) Application of the general principles to the facts of the present case

36. Turning to the facts of the present case, the Court once again reiterates that there is no dispute between the parties as to the fact that the police, when arresting the applicant and placing him in the sobering-up centre, followed the procedure provided for by paragraph 18 of the Regulations (see paragraph 23 above). The Court therefore considers that the applicant's detention had a legal basis in Russian law.

37. The Court further notes that the essential statutory conditions for the application of the measures laid down in paragraph 18 of the Regulations are, first, that the person concerned is in a public place in a state of alcohol intoxication and, second, that either his appearance offends human dignity and public morals, or his condition is such that he is unable to walk unaided, or his behaviour endangers his own or public safety. In this connection, the Court reiterates, and the Government insisted on that point, that the domestic courts, while finding that the applicant's detention had been lawful, relied on the two grounds: the applicant's state

of alcohol intoxication and his appearance in a public place in a condition which, in their view, was offensive to public morals and human dignity (see paragraphs 18 and 26 above). The Court, moreover, has the task of establishing whether the applicant's detention was "the lawful detention" of an "alcoholic", within the autonomous meaning of the Convention as the Court has explained in paragraphs 34 and 35 above.

(i) Whether the applicant was under the influence of alcohol

38. The Court firstly reiterates the Government's argument that on 11 October 2001 the applicant was in a moderate state of alcohol intoxication. The Government supported their assertion with a copy of medical report no. 22 drawn up on the applicant's admission to the sobering-up centre. The applicant, without disputing the fact of his alcohol input, argued that there was no objective medical evidence, such as results of a breathalyser or blood test, to support the authorities' conclusion that he had been moderately drunk.

39. The Court is mindful of the ambiguity of the terms used by the applicant. Furthermore, it does not lose sight of the fact that the applicant raised the present argument for the first time in his observations lodged with the Court in July 2005. He did not dispute the fact of the alcohol intoxication before any domestic court (see paragraph 17 above). Furthermore, the applicant did not dispute the medical qualification or impartiality of the medical assistant, Ms S., whose observations had been recorded in medical report no. 22 and who had made the finding pertaining to his state of intoxication. Therefore, the Court, seeing no reason to reach a contrary conclusion, finds it established that on 11 October 2001, on admission to the sobering-up centre, the applicant was under the influence of alcohol. In other words, the matter was covered by the notion of "alcoholic" in sub-paragraph (e) of Article 5 § 1 of the Convention (see, for similar reasoning, Hilda Hafsteinsdóttir, cited above, § 42).

(ii) Whether the applicant's detention was free from arbitrariness

40. Taking the principles laid down in paragraphs 34 and 35 above into account, the Court further observes that the essential criteria, when assessing the "lawfulness" of the detention of an "alcoholic" under Article 5 § 1 (e) of the Convention, are whether the person concerned behaved, under the influence of alcohol, in such a way that he posed a threat to the public or endangered his own health, well-being or personal safety, and whether detention of the intoxicated person was the last resort to safeguard the individual or the public interest, because less severe measures have been considered and found to be insufficient. When one of

these criteria is not fulfilled, the basis for the deprivation of liberty does not exist (see Enhorn, cited above, § 44 and Witold Litwa, cited above, § 78).

41. In this connection, the Court reiterates that, as the relevant domestic courts' decisions indicate, the applicant was arrested at 9.20 p.m. on 11 October 2001 and placed in the sobering-up centre because his appearance, in particular his unsteady walk, his incoherent speech, the strong smell of alcohol on his breath and difficulty in staying upright, offended human dignity and public morals (see paragraph 18 above).

42. The Court does not lose sight of the Government's argument that the applicant's allegedly aggressive behaviour in the shop prior to his arrest on 11 October 2001 was an additional reason warranting his confinement in the sobering-up centre. The applicant disputed the Government's version of events, noting that it was based on written statements by a shop assistant, Ms V., and a shop security guard, Mr G., which they had made almost four years after the events under consideration. Bearing in mind the primary role played by national authorities, notably courts, in interpreting and applying national law, the Court finds it particularly regrettable that it has to resolve the difference of opinion between the applicant and the Government in a situation when, and this was the argument on which the Government strongly relied in their submissions, at no point in the proceedings did the domestic courts review the applicant's behaviour prior to his admission to the sobering-up centre, and determined whether it had presented a danger to the applicant's own or public safety, thus necessitating his detention in the sobering-up centre. Before embarking on the analysis of other matters which could have warranted the authorities' conclusion that it was necessary to detain the applicant, the Court considers it important to stress that there can be no question of the authority of a State in the exercise of its police power to regulate the management and use of alcohol with a view to preventing or limiting harm which an intoxicated person is capable of causing to himself or to public order. The right to exercise this power is so manifest in the interest of public health and welfare that it is unnecessary to enter into a discussion of it beyond saying that it is too firmly established to be successfully called into question. The Court further observes that State regulation could take a number of valid forms. A State might establish a programme of compulsory treatment for those addicted to alcohol, or introduce a measure of requiring short periods of involuntary confinement for intoxicated persons. In both cases the limitation imposed on the individual's right to liberty would only be justified by the interests of the protection of the well-being of the individual or others around him.

43. The Court reiterates that while declaring the applicant's detention in the sobering-up centre to be lawful the domestic courts justified the detention by the applicant's physical appearance, which, according to them, being under the influence of alcohol was offensive to human dignity and public morals. Although not disputing the State's interest in protecting public morality, the Court, having regard to the prominent place which the right to liberty holds in a democratic society, considers that detention of an individual for the mere reason that his physical appearance, under the influence of alcohol, presents an insult to public morals, is incompatible with the purpose of sub-paragraph (e) of Article 5 § 1 of the Convention (see Witold Litwa, cited above, § 62). An offensive physical appearance, standing alone, is not a sufficient ground upon which to justify detention; this rationale would be only a step away from introducing a system of compulsory confinement for any abnormal appearance which might be perceived by some as offensive or insulting to human dignity and public morality. Mere public intolerance or animosity cannot justify the deprivation of a person's liberty, particularly so because the loss of liberty produced by the detention is more than a loss of freedom from confinement, since it can engender adverse social consequences for the individual.

44. However, while finding the reasoning employed by the Russian courts to justify the applicant's detention in the sobering-up to be inexplicably inadequate, the Court cannot overlook other evidence in the case which supports the Government's argument that the applicant's aggressive and offensive behaviour in the shop and, accordingly, his causing a disturbance in a public place and posing a danger to others was the main and sufficient reason for the applicant's detention. In particular, on the basis of the written statement by the shop assistant, Ms V., and shop guard, Mr G., as well as the official reports filed by the police officers in the aftermath of the events on 11 October 2001, the Court finds it established that in the evening of 11 October 2001 the applicant had a heated argument in the shop with assistant V. Following the applicant's refusal, accompanied by the use of offensive language and threats, to leave the shop, the police were called and escorted the applicant from the shop. In the street the applicant continued his unruly conduct attempting to start a fight with the police officers, waving his hands about, using offensive language and throwing his bag around. Similar behaviour continued in the police car and later in the sobering-up centre. In these circumstances the Court is able to conclude that the applicant's arrest and subsequent detention in the sobering-up centre were effected on account of his conduct in a state of serious intoxication, causing a disturbance in a public place and presenting a danger to other individuals or himself, as described in paragraph 18 of the Regulations (see paragraph 23

above). The Court is of the opinion that the police had sufficient reasons to detain the applicant in the centre until he had sobered up, having given serious regard to his right to liberty and having balanced it against the public interests of maintaining order and guaranteeing security of other individuals. The Court further considers that the police had no other means at their disposal but to detain the applicant, that is to say the applicant's detention was the last resort in the circumstances of the case.

45. To sum up, although the domestic courts' reasoning puzzlingly made no express reference to the applicant's bizarre, offensive and aggressive behaviour as the main justification for his detention, the Court is satisfied on the evidence before it that the detention in question conformed to the national substantive and procedural rules and that it was called for by the need to restore order and protect others from the applicant and the applicant from himself. It also appears that the police contemplated less serious measures, found them insufficient to safeguard the public interest and reasonably considered that it was necessary to detain the applicant (see, for similar reasoning, Hilda Hafsteinsdóttir, cited above, § 52). Moreover, the Court considers that by releasing the applicant immediately after he had sobered up and gone through the administrative formalities the authorities struck a fair balance between the need to safeguard public order and interest of other individuals and the applicant's right to liberty (see, by contrast, Enhorn, cited above, § 55).

46. In these circumstances, the Court finds that the applicant's detention in the present case can be considered “lawful” under Article 5 § 1 (e) of the Convention.

47. In conclusion, the Court finds that there has been no violation of Article 5 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

48. The applicant, relying on a number of Convention provisions, complained that the police officers had applied a torture method, known as “the swallow” to him, that the domestic courts had misinterpreted his claims, had incorrectly applied the procedural law, had erred in assessing the evidence before them and had made incorrect findings, and that the police had not followed the procedure during his arrest, by failing to draw up a record of his arrest and to provide him with legal assistance, performing a body search on him and seizing his personal belongings and cash.

49. Having regard to all the material in its possession, the Court finds that the evidence discloses no appearance of a violation of the rights and freedoms set out in the Convention or

its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3[14] and 4[15] of the Convention.

3.3.4. Court's decision

1. Declares unanimously the complaint concerning the detention in the sobering-up centre of the Arkhangelsk Town Police Department admissible and the remainder of the application inadmissible;

2. Holds by four votes to three that there has been no violation of Article 5 § 1[6] of the Convention.

3.4. Case of Mikhaniv v. Ukraine[7]

3.4.1. The procedure

1. The case originated in an application (no. 75522/01) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian and a Russian national, Mr Andrey Antonovich Mikhaniv ("the applicant"), on 26 February 2001.

2. The applicant was represented by Mr D.A. Koutakh, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agents, represented by their Agents, Ms V. Lutkovska, Ms Z. Bortnovska and Mr Y. Zaytsev.

3. The applicant alleged, in particular, that he had not received the appropriate medical treatment in the Zhytomyr SIZO, that his detention on remand had been unlawful and unreasonably long, and that the length of the criminal proceedings against him was excessive.

4. By a decision of 20 May 2008, the Court declared the application partly admissible.

[7] CASE OF MIKHANIV v. UKRAINE; (Application no. 75522/01); JUDGMENT STRASBOURG; 6 November 2008; FINAL 06/04/2009

5. In accordance with Article 36 § 1 of the Convention, the Russian Government were invited to exercise their right to intervene in the proceedings, but they declined to do so.

6. The applicant, but not the Government, filed further written observations (Rule 59 § 1). The Chamber have decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 in fine).

3.4.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1966 and lives in Kyiv.

8. The applicant is a former vice-president of the Khlib Ukrainy Company (ДАК Хліб України), a State-owned company trading in grain.

A. Criminal proceedings against the applicant

9. On 11 January 2000 the General Prosecutor's Office (the "GPO") opened a criminal investigation in respect of the applicant and another employee of Khlib Ukrainy on charges of aggravated embezzlement of public funds by means of fraudulent transactions for the amount of approximately 44,000 euros (EUR) via the private company Ukrzovnishtorg ("the Ukrzovnishtorg case"). The applicant was also accused of producing a copy of a forged university degree certificate when applying in 1996 for a position in the civil service.

10. The applicant was arrested on 17 January 2000.

11. On 19 January 2000 the investigator appointed to deal with his case formally charged the applicant with aggravated embezzlement of public funds and forgery.

12. On 20 January 2000 the Deputy Prosecutor General ordered the applicant's detention on remand for two months on the grounds that the charges were serious and that the applicant might abscond and pervert the course of justice. The applicant appealed against his detention to the Pechersky District Court of Kyiv ("the Pechersky Court").

13. On 14 March 2000 the GPO extended the applicant's detention to five months.

14. On 15 March 2000 the GPO opened two more criminal cases against the applicant for aggravated embezzlement of public funds by means of fraudulent transactions via the Internova Trading Company and the Anmikh-Rossiya Company (respectively "the Internova case" and "the Anmikh case"). These cases were joined to the Ukrzovnishtorg case.

15. On 27 March 2000 the Pechersky Court, on the applicant's appeal, revoked the detention order of 20 January 2000. The court found that there was no evidence that the applicant would abscond or pervert the course of justice if released. In particular, the applicant had his permanent residence in Ukraine and financially supported his wife and a child living in Kyiv. He had never failed to respond to a summons or attempted to obstruct the investigation. Moreover, the court found that, when ordering the applicant's detention, the prosecution had not taken into account the fact that the applicant suffered from a number of serious illnesses.

16. On the same day, without releasing him from the Kyiv SIZO, the investigator placed him under arrest again, this time on suspicion of involvement in the Internova case. The Deputy General Prosecutor, on that same date, ordered the applicant's detention on remand for a period of two months on the ground that he was suspected of a serious offence and that he might abscond or pervert the course of justice.

17. On 28 March 2000 the applicant was officially charged with embezzlement of public funds in the Internova case.

18. On 30 March 2000 the Deputy Prosecutor General lodged a request for supervisory review (protest) with the Kyiv City Court against the Pechersky Court's decision of 27 March 2000.

19. On 10 April 2000 the Presidium of the Kyiv City Court quashed the Pechersky Court's decision of 27 March 2000 and upheld the detention order of 20 January 2000. It found that the applicant's wife and two children lived in Estonia. In Ukraine the applicant lived with his partner and their son in Kyiv whilst being registered in Dnipropetrovs'k. He had two registered addresses (in Ukraine and Estonia), three international passports (one Russian and two Ukrainian: ordinary and official) and had an account with an Estonian bank, and was therefore likely to abscond if released. Moreover, the Kyiv City Court held that the first-instance court had overlooked the fact that the applicant in his appeal had requested the "replacement of the preventive measure" rather than the "annulment of the detention order" and, therefore, this appeal fell outside the scope of judicial review at the investigation stage.

20. On 29 May and 29 August 2000 the GPO prolonged the applicant's pre-trial detention respectively to eight months and eleven months.

21. On 27 October 2000 the investigator, with a view to preventing any communication between the applicant and his co-accused, ordered the applicant's transfer from the Kyiv SIZO to the Zhytomyr Regional Pre-trial Detention Centre no. 8 (Житомирський обласний слідчий ізолятор № 8 "the Zhytomyr SIZO") for the period from 30 October to 30 November 2000.

22. The applicant was transferred to the Zhytomyr SIZO on 1 November 2000.

23. On 27 November 2000 the GPO prolonged the applicant's detention to twelve months.

24. On 14 December 2000 the investigator ordered the applicant's transfer back to the Kyiv SIZO.

25. Meanwhile, on an undetermined date in December 2000, the applicant's lawyer appealed against the prosecutor's detention orders of 20 January 2000 and 27 March 2000.

26. On 27 December 2000 the appeal was examined by the Pechersky Court in the presence of the prosecutor and the applicant's lawyer. The court held that, although the domestic law allowed the detention of a defendant charged with aggravated embezzlement of public funds on the sole basis of the gravity of the charges, the other grounds provided for by the law should also be taken into account. The Pechersky Court found, in particular, that there was no compelling evidence that if released the applicant would abscond or pervert the course of justice. The applicant had permanent residence in Ukraine and could not lawfully leave it since his international passport had expired. The applicant lived with his wife and two children in Ukraine. He also financially supported his father and mother-in-law, who lived in Ukraine. Moreover, the applicant suffered from serious health problems. The Pechersky Court considered the medical experts' report produced by the prosecution, to the effect that the applicant was fit for detention in the remand facilities, unreliable in the light of the fact that during his detention in the Zhytomyr SIZO the applicant had not been administered any of the drugs prescribed for him. On the basis of the above findings the Pechersky Court quashed the detention orders of 20 January 2000 and 27 March 2000. On the same day the Deputy Prosecutor General lodged a request for supervisory review against this decision.

27. On 28 December 2000 the applicant, while still detained in the Kyiv SIZO, was arrested by the investigator on suspicion of involvement in the Anmikh case. On the same day the applicant was officially charged with the said offence.

28. On 5 January 2001 the GPO extended the applicant's pre-trial detention to fifteen months.

29. On 15 January 2001 the Presidium of the Kyiv City Court, following the prosecution's request for supervisory review, quashed the Pechersky Court's decision of 27 December 2000, citing essentially the same arguments as in its decision of 10 April 2000. The court also stated that there was no reason why the applicant could not be detained on the sole basis of the gravity of the charges, as provided for by Article 155 of the CCP.

30. On 5 April 2001 the GPO extended the applicant's detention up to eighteen months.

31. On 31 May 2001 the GPO instituted another criminal case against the applicant and Mr L. respectively for giving and taking bribes. This case was joined to the criminal case against the applicant.

32. On 18 June 2001 the applicant and his lawyer were granted access to the 120-volume case file. The applicant, however, refused to study the case file, alleging that the relevant formalities had not been completed. On the same day the investigator rejected this complaint as unsubstantiated.

33. On 16 July 2001 the prosecution lodged the bill of indictment with the Kyiv City Court of Appeal (the former Kyiv City Court).

34. On an unknown date the applicant requested and was granted access to the case file, a right which he and his lawyer exercised from 20 July to 26 September 2001.

35. On an unknown date in September 2001 the Kyiv City Court of Appeal referred the applicant's case file to the Radyansky District Court of Kyiv for examination.

36. On 11 October 2001 the Deputy Prosecutor General decided that only the Ukrzovnishtorg case was ready for trial and withdrew the remainder of the charges because they required further pre-trial investigation.

37. On 12 October 2001 an amended bill of indictment was lodged with the Svyatoshynsky District Court ("the Svyatoshynsky Court").

38. On 1 November 2001 a preparatory hearing was held before a judge of the Svyatoshynsky Court. The judge considered that the case was ready for trial and decided that the applicant was to remain in detention on remand. The applicant's request for release was rejected on the ground that, although he had already spent a total of 21 months in detention, the period of his detention during the investigation had not exceeded 18 months and thus was in compliance with Article 156 of the CCP. The judge considered that the applicant's transfer to the Zhytomyr SIZO was necessary for the proper conduct of the investigation and that there was no indication of ill-treatment. He concluded that there were no medical or other special circumstances warranting the applicant's release.

39. The proceedings before the trial court started on 26 November 2001.

40. At a hearing on 18 January 2002 the Svyatoshynsky Court dismissed the applicant's request for release, stating that there were no new circumstances warranting a re-evaluation of the preventive measure imposed. The court also granted the prosecution's motion to adjourn the hearing until 1 February 2002 to allow the new prosecutor to familiarise himself with the case file.

41. On 1 February 2002 the Svyatoshynsky Court of its own motion decided that further pre-trial investigation was necessary. The court also ordered the applicant's release on an undertaking not to abscond.

42. On 2 February 2002 the applicant tried to leave Ukraine for Russia by train but was stopped on the border and sent back to Kyiv.

43. On an unspecified date the prosecution appealed against the remittal of the case for further investigation, considering that it was ready for examination on the merits. The applicant also challenged the remittal, stating that it was motivated by the court's reluctance to acquit him. On 18 April 2002 the Kyiv City Court of Appeal granted the appeals, quashed the decision of 1 February 2002 and ordered that the trial proceedings in the applicant's case be resumed.

44. The hearings before the Svyatoshynsky Court resumed on 30 April 2002. On 14 August 2002 the trial court ordered that by 19 September 2002 the GPO was to carry out additional enquiries in order to collect further evidence. However, it was not until 24 December 2002 that the authorities produced the requested evidence in court and the trial could resume.

45. On 11 February 2003 the Svyatoshynsky Court acquitted the applicant of the charges brought against him. The prosecution appealed. On 28 June 2003 the Kyiv City Court of Appeal upheld the applicant's acquittal.

46. On 13 July 2004 the Supreme Court, following the appeal of the GPO, reversed the decisions of the lower courts and remitted the case for further investigation.

47. The case file was received by the GPO on an unknown date in October 2004. On 28 October 2004 the investigator amended the applicant's charges in accordance with the new 2001 Criminal Code. On the same day the applicant was summoned to give evidence but failed to appear. Since then, according to the Government's submissions, the GPO has carried out a number of forensic examinations, questioned witnesses and seized documentary evidence. Further documents have been requested and received from Swiss authorities.

48. On an unknown date the applicant made use of the recent amendments to the CCP by challenging the initial decision of the GPO of 11 January 2000 to institute criminal proceedings against him. On 24 November 2005 the Pechersky Court allowed this application and revoked the impugned decision. The prosecution appealed.

49. On 2 February 2006 the Kyiv City Court of Appeal reversed the Pechersky Court's decision and rejected the applicant's application.

50. On 29 March and 22 June 2007 the applicant requested the investigator for termination of the criminal proceedings as time-barred. In reply the investigator informed the applicant that his requests would be examined and the decision would be adopted in accordance with the relevant law.

51. On 13 May 2008 the applicant was charged with abuse of power and forgery and ordered not to leave his place of residence.

52. The investigation in the applicant's case is still pending.

B. Administrative proceedings concerning lawfulness of detention

53. On 18 July 2001 the applicant's lawyer, referring to Article 29 § 1^{12} of the Constitution, filed an administrative complaint about the inactivity of the administration of the Kyiv SIZO, namely for their failure to release the applicant after 17 July 2001, when the overall term of his detention had reached eighteen months. On 20 August 2001 the Shevchenkivsky District Court of Kyiv refused to entertain this complaint on the ground that the lawyer's authority to

act issued by the applicant was limited to the criminal proceedings before the Kyiv Court of Appeal. This decision was not appealed against by the applicant.

54. The applicant's similar administrative complaint against the GPO was declared inadmissible on 26 October 2001 by the Pechersky Court on the ground that such complaints fell to be examined in the criminal proceedings which at that time were pending before the Radyansky Court.

C. Medical treatment

55. After the applicant's arrest in January 2000 his health started to deteriorate. According to the Pechersky Court's decision of 27 March 2000 the applicant started to receive medical treatment in the Kyiv SIZO for his illnesses as early as March 2000.

56. On 15 June 2000, in response to the applicant's numerous requests, the investigator dealing with his case ordered that a forensic medical report on the applicant's state of health be obtained. In its report no. 83 of 16 June 2000, a commission of the Kyiv City Bureau of Forensic Medical Examinations (Київське міське бюро судово-медичних експертиз) stated that the applicant suffered from a post-traumatic encephalopathy, duodenal ulcer with reflux and heart pathology. The applicant was prescribed a diet and heart drugs. In conclusion the experts suggested that the applicant's encephalopathy be examined in a specialised neurological institution.

57. On 29 August 2000 an expert commission of the Kyiv City Centre of Forensic Psychiatric Examinations (Київський центр судово-психіатричних експертиз), with the participation of a neuropathologist from the district hospital, drew up a forensic report (no. 957) at the request of the investigator. The commission found that the applicant suffered from post-traumatic encephalopathy (after a head injury suffered at the age of fifteen). According to the applicant this disease caused him severe headaches and hand tremor. The applicant was prescribed the relevant drugs. He was found fit for detention on remand subject to the prescribed treatment.

58. On 1 November 2000 the applicant was transferred to the Zhytomyr SIZO.

59. On 20 December 2000 the applicant's lawyer asked the Governor of the Zhytomyr SIZO whether they had provided the applicant with the medicines prescribed for him.

60. On 25 December 2000 the Governor of the Zhytomyr SIZO issued a letter, stating that on his admission the applicant had been examined by the prison doctors, who had diagnosed him

as suffering from encephalopathy. Subsequently he had been examined by the cardiologist who confirmed the above heart pathology diagnosis of the Kyiv experts. The Governor stated that, although the content of the above medical experts' reports had been made known to the prison authorities, the drugs prescribed in those reports were not in the possession of the Zhytomyr SIZO and thus could not be administered to the applicant.

61. On 11 January 2001, after the applicant's transfer from the Kyiv ITU, he was examined by a doctor from the medical department of the Kyiv SIZO, who found that he suffered from headaches, heart and stomach pains. The applicant was prescribed fifteen drugs, including those specified in the experts' reports.

II. RELEVANT DOMESTIC LAW

62. The relevant domestic law is summarised in the judgment of Nevmerzhitsky v. Ukraine (no. 54825/00, §§ 53-56, ECHR 2005 II).

3.4.3. The law

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

63. The applicant complained that the lack of medical assistance in the Zhytomyr SIZO amounted to inhuman and degrading treatment contrary to Article 3 of the Convention, which provides as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

64. The Government maintained that, although the applicant did suffer from several insignificant illnesses, the very fact that expert examinations of his medical condition had been conducted pointed to the authorities' care for his health. They stated that after 11 January 2001 the applicant had been prescribed and had received the relevant treatment in the Kyiv SIZO. Moreover, the applicant had refused on two occasions to undergo examinations by independent doctors without giving any reason.

65. The applicant stated that the medical treatment he had received during his detention was inadequate. In particular, while he was held in the Zhytomyr SIZO he did not receive any proper care.

66. The Court's case-law in relation to Article 3 of the Convention, as applicable to the instant case, is summarised in the judgments of Koval (cited above, § 79) and Melnik (cited above, § 93).

67. In view of the applicant's complaints, the Court will concentrate on his medical situation while in detention at the Zhytomyr SIZO during the period of approximately six weeks from 1 November until 14 December 2000.

68. In the Court's opinion, the issue before it is not whether the pains which the applicant may have endured on account of the various health problems attained the level of inhuman and degrading treatment according to Article 3 of the Convention. Rather, the Court must examine whether, in view of the applicant's health, he was afforded the medical treatment required by Article 3 of the Convention while in detention. Thus, according to this provision, a State becomes responsible for the welfare of persons in detention, and the authorities have a duty to afford such persons the required protection (see, among other authorities, Kudła v. Poland [GC], no. 30210/96, § 94, ECHR 2000 XI, and Nevmerzhitsky v. Ukraine, cited above, § 81).

69. The evidence submitted by both parties confirms that during his detention the applicant suffered from previously acquired post-traumatic encephalopathy, a duodenal ulcer with reflux, and a heart pathology.

70. It is not the Court's task to substitute its opinion with that of the domestic experts in assessing the seriousness of the applicant's health conditions and their possible risks of aggravation (see, mutatis mutandis, Nevmerzhitsky, cited above, § 73, and Adalı v. Turkey, no. 38187/97, § 213, 31 March 2005). In the present case, it suffices to note that after being remanded in custody, the applicant was examined by various medical authorities which concluded that he was fit for detention on remand subject to the prescribed medication (see paragraph 56 above). In the Court's opinion, this provides a strong indication that the domestic medical experts themselves regarded the applicant's health condition as being sufficiently serious.

71. A further confirmation for the seriousness of the applicant's health condition can be seen in the fact that, after the applicant's return to Kyiv SIZO, he continued to be prescribed a large number of drugs (altogether fifteen), including those specified in the experts' previous reports.

72. Finally, the Court notes that the applicant failed to receive the required medication for what may qualify in these circumstances as a substantial duration, namely a period of six weeks.

73. Without doubt, the prison administration was aware of the medical experts' previous reports which considered that the applicant could only be detained if he was afforded the required medical treatment. The explanations given by the domestic authorities - the applicant was not administered the required drugs on the ground that they were not available in the prison pharmacy – do not appear satisfactory. In fact, the Government have produced no evidence of any medical care at all being provided to the applicant during his detention in the Zhytomyr SIZO.

74. In the Court's opinion, leaving a detained person without essential medical treatment as required by medical experts for his health condition over a substantial period of time and without satisfactory explanations amounts to inhuman and degrading treatment in breach of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

75. The applicant complained that his detention on remand had been unlawful and excessively long. The Court considers that these complaints are to be considered respectively under Article 5 § 1 (c)[6] and Article 5 § 3[7] of the Convention., which, in so far as relevant, provides as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. Alleged violation of Article 5 § 1 (c) of the Convention

76. The Government stated that the applicant was re-arrested in accordance with a procedure established by law. Moreover, the unlawful and unreasonable Pechersky Court decision to release him was quashed by a higher instance.

77. The applicant considered that his detention had been arbitrary and unlawful.

78. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, it is otherwise in relation to cases where, as under Article 5 § 1, failure to comply with that law entails a breach of the Convention. In such cases the Court can and should exercise a certain power to review whether national law has been observed.

79. However, the "lawfulness" of detention under domestic law is the primary but not always the decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1, which is to prevent persons from being deprived of their liberty in an arbitrary fashion. The Court must moreover ascertain whether the domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein.

80. On this last point, the Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see Baranowski v. Poland, no. 28358/95, §§ 50-52, ECHR 2000-III).

81. On 27 March 2000 the Pechersky Court, upon the applicant's appeal, revoked the prosecution's detention order of 20 January 2000, finding that there was no evidence that the applicant would abscond or pervert the course of justice if released. On the same day, without releasing the applicant from prison, the investigator placed him under arrest again, on suspicion of another count of aggravated embezzlement of public funds. On 10 April 2000, upon a request for supervisory review by the Deputy General Prosecutor, the Kyiv City Court quashed the decision of 27 March 2000 and upheld the detention order of 20 January 2000.

82. On 27 December 2000 the Pechersky Court revoked the prosecution's detention orders of 20 January 2000 and 27 March 2000, finding again that there was no compelling evidence that if released the applicant would abscond or pervert the course of justice. On the next day, while still in prison, the applicant was re-arrested and subsequently detained on suspicion of involvement in another count of embezzlement of public funds. On 15 January 2001 the Kyiv City Court, upon the prosecutor's request for supervisory review, quashed the Pechersky Court's decision. The applicant complained that his arrest on 28 December 2000 had been unlawful.

83. The Court notes that there is no reason to believe that the applicant's re-arrests on 27 March and on 28 December 2000 were incompatible with the domestic procedural regulations applicable at the material time. The detention was on both occasions ordered by a competent prosecutor in respect of a person who had been accused of having committed a crime punishable by a term of imprisonment of more than one year. The respective orders were issued on the same day the applicant was arrested, that is to say within the statutory three-day time-limit.

84. The Court further accepts that the relevant provisions of the CCP constituted a clear and foreseeable legal basis for the applicant's custody. Moreover, the applicant was detained on the basis of a "reasonable suspicion" that he had committed a crime and for the purpose of bringing him before a court to stand trial.

85. The Court notes that both re-arrests were ordered after decisions by a competent court ordering the applicant's release. It is true that formally different charges from those that had served as a basis for the previous, annulled detention orders were relied upon, though these charges all formed part of the same complex of investigations on several counts of aggravated embezzlement of public funds. Moreover, the charges that served as a basis for re-arresting him had been joined to the original criminal case as far back as March 2000.

86. The Court further notes that while on the first occasion the re-arrest and detention were ordered the same day, when the applicant was still detained, the second time the applicant remained in detention for a day without any reasons advances prior to the decision on his new arrest was made. In this context, the Court reiterates that administrative formalities connected with release could not have justified a delay of more than several hours (see Kucheruk v. Ukraine, no. 2570/04, § 191, 6 September 2007, and Nikolov v. Bulgaria, no. 38884/97, § 82, 30 January 2003).

87. It is not the task of this Court to assess the strategy chosen by the prosecuting authorities in the criminal proceedings, but the situation described above gives the strong appearance that, on two occasions, the authorities used the largely similar charges, which had already been part of the case against the applicant, as a pretext to secure his continued detention, thereby circumventing the effect of courts' orders on the applicant's release. It does not appear that the domestic law clearly regulated such a situation or provided sufficient guarantees against abuse.

88. In the Court's view, the conduct of the prosecuting authorities in securing the applicant's continued detention after the decisions of the Pechersky Court ordering his release, in the light of all these elements taken together, is incompatible with the principle of legal certainty and arbitrary, and runs counter to the principle of the rule of law.

89. The Court finds, therefore, that the applicant's re-arrests, on two occasions, and subsequent detention by the investigating authorities after court decisions revoking the detention orders were in breach of Article 5 § 1 of the Convention.

B. Alleged violation of Article 5 § 3^7 of the Convention

90. The applicant claimed that that the length of his detention on remand had been unreasonable.

1. Parties' submissions

91. The Government argued that a period of twenty-four and a half months for the applicant's detention on remand was reasonable in the circumstances. They pointed out that in extending the time-limits of the applicant's detention the prosecutors had referred, inter alia, to the risk of his absconding or perverting the course of justice. In this connection the Government stated that those submissions were justified by the fact that the applicant had three international passports (one Russian and two Ukrainian, including an official passport), that his family lived in Estonia, that he had several accounts in foreign banks and that he was accused of committing offences in collaboration with certain persons who were at large at the material time.

92. The Government further maintained that the length of the applicant's detention had been justified by the complexity of the case: the applicant was charged with four distinct offences, three of which involved complex economic fraud and international transactions. The authorities had to carry out a number of time-consuming investigations, involving several

examinations by accountancy experts and ordering and processing financial documents from foreign law-enforcement agencies. After the case was referred to the court for trial, the applicant requested access to the case file, which was granted. Therefore the State could not bear responsibility for the period between 20 July and 26 September 2001 when the applicant and his lawyers were studying the case file. The trial proceedings lasted for three months, during which period the Svyatoshynsky Court held nine hearings, questioned witnesses, examined five motions from the applicant's lawyers and issued three orders for the compulsory appearance of witnesses.

93. The applicant challenged the authorities' failure to bring him promptly before a judge for examination of the lawfulness of his detention on remand. He further contested the reasonableness of the length of his detention on remand, stating that in the subsequent trial it had become apparent that the eighteen-month pre-trial investigation had not produced any compelling evidence of his guilt.

2. Court's assessment

94. The applicant's detention on remand lasted from 17 January 2000 to 1 February 2002. The period to be taken into consideration is therefore two years and fifteen days.

95. The Court notes that the domestic authorities advanced three principal reasons for continuation of the applicant's detention, namely that the applicant remained under strong suspicion of having committed the serious offences of which he stood accused and that he was likely to abscond or pervert the course of justice if released. The Court recalls in this connection that the existence of strong suspicion of the involvement of a person in serious offences, while constituting a relevant factor, cannot alone justify a long period of pre-trial detention (see, inter alia, Scott v. Spain, judgment of 18 December 1996, Reports of Judgments and Decisions 1996 VI, § 78). It will therefore proceed to ascertain whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty.

96. The national courts disagreed on the question whether there were reasons to justify the applicant's detention. The Pechersky Court considered that there was no risk that the accused might pervert the course of justice or attempt to abscond, whereas the Kyiv City Court affirmed such a risk. The risk that the applicant would abscond if released was inferred from the fact that he had double citizenship (Russian and Ukrainian) and, consequently, several international passports, lived in Kyiv whilst having a registered address in Dnepropetrovsk and had a family and bank accounts in Estonia.

97. The Court, assuming that the above circumstances were initially relevant and sufficient, notes that the risk of the applicant's absconding diminished over the duration of his detention on remand (see Calleja v. Malta, no. 75274/01, § 108, 7 April 2005). Moreover, as the proceedings progressed and the collection of evidence neared completion, the risk of his tampering with evidence would also have become less relevant (see Nevmerzhitsky, cited above, § 136).

98. However, after the Kyiv City Court's decision of 15 January 2001 the applicant's detention was extended without any reference to any concrete factual circumstances capable of showing that the risks relied on actually persisted during the relevant period (see Trzaska v. Poland, no. 25792/94, § 65, 11 July 2000). The Court further notes that in the above decision the City Court had already stated that there was no reason why the applicant could not be detained on the sole basis of the gravity of the charges against him. This suspicion that the applicant had committed the imputed offences was the only ground on which the Svyatoshynsky Court based its decision of 1 November 2001 to detain the applicant pending trial. In these circumstances the Court finds that the authorities have failed to show that the grounds justifying the applicant's detention persisted throughout the whole period of his deprivation of liberty (compare and contrast Gevizovic v. Germany, no. 49746/99, § 40, 29 July 2004).

99. Lastly, the Court notes that no alternative measures were effectively considered by the domestic authorities to ensure the applicant's appearance at trial (see Nevmerzhitsky, cited above, § 137). Indeed, on 10 April 2000 the Kyiv City Court found that the fact that the applicant's appeal against the prosecutor's detention order suggested the possibility of its replacement with another preventive measure rendered it inadmissible as falling outside the scope of the courts' jurisdiction at the investigation stage of criminal proceedings (see paragraph 19 above).

100. In sum, the Court finds that the reasons relied on by the authorities to justify the applicant's continued detention for more than two years, although possibly relevant and sufficient initially, lost these qualities as time passed. In these circumstances it is not necessary to examine whether the proceedings were conducted with due diligence.

101. There has accordingly been a violation of Article 5 § 3 of the Convention.

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

102. The applicant maintained that his right to a "hearing within a reasonable time" had not been respected and that there had accordingly been a violation of Article 6 § 1 of the Convention, the relevant part of which provides:

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

103. There was no dispute over the fact that the proceedings started on 11 January 2000, when the criminal investigation was instituted against the applicant. The proceedings in issue are still pending before the General Prosecutor's Office. The Court accordingly finds that the proceedings have lasted for over eight years.

104. The Government repeated their submissions with regard to Article 5 § 3[7]. In particular the Government pointed out that the applicant's case was one of a certain complexity in that it concerned complex financial issues and international transactions, which had led the investigators to order a number of accounting and other expert examinations and to seek assistance from foreign law-enforcement authorities. These circumstances could explain the prolonged pre-trial investigation into the alleged offences. Once the case was set down for trial the courts dealt with it in a timely manner and without undue delay. After the Supreme Court had ordered the re-investigation, the authorities had carried out several expert examinations, questioned witnesses and seized documents. The General Prosecutor's Office had also requested certain documents from the Swiss authorities.

105. In sum, the Government contended that there had been no significant periods of inactivity in the proceedings for which the judicial authorities could be held responsible and that, accordingly, there had been no violation of Article 6 § 1[8].

106. The applicant maintained that his right to a hearing within a reasonable time had been infringed.

107. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, Frydlender v. France [GC], no. 30979/96, § 43, ECHR 2000-VII).

108. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see, for example, Merit v. Ukraine, cited above, §§ 72-76).

109. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

There has accordingly been a breach of Article 6 § 1.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

110. 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

111. The applicant claimed compensation for the pecuniary damage caused by his suspension from the post of Deputy Minister of Agriculture in an amount of 30,000 to 65,000 euros (EUR). He also claimed compensation for the seizure of jewellery and the attachment of his property, including two cars, a flat in Kyiv, five shops in Dnipropetrovsk, shares in the private company Prokholoda and his account with the Crédit Lyonnais bank. The applicant claimed non-pecuniary damage in the amount of EUR 155,520.

112. The Government considered that the pecuniary damage thus claimed was not related to the subject matter of the case. Moreover, the applicant had failed to prove that he had ever occupied the post of Deputy Minister of Agriculture. The jewellery was seized and the account attached in accordance with the law, to ensure the enforcement of a possible civil judgment in the criminal case. The cars and the flat had been attached for the same reason and remained in the possession of the applicant or members of his family. There was no information that the applicant owned any property in Dnipropetrovsk.

The Government considered that the sum claimed by the applicant for non-pecuniary damage was exorbitant.

113. The Court, like the Government, does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore dismisses this claim. As regards the non-pecuniary damage, the Court points to its above findings of violations of Articles 3, 5, and 6 of the Convention in the present case. Having regard to comparable applications in its case-law, and deciding on an equitable basis, the Court awards the applicant EUR 5,000 in compensation for non-pecuniary damage, plus any tax that may be chargeable on that amount. (cf. Nevmerzhitsky, cited above, § 145; Koval, cited above, § 130; and Khokhlich, cited above, § 228).

B. Costs and expenses

114. The applicant also claimed EUR 130,000 for the costs and expenses incurred in proceedings before the domestic courts and EUR 9,415 for those incurred in the proceedings before the Court.

115. The Government stated that the costs claimed were exaggerated. Moreover, there was no indication that the applicant had actually incurred those costs in the domestic proceedings.

116. The Court reiterates that in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see Nilsen and Johnsen v. Norway [GC], no. 23118/93, § 62, ECHR 1999-VIII). In the present case the Court notes that the applicant's complaints were partly declared inadmissible. On the whole it finds excessive the total amount which the applicant claimed in respect of his legal costs and expenses and considers that it has not been demonstrated that they were necessarily and reasonably incurred.

117. In these circumstances, the Court is unable to award the totality of the amount claimed; deciding on an equitable basis, it awards the applicant the sum of EUR 3,000 in respect of costs and expenses, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

118. 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.

3.4.4. Court's decision

1. Holds by five votes to two that there has been a violation of Article 3[39] of the Convention;

2. Holds unanimously that there has been a violation of Article 5 § 1[6] of the Convention;

3. Holds unanimously that there has been a violation of Article 5 § 3[7] of the Convention;

4. Holds unanimously that there has been a violation of Article 6 § 1[8] of the Convention in respect of the applicant's right to a "hearing within a reasonable time";

5. Holds unanimously

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2[9] of the Convention, the following amounts:

(i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable on this amount;

(ii) EUR 3,000 (three thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant on this amount;

(b) that the above amounts shall be converted into the national currency of the respondent State at the rate applicable at the date of settlement;

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

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

3.5. Case of Premininy v. Russia[8]

This judgment has become final under Article 44 § 2 (c)[9] of the Convention. It may be subject to editorial revision.

3.5.1. The procedure

1. The case originated in an application (no. 44973/04) against the Russian Federation lodged with the Court under Article 34[10] of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Russian nationals, Mr Nikolay Anatolyevich Preminin and Mr Anatoliy Nikolayevich Preminin ("the applicants"), on 7 November 2004.

2. The Russian Government ("the Government") were represented by Mrs V. Milinchuk, former Representative of the Russian Federation at the European Court of Human Rights.

3. On 9 July 2007 the President of the First Section decided to give notice of the application to the Government.

3.5.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1981 and 1953 respectively and live in the town of Surgut in the Tyumen Region. They are son and father.

A. Criminal proceedings against the first applicant

5. On 19 January 2002 criminal proceedings were instituted against the first applicant. He was suspected of having broken into the online security system of an American bank, Green

[8] case of premininy v. Russia (application no. 44973/04); judgment strasbourg; 10 february 2011; final 20/06/2011

Point Bank (hereafter – the Bank), and having stolen the Bank's client database. According to the prosecution, in November 2001 the first applicant contacted the Bank using a fake name. He demanded money in exchange for a promise not to publish the Bank's database on the Internet. The Bank agreed to pay and the first applicant provided it with his real name and address. At the same time he published a part of the Bank's database on the Internet. The Bank transferred 10,000 United States dollars to the first applicant.

6. At the beginning of April 2002 the first applicant was charged with aggravated extortion. He gave a written undertaking not to leave the town.

1. Arrest of the first applicant

7. On 23 April 2002 a deputy prosecutor general of the Russian Federation authorised the first applicant's placement in custody on the ground that he had been charged with a serious criminal offence and was liable to pervert the course of justice, reoffend or abscond.

8. The first applicant was arrested on 7 May 2002 and placed in a detention ward at Surgut police station. On the following day he lodged a complaint with the Surgut Town Court challenging the grounds for his placement in custody. His lawyer submitted a separate complaint. On 9 May 2002 the first applicant was transferred to a detention facility in Tyumen.

9. On 24 May 2002 the Surgut Town Court declined to examine the first applicant's and his lawyer's complaints, noting that it did not have territorial jurisdiction over the matter. The Town Court advised the first applicant and his lawyer to lodge complaints with a court in Yekaterinburg.

2. Further complaints concerning the unlawfulness of detention

(a) Request for release of 11 July 2002

10. On 11 July 2002 the first applicant's counsel, Mr Ch., lodged a complaint with the Surgut Town Court arguing that the first applicant's arrest and detention were unlawful.

11. On 17 July 2002 the Surgut Town Court declined to examine the complaint giving the same reasons as those cited in its decision of 24 May 2002. On 20 August 2002 the Khanty-Mansi Regional Court upheld the Town Court's findings.

(b) Complaint of 22 July 2002

12. On 22 July 2002 Mr Ch. complained to the Surgut Town Court that the first applicant's arrest and subsequent detention were unlawful and asked for his release.

13. Three days later the Surgut Town Court declined to examine the complaint, once again relying on a lack of territorial jurisdiction. On 20 August 2002 the Khanty-Mansi Regional Court, acting in its appellate jurisdiction, confirmed the lawfulness of the Town Court's decision.

3. Proceedings for application of compulsory measures of a medical nature to the first applicant

14. On 25 July 2002 the Sverdlovsk Regional Psychiatric Hospital carried out a psychiatric examination of the first applicant and issued an expert report. The relevant part of the report read as follows:

"... the psychiatric examination concludes that [the first applicant] is showing signs of brief reactive psychosis.

The examinee reports that the illness emerged after the offence, during his stay in the temporary detention facility where he developed strong feelings of fear and hopelessness accompanied by psychologically understandable feelings of depression as a result of additional traumatic experiences, systematic ill-treatment, and physical and psychological abuse inflicted on him by his fellow inmates. There is no information in the medical record concerning [the first applicant's] mental health during his stay in the hospital of the temporary detention facility with concussion and broken ribs.

...

[The first applicant] cannot take part in any investigative or judicial activities.

[The first applicant] needs to be placed in a psychiatric hospital for compulsory treatment ... until his recovery from the psychosis ..."

15. On 28 September 2002 a deputy prosecutor of Surgut sent the case to the Surgut Town Court for trial. He noted that the first applicant was mentally ill, presented a danger to public safety and was liable to cause substantial damage. The deputy prosecutor argued that compulsory measures of a medical nature ought to be applied to the first applicant.

16. On 18 October 2002 the Surgut Town Court fixed the first hearing for 4 November 2002. It also examined a request from the second applicant seeking his son's release or,

alternatively, his transfer to a psychiatric hospital. The Town Court decided that the first applicant was to remain in custody because he had been charged with a serious criminal offence. However, he was to be transferred to the Tyumen Regional Psychiatric Hospital in view of the state of his mental health. The first applicant was placed in that hospital on 4 December 2002.

4. Re-examination of the detention order of 24 May 2002 and the trial proceedings

17. On 22 November 2002 the Presidium of the Khanty-Mansi Regional Court considered, by way of supervisory review, that on 24 May 2002 the Surgut Town Court had incorrectly applied the law and had wrongfully concluded that it had not had territorial jurisdiction over the matter of the first applicant's detention. The Presidium quashed the decision of 24 May 2002 and sent the case to the Town Court for fresh examination.

18. In the meantime, on 3 December 2002 the Surgut Town Court found that the first applicant had committed aggravated extortion but absolved him of criminal responsibility finding that he was mentally incapacitated. The Town Court ordered that compulsory measures of a medical nature should be applied to the first applicant and that he should be placed in a psychiatric hospital for general care. The judgment was not appealed against and became final.

19. On 10 December 2002 the Surgut Town Court declined to re-examine the complaints of the first applicant and his lawyer that his arrest and detention were unlawful. The Town Court held that on 3 December 2002 it had examined the criminal case, found that the first applicant had committed aggravated extortion and ordered that he be placed in a psychiatric hospital. It had no competence to examine the subject of the applicant's detention after the criminal case had been decided on its merits.

5. Re-examination of the detention order of 25 July 2002

20. On 24 October 2003 the Presidium of the Khanty-Mansi Regional Court, by way of supervisory review and giving the same reasons as it had given on 22 November 2002, quashed the decisions of 25 July and 20 August 2002 by which the lawyer's request of 22 July 2002 for the first applicant's release had been refused. The Presidium ordered an examination of the detention on its merits.

21. On 5 February 2004 the Surgut Town Court, having re-examined the lawyer's complaint concerning the lawfulness of the first applicant's detention, dismissed it finding that the

criminal case had already been closed, the first applicant was being detained by virtue of the final judgment and the Town Court could no longer examine the matter.

22. On 30 March 2004 the Khanty-Mansi Regional Court quashed the decision of 5 February 2004 and ordered a fresh examination of the applicant's detention. The relevant part of the decision read as follows:

"By virtue of Article 123 of the Russian Code of Criminal Procedure, parties to criminal proceedings and other persons, in so far as their interests have been affected by procedural actions and decisions, can appeal against [the] actions and decisions of a pre-trial investigation body, an investigator, an interviewing officer, a prosecutor or court in accordance with the procedure established by the present Code.

Article 125 of the Russian Code of Criminal Procedure sets forth the judicial procedure for an examination of such complaints.

Examination of the presented materials shows that the [town] court did not in fact examine the grounds for [the first applicant's complaints] or check the lawfulness of the actions and decisions of the indicated persons.

The record of the court hearing does not show which materials were examined by the court.

The [town] court's conclusion that the subject of the complaint no longer existed was not based on law; the fact that a court has given a judgment in a criminal case cannot serve as a ground for declining to examine the lawfulness of procedural actions and procedural decisions taken in the course of that criminal case and affecting the [first applicant's] interests, [and cannot serve as a ground] for declining to examine the [first applicant's] complaints.

Moreover, that complaint was lodged with the court long before the examination of the criminal case by the court."

23. On 19 May 2004 the Surgut Town Court found that the first applicant's arrest and subsequent detention had been lawful. The first applicant's lawyer attended the hearing. However, the second applicant, despite having been properly summonsed, defaulted and did not notify the Town Court of the reasons for his absence.

24. On 21 July 2004 the Khanty-Mansi Regional Court upheld the decision on appeal.

6. Proceedings concerning the first applicant's release from hospital

25. On 17 June 2003 Lebedyovskaya Psychiatric Hospital examined the first applicant and recommended that he be released from hospital because he no longer presented a danger to himself or the public. On 30 June 2003 the Director of Lebedyovskaya Psychiatric Hospital applied to the Surgut Town Court seeking the release of the first applicant.

26. On 4 July 2003 the Surgut Town Court sent the request to the Zavudkovskiy District Court, finding that the latter had territorial jurisdiction over the matter.

27. On 8 October 2003 the Zavudkovskiy District Court returned the case file to the Surgut Town Court noting that the matter should be examined in Surgut.

28. On 12 March 2004 the Presidium of the Khanty-Mansi Regional Court, by way of supervisory review, quashed the decision of 4 July 2003 and ordered the Surgut Town Court to examine the request for the first applicant's release.

29. On 13 July 2004 Tyumen Regional Psychiatric Hospital carried out a psychiatric examination of the first applicant and considered that the conclusions reached by Lebedyovskaya Psychiatric Hospital on 17 June 2003 had been incorrect and that the first applicant should remain in a psychiatric hospital for further compulsory medical treatment.

30. On 2 September 2004 the Surgut Town Court dismissed the request for the release of the first applicant on the ground that the expert report of 17 June 2003 had been inconclusive, that on 13 July 2004 it had been found that the first applicant was still suffering from schizophrenia and had been considered in need of further compulsory psychiatric treatment. The decision was not appealed against and became final.

31. On 2 February 2005, following a new psychiatric examination of the first applicant and a request from Tyumen Regional Psychiatric Hospital, the Surgut Town Court authorised his release from hospital.

B. Ill-treatment of the first applicant in the temporary detention facility

1. Events of 10 June 2002

32. At the end of May 2002 the first applicant was transferred to Yekaterinburg no. 1 temporary detention facility and placed in cell no. 131. The cell housed four inmates. According to the first applicant, he was systematically humiliated and ill-treated by warders and detainees alike. On 10 June 2002 his cellmates, acting upon an order of the administration

of the detention facility, severely beat him up with long wooden sticks which they had received from the warders.

33. The Government disputed the first applicant's version of events, arguing that on the night of 9 June 2002 the first applicant had initiated a conflict with one of his cellmates, calling him names. A fight broke out and the first applicant received injuries. The Government insisted that the first applicant's allegations of the authorities' instigating role in the dispute were not supported by any evidence.

34. The Government submitted medical certificate no. 226 drawn up in the detention facility on 10 June 2002 following an examination of the first applicant by a prison doctor. It appears from the certificate that the prison doctor diagnosed the first applicant with concussion and numerous abrasions to his arms, legs, back, shoulders, face and ears and prescribed him bed rest. The doctor also noted that the first applicant had received those injuries over a period of a week in cell no. 131. The first applicant was transferred to the medical unit of the detention facility on the afternoon of 10 June 2002.

35. According to a copy of the facility's logbook produced by the Government, on the morning of 10 June 2002 an officer on duty made an entry in the log of an incident involving the first applicant and listed his injuries.

36. On 11 June 2002 the acting director of detention facility no. 1, having examined the information about a possible offence committed against the first applicant, refused to institute criminal proceedings. He found that on 10 June 2002 the first applicant had had a heated argument with one of his cellmates, Mr K. The latter had kicked the first applicant once in the stomach, as a result of which the first applicant had fallen, having hit his head and back against a wall. The first applicant had got back to his feet and attempted to strike back, but was stopped by two other cellmates who broke up the fight. The director of the facility also noted that, when questioned about the incident, the first applicant had confirmed that he had verbally assaulted Mr K. and asked that criminal proceedings against the latter not be instituted. The two remaining cellmates gave similar descriptions of the incident. A copy of the director's decision of 11 June 2002 was served on the first applicant and sent to the Sverdlovsk Regional Prosecutor's Office to verify that the domestic law had been properly applied in the case.

37. In April 2004 the second applicant was appointed the legal guardian of the first applicant. On 21 April 2004 he complained to the Sverdlovsk Regional Prosecutor's Office about the decision of 11 June 2002.

38. On 16 August 2004 the Sverdlovsk Regional Prosecutor quashed the decision of 11 June 2002 finding that it had been issued "prematurely" and ordered an additional investigation into the first applicant's complaints. The prosecutor also noted that the first applicant suffered from a serious mental illness impairing his legal capacity and that in those circumstances his alleged request that no proceedings be instituted against cellmate K. should not have had any legal implications.

39. On 18 August 2004 the administration of the temporary detention facility refused to institute criminal proceedings in respect of the first applicant's complaint of ill-treatment on the ground that the statutory limitation period had expired. That decision was quashed on 14 December 2004 and an additional investigation was authorised.

40. On 24 December 2004 an assistant to the Sverdlovsk Regional Prosecutor refused to institute criminal proceedings against Mr K. because the statutory limitation period of two years had expired on 10 June 2004 and Mr K. could no longer bear criminal responsibility. In his decision the assistant also listed statements by warders who had insisted that the first applicant had had a dispute with Mr K. The latter had beaten up the first applicant. The fight had been stopped by the two other cellmates. The warders had not asked the cellmates to threaten the first applicant or to beat him up. At the same time, Mr K. retracted his previous statements and claimed that he had not beaten up the first applicant. The other two inmates were not questioned because their whereabouts were unknown. A copy of the decision of 24 December 2004 was served on the second applicant.

41. The Government submitted that on 29 August 2007 the decision of 24 December 2004 had been quashed by a higher-ranking prosecutor and the investigation was now pending.

2. Events of 14 June 2002

42. The first applicant complained that he had been systematically beaten up by warders. He claimed that on 14 June 2002 the warders had broken three of his ribs.

43. The Government argued that on the night of 14 June 2002 the first applicant had fallen over on his way to the lavatory, breaking two ribs.

44. As can be seen from a copy of the first applicant's medical record drawn up in detention facility no. 1 and submitted by the Government, on 14 June 2002 the first applicant was examined by a neurologist and the head of the detention facility's medical unit. They noted an injury to the first applicant's chest and authorised a chest X-ray. The X-ray was taken on 18 June 2002 and showed that the first applicant had two broken ribs on his right side. Four days later the first applicant was again examined by the facility doctors, who noted his anxious state. The doctors recorded that the first applicant had refused to remain in his cell, had been disorientated and inert, and had not given proper responses to their questions. Following a further medical examination on 24 June 2002 the doctors noted that the first applicant had had difficulty formulating sentences and concentrating, that his reactions had been slow and that he had constantly stared straight ahead. A psychiatric examination of the first applicant was recommended.

45. On 21 June 2002 the director of the facility closed an investigation into the cause of the first applicant's injury, finding that he had broken his ribs when falling over in a cell on 14 June 2002. The decision was based on statements by the first applicant's three cellmates who had insisted that no force had been used against him. The director also noted that it had been impossible to interview the first applicant as his behaviour had been strange and he had not answered the questions put to him owing to the poor state of his mental health. A copy of the director's decision was served on the first applicant and sent to the Sverdlovsk Regional Prosecutor for verification.

46. On 21 April 2004 a deputy to the Sverdlovsk Regional Prosecutor quashed the decision of 21 June 2002 and ordered an additional investigation, having found that it was necessary to carry out a forensic medical examination of the first applicant and to question his cellmates and the warders. The deputy prosecutor stated that his decision was a response to information received on 21 June 2002 from the director of detention facility no. 1 about a possible criminal offence.

47. On 30 April 2004 a senior inspector, having concluded that on 14 June 2002 the first applicant had slipped, fallen to the floor and injured himself, found that the complaint was unsubstantiated. The decision was based on evidence collected during the internal investigation carried out by the administration of the detention facility in June 2002. In addition, the senior investigator relied on a report by forensic medical experts who had studied the first applicant's medical documents in April 2004 and concluded that there was insufficient evidence to confirm that the first applicant had had broken ribs.

48. On 14 December 2004 the decision of 30 April 2004 was quashed and an additional investigation was ordered.

49. On 24 December 2004 an assistant of the Sverdlovsk Regional Prosecutor refused to institute criminal proceedings against the warders, finding no prima facie case of ill-treatment. The assistant's decision was based on the statements of one of the first applicant's cellmates, a warder and a medical assistant who had examined the first applicant on 22 June 2002. The first applicant's cellmate stated that he had fallen over. He had had no visible injuries, but had complained of being in pain. The warder, while noting that conflicts among detainees had been very frequent and that it was impossible to remember each and every one of them, insisted that no force had been used against the first applicant on any occasion. The medical assistant stated that prior to his placement in the detention facility's medical unit on 22 June 2002 the first applicant had acted aggressively towards other inmates and provoked, in turn, aggressive actions towards himself.

The assistant was unable to locate and question the first applicant's other cellmates.

50. It appears from the Government's submissions that the decision of 24 December 2004 was quashed on 29 August 2007. A fresh investigation appears to be pending now.

II. RELEVANT DOMESTIC LAW

A. Investigation into criminal offences

51. The Code of Criminal Procedure of the Russian Federation (in force since 1 July 2002, "the CCrP") provides that a criminal investigation can be initiated by an investigator or a prosecutor upon a complaint by an individual or on the investigative authorities' own initiative where there are reasons to believe that a crime has been committed (Articles 146 and 147). The prosecutor is responsible for the overall supervision of the investigation (Article 37). He or she can order specific investigative measures, transfer the case from one investigator to another or order an additional investigation. If there are no grounds upon which to initiate a criminal investigation, the prosecutor or investigator shall give a reasoned decision to that effect, which must be brought to the attention of the interested party. The decision is amenable to appeal to a higher-ranking prosecutor or to a court of general jurisdiction in accordance with a procedure established by Article 125 of the CCrP (Article 148). Article 125 of the CCrP provides for judicial review of decisions given by investigators and prosecutors that might infringe the constitutional rights of parties to proceedings or prevent access to court.

B. Authorities' response to alleged instances of ill-treatment in detention facilities

52. Russian law sets out detailed guidelines for the detention of individuals in temporary detention facilities. These guidelines are found in Ministry of Justice Decree no. 189 on Internal Regulations of Temporary Detention Facilities ("the Decree"), enacted on 14 October 2005. In particular, Section II of the Decree provides that an investigation should be carried out into the circumstances in which a detainee has sustained injuries. Case-file materials drawn up as part of the investigation into the circumstances of a possible offence should be transferred to a prosecutor's office which has to take a decision on the institution or refusal to institute criminal proceedings in compliance with the requirements of the Russian Code of Criminal Procedure (paragraph 16 of Section II).

C. Supervision by prosecution authorities in detention facilities

53. Chapter III of the Prosecutor's Offices Act (Federal Law no. 2202-I of 17 January 1992) identifies the jurisdiction and powers of prosecution authorities in the field of prosecution supervision. In particular, if information about a possible violation of Russian law is received, prosecution authorities should carry out their supervisory function. Prosecutors are authorised to monitor the enforcement of the Russian Constitution and laws by various federal and local authorities and their officials, including the administrations of detention facilities (section 21). They should also ensure that the rights and freedoms of detained individuals are respected in places of detention. In performing their task prosecutors should respond to information about possible violations of human rights and freedoms and take measures to prevent or eliminate such violations, bringing those responsible to justice, which can include instituting administrative or criminal proceedings and awarding damages (sections 26, 27 and 32). While supervising the work of the administration of a detention facility, prosecutors are to demand that the administration creates conditions in which the rights and freedoms of detained individuals are fully respected, to check that the administration's decisions comply with domestic legal norms and to receive additional explanations from officials of the detention facility if needed (section 33).

III. RELEVANT INTERNATIONAL REPORTS AND DOCUMENTS

54. The complexity and importance of prevention of violence in detention facilities, specificity of procedures to be employed by facility administration addressing inter-prison violence and necessity of special care, including psychiatric care, of detainees was discussed

by the European Committee for the Prevention of Torture in its General Reports. The following are the extracts from the Reports:

A. 2nd General Report of the European Committee for the Prevention of Torture [CPT/Inf (92) 3]

"54. Effective grievance and inspection procedures are fundamental safeguards against ill-treatment in prisons. Prisoners should have avenues of complaint open to them both within and outside the context of the prison system, including the possibility to have confidential access to an appropriate authority. The CPT attaches particular importance to regular visits to each prison establishment by an independent body (eg. a Board of visitors or supervisory judge) possessing powers to hear (and if necessary take action upon) complaints from prisoners and to inspect the establishment's premises. Such bodies can inter alia play an important role in bridging differences that arise between prison management and a given prisoner or prisoners in general.

55. It is also in the interests of both prisoners and prison staff that clear disciplinary procedures be both formally established and applied in practice; any grey zones in this area involve the risk of seeing unofficial (and uncontrolled) systems developing. Disciplinary procedures should provide prisoners with a right to be heard on the subject of the offences it is alleged they have committed, and to appeal to a higher authority against any sanctions imposed. Other procedures often exist, alongside the formal disciplinary procedure, under which a prisoner may be involuntarily separated from other inmates for discipline-related/security reasons (eg. in the interests of "good order" within an establishment). These procedures should also be accompanied by effective safeguards. The prisoner should be informed of the reasons for the measure taken against him, unless security requirements dictate otherwise1, be given an opportunity to present his views on the matter, and be able to contest the measure before an appropriate authority."

B. 3rd General Report [CPT/Inf (93) 12]

"ii) psychiatric care

41. In comparison with the general population, there is a high incidence of psychiatric symptoms among prisoners. Consequently, a doctor qualified in psychiatry should be attached to the health care service of each prison, and some of the nurses employed there should have had training in this field.

The provision of medical and nursing staff, as well as the layout of prisons, should be such as to enable regular pharmacological, psychotherapeutic and occupational therapy programmes to be carried out.

42. The CPT wishes to stress the role to be played by prison management in the early detection of prisoners suffering from a psychiatric ailment (eg. depression, reactive state, etc.), with a view to enabling appropriate adjustments to be made to their environment. This activity can be encouraged by the provision of appropriate health training for certain members of the custodial staff."

C. 11th General Report [CPT/Inf (2001) 16]

"Staff-prisoner relations

26. The cornerstone of a humane prison system will always be properly recruited and trained prison staff who know how to adopt the appropriate attitude in their relations with prisoners and see their work more as a vocation than as a mere job. Building positive relations with prisoners should be recognised as a key feature of that vocation.

Regrettably, the CPT often finds that relations between staff and prisoners are of a formal and distant nature, with staff adopting a regimented attitude towards prisoners and regarding verbal communication with them as a marginal aspect of their work. The following practices frequently witnessed by the CPT are symptomatic of such an approach: obliging prisoners to stand facing a wall whilst waiting for prison staff to attend to them or for visitors to pass by; requiring prisoners to bow their heads and keep their hands clasped behind their back when moving within the establishment; custodial staff carrying their truncheons in a visible and even provocative manner. Such practices are unnecessary from a security standpoint and will do nothing to promote positive relations between staff and prisoners.

The real professionalism of prison staff requires that they should be able to deal with prisoners in a decent and humane manner while paying attention to matters of security and good order. In this regard prison management should encourage staff to have a reasonable sense of trust and expectation that prisoners are willing to behave themselves properly. The development of constructive and positive relations between prison staff and prisoners will not only reduce the risk of ill-treatment but also enhance control and security. In turn, it will render the work of prison staff far more rewarding.

Ensuring positive staff-inmate relations will also depend greatly on having an adequate number of staff present at any given time in detention areas and in facilities used by prisoners for activities. CPT delegations often find that this is not the case. An overall low staff complement and/or specific staff attendance systems which diminish the possibilities of direct contact with prisoners, will certainly impede the development of positive relations; more generally, they will generate an insecure environment for both staff and prisoners.

It should also be noted that, where staff complements are inadequate, significant amounts of overtime can prove necessary in order to maintain a basic level of security and regime delivery in the establishment. This state of affairs can easily result in high levels of stress in staff and their premature burnout, a situation which is likely to exacerbate the tension inherent in any prison environment.

Inter-prisoner violence

27. The duty of care which is owed by custodial staff to those in their charge includes the responsibility to protect them from other inmates who wish to cause them harm. In fact, violent incidents among prisoners are a regular occurrence in all prison systems; they involve a wide range of phenomena, from subtle forms of harassment to unconcealed intimidation and serious physical attacks.

Tackling the phenomenon of inter-prisoner violence requires that prison staff be placed in a position, including in terms of staffing levels, to exercise their authority and their supervisory tasks in an appropriate manner. Prison staff must be alert to signs of trouble and be both resolved and properly trained to intervene when necessary. The existence of positive relations between staff and prisoners, based on the notions of secure custody and care, is a decisive factor in this context; this will depend in large measure on staff possessing appropriate interpersonal communication skills. Further, management must be prepared fully to support staff in the exercise of their authority. Specific security measures adapted to the particular characteristics of the situation encountered (including effective search procedures) may well be required; however, such measures can never be more than an adjunct to the above-mentioned basic imperatives. In addition, the prison system needs to address the issue of the appropriate classification and distribution of prisoners."

3.5.3. The law

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF THE BEATINGS BY INMATES

55. The applicants complained that the first applicant had been systematically humiliated and beaten up by his cellmates, the most serious incident having occurred on 10 June 2002, and that there had not been an effective investigation into the events. The Court will examine this complaint from the standpoint of the State's obligations flowing from Article 3, which reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Submissions by the parties

56. The Government first submitted that the second applicant could not be regarded as a victim of the alleged violations as he had not been personally affected by the situation. They insisted that his complaints should therefore be dismissed as being incompatible ratione personae within the meaning of Article 35 § 3 of the Convention. The Government further argued that the first applicant's complaints were also inadmissible. In the Government's opinion the first applicant's failure, prior to his being pronounced legally incompetent, to complain to a prosecution authority or court that he was being beaten up, as well as the second applicant's reluctance for two years to appeal against the decision of 10 June 2002, should be interpreted by the Court as a failure to exhaust domestic remedies contrary to the requirements of Article 35 § 1 of the Convention.

57. In addressing the merits of the applicants' complaints, the Government stressed that the first applicant's injuries had been caused by a private individual for whom the State did not bear any responsibility. They maintained that there was no evidence that the fight between the first applicant and his cellmate had been initiated or in any way provoked by the administration of the detention facility. At the same time the facility administration had taken all possible steps to ensure detainees' safety. In particular, the facility lights were not turned off at night and warders occasionally checked that order was maintained in the cells. They submitted, however, that conflicts among detainees occurred quite often and could not be entirely prevented by any system of control or security, no matter how efficient. The Government concluded by stating that the administration of the detention facility had carried out an investigation into the events of 10 June 2002, having questioned the warders and the

first applicant's cellmates and having examined medical documents. There was no evidence that the decision of the facility administration not to institute criminal proceedings had been manifestly ill-founded or unlawful.

58. The applicants disputed the Government's description of the circumstances in which the first applicant had sustained his injuries. In particular, relying on medical certificate no. 226 drawn up on 10 June 2002, they argued that the medical personnel who had examined the first applicant on the morning of 10 June 2002 had considered his version of systematic beatings by his cellmates to be a plausible one and had recorded this in the first applicant's medical notes. Furthermore, forensic medical experts, while assessing the state of the first applicant's mental health in July 2002, also accepted that systematic ill-treatment of the first applicant in the detention facility had been the underlying cause of the deterioration of his mental health. The applicants submitted that the first applicant's poor mental health should be taken into account when assessing the issue of exhaustion of domestic remedies. They further noted that once the second applicant had learned of the first applicant's ill-treatment in 2004 he had immediately complained to the domestic authorities.

B. The Court's assessment

1. Admissibility

59. The Court notes that the Government raised two major objections against the admissibility of the applicants' complaint. In particular, they argued that the second applicant did not have standing in the proceedings before the Court as he was personally unaffected by the events under examination. They further submitted that the applicants had failed to exhaust domestic remedies as the first applicant had never raised an issue of ill-treatment before any domestic authorities and the second applicant had not appealed against the decision of 10 June 2002 until more than two years later.

(a) Victim status

60. As to the question whether both applicants can be regarded as “victims” within the meaning of Article 34 of the Convention, the Court reiterates that there must be a sufficiently direct link between an applicant and the damage which he or she claims to have sustained as a result of the alleged violation in order for that applicant to be able to claim that he or she is the victim of a violation of one or more of the rights and freedoms recognised by the Convention and its Protocols (see Smits and Others v. the Netherlands (dec.), nos. 39032/97, 39343/98, etc., 3 May 2001).

61. The Court observes that the second applicant was not directly affected by the matters complained of. He was neither present at or affected by the events of June 2002 nor a direct party to the investigation carried out by the domestic authorities into the events in question. Furthermore, he never argued that he himself had sustained any damage as a result of his son's situation. The Court notes that the complaints before it concern the allegation that the first applicant had been ill-treated in the detention facility and that there had been no effective investigation into the matter, in breach of Article 3 guarantees. In these circumstances the Court does not consider that the second applicant can claim to be a victim of violations of that Convention provision in the sense of Article 34 of the Convention (see O'Reilly and Others v. Ireland (dec.), no. 54725/00, 4 September 2003). It follows that his complaint under Article 3 of the Convention in respect of the events of June 2002 is thus incompatible ratione personae with the Convention's provisions and must be dismissed pursuant to Article 35 § 4 of the Convention.

(b) Exhaustion of domestic remedies

(i) General principles

62. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against a State before the Court to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption, reflected in Article 13 of the Convention (with which it has close affinity), that there is an effective remedy available in respect of the alleged breach in the domestic system, whether or not the provisions of the Convention are incorporated in national law. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see Handyside v. the United Kingdom, 7 December 1976, § 48, Series A no. 24).

63. Under Article 35 of the Convention, an applicant should normally have recourse to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, inter alia, Vernillo v. France, 20 February 1991, § 27, Series A no. 198, and Johnston and Others v. Ireland, 18 December 1986, § 22, Series A no. 112). Article 35 also requires that complaints made before the Court should have been made to the appropriate

domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (see Cardot v. France, 19 March 1991, § 34, Series A no. 200).

64. Furthermore, in the area of exhaustion of domestic remedies, there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government had in fact been used, or was for some reason inadequate or ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement.

65. The Court emphasises that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that the rule of domestic remedies must be applied with some degree of flexibility and without excessive formalism (see Cardot, cited above, § 34). It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see Van Oosterwijck v. Belgium, 6 November 1980, § 35, Series A no. 40). This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicants (see Akdivar and Others v. Turkey, 16 September 1996, §§ 65-68, Reports of Judgments and Decisions 1996 IV).

(ii) Application of the general principles to the present case

66. The Court notes that the Government's objection is twofold. They argued that the first applicant had not complained of ill-treatment even when he had still been legally competent to do so. In addition, they submitted that the second applicant, being the legal representative of the first applicant, had waited for two years before raising the issue of ill treatment before the prosecutor's office.

67. Turning to the circumstances of the present case, the Court observes that on 11 June 2002 the director of the detention facility gave a decision refusing to open a criminal investigation into the beatings of the first applicant. The decision was served on the first applicant and then sent to the Sverdlovsk Regional Prosecutor's Office for supervision (see paragraph 36 above). It was not until 16 August 2004, that is, more than two years after the events in question, that the Regional Prosecutor quashed the decision of 11 June 2002 and authorised an additional investigation into the events (see paragraph 38 above). The Court accepts the Government's argument that there is no evidence that the first applicant has ever raised a complaint of ill treatment before any domestic authority. However, it does not find this situation surprising given the manner in which the ensuing events developed. In particular, the Court observes that merely days after the decision of 11 June 2002 the medical personnel of the detention facility made a record of the first applicant's strange behaviour, noting his anxious state, disorientation and inertness, as well as his inability to concentrate, respond to questions or formulate sentences in an organised manner (see paragraph 44 above). Similar comments regarding the first applicant's ability to express his opinion were made by the director of the detention facility when he had attempted to question the first applicant about the events of 14 June 2002 (see paragraph 45 above). Following a psychiatric examination of the first applicant on 25 July 2002, which diagnosed a serious mental disorder, the first applicant was declared legally incompetent. The Court attributes particular weight to the fact that the psychiatrists considered the first applicant to be mentally incapable of taking part in investigative or judicial activities (see paragraph 14 above). In these circumstances the Court is convinced that there exists clear and conclusive evidence that the first applicant's state of mental health hindered his ability to steer his way through the complaints procedure and prevented him from applying to the competent domestic authorities with a complaint of ill-treatment (see, by contrast, Peters v. Germany, no. 25435/94, Commission decision of 20 February 1995). Having found that the first applicant could not have been reasonably expected to exhaust the national channels of redress, the Court dismisses this part of the Government's objection.

68. The Court further notes the Government's argument that, even if the first applicant's mental health had precluded him from applying to the domestic authorities, it was for the second applicant, the legal guardian of the first applicant, to step in and promptly challenge the decision of 11 June 2002, thus notifying the domestic authorities of a possible violation of his son's rights. In this connection the Court observes that, as it can be seen from the parties' submissions, the second applicant applied to the prosecutor's office with a complaint of ill-

treatment as soon as he had acquired legal status as the first applicant's representative, received access to the case file and had grounds to make a complaint (see paragraph 37 above). As a result, the decision of 11 June 2002 is no longer in force, having been quashed on 16 August 2004 by a decision of the Sverdlovsk Regional Prosecutor's Office which authorised a fresh investigation. That investigation is still pending, having been closed and reopened on a number of occasions following the second applicant's successful complaints to higher-ranking prosecutors. The domestic authorities were therefore afforded ample opportunity to remedy the alleged violation of the first applicant's rights. In these circumstances the Court is unable to accept the Government's objection that the second applicant's alleged failure to appeal for two years against the decision of 11 June 2002 rendered the first applicant's Article 3 complaint inadmissible (see, for similar reasoning, Samoylov v. Russia, no. 64398/01, § 45, 2 October 2008).

(c) The Court's decision on the admissibility of the complaint

69. The Court notes that this complaint of the first applicant 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. It must therefore be declared admissible.

2. Merits

(a) General principles

70. The Court observes that the first applicant drew his complaint in two directions, laying blame on the authorities of the respondent State for the incitement of ill-treatment and humiliation to which he was allegedly subjected by his cellmates while at the same time suggesting that, even if this systematic ill-treatment had not been organised by State agents, the authorities knew or ought to have known that he had been at risk of physical violence at the hands of his cellmates and failed to take appropriate measures to protect him against that risk. In this connection, the Court notes that there is no evidence in the file capable of founding an “arguable claim” of any direct involvement of State agents in the first applicant's beatings. There is no indication that violence against the first applicant was, in any way, permitted by the facility administration.

71. However, the absence of any direct State involvement in acts of violence that meet the condition of severity such as to engage Article 3 of the Convention does not absolve the State from its obligations under this provision. The Court reiterates that the engagement undertaken by a Contracting State under Article 1 of the Convention is confined to “securing” the listed

rights and freedoms to persons within its own “jurisdiction” (see Soering v. the United Kingdom, 7 July 1989, § 86, Series A no. 161).

72. It is true that, taken together, Articles 1 and 3 place a number of positive obligations on the High Contracting Parties, designed to prevent and provide redress for torture and other forms of ill-treatment. Thus, in A. v. the United Kingdom (23 September 1998, § 22, Reports 1998-VI) the Court held that, by virtue of these two provisions, States are required to take certain measures to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including ill-treatment administered by private individuals (see, for similar reasoning, Moldovan and Others v. Romania (no. 2), nos. 41138/98 and 64320/01, § 98, ECHR 2005-VII (extracts), and M.C. v. Bulgaria, no. 39272/98, § 149, ECHR 2003-XII). In Aksoy v. Turkey (18 December 1996, § 98, Reports 1996-VI) it was established that Article 13 in conjunction with Article 3 imposes an obligation on States to carry out a thorough and effective investigation of incidents of torture and, in Assenov and Others v. Bulgaria (28 October 1998, § 102, Reports 1998 VIII), the Court held that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention”, requires by implication that there should be an effective official investigation. Such a positive obligation cannot be considered to be limited solely to cases of ill-treatment by State agents (see Denis Vasilyev v. Russia, no. 32704/04, § 99, 17 December 2009).

73. Admittedly, it goes without saying that the obligation on States under Article 1 of the Convention cannot be interpreted as requiring a State to guarantee through its legal system that inhuman or degrading treatment is never inflicted by one individual on another or, if it has been, that criminal proceedings should necessarily lead to a particular punishment. However, it has been the Court's constant approach that Article 3 imposes on States a duty to protect the physical well-being of persons who find themselves in a vulnerable position by virtue of being within the control of the authorities, such as, for instance, detainees or conscripted servicemen (see Chember v. Russia, no. 7188/03, § 50, 3 July 2008; Sarban v. Moldova, no. 3456/05, § 77, 4 October 2005; Jalloh v. Germany [GC], no. 54810/00, § 69, ECHR 2006-IX; and Mouisel v. France, no. 67263/01, § 40, ECHR 2002-IX).

74. Article 3 also requires that authorities conduct an effective official investigation into any alleged ill-treatment even if such treatment has been inflicted by private individuals (see Ay v. Turkey, no. 30951/96, § 60, 22 March 2005, and M.C. v. Bulgaria, cited above, § 151). Even though the scope of a State's positive obligations might differ between cases where treatment contrary to Article 3 has been inflicted through the involvement of State agents and cases where violence is inflicted by private individuals (see Beganović v. Croatia, no. 46423/06, § 69, ECHR 2009 ... (extracts)), the requirements for an official investigation are similar. For the investigation to be regarded as "effective", it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. Authorities must take the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context (see, among many other authorities, Mikheyev v. Russia, no. 77617/01, § 107 et seq., 26 January 2006, and Assenov and Others v. Bulgaria, 28 October 1998, §§ 102 et seq., Reports 1998-VIII). In cases under Articles 2 and 3 of the Convention where the effectiveness of the official investigation has been at issue, the Court has often assessed whether the authorities reacted promptly to the complaints at the relevant time (see Labita v. Italy [GC], no. 26772/95, §§ 133 et seq., ECHR 2000 IV). Consideration has been given to the opening of investigations, delays in taking statements (see Timurtaş v. Turkey, no. 23531/94, § 89, ECHR 2000-VI, and Tekin v. Turkey, 9 June 1998, § 67, Reports 1998-IV) and to the length of time taken for the initial investigation (see Indelicato v. Italy, no. 31143/96, § 37, 18 October 2001).

(b) Application of the above-mentioned principles to the circumstances of the present case

75. The Court observes that the present complaint which the first applicant raised under Article 3 of the Convention in fact poses two separate but interconnected questions: the credibility of his version of events and the gravity of the ill-treatment to which he was allegedly subjected, and the State's accountability for that treatment.

(i) Obligation of the State to prevent ill-treatment or mitigate its harm

(α) Establishment of the facts and assessment of the severity of the ill-treatment

76. The Court notes that the facts were disputed by the parties. In particular, the first applicant argued that for at least a week prior to the culmination of the events on 10 June 2002 he had been systematically humiliated and assaulted by his cellmates in cell no. 131. On 10 June 2002 he had been brutally attacked by his cellmates, sustaining concussion and numerous injuries to his body. The Government averred that the first applicant's injuries had resulted from a one-off fight between the first applicant and his cellmate K., in which the latter had kicked the first applicant in the stomach.

77. The Court reiterates that for the treatment to fall within the scope of Article 3 of the Convention it must attain a minimum level of severity. The assessment of this minimum is, by nature, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see, amongst many other authorities, Soering, cited above, § 100). Treatment has been held by the Court to be "inhuman" because, inter alia, it was premeditated, applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering, and also "degrading" because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see T. v. the United Kingdom [GC], no. 24724/94, § 69, 16 December 1999).

78. The Court further reiterates that allegations of ill-treatment must be supported by appropriate evidence. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see Ireland v. the United Kingdom, 18 January 1978, § 161, Series A no. 25). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly or in large part within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see Salman v. Turkey [GC], no. 21986/93, § 100, ECHR 2000-VII).

79. Turning to the circumstances of the present case, the Court observes that on the morning of 10 June 2002 the first applicant was examined by a prison doctor who recorded numerous injuries to his arms, legs, back, shoulders, face and ears and also diagnosed him with concussion. The doctor's conclusion was that the injuries resulted not from a sporadic occurrence but were evidence of systematic beatings sustained within the week preceding the

medical examination. The first applicant was recommended bed rest (see paragraph 34 above). The parties do not dispute that those injuries as recorded in medical certificate no. 226 were sustained by the first applicant during his detention, that is, when he was under the full control of the administration of Yekaterinburg no.1 detention facility.

80. The Court is not convinced by the Government's argument that the first applicant's injuries resulted from a one-off fight with his cellmate K. It observes that the first applicant alleged that he had suffered physical and psychological abuse at the hands of his cellmates in cell no. 131 for over a week. It appears that attacks on the first applicant were initiated almost immediately after his transfer to that cell (see paragraph 32 above). The Court notes that the Government contested the first applicant's allegations and argued that they were false and unsubstantiated. They submitted that the first applicant's injuries as recorded in medical certificate no. 226 had resulted from a blow to the stomach he had received from cellmate K. and the subsequent fall he had taken after hitting his head and back against a wall. The Court considers that the Government's explanation sits ill with the nature and location of the first applicant's injuries. It does not lose sight of the prison doctor's finding that the first applicant had numerous injuries covering a substantial surface of his body, although no injuries to his stomach were recorded (see paragraph 34 above). The Court finds, and this finding is also supported by the prison doctor's opinion (see paragraph 34 above), that the description of the first applicant's injuries corresponds to physical sequelae from systematic beatings rather than to injuries sustained as a result of a single blow and the subsequent collision of the first applicant with a concrete wall. The Court further observes that a forensic psychiatric examination of the first applicant carried out on 25 July 2002 revealed a strong link between the deterioration of his mental health and a psychologically traumatic experience encountered by the first applicant through systematic ill-treatment and physical and psychological abuse in detention. The Court is therefore bound to conclude that the first applicant was a victim of systematic ill-treatment at the hands of his cellmates which lasted for at least a week.

81. The Court further finds that all the injuries recorded in the medical certificate and the first applicant's statements regarding the ill-treatment to which he had been subjected in detention establish the existence of physical and undoubtedly mental pain and suffering. The acts complained of were such as to arouse in the first applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and emotional resistance. This conclusion is supported by the experts' finding that physical and psychological abuse led to the first applicant feeling afraid, depressed and hopeless (see paragraph 14 above). An important element to be taken into consideration is also the long-

term consequences of the ill-treatment on the first applicant's mental health (see paragraphs 14 and 16 above). The Court also attaches great importance to the first applicant's young age at the time of the events, which made him particularly vulnerable at the hands of his aggressors. Having regard to the nature and degree of the ill-treatment and its effect on the first applicant's mental health, the Court finds that there are elements which are sufficiently serious to render such treatment inhuman and degrading contrary to the guarantees of Article 3 of the Convention. It therefore remains to determine whether the State authorities can be held accountable for the ill-treatment of which the first applicant was a victim.

(β) State responsibility: supervision and control system in detention

82. The Court notes that the Government refused to take any responsibility for the ill-treatment in question, arguing that there had been no failing or omission on the part of the detention facility administration. They submitted that the State could neither be implicated in instigating a conflict between the inmates nor accused of failing to take all necessary steps to prevent the occurrence of such a conflict. In the Government's opinion, violence was an inevitable element of prison life and its existence was not related to the efficiency of the system of supervision and control existing in a detention facility.

83. In this connection, the Court firstly reiterates that Article 3 enshrines one of the most fundamental values of democratic societies and, in accordance with this notion, prohibits in absolute terms torture and inhuman or degrading treatment or punishment (see, among other authorities, Chahal v. the United Kingdom, 15 November 1996, § 79, Reports 1996-V). It imposes an obligation on the Contracting States not only to refrain from provoking ill-treatment, but also to take the necessary preventive measures to preserve the physical and psychological integrity and well-being of persons deprived of their liberty (see Mouisel v. France, no. 67263/01, § 40, ECHR 2002 IX, and Keenan v. the United Kingdom, no. 27229/95, § 111, ECHR 2001 III). At the same time the Court has consistently interpreted that obligation in such a manner as not to impose an impossible or disproportionate burden on the authorities (see Pantea v. Romania, no. 33343/96, § 189, ECHR 2003 VI (extracts)). The Court has also stated that the scope of the State's positive obligation under Article 3 must be compatible with the other rights and freedoms under the Convention (see Keenan, cited above, §§ 89-91).

84. Having regard to the absolute character of the protection guaranteed by Article 3 of the Convention and given its fundamental importance in the Convention system, the Court has developed a test for cases concerning a State's positive obligation under that Convention

provision. In particular, it has held that to successfully argue a violation of his Article 3 right it would be sufficient for an applicant to demonstrate that the authorities had not taken all steps which could have been reasonably expected of them to prevent real and immediate risks to the applicant's physical integrity, of which the authorities had or ought to have had knowledge. The test does not, however, require it to be shown that "but for" the failing or omission of the public authority the ill-treatment would not have occurred. The answer to the question whether the authorities fulfilled their positive obligation under Article 3 will depend on all the circumstances of the case under examination (see Pantea, cited above, §§ 191-96). The Court also reiterates that State responsibility is engaged by a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm to the applicant (see E. and Others v. the United Kingdom, no. 33218/96, §§ 89-101, 26 November 2002). The Court therefore has to establish whether, in the circumstances of the present case, the authorities knew or ought to have known that the first applicant was suffering or at risk of being subjected to ill-treatment at the hands of his cellmates, and if so, whether the administration of the detention facility, within the limits of their official powers, took reasonable steps to eliminate those risks and to protect the first applicant from that abuse.

85. The Court notes the Government's argument that the authorities could not have foreseen a sporadic fight breaking out between the first applicant and his cellmate K. They stressed that conflicts among detainees were not rare and therefore there existed no means of eliminating them entirely. In this connection, the Court notes that it is the State's utmost responsibility to prevent and address violence among inmates in prisons in accordance with its obligation to respect, protect and fulfil the right of individuals not to be subjected to torture or to inhuman or degrading treatment or punishment.

86. Furthermore, the Court has already made a finding on the materials before it, which are uncontroverted, that the first applicant suffered systematic abuse at the hands of his cellmates. The acts of violence against the first applicant continued for at least a week (see paragraph 80 above). The materials before the Court also disclose the authorities' knowledge of the situation. In particular, as can be seen from the decision of 24 December 2004 given by the assistant prosecutor of the Sverdlovsk Region, the administration of the detention facility was aware of the acts of violence against the first applicant, which they considered to be a response to his own aggressive behaviour (see paragraph 49 above). Irrespective of the cause of the abuse which the first applicant suffered, the Court is of the opinion that the authorities, apprised of the first applicant's allegedly provocative behaviour, could have reasonably foreseen that such behaviour rendered him more vulnerable than an average detainee. The

authorities should have enquired into the first applicant's psychological state, having considered that, in view of his relatively young age, background and no previous experience of the criminal justice system, the detention could have exacerbated his feeling of distress, already inherent in any measure of deprivation of liberty, making him more prone to episodes of anger and irascibility, which he allegedly manifested against other inmates (see, for similar reasoning, Pantea, cited above, § 192). Moreover, apart from a general knowledge that the first applicant was at risk of violence as a consequence of his unconventional behaviour, the administration of the detention facility could not but have noticed actual signs of abuse, as it was not disputed by the parties that at least part of the first applicant's injuries were visible. In this situation the Court takes the view that even if the facility administration was not immediately aware of the first attack inflicted on the first applicant, within a few days they should have been alerted to the fact that the first applicant had been subjected to ill-treatment and that there was cause to introduce specific security and surveillance measures to prevent him being the subject of continual verbal and physical aggression.

87. The Court notes that responding to prison violence requires prompt action by facility staff, including ensuring that the victim is protected from further abuse and can access the necessary medical and mental health services. Such response should include the coordination of security staff, forensic, medical, and mental health practitioners and facility management. However, in the present case, notwithstanding the existence of a serious risk to the first applicant's well-being, no specific and prompt security or surveillance measures were introduced at the detention facility. In particular, there is no evidence in the materials submitted by the parties that the administration of the detention facility had ever considered the specific details of the first applicant's personal situation in their choice of co-detainees to place in his cell (see, for similar reasoning, Rodić and Others v. Bosnia and Herzegovina, no. 22893/05, § 71, 27 May 2008). In fact, it appears that the management of the detention facility lacked a clear policy on the classification and housing of detainees, key to promoting internal prison security and preventing prison violence. The Court reiterates that a proper classification system which includes screening for the risk of victimisation and abusiveness, consideration of the traits known to place someone at risk and of an individual's own perception of vulnerability is critical to ensuring that potential predators and potential victims are not housed together (see, also for guidance, paragraph 54 above).

88. Furthermore, there is no indication that the facility administration attempted to monitor, on a regular basis, the conduct of inmates prone to being violent or those who were at risk of being subjected to violence. Nor is there evidence that disciplinary measures were taken

against the offenders. As to the monitoring, the Court is not satisfied that keeping the lights on at night and having cells occasionally checked on by warders were sufficient measures to enhance inmate security, and, in particular, to protect the first applicant from continual abuse. The Government, however, did not suggest any other protective measures which could have prevented further attacks on the first applicant. In respect of the disciplinary action, the Court is not convinced that the facility administration adhered to a standardised policy of punishments for inmates who perpetrated abuse. The absence of such a policy shows that prison violence was not taken as seriously as other crimes and that the facility administration allowed detainees to act with impunity to the detriment of the rights of other inmates, including the right guaranteed by Article 3 of the Convention.

89. At the same time, what is more striking is that it was not until the incident of 10 June 2002, which the first applicant described as the culmination of the ill-treatment, that he was removed from the cell where he had been subjected to systematic assault. The Court attributes particular weight to this fact in view of the absence of any other mechanisms for promoting inmates' security in the detention facility. The Court also finds it regrettable that the facility administration did not make any meaningful attempts to provide the first applicant with psychological rehabilitation in the aftermath of the events.

90. In sum, the facility administration did not maintain a safe environment for the first applicant, having failed to detect, prevent or monitor, and respond promptly, diligently and effectively to the systematic inhuman and degrading treatment to which he had been subjected by his cellmates. The Court therefore concludes that the authorities did not fulfil their positive obligation to adequately secure the physical and psychological integrity and well-being of the first applicant.

91. Accordingly, there has been a violation of Article 3 of the Convention in this respect.

(ii) Obligation to investigate

92. The Court holds that medical evidence of serious damage to the first applicant's health, together with his allegation of being subjected to systematic beatings by his cellmates, amounted to an “arguable claim” of ill-treatment. Accordingly, the authorities had an obligation to carry out an effective investigation into the events. For the purposes of its further analysis, the Court refers to the requirements as to the effectiveness of an investigation set out in paragraph 74 above.

93. The Court notes that the first applicant was entirely reliant on the prosecuting authorities to assemble the evidence necessary to corroborate his allegation of ill-treatment. The prosecutor had the legal powers to interview the warders and inmates, visit the scene of the incident, collect forensic evidence and take all other crucial steps for the purpose of establishing the veracity of the first applicant's account. The prosecutor's role was critical not only to the pursuit of criminal proceedings against the perpetrators of the offence but also to the pursuit by the first applicant of other remedies to redress the harm he had suffered (see paragraph 51 above).

94. The Court observes, firstly, that the competent prosecution authorities were particularly slow in opening a criminal investigation into the alleged ill-treatment. The situation was initially addressed by the acting director of the detention facility who on 11 June 2002, the day following the most serious incident of ill-treatment, gave a decision finding no cause to take any action. In this connection the Court has serious doubts as to the ability of the facility's administration to carry out an independent investigation as required by Article 3. The initial one-day investigation was closed on the basis of the unreasonable finding that the first applicant had had a sporadic fight with his cellmate K. and that the first applicant had had no intention of pressing charges. That decision was sent to the Sverdlovsk Regional Prosecutor's Office in compliance with the established procedure. It was more than two years later that the prosecution authorities responded, having quashed the decision of 11 June 2002 as premature. An additional investigation into the events of June 2002 was authorised. However, the initial delay in opening the investigation resulted in a loss of precious time and made it impossible to secure evidence of the incident. That failure also made it impossible to bring the perpetrators to justice owing to the expiry of the statutory limitation period.

95. The Court notes the Government's argument that it was the second applicant's failure to appeal against the decision of 11 June 2002 that had led to the prosecution's futile attempts to investigate the events. In this respect, the Court does not lose sight of the fact that Russian law entrusts prosecution authorities with a function of supervision over decisions of the management of detention facilities, particularly those which concern instances of alleged ill-treatment of detainees. The authorities must act of their own motion, once the matter has come to their attention, and they cannot leave it to the initiative of the victims or their relatives (see paragraphs 52 and 53 above). It appears that by not linking the obligation to investigate to the presence of a complaint, that legal provision has been designed to protect the interests of detainees, individuals in a vulnerable situation who, owing to intimidation and fear of reprisal, are not inclined to complain of unlawful actions committed against them in

detention. The fact that the investigation was only initiated after the second applicant's complaint that the decision of 11 June 2002 was unlawful is evidence of a manifest breach of the applicable procedures by the prosecution authorities in the present case.

96. The Court is also not convinced that, once instituted, the proceedings were conducted in a diligent manner. The responsibility for the investigation was transferred from the prosecution authorities to the facility administration and back to the prosecution authorities. Within a period of four months two decisions not to institute criminal proceedings were given, only to be subsequently quashed by supervising prosecutors. The decisions ordering the reopening of the proceedings consistently referred to the need for further and more thorough investigation. However, this direction was not followed by the investigators in charge of the case, and the decisions to discontinue the proceedings were based on identical evidence and reasoning. It appears that the authorities took no meaningful steps to ensure, as far as possible, that all the facts were established, that culpable conduct was exposed and that those responsible were held accountable. The scope of the investigation has not evolved over time to include verification of new versions of events, such as the one that the first applicant was systematically beaten up in cell no. 131 and that a number of his co-detainees had been involved. The Court also notes that the investigation is currently pending without any evidence of progress being made.

97. In the light of the very serious shortcomings identified above, the Court concludes that the investigation was not prompt, expeditious or sufficiently thorough. The Court accordingly holds that there has been a violation of Article 3 of the Convention under its procedural limb in that the investigation into the first applicant's allegations of systematic ill-treatment by inmates in detention facility no. 1 in Yekaterinburg was not effective.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF EVENTS OF 14 JUNE 2002

98. The first applicant, relying on Article 3 of the Convention, complained that he had been severely beaten up by warders on 14 June 2002 and that the investigation had not led to the punishment of those responsible.

A. Submissions by the parties

99. The Government again argued that the complaint of the first applicant should be dismissed for failure to exhaust domestic remedies, as neither he nor the second applicant had made use of the avenues available to them under the Russian law. In particular, the

Government once again stressed that the first applicant had never raised his grievances before any domestic authority and the second applicant had delayed his appeal against the decision of 21 June 2002.

100. In the alternative, they submitted that the complaint was manifestly ill-founded as no evidence of ill-treatment of the first applicant on account of the events of 14 June 2002 had been established by the domestic investigating authorities. The only injuries discovered during the medical examination of the first applicant were two broken ribs which, as it was unequivocally found by the investigating authorities, had been the result of the fall the first applicant had taken when, feeling unwell and dizzy owing to concussion, he had slipped and fallen to the concrete floor. The first applicant had, therefore, failed to prove "beyond reasonable doubt" that he had been subjected to ill-treatment. Having addressed the quality of the investigation, the Government noted that it had been effective and efficient. They stressed that, being questioned on 14 June 2002 the first applicant had acted "strangely", refused to answer the warders' questions and failed to exercise his rights, to complain about the ill-treatment and to assist the investigators in establishing the exact circumstances leading to his injury.

101. The first applicant maintained his complaints.

B. The Court's assessment

1. Admissibility

102. The Court reiterates that in dealing with the allegations of the first applicant's ill-treatment by his cellmates it has addressed the Government's non-exhaustion argument which was built along the same lines. The Court has dismissed the objection, having found that the state of the first applicant's mental health precluded him from effectively raising his grievances before the competent domestic authorities. It has also not escaped the Court's attention that the investigation, reopened at the second applicant's request as soon as he had acquired the legal authority to complain, is still pending, thus rendering the Government's non-exhaustion argument devoid of substance (see paragraphs 66-68 above).

103. The Court sees no reason to depart from the above-mentioned finding. It observes that the same considerations which led it to the decision to dismiss the Government's non-exhaustion argument raised in respect of the admissibility of the applicants' complaint of ill-treatment by his cellmates govern its decision to reject the similar objection within the examination of the admissibility of the present complaint.

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

2. Merits

(a) Alleged ill-treatment by warders

105. Having examined the parties' submissions and all the material presented by them, the Court finds it established that on 14 June 2002 the first applicant, detained in the medical unit of the detention facility, was examined by a neurologist and the head of the medical unit. Having recorded an injury to the first applicant's chest, the doctors prescribed a chest X-ray which, taken four days later, revealed that the first applicant had two broken ribs on his right side (see paragraph 44 above).

106. The Court notes that the Government, relying on the findings of the domestic investigating authorities, argued that the first applicant's injury had been caused by a fall. They explained that the fall had been purely accidental and occurred when the first applicant had slipped over in a cell. The first applicant did not provide any description of the events on 14 June 2002 save for a general statement that the injury had been caused by warders in the detention facility. The Court observes that the medical evidence before it does not allow either version of events to be excluded. It is particularly mindful of the expert findings in April 2004 which called into question the nature of the first applicant's chest injury (see paragraph 47 above). While noting the inconclusive character of the first applicant's injury, the Court further observes that there was no other evidence of ill-treatment, such as testimony by an independent witness, which could have provided support to the applicant's version of events on 14 June 2002. At the same time the Court attributes particular weight to the fact that the Government's submissions were corroborated by statements by the three inmates detained together with the applicant in the facility medical unit (see paragraph 45 above).

107. It follows that the material in the case file does not provide an evidential basis sufficient to enable the Court to find “beyond reasonable doubt” that the first applicant was subjected to the alleged ill-treatment on 14 June 2002 (see, for similar reasoning, Gusev v. Russia (dec.), no. 67542/01, 9 November 2006; Toporkov v. Russia, no. 66688/01, §§ 43 45, 1 October 2009; and, most recently, Maksimov v. Russia, no. 43233/02, §§ 97-99, 18 March 2010). Accordingly, the Court cannot but conclude that there has been no violation of Article 3 of the Convention under its substantive limb.

(b) Alleged inadequacy of the investigation

108. The Court considers that the medical evidence, the first applicant's complaint of ill-treatment, and the fact that he had already alleged being assaulted in detention together raise a reasonable suspicion that his chest injury may not have been self-inflicted. The first applicant's complaint in this regard is therefore "arguable". The authorities thus had an obligation to carry out an effective investigation into the circumstances in which the first applicant sustained that injury (see Krastanov v. Bulgaria, no. 50222/99, § 58, 30 September 2004).

109. The Court notes that the investigation into the events of 14 June 2002 was riddled with the same defects as those which the Court identified in the investigation into the first applicant's allegations of systematic ill treatment by his cellmates (see paragraphs 93-97 above). In particular, it observes that following the refusal of the facility director to initiate criminal proceedings on 21 June 2002, the prosecution authorities launched the investigation almost two years later when the chance of collecting any evidence of alleged ill-treatment was almost illusory. As to the very fact of internal investigation by the management of the detention facility, the Court acknowledges the need for internal investigation with a view to possible disciplinary action in cases of abuse by warders. However, it finds it striking that in the present case the initial investigative steps, which usually prove to be crucial for establishing the truth in cases of brutality committed by State officials, were conducted by the same State authority whose employees were allegedly implicated in the events which were to be investigated (see, for similar reasoning, Vladimir Fedorov v. Russia, no. 19223/04, § 69, 30 July 2009, and Maksimov v. Russia, no. 43233/02, § 87, 18 March 2010). In this connection the Court reiterates its finding made on a number of occasions that the investigation should be carried out by competent, qualified and impartial experts who are independent of the suspected perpetrators and the agency they serve (see Ramsahai and Others v. the Netherlands [GC], no. 52391/99, § 325, ECHR 2007-..., and Oğur v. Turkey [GC], no. 21594/93, §§ 91-92, ECHR 1999-III). Furthermore, the Court would like to stress at this juncture that it is struck by the fact that, despite relying on the warders' and inmates' statements in the decision of 30 April 2004, the investigator did not hear evidence from them in person and merely recounted the witnesses' statements made during the internal investigation. The Court, however, is mindful of the important role which investigative interviews play in obtaining accurate and reliable information from suspects, witnesses and victims and, in the end, the discovery of the truth of the matter under investigation. Observing

the suspects', witnesses' and victims' demeanour during questioning and assessing the probative value of their testimony forms a substantial part of the investigative process.

110. The Court is also struck by the fact that it was not until December 2004 that the investigator questioned one of the first applicant's cellmates. The excerpts from the cellmate's testimony were included for the first time in the decision of 24 December 2004. Owing to the significant length of the investigation the authorities could no longer locate other former inmates who had been detained with the first applicant in the medical unit of the detention facility. The Court also finds it inexplicable that in disregard of direct orders from the Sverdlovsk Regional Prosecutor the investigator did not make any attempt to question the warders, save for one, who could have witnessed the events of 14 June 2002. In this connection, the Court notes that while the investigating authorities may not have been provided with the names of individuals who could have witnessed the first applicant's alleged beatings or provided other valuable information, they were expected to take steps on their own initiative to identify possible eyewitnesses.

111. In addition, no attempt was ever made to promptly conduct a forensic medical examination of the first applicant. The Court reiterates in this connection that proper medical examinations are an essential safeguard against ill-treatment. The forensic doctor must enjoy formal and de facto independence, have been provided with specialised training and have a mandate which is broad in scope (see Akkoç v. Turkey, nos. 22947/93 and 22948/93, § 55 and § 118, ECHR 2000 X). When a doctor writes a report after examining a person who has alleged ill-treatment, it is extremely important that the doctor states the degree of consistency with the allegations of ill-treatment. A conclusion indicating the degree of support for the allegations of ill-treatment should be based on a discussion of different possible diagnoses (injuries not relating to ill-treatment including self-inflicted injuries and diseases) (see Barabanshchikov v. Russia, no. 36220/02, § 59, 8 January 2009). The forensic medical examination performed in April 2004 did not comply with the above-mentioned requirements. The experts only studied medical evidence drawn up in the aftermath of the events of 14 June 2002 and made conclusions without observing the first applicant. In this connection, the Court has doubts that an expert examination carried out almost two years after the events in question could have provided valid and valuable findings as to the origin and nature of the first applicant's injuries. The indecisive character of the experts' conclusions supports this finding by the Court.

112. The Court is thus of the view that the investigator's inertness and reluctance to look for corroborating evidence precluded the creation of an accurate, reliable and precise record of the events of 14 June 2002.

113. The Court further observes that, having been opened almost two years after the alleged incident of ill-treatment, the investigation became very lengthy. The Court finds it striking that for a period of almost three years between December 2004 and August 2007 there were no further developments. The investigation is still pending, having been reopened in August 2007. The Government did not indicate what progress had been made since August 2007 and also failed to provide any explanation for the length of the criminal proceedings.

114. In such circumstances the Court is bound to conclude that the authorities failed to comply with the requirements of promptness, thoroughness and effectiveness (see Kişmir v. Turkey, no. 27306/95, § 117, 31 May 2005; Angelova and Iliev v. Bulgaria, no. 55523/00, § 103, ECHR 2007-IX; and Vladimir Fedorov, cited above, § 70). Accordingly, it holds that there has been a violation of Article 3 of the Convention under its procedural limb.

III. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

115. The first applicant complained that he had been denied effective judicial review of his application for release of 22 July 2002 as it had not been examined speedily by the domestic courts. The Court considers that the present complaint falls to be examined under Article 5 § 4 of the Convention, which reads as follows:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

A. Submissions by the parties

116. The Government stressed that the Russian courts had lawfully declined to examine the lawyer's application for release as the first applicant had been transferred to a detention facility in another town and the courts no longer had jurisdiction over the case.

117. The first applicant averred that the Presidium of the Khanty-Mansi Regional Court had declared the lower courts' interpretation of the jurisdictional issue to be incorrect and had quashed their decisions. The Presidium's decision led to the re-examination of the first applicant's detention. The proceedings therefore lasted for almost a year.

B. The Court's assessment

1. Admissibility

118. The Court observes that this complaint is not manifestly ill founded within the meaning of Article 35 § 3[14] of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) General principles

119. The Court reiterates that Article 5 § 4[43], in guaranteeing to persons arrested or detained a right to take proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful. Although it does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention, a State which institutes such a system must in principle accord to detainees the same guarantees on appeal as at first instance (see Navarra v. France, 23 November 1993, § 28, Series A no. 273-B, and Toth v. Austria, 12 December 1991, § 84, Series A no. 224). The requirement that a decision be given "speedily" is undeniably one such guarantee and Article 5 § 4, concerning issues of liberty, requires particular expedition (see Hutchison Reid v. the United Kingdom, no. 50272/99, § 79, ECHR 2003-IV). In that context, the Court also observes that there is a special need for a swift decision determining the lawfulness of detention in cases where a trial is pending, because the defendant should benefit fully from the principle of the presumption of innocence (see Iłowiecki v. Poland, no. 27504/95, § 76, 4 October 2001).

(b) Application of the general principles to the present case

120. The Court observes that on 20 August 2002 the Khanty-Mansi Regional Court upheld the decision of the Surgut Town Court dismissing the lawyer's complaint of 22 July 2002 by which the latter petitioned for the release of the first applicant. On 24 October 2003 the Presidium of the Khanty-Mansi Regional Court, having found that the reasoning by the lower instances was erroneous, quashed both decisions by way of supervisory review and authorised the detention to be re-examined. On 21 July 2004 the Regional Court, ruling at final instance, confirmed the lawfulness of the first applicant's arrest and subsequent detention.

121. The Court therefore finds that the domestic proceedings in issue were pending from 22 July to 20 August 2002 (see paragraphs 12-13. above) and from 24 October 2003 to 21 July 2004 (see paragraphs 20-24 above) (see, mutatis mutandis, Chevkin v. Russia, no. 4171/03, §§ 32-34, 15 June 2006). It thus took the domestic courts almost ten months to examine the request for release. Nothing suggests that the first applicant or his lawyer caused delays in the examination of the request. The Court considers that the period under examination cannot be considered compatible with the "speediness" requirement of Article 5 § 4, especially taking into account that its entire duration was attributable to the authorities (see, for example, Mamedova v. Russia, no. 7064/05, § 96, 1 June 2006; Khudoyorov, cited above, §§ 198 and 203; and Rehbock v. Slovenia, no. 29462/95, §§ 85-86, ECHR 2000-XII, where review proceedings which lasted twenty-three days were not "speedy").

122. Furthermore, the Court cannot overlook the fact that the final decision was taken on 21 July 2004, that is, almost twenty months after the trial court had determined the merits of the criminal case against the first applicant. The Court finds that the issue of the speediness of review in the present case overlaps with the issue of its effectiveness. The Court considers that in the circumstances of the case the authorities' failure to review without delay the lawfulness of the first applicant's detention deprived, in principle, the review of the requisite effectiveness (see Sabeur Ben Ali v. Malta, no. 35892/97, § 40, 29 June 2000; Galliani v. Romania, no. 69273/01, §§ 61-62, 10 June 2008; and, most recently, Eminbeyli v. Russia, no. 42443/02, § 57, 26 February 2009).

123. The Court therefore finds that there has been a violation of Article 5 § 4 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

124. The Court has examined the other complaints submitted by the applicants. However, having regard to all the material in its possession, and in so far as these complaints fall within the Court's competence, it finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

125. 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

126. The first applicant claimed 300,000 euros (EUR) in respect of non pecuniary damage.

127. The Government submitted that the claim was unsubstantiated, excessive and manifestly ill-founded.

128. The Court reiterates, firstly, that the first applicant cannot be required to furnish any proof of the non-pecuniary damage he sustained (see Gridin v. Russia, no. 4171/04, § 20, 1 June 2006). The Court further observes that it has found particularly grievous violations in the present case. The Court accepts that the first applicant suffered humiliation and distress on account of the ill-treatment inflicted on him by his cellmates. In addition, he did not benefit from an adequate and effective investigation into his complaints of ill-treatment. In these circumstances, it considers that the first applicant's suffering and frustration cannot be compensated for by a mere finding of a violation. Nevertheless, the particular amount claimed appears excessive. Making its assessment on an equitable basis, it awards the first applicant EUR 40,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

129. The first applicant did not claim any amount for the costs and expenses incurred before the domestic courts or before the Court. Consequently, the Court does not make any award under this head.

C. Default interest

130. 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.

3.5.4. The Court’s decision

1. Declares the first applicant's complaints concerning his ill-treatment by inmates and warders in the first half of June 2002, the ineffectiveness of the investigations into both incidents and absence of effective judicial review of the application for his release lodged on 22 July 2002 admissible and the remainder of the application inadmissible;

2. Holds that there has been a violation of Article 3[39] of the Convention on account of the authorities' failure to fulfil their positive obligation to adequately secure the physical and psychological integrity and well-being of the first applicant in detention facility no. 1 in Yekaterinburg;

3. Holds that there has been a violation of Article 3 of the Convention on account of the authorities' failure to investigate effectively the incidents of the first applicant's ill-treatment by his cellmates in detention facility no. 1 in Yekaterinburg;

4. Holds that there has been no violation of Article 3 of the Convention on account of the first applicant's allegations of ill-treatment by warders on 14 June 2002;

5. Holds that there has been a violation of Article 3 of the Convention on account of the authorities' failure to investigate effectively the first applicant's complaint of ill-treatment by warders;

6. Holds that there has been a violation of Article 5 § 4[43] of the Convention on account of the domestic courts' failure to examine speedily and effectively the application for release lodged on 22 July 2002;

7. Holds

(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 40,000 (forty thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable on the date of settlement, plus any tax that may be chargeable on that amount;

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

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

3.6. Case of Shtukaturov v. Russia[9]

This judgment will become final in the circumstances set out in

Article 44 § 2[9] of the Convention. It may be subject to editorial revision.

3.6.1. The procedure

1. The case originated in an application (no. 44009/05) against the Russian Federation lodged with the Court under Article 34[10] of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Pavel Vladimirovich Shtukaturov ("the applicant"), on 10 December 2005.

2. The applicant, who was granted legal aid, was represented by Mr D. Bartenev, a lawyer practising in St Petersburg. The Russian Government ("the Government") were represented by Mr P. Laptev, the former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged that by depriving him of his legal capacity without his participation and knowledge the domestic courts had breached his rights under Articles 6[23] and 8[21] of the Convention. He further alleged that his detention in a psychiatric hospital infringed Articles 3[39] and 5 of the Convention.

4. On 9 March 2006 the Court decided that an interim measure should be indicated to the Russian Government under Rule 39[44] of the Rules of Court. The Government was requested to allow the applicant to meet his lawyer in hospital in order to discuss the present case before the Court.

[9] CASE OF SHTUKATUROV v. RUSSIA; (Application no. 44009/05); JUDGMENT STRASBOURG; 27 March 2008; FINAL 27/06/2008

5. On 23 May 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3[26] of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

3.6.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1982 and lives in St Petersburg.

7. Since 2002 the applicant has suffered from a mental disorder. On several occasions he was placed in Hospital no. 6 in St Petersburg for in patient psychiatric treatment. In 2003 he obtained the status of a disabled person. The applicant lived with his mother; he did not work and received a disability pension.

8. In May 2003 the applicant's grand-mother died. The applicant inherited from her a flat in St Petersburg and a house with a plot of land in the Leningrad region.

9. On 27 July 2004 the applicant was placed in Hospital no. 6 for in patient treatment.

A. Incapacitation proceedings

10. On 3 August 2004 the applicant's mother lodged an application with the Vasileostrovskiy District Court of St Petersburg, seeking to deprive the applicant of legal capacity. She claimed that her son was inert and passive, that he rarely left the house, that he spent his days sitting on a couch, and that sometimes he behaved aggressively. She indicated that her son had recently inherited property from his grand-mother; however, he had not taken the necessary steps to register his property rights. This indicated that he was incapable of leading an independent social life and thus needed a guardian. It appears that the applicant was not formally notified about the proceedings that had been brought in his respect.

11. On 10 August 2004 the judge invited the applicant and his mother to the court to discuss the case. However, there is no evidence that the invitation ever reached the applicant. The court also requested the applicant's medical records from Hospital no. 6.

12. On 12 October 2004 the judge of the Vasileostrovskiy District Court of St Petersburg commissioned a psychiatric expert examination of the applicant's mental health. The

examination was assigned to the doctors of Hospital no. 6, where the applicant had been undergoing treatment. The judge formulated two questions to the doctors: first, whether the applicant suffered from any mental illness, and, second, whether he was able to understand his actions and control them.

13. On 12 November 2004 an expert team from Hospital no. 6 examined the applicant and his medical records. The report prepared by the expert team may be summarised as follows. After graduating from the school the applicant worked for a short time as an interpreter. However, some time later he became aggressive, unsympathetic and secluded, and prone to empty philosophizing. He abandoned his job, started attending religious meetings and visiting Buddhist shrines, lost most of his friends, neglected his personal hygiene and became very negative towards his relatives. He suffered from anorexia and was hospitalised in this respect.

14. In August 2002 he was placed in a psychiatric hospital for the first time with a diagnosis of "simple schizophrenia". In April 2003 he was discharged from hospital, however, in April 2003 he was admitted again because of his aggressive behaviour towards his mother. In the following months he was placed in hospital two more times. In April 2004 he was discharged. However, he "continued to live in an anti-social way". He did not work, loitered in the flat, prohibited his mother from preparing him food, leaving the flat or moving around, and threatened her. She was so afraid of the applicant that one day she spent a night at her friends' home and had to complain to the police about her son.

15. The final part of the report concerned the applicant's mental condition at the moment of his examination. The doctors noted that the applicant's social maladjustment and autism had worsened. They noted, inter alia, that "the applicant did not understand why he had been subjected to a [forensic] psychiatric examination". The doctors further stated that the applicant's "intellectual and mnemonic abilities were without any impairment". However, his behaviour was characterised by several typical features of schizophrenia, such as "formality of contacts, structural thought disorder [...], lack of judgment, emotional emasculation, coldness, reduction of energetic potential". The expert team concluded that the applicant was suffering from "simple schizophrenia with a manifest emotional and volitional defect" and that he could not understand his actions and control them.

16. On 28 December 2004 Judge A. of the Vasileostrovskiy District Court held a hearing on the merits of the case. The applicant was neither notified nor present at that hearing. The applicant's mother was notified but did not appear. She informed the court that she maintained her initial request and asked the court to examine the case in her absence. The case was

examined in the presence of the district prosecutor. A representative of Hospital no. 6 was also present. The representative of the hospital, described in the judgment as "an interested party", asked the court to declare the applicant incapable. It appears that the prosecutor did not make any remarks on the substance of the case. The hearing lasted ten minutes. As a result, the judge declared the applicant legally incapable, referring to the experts' findings.

17. Since no appeal was lodged against the judgment of 28 December 2004 within the ten-day time-limit provided by the law, on 11 January 2005 the judgment became final.

18. On 14 January 2005 the applicant's mother received a copy of the full text of the judgment of 28 December 2004. Subsequently, on an unspecified date she was appointed the applicant's guardian, and authorised by law to act on his behalf in all matters.

19. According to the applicant, he was not sent a copy of the judgment and became aware of its existence by chance in November 2005, when he found a copy of the judgment among his mother's papers at home.

B. The first contact with the lawyer

20. On 2 November 2005 the applicant contacted Mr Bartenev, a lawyer with the Mental Disability Advocacy Centre ("the lawyer"), and told him his story. The applicant and the lawyer met for two hours and discussed the case. According to the lawyer, who holds a degree in medicine from the Petrozavodsk State University, during the meeting the applicant was in an adequate state of mind and was fully able to understand complex legal issues and give relevant instructions. On the same day the lawyer helped the applicant to draft a request to restore the time-limits for lodging an appeal against the judgment of 28 December 2004.

C. Confinement in the psychiatric hospital in 2005

21. On 4 November 2005 the applicant was placed in Hospital no. 6. The admission to the hospital was requested by the applicant's mother, as his guardian; in terms of domestic law it was therefore voluntary and did not require approval by a court (see paragraph 56 below). The applicant claimed, however, that he had been confined in hospital against his will.

22. On 9, 10, 12 and 15 November 2005 the lawyer attempted to meet his client in the hospital. The applicant, in his turn, requested the hospital administration to allow him to see his lawyer in private. However, Dr Sh., the director of the hospital, refused permission. He referred to the applicant's mental condition and the fact that the applicant was legally incapable and therefore could act only through his guardian.

23. On 18 November 2005 the lawyer had a telephone conversation with the applicant. Following that conversation the applicant signed an authority form, authorising the lawyer to lodge an application with the European Court of Human Rights in connection with the events described above. That authority form was then transmitted to the lawyer through a relative of another patient in Hospital no. 6.

24. The lawyer reiterated his request for a meeting. He specified that he was representing the applicant before the European Court and enclosed a copy of the power of attorney. However, the hospital administration refused permission on the ground that the applicant did not have legal capacity. The applicant's guardian also refused to take any action on the applicant's behalf.

25. From December 2005 the applicant was prohibited any contact with the outside world; he was not allowed to keep any writing equipment or use a telephone. The applicant's lawyer produced a written statement by Mr S., another former patient in Hospital no. 6. Mr S. met the applicant in January 2006 while Mr S. was in the hospital in connection with attempted suicide. Mr S. and the applicant shared the same room. In the words of Mr S., the applicant was someone friendly and quiet. However, he was treated with strong medicines, such as Haloperidol and Chlorpromazine. The hospital staff prevented him from meeting his lawyer or his friends. He was not allowed to write letters; his diary was confiscated. According to the applicant, at a certain moment he attempted to escape from the hospital, but the staff members captured him and attached him to his bunk-bed.

D. Applications for release

26. On 1 December 2005 the lawyer complained to the guardianship office of Municipal District no. 11 of St Petersburg about the actions of the applicant's official guardian – his mother. He claimed that the applicant had been placed in the hospital against his will and without medical necessity. The lawyer also complained that the hospital administration was preventing him from meeting the applicant.

27. On 2 December 2005 the applicant himself wrote a letter in similar terms to the district prosecutor. He indicated, in particular, that he was prevented from meeting his lawyer, that his hospitalisation had not been voluntary, and that his mother had placed him in the hospital in order to appropriate his flat.

28. On 7 December 2005 the applicant wrote a letter to the Chief Doctor of Hospital no. 6, asking for his immediate discharge. He claimed that he needed some specialist dental

assistance which could not be provided within the psychiatric hospital. In the following weeks the applicant and his lawyer wrote several letters to the guardianship authority, district prosecutor, public health authority etc., calling for the applicant's immediate discharge from the psychiatric hospital.

29. On 14 December 2005 the district prosecutor advised the lawyer that the applicant had been placed in the hospital at the request of his official guardian, and that all questions related to his eventual release should be decided by her.

30. On 16 January 2006 the guardianship office informed the lawyer that the actions of the applicant's guardian had been lawful. According to the guardianship office, on 12 January 2006 the applicant was examined by a dentist. As follows from this letter, the representatives of the guardianship office did not meet the applicant and relied solely on information obtained from the hospital and from the guardian – the applicant's mother.

E. Request under Rule 39[44] of the Rules of Court

31. In a letter of 10 December 2005, the lawyer requested the Court to indicate to the Russian Government interim measures under Rule 39 of the Rules of Court. In particular, he requested the Court to oblige the Russian authorities to grant him access to the applicant with a view to assisting him in the proceedings and preparing his application to the European Court.

32. On 15 December 2005 the President of the Chamber decided not to take any decision under Rule 39 until more information was received. The parties were invited to produce additional information and comments regarding the subject matter of the case.

33. Based on the information received from the parties, on 6 March 2006 the President of the Chamber decided to indicate to the Government of Russia, under Rule 39 of the Rules of Court, interim measures desirable in the interests of the proper conduct of the proceedings before the Court. These measures were as follows: the respondent Government was directed to organise, by appropriate means, a meeting between the applicant and his lawyer. That meeting could take place in the presence of the personnel of the hospital where the applicant was detained, but outside their hearing. The lawyer was to be provided with the necessary time and facilities to consult with the applicant and help him in preparing the application before the European Court. The Russian Government was also requested not to prevent the lawyer from having such meeting with his client at regular intervals in future. The lawyer, in his turn, was obliged to be cooperative and comply with reasonable requirements of the hospital regulations.

34. However, the applicant's lawyer was not given access to the applicant. The Chief Doctor of Hospital no. 6 informed the lawyer that he did not regard the Court's decision on interim measures as binding. Furthermore, the applicant's mother objected to the meeting between the applicant and the lawyer.

35. The applicant's lawyer challenged that refusal before the St Petersburg Smolninskiy District Court, referring to the interim measure indicated by the European Court of Human Rights. On 28 March 2006 the court upheld his claim, declaring the ban on meetings between the applicant and his lawyer was unlawful.

36. On 30 March 2006 the former Representative of the Russian Federation at the European Court of Human Rights, Mr P. Laptev, wrote a letter to the President of the Vasileostrovskiy District Court of St Petersburg, informing him of the interim measures applied by the Court in the present case.

37. On 6 April 2006 the Vasileostrovskiy District Court examined, on the applicant's motion, the Court's request under Rule 39 of the Rules and held that the lawyer should be allowed to meet the applicant.

38. The hospital and the applicant's mother appealed against that decision. On 26 April 2006 the St Petersburg City Court examined their appeal and quashed the lower court's judgment of 6 April 2006. The City Court held, in particular, that the District Court had no competence to examine the request lodged by the Representative of the Russian Federation. The City Court further noted that the applicant's official guardian – his mother – had not applied to the court with any requests of this kind. The City Court finally held as follows:

"... The applicant's complaint [to the European Court] was lodged against the Russian Federation... The request by the European Court was addressed to the authorities of the Russian Federation. The Russian Federation as a special subject of international relations enjoys immunity from foreign jurisdiction, it is not bound by coercive measures applied by foreign courts and cannot be subjected to such measures ... without its consent. The [domestic] courts have no right to undertake on behalf of the Russian Federation an obligation to comply with the preliminary measures... This can be decided by the executive ... by way of an administrative decision."

39. On 16 May 2006 the St Petersburg City Court examined the appeal against the judgment of 28 March 2006 lodged by the Chief Doctor of Hospital no. 6. The City Court held that "under Rule 34 of the Rules of Court the authority of an advocate [representing the applicant

before the European Court] should be formalised in accordance with the legislation of the home country". The City Court further held that under Russian law the lawyer could not act on behalf of the client in the absence of an agreement between them. However, no such agreement had been concluded between Mr Bartenev (the lawyer) and the applicant's mother – the person who had the right to act on behalf of the applicant in all legal transactions. As a result, the City Court concluded that the lawyer had no authority to act on behalf of the applicant, and his complaint should be dismissed. The judgment of 28 March 2006 by the Smolninskiy District Court was thus reversed.

40. On the same day the applicant was discharged from hospital and met with his lawyer.

F. Appeals against the judgment of 28 December 2004

41. On 20 November 2005 the applicant's lawyer brought an appeal against the decision of 28 December 2004. He also requested the court to extend the time-limit for lodging the appeal, claiming that the applicant had not been aware of the proceedings in which he had been declared incapable. The appeal was lodged through the registry of the Vasileostrovskiy District Court.

42. On 22 December 2005 Judge A. of the Vasileostrovskiy District Court returned the appeal to the applicant's lawyer without examination. She indicated that the applicant had no legal capacity to act and, therefore, could lodge an appeal or any other request only through his guardian.

43. On 23 May 2006, after the applicant's discharge from the psychiatric hospital, the applicant's lawyer appealed against the decision of 22 December 2005. By a ruling of 5 July 2006 the St Petersburg City Court upheld the decision of 22 December 2005. The City Court held that the Code of Civil Procedure did not allow for the lodging of applications for restoration of procedural terms by legally incapable persons.

44. In the following months the applicant's lawyer introduced two appeals for supervisory review, but to no avail.

45. According to the applicant's lawyer, in 2007 the applicant was admitted to Hospital no. 6 again, at the request of his mother.

II. RELEVANT DOMESTIC LAW

A. Legal capacity

46. Under Article 21 of the Civil Code of the Russian Federation of 1994, any individual aged 18 or more has, as a rule, full legal capacity (дееспособность), which is defined as "the ability to acquire and enjoy civil rights, create and fulfil civil obligations by his own acts". Under Article 22 of the Civil Code legal capacity can be limited, but only on the grounds defined by law and within a procedure prescribed by law.

47. Under Article 29 of the Civil Code, a person who cannot understand or control his or her actions as a result of a mental disease may be declared legally incapable by the court and placed in the care of a guardian (опека). All legal transactions on behalf of the incapacitated person are concluded by his guardian. The incapacitated person can be declared fully capable if the grounds on which he or she was declared incapable cease to exist.

48. Article 30 of the Civil Code provides for partial limitation of legal capacity. If a person's addiction to alcohol or drugs is creating serious financial difficulties for his family, he can be declared partially incapable. That means that he is unable to conclude large-scale transactions. He can, however, dispose of his salary or pension and make small transactions, under the control of his guardian.

49. Article 135 (1) of the Code of Civil Proceedings of 2002 establishes that a civil claim lodged by a legally incapable person should be returned to him without examination.

50. Article 281 of the Code of Civil Proceedings of 2002 establishes the procedure for declaring a person incapable. A request for incapacitation of a mentally ill person can be brought before a first-instance court by a family member of the person concerned. On receipt of the request, the judge must commission a forensic psychiatric examination of the person concerned.

51. Article 284 of the Code of Civil Proceedings provides that the incapacitation request should be examined in the presence of the person concerned, the plaintiff, the prosecutor and a representative of the guardianship office (орган опеки и попечительства). The person whose legal capacity is being examined by the court is to be summoned to the court hearing, unless his state of health prohibits him from attending it.

52. Article 289 of the Code of Civil Proceedings provides that full legal capacity can be restored by the court at the request of the guardian, a close relative, the guardianship office or the psychiatric hospital, but not of the person declared incapable himself.

B. Confinement to a psychiatric hospital

53. The Psychiatric Assistance Act of 2 July 1992, as amended ("the Act"), provides that any recourse to psychiatric aid should be voluntary. However, a person declared fully incapable may be subjected to psychiatric treatment at the request or with the consent of his official guardian (section 4 of the Act).

54. Section 5 (3) of the Act provides that the rights and freedoms of persons with mental illnesses cannot be limited solely on the ground of their diagnosis, or the fact that they have been subjected to treatment in a psychiatric hospital.

55. Under section 5 of the Act, a patient in a psychiatric hospital can have a legal representative. However, pursuant to point 2 of section 7, the interests of a person declared fully incapable are represented by his official guardian.

56. Section 28 (3) and (4) of the Act ("Grounds for hospitalisation") provides that a person declared incapable can be subjected to hospitalisation in a psychiatric hospital at the request of his guardian. This hospitalisation is regarded as voluntary and does not require approval by the court, as opposed to non-voluntary hospitalisation (sections 39 and 33 of the Law).

57. Section 37 (2) of the Law establishes the list of rights of a patient in a psychiatric hospital. In particular, the patient has the right to communicate with his lawyer without censorship. However, under section 37 (3) the doctor may limit the applicant's rights to correspond with other persons, have telephone conversations and meet visitors.

58. Section 47 of the Act provides that the doctors' actions can be appealed against before the court.

III. RELEVANT INTERNATIONAL DOCUMENTS

59. On 23 February 1999 the Committee of Ministers of the Council of Europe adopted "Principles concerning the legal protection of incapable adults", Recommendation No. R (99) 4. The relevant provisions of these Principles read as follows:

Principle 2 – Flexibility in legal response

"1. The measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable suitable legal response to be made to different degrees of incapacity and various situations. ...

4. The range of measures of protection should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned."

Principle 3 – Maximum reservation of capacity

"1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.

2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so. ..."

Principle 6 – Proportionality

"1. Where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.

2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention. ..."

Principle 13 – Right to be heard in person

"The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity."

Principle 14 – Duration review and appeal

"1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews. ...

4. There should be adequate rights of appeal.”

3.6.3. The law

60. The Court notes that the applicant submitted several complaints under different Convention provisions. Those complaints relate to his incapacitation, placement in a psychiatric hospital, inability to obtain a review of his status, inability to meet with his lawyer, interference with his correspondence, involuntary medical treatment, etc. The Court will examine these complaints in chronological sequence. Thus, the Court will start with the complaints related to the incapacitation proceedings – the episode which gave rise to all the subsequent events, and then examine the applicant's hospitalisation and the complaints stemming from it.

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AS REGARDS THE INCAPACITATION PROCEEDINGS

61. The applicant complained that he had been deprived of his legal capacity as a result of proceedings which had not been “fair” within the meaning of Article 6 of the Convention. Article 6 § 1, in so far as relevant, provides:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

A. Submissions by the parties

62. The Government contended that the proceedings before the Vasileostrovskiy District Court had been fair. Under Russian law, a request to declare a person legally incapable may be lodged by a close relative of the person suffering from a mental disorder. In the present case it was Ms Shtukaturova, the applicant's mother, who filed such a request. The court ordered a psychiatric examination of the applicant. Having examined the applicant, the doctors concluded that he was unable to understand and control his actions. Given the applicant's medical condition, the court decided not to summon him to the hearing. However, in compliance with Article 284 of the Code of Civil Procedure, a prosecutor and a representative of the psychiatric hospital were present at the hearing. Therefore, the applicant's procedural rights were not breached.

63. The applicant maintained that the proceedings before the first instance court had been unfair. The judge had not explained why she changed her mind and considered that the applicant's personal presence had not been necessary (see paragraphs 11 et seq. above). The court had decided on the applicant's incapacity without hearing or seeing him, or obtaining any submissions from the applicant. The court based its decision on the written medical report, which the applicant had not seen and had had no opportunity to challenge. The prosecutor who participated in the hearing on 28 December 2004 also supported the application, without having seen the applicant prior to the hearing. The Vasileostrovskiy District Court also failed to question the applicant's mother, who had lodged the application for incapacity. In sum, the court failed to take even minimal measures in order to ensure an objective assessment of the applicant's mental condition. Further, the applicant maintained that he was unable to challenge the judgment of 28 December 2004 because under Russian law he lacked standing to lodge an appeal.

B. Admissibility

64. The parties did not dispute the applicability of Article 6, under its "civil" head, to the proceedings at issue, and the Court does not see any reason to hold otherwise (see Winterwerp v. the Netherlands, judgment of 24 October 1979, Series A no. 33, § 73).

65. The Court notes that the applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

C. Merits

1. General principles

66. In most of the previous cases before the Court involving "persons of unsound mind", the domestic proceedings concerned their detention and were thus examined under Article 5 of the Convention. However, the Court has consistently held that the "procedural" guarantees under Article 5 §§ 1 and 4 are broadly similar to those under Article 6 § 1 of the Convention (see, for instance, Winterwerp, cited above, § 60; Sanchez-Reisse v. Switzerland, judgment of 21 October 1986, Series A no. 107; Kampanis v. Greece, 13 July 1995, Series A no. 318-B; and Ilijkov v. Bulgaria, no. 33977/96, § 103, 26 July 2001). Therefore, in deciding whether the incapacitation proceedings in the present case were "fair", the Court will have regard, mutatis mutandis, to its case-law under Article 5 § 1 (e) and Article 5 § 4 of the Convention.

67. The Court recalls that in deciding whether an individual should be detained as a "person of unsound mind", the national authorities are to be recognised as having a certain margin of appreciation. It is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case; the Court's task is to review under the Convention the decisions of those authorities (see Luberti v. Italy, judgment of 23 February 1984, Series A no. 75, § 27).

68. In the context of Article 6 § 1 of the Convention, the Court assumes that in cases involving a mentally ill person the domestic courts should also enjoy a certain margin of appreciation. Thus, for example, they can make the relevant procedural arrangements in order to secure the good administration of justice, protection of the health of the person concerned, etc. However, such measures should not affect the very essence of the applicant's right to a fair trial as guaranteed by Article 6 of the Convention. In assessing whether or not a particular measure, such as exclusion of the applicant from a hearing, was necessary, the Court will take into account all relevant factors (such as the nature and complexity of the issue before the domestic courts, what was at stake for the applicant, whether his appearance in person represented any threat to others or to himself, etc.).

2. Application to the present case

69. It is not disputed that the applicant was unaware of the request for incapacitation made by his mother. Nothing suggests that the court notified the applicant proprio motu about the proceedings (see paragraph 10 above). Further, as follows from the doctor's report of 12 November 2004 (see paragraph 13 above), the applicant did not realise that he was being subjected to a forensic psychiatric examination. The Court concludes that the applicant was unable to participate in the proceedings before the Vasileostrovskiy District Court in any form. It remains to be ascertained whether, in the circumstances, this was compatible with Article 6 of the Convention.

70. The Government argued that the decisions taken by the national judge had been lawful in domestic terms. However, the crux of the complaint is not the domestic legality but the "fairness" of the proceedings from the standpoint of the Convention and the Court's case-law.

71. In a number of previous cases (concerning compulsory confinement in a hospital) the Court confirmed that a person of unsound mind must be allowed to be heard either in person or, where necessary, through some form of representation – see, for example, Winterwerp, cited above, § 60. In Winterwerp the applicant's freedom was at stake. However, in the

present case the outcome of the proceedings was at least equally important for the applicant: his personal autonomy in almost all areas of life was at issue, including the eventual limitation of his liberty.

72. Further, the Court notes that the applicant played a double role in the proceedings: he was an interested party, and, at the same time, the main object of the court's examination. His participation was therefore necessary not only to enable him to present his own case, but also to allow the judge to form her personal opinion about the applicant's mental capacity (see, mutatis mutandis, Kovalev v. Russia, no. 78145/01, §§ 35-37, 10 May 2007).

73. The applicant was indeed an individual with a history of psychiatric troubles. From the materials of the case, however, it appears that despite his mental illness he had been a relatively autonomous person. In such circumstances it was indispensable for the judge to have at least a brief visual contact with the applicant, and preferably to question him. The Court concludes that the decision of the judge to decide the case on the basis of documentary evidence, without seeing or hearing the applicant, was unreasonable and in breach of the principle of adversarial proceedings enshrined in Article 6 § 1 (see Mantovanelli v. France, judgment of 18 March 1997, Reports of Judgments and Decisions 1997-II, § 35).

74. The Court has examined the Government's argument that a representative of the hospital and the district prosecutor attended the hearing on the merits. However, in the Court's opinion, their presence did not make the proceedings truly adversarial. The representative of the hospital acted on behalf of an institution which had prepared the report and was referred to in the judgment as an "interested party". The Government did not explain the role of the prosecutor in the proceedings. In any event, from the record of the hearing it appears that both the prosecutor and the hospital representative remained passive during the hearing, which, moreover, lasted only ten minutes.

75. Finally, the Court recalls that it must always assess the proceedings as a whole, including the decision of the appellate court (see C.G. v. the United Kingdom, no. 43373/98, § 35, 19 December 2001). The Court notes that in the present case the applicant's appeal was disallowed without examination, on the ground that the applicant had no legal capacity to act before the courts (see paragraph 41 above). Regardless of whether or not the rejection of his appeal without examination was acceptable under the Convention, the Court merely notes that the proceedings ended with the first-instance court judgment of 28 December 2004.

76. The Court concludes that in the circumstances of the present case the proceedings before the Vasileostrovskiy District Court were not fair. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION AS REGARDS THE INCAPACITATION OF THE APPLICANT

77. The applicant complained that by depriving him of his legal capacity the authorities had breached Article 8 of the Convention. Article 8 provides:

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

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

A. Submissions by the parties

1. The Government

78. The Government admitted that the judgment depriving the applicant of his legal capacity entailed a number of limitations in the area of private life. However, they claimed that the applicant's rights under Article 8 had not been breached. Their submissions can be summarised as follows. First, the measure adopted by the court was aimed at the protection of the interests and health of other persons. Further, the decision was taken in conformity with the substantive law, namely on the basis of Article 29 of the Civil Code of the Russian Federation.

2. The applicant

79. The applicant insisted on his initial complaint that Article 8 had been breached in his case. He maintained that Article 29 of the Civil Code, which had served as a basis for depriving him of legal capacity, was not formulated with sufficient precision. The law permitted the deprivation of an individual's legal capacity if that person "could not understand the meaning of his actions or control them". However, the law did not explain what kind of "actions" the applicant should understand or control, or how complex these actions should be.

In other words, there was no legal test to establish the severity of the reduction in cognitive capacity which called for full deprivation of legal capacity. The law was clearly deficient in this respect; it failed to protect mentally ill people from arbitrary interference with their right to private life. Therefore, the interference with his private life had not been lawful.

80. The applicant further argued that the interference did not pursue a legitimate aim. The authorities did not seek to protect national security, public safety or the economic well-being of the country, or to prevent disorder or crime. As to the protection of health and morals of others, there was no indication that the applicant represented a threat to the rights of third parties. Finally, with regard to the applicant himself, the government did not suggest that the incapacitation had had a therapeutic effect on the applicant. Nor was there any evidence that the authorities had sought to deprive the applicant of his capacity because he would otherwise have carried out actions which would result in a deterioration of his health. With regard to his own pecuniary interests, the protection of a person's own rights is not a ground listed in Article 8 § 2^{21}, and it cannot therefore serve as a justification for interfering with a person's rights as protected under Article 8 § 1 of the Convention. In sum, the interference with his private life did not pursue any of the legitimate aims listed in Article 8 § 2 of the Convention.

81. Finally, the applicant submitted that the interference had not been "necessary in a democratic society", as there had been no need to restrict his legal capacity. The Vasileostrovskiy District Court did not adduce any reason for its decision: there was no indication that the applicant had had problems with managing his property in the past, was unable to work, abused his employment, etc. The medical report was not corroborated by any evidence, and the court did not assess the applicant's past behaviour in any of the areas where it restricted his legal capacity.

82. Even if the Vasileostrovskiy District Court was satisfied that the applicant could not act in a certain area of life, it could have restricted his capacity in that specific area, without going further. However, Russian law, unlike the legislation in many other European countries, did not allow a partial limitation of one's legal capacity, but provided only for full incapacitation. The restricted capacity option could be used solely for those who abused drugs or alcohol. In such circumstances the court should have refused to apply a measure as drastic as full incapacitation. Instead, the court preferred to strip bluntly the applicant of all of his decision-making powers for an unlimited period of time.

B. Admissibility

83. The parties agreed that the judgment of 28 December 2004 amounted to an interference in the applicant's private life. The Court recalls that Article 8 “secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his personality” (see Brüggeman and Scheuten v. Germany, no. 6959/75, Commission's report of 12 July 1977, Decisions and Reports 10, p. 115, § 55). The judgment of 28 December 2004 deprived the applicant of his capacity to act independently in almost all areas of life: he was no longer able to sell or buy any property on his own, to work, to travel, to choose his place of residence, to join associations, to marry, etc. Even his liberty could henceforth have been limited without his consent and without any judicial supervision. In sum, the Court concludes that the deprivation of legal capacity amounted to an interference with the private life of the applicant (see Matter v. Slovakia, no. 31534/96, § 68, 5 July 1999).

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

C. Merits

85. The Court reiterates that any interference with an individual's right to respect for his private life will constitute a breach of Article 8 unless it was “in accordance with the law”, pursued a legitimate aim or aims under paragraph 2, and was “necessary in a democratic society” in the sense that it was proportionate to the aims sought.

86. The Court took note of the applicant's contention that the measure applied to him had not been lawful and had not pursued any legitimate aim. However, in the Court's opinion it is not necessary to examine these aspects of the case, since the decision to incapacitate the applicant was in any event disproportionate to the legitimate aim invoked by the Government for the reasons set out below.

1. General principles

87. The applicant claimed that full incapacitation had been an inadequate response to the problems he experienced. Indeed, under Article 8 the authorities must strike a fair balance between the interests of a person of unsound mind and the other legitimate interests concerned. However, as a rule, in such a complex matter as determining somebody's mental capacity, the authorities should enjoy a wide margin of appreciation. This is mostly explained

by the fact that the national authorities have the benefit of direct contact with the persons concerned and are therefore particularly well placed to determine such issues. The task of the Court is rather to review under the Convention the decisions taken by the national authorities in the exercise of their powers in this respect (see, mutatis mutandis, Bronda v. Italy, judgment of 9 June 1998, Reports 1998-IV, p. 1491, § 59).

88. At the same time, the margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake (see Elsholz v. Germany [GC], no. 25735/94, § 49, ECHR 2000-VIII). A stricter scrutiny is called for in respect of very serious limitations in the sphere of private life.

89. Further, the Court reiterates that, whilst Article 8 of the Convention contains no explicit procedural requirements, "the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8" (see Görgülü v. Germany, no. 74969/01, § 52, 26 February 2004). The extent of the State's margin of appreciation thus depends on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism (see, mutatis mutandis, Sahin v. Germany, no. 30943/96, §§ 46 et seq., 11 October 2001).

2. Application to the present case

90. First, the Court notes that the interference with the applicant's private life was very serious. As a result of his incapacitation the applicant became fully dependant on his official guardian in almost all areas of life. Furthermore, "full incapacitation" was applied for an indefinite period and could not, as the applicant's case shows, be challenged otherwise than through the guardian, who opposed any attempts to discontinue the measure (see also "Relevant Domestic Law" above, paragraph 52).

91. Second, the Court has already found that the proceedings before the Vasileostrovskiy District Court were procedurally flawed. Thus, the applicant did not take part in the court proceedings and was not even examined by the judge in person. Further, the applicant was unable to challenge the judgment of 28 December 2004, since the City Court refused to examine his appeal. In sum, his participation in the decision-making process was reduced to zero. The Court is particularly struck by the fact that the only hearing on the merits in the applicant's case lasted ten minutes. In such circumstances it cannot be said that the judge had

“had the benefit of direct contact with the persons concerned”, which normally would call for judicial restraint on the part of this Court.

92. Third, the Court must examine the reasoning of the judgment of 28 December 2004. In doing so, the Court will have in mind the seriousness of the interference complained of, and the fact that the court proceedings in the applicant's case were perfunctory at best (see above).

93. The Court notes that the District Court relied solely on the findings of the medical report of 12 November 2004. That report referred to the applicant's aggressive behaviour, negative attitudes and “anti-social” lifestyle; it concluded that the applicant suffered from schizophrenia and was thus unable to understand his actions. At the same time, the report did not explain what kind of actions the applicant was unable of understanding and controlling. The incidence of the applicant's illness is unclear, as are the possible consequences of the applicant's illness for his social life, health, pecuniary interests, etc. The report of 12 November 2004 was not sufficiently clear on these points.

94. The Court does not cast doubt on the competence of the doctors who examined the applicant and accepts that the applicant was seriously ill. However, in the Court's opinion the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation. By analogy with the cases concerning deprivation of liberty, in order to justify full incapacitation the mental disorder must be “of a kind or degree” warranting such a measure – see, mutatis mutandis, Winterwerp, cited above, § 40. However, the questions to the doctors, as formulated by the judge, did not concern “the kind and degree” of the applicant's mental illness. As a result, the report of 12 November 2004 did not analyse the degree of the applicant's incapacity in sufficient detail.

95. It appears that the existing legislative framework did not leave the judge another choice. The Russian Civil Code distinguishes between full capacity and full incapacity, but it does not provide for any “borderline” situation other than for drug or alcohol addicts. The Court refers in this respect to the principles formulated by Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe, cited above in paragraph 59. Although these principles have no force of law for this Court, they may define a common European standard in this area. Contrary to these principles, Russian legislation did not provide for a “tailor-made response”. As a result, in the circumstances the applicant's rights under Article 8 were limited more than strictly necessary.

96. In sum, having examined the decision-making process and the reasoning behind the domestic decisions, the Court concludes that the interference with the applicant's private life was disproportionate to the legitimate aim pursued. There was, therefore, a breach of Article 8 of the Convention on account of the applicant's full incapacitation.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

97. Under Article 5 § 1 of the Convention the applicant complained that his placement in the psychiatric hospital had been unlawful. Article 5, in so far as relevant, provides:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...

(e) the lawful detention of persons ... of unsound mind..."

A. Submissions by the parties

1. The Government

98. The Government claimed that the applicant's placement in the hospital had been lawful. Under sections 28 and 29 of the Psychiatric Assistance Act, a person can be placed in a psychiatric hospital pursuant to a court order or at the request of the doctor, provided that the person suffers from a mental disorder. The law distinguishes between non-voluntary and voluntary confinement in hospital. The latter does not require a court order and may be authorised by the official guardian, if the person is legally incapable. The applicant was placed in the hospital at the request of his official guardian in relation to a worsening of his mental condition. In such circumstances, there was no need for a court order authorising the confinement.

99. The Government further indicated that section 47 of the Psychiatric Assistance Act provided for administrative and judicial remedies against the acts or negligence of medical personnel. However, under paragraph 2 of Article 31 of the Civil Code of the Russian Federation, if a person is legally incapable, it is his official guardian who should act in his stead before the administrative bodies or the courts. The applicant's official guardian was his mother, who did not lodge any complaint. The prosecutor's office, after an inquiry, concluded that the applicant's rights had not been breached. Therefore, the domestic law provided effective remedies to protect the applicant's rights.

100. As to compensation for damages caused by the confinement in a psychiatric hospital, it is recoverable only if there was a fault on the part of the domestic authorities. The Government asserted that the medical personnel had acted lawfully.

2. The applicant

101. The applicant maintained his claims. First, he alleged that his placement in hospital had amounted to a deprivation of his liberty. Thus, he was placed in a locked facility. After he attempted to flee the hospital in January 2006, he was tied to his bed and given an increased dose of sedative medication. He was not allowed to communicate with the outside world until his discharge. Finally, the applicant subjectively perceived his confinement in the hospital as a deprivation of liberty. Contrary to what the Government suggested, he had never regarded his detention as consensual and had unequivocally objected to it throughout the entire duration of his stay in the hospital.

102. Further, the applicant claimed that his detention in the hospital was not "in accordance with the procedure prescribed by law". Thus, under Russian law, his hospitalization was regarded as voluntary confinement, regardless of his opinion, and, consequently, none of the procedural safeguards usually required in cases of non-voluntary hospitalisation applied to him. There should, however, be some procedural safeguards in place, especially where the person concerned clearly expressed his disagreement with his guardian's decision. In the present case the authorities did not assess the applicant's capacity to take an independent decision of a specific kind at the moment of his hospitalisation. They relied on the applicant's status as a legally incapable person, no matter how far removed in time the court decision about his global capacity might be. In the present case it was made more than ten months prior to the hospitalisation.

103. Furthermore, Russian law did not sufficiently reflect the fact that a person's capacity could change over time. There was no mandatory periodic review of the capacity status, nor was there a possibility for the person under guardianship to request such a review. Even assuming that, at the moment of the initial court decision declaring him incapable, the applicant's capacity was so badly impaired that he could not decide for himself the question of hospitalisation, his condition might have changed in the meantime.

B. Admissibility

104. The Government may be understood as claiming that the applicant's hospitalisation was, in domestic terms, voluntary, and, as such, did not fall under the scenario of "deprivation of

liberty" within the meaning of Article 5 of the Convention. However, the Court cannot subscribe to this thesis.

105. It reiterates that in order to determine whether there has been a deprivation of liberty, the starting point must be the concrete situation of the individual concerned. Account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question (see Guzzardi v. Italy, judgment of 6 November 1980, Series A no. 39, § 92, and Ashingdane v. the United Kingdom, judgment of 28 May 1985, Series A no. 93, § 41).

106. The Court further recalls that the notion of deprivation of liberty within the meaning of Article 5 § 1 does not only comprise the objective element of a person's confinement in a particular restricted space for a not negligible length of time. A person can only be considered to have been deprived of his liberty if, as an additional subjective element, he has not validly consented to the confinement in question (see, mutatis mutandis, H.M. v. Switzerland, no. 39187/98, § 46, ECHR 2002-II).

107. The Court observes in this respect that the applicant's factual situation at the hospital was largely undisputed. The applicant was confined in the hospital for several months, he was not free to leave and his contacts with the outside world were seriously restricted. As to the "subjective" element, it was disputed between the parties whether the applicant had consented to his stay in the clinic. The Government mostly relied on the legal construction of "voluntary confinement", whereas the applicant referred to his own perception of the situation.

108. The Court notes in this respect that, indeed, the applicant lacked de jure legal capacity to decide for himself. However, this does not necessarily mean that the applicant was de facto unable to understand his situation. First, the applicant's own behaviour at the moment of his confinement proves the contrary. Thus, on several occasions the applicant requested his discharge from hospital, he contacted the hospital administration and a lawyer with a view to obtaining his release, and once he attempted to escape from the hospital (see, a fortiori, Storck v. Germany, no. 61603/00, ECHR 2005-V, of 16 June 2005, where the applicant consented to her stay in the clinic but then attempted to escape). Second, it follows from the Court's above conclusions that the findings of the domestic courts on the applicant's mental condition were questionable and quite remote in time (see paragraph 96 above).

109. In sum, even though the applicant was legally incapable of expressing his opinion, the Court in the circumstances is unable to accept the Government's view that the applicant

agreed to his continued stay in the hospital. The Court therefore concludes that the applicant was deprived of his liberty by the authorities within the meaning of Article 5 § 1 of the Convention.

110. The Court further notes that although the applicant's detention was requested by the applicant's guardian, a private person, it was implemented by a State-run institution – a psychiatric hospital. Therefore, the responsibility of the authorities for the situation complained of was engaged.

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

C. Merits

112. The Court accepts that the applicant's detention was "lawful", if this term is construed narrowly, in the sense of formal compatibility of the detention with the procedural and material requirements of the domestic law. It appears that the only condition for the applicant's detention was the consent of his official guardian, his mother, who was also the person who solicited the applicant's placement in the hospital.

113. However, the Court recalls that the notion of "lawfulness" in the context of Article 5 § 1 (e) has also a broader meaning. "The notion underlying the term ['procedure prescribed by law'] is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary" (see Winterwerp, cited above, § 45). In other words, the detention cannot be considered as "lawful" within the meaning of Article 5 § 1 if the domestic procedure does not provide sufficient guarantees against arbitrariness.

114. In its Winterwerp judgment of 24 October 1979, the Court set out three minimum conditions which have to be satisfied in order for there to be "the lawful detention of a person of unsound mind" within the meaning of Article 5 § 1 (e): except in emergency cases, the individual concerned must be reliably shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder.

115. Turning to the present case, the Court notes that it was submitted on behalf of the applicant that his deprivation of liberty had been arbitrary, because he had not been reliably shown to be of unsound mind at the time of his confinement. The Government submitted nothing to refute this argument. Thus, the Government did not explain what made the applicant's mother request his hospitalisation on 4 November 2005. Further, the Government did not provide the Court with any medical evidence concerning the applicant's mental condition at the moment of his admission to the hospital. It appears that the decision to hospitalise relied merely on the applicant's legal status, as it was defined ten months earlier by the court, and, probably, on his medical history. Indeed, it is inconceivable that the applicant remained in hospital without any examination by the specialist doctors. However, in the absence of any supporting documents or submissions by the Government concerning the applicant's mental condition during his placement, the Court has to conclude that it has not been "reliably shown" by the Government that the applicant's mental condition necessitated his confinement.

116. In view of the above the Court concludes that the applicant's hospitalisation between 4 November 2005 and 16 May 2006 was not "lawful" within the meaning of Article 5 § 1 (e) of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

117. The applicant complains that he was unable to obtain his release from the hospital. Article 5 § 4, relied on by the applicant, provides:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Submissions by the parties

118. The Government maintained that the applicant had had an effective remedy to challenge his admission to the psychiatric hospital. Thus, he could have applied for release or complained about the actions of the medical staff through his guardian, who represented him before third parties, including the court. Further, the General Prosecutor's Office had carried out a check of the applicant's situation and did not establish any violation of his rights.

119. The applicant claimed that Russian law allowed him to bring court proceedings only through his guardian, who was opposed to his release.

B. Admissibility

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

C. Merits

121. The Court recalls that by virtue of Article 5 § 4, a person of unsound mind compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention (see Winterwerp, cited above, § 55, and Luberti v. Italy, judgment of 23 February 1984, Series A no. 75, § 31; see also Rakevich v. Russia, no. 58973/00, §§ 43 et seq., 28 October 2003).

122. This is so in cases where the initial detention was initially authorised by a judicial authority (see X v. the United Kingdom, judgment of 5 November 1981, Series A no. 46, § 52), and it is a fortiori true in the circumstances of the present case, where the applicant's confinement was authorised not by a court but by a private person, namely the applicant's guardian.

123. The Court accepts that the forms of the judicial review may vary from one domain to another, and depend on the type of the deprivation of liberty at issue. It is not within the province of the Court to inquire into what would be the best or most appropriate system of judicial review in this sphere. However, in the present case the courts were not involved in deciding on the applicant's detention at any moment and in any form. It appears that Russian law does not provide for automatic judicial review of confinement in a psychiatric hospital in situations such as the applicant's. Further, the review cannot be initiated by the person concerned if that person has been deprived of his legal capacity. Such a reading of Russian law follows from the Government's submissions on the matter. In sum, the applicant was prevented from pursuing independently any legal remedy of judicial character to challenge his continued detention.

124. The Government claimed that the applicant could have initiated legal proceedings through his mother. However, that remedy was not directly accessible to him: the applicant fully depended on his mother who had requested his placement in hospital and opposed his release. As to the inquiry carried out by the prosecution authorities, it is unclear whether it

concerned the “lawfulness” of the applicant's detention. In any event, a prosecution inquiry as such cannot be regarded as a judicial review satisfying the requirements of Article 5 § 4 of the Convention.

125. The Court recalls its findings that the applicant's hospitalisation was not voluntary. Further, the last time on which the courts had assessed the applicant's mental capacity was ten months before his admission to the hospital. The “incapacitation” court proceedings were seriously flawed, and, in any event, the court never examined the necessity of the applicant's placement in a closed institution. Nor was this necessity assessed by a court at the moment of his placement in the hospital. In such circumstances the applicant's inability to obtain judicial review of his detention amounted to a violation of Article 5 § 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

126. The applicant submitted that the compulsory medical treatment he received in hospital amounted to inhuman and degrading treatment. Furthermore, on one occasion physical restraint was used against him, when he was tied to his bed for more than 15 hours. Article 3 of the Convention, referred to by the applicant in this respect, provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

127. The Court notes that the complaint under Article 3 relates to two distinct facts: (a) involuntary medical treatment and (b) the securing of the applicant to his bed after his attempted escape. As regards the second allegation, the Court notes that it was not part of the applicant's initial submissions to the Court and was not sufficiently substantiated. Reference to it appeared only in the applicant's observations in reply to those of the Government. Therefore, this incident falls outside of the scope of the present application, and, as such, will not be examined by the Court.

128. It remains to be ascertained, however, whether the medical treatment of the applicant in the hospital amounted to “inhuman and degrading treatment” within the meaning of Article 3. According to the applicant, he was treated with Haloperidol and Chlorpromazine. He described these substances as obsolete medicine with strong and unpleasant side effects. The Court notes that the applicant did not provide any evidence showing that he had actually been treated with this medication. Furthermore, there is no evidence that the medication in question had the unpleasant effects he was complaining of. The applicant does not claim that his health has deteriorated as a result of such treatment. In such circumstances the Court finds that the applicant's allegations in this respect are unsubstantiated.

129. The Court concludes that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

130. The applicant complained under Article 13, taken together with Articles 6 and 8 of the Convention, that he had been unable to obtain a review of his status as a legally incapable person. Article 13, insofar as relevant, provides:

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

131. The Court finds that this complaint is linked to the complaints submitted under Article 6 and 8 of the Convention, and it should therefore be declared admissible.

132. The Court further notes that in analysing the proportionality of the measure complained of under Article 8 it took account of the fact that the measure was imposed for an indefinite period of time and could not be challenged by the applicant independently from his mother or other persons empowered by law to seek its withdrawal (see paragraph 90 above). Furthermore, this aspect of the proceedings was considered by the Court in its examination of the overall fairness of the incapacitation proceedings.

133. In these circumstances the Court does not consider it necessary to re-examine this aspect of the case separately through the prism of the "effective remedies" requirement of Article 13.

VII. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

134. The Court notes that under Article 14 of the Convention the applicant complained about his alleged discrimination. The Court finds that this complaint is linked to the complaints submitted under Article 6 and 8 of the Convention, and it should therefore be declared admissible. However, in the circumstances and given its findings under Articles 5, 6 and 8 of the Convention, the Court considers that there is no need to examine the complaint under Article 14 of the Convention separately.

VIII. COMPLIANCE WITH ARTICLE 34 OF THE CONVENTION

135. The applicant maintained that, by preventing him from meeting his lawyer in private for a long period of time, despite the measure indicated by the Court under Rule 39 of the Rules

of Court, Russia had failed to comply with its obligations under Article 34 of the Convention. Article 34 of the Convention provides:

"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."

Rule 39 of the Rules of Court provides:

"1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.

2. Notice of these measures shall be given to the Committee of Ministers.

3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated."

A. Submissions by the parties

136. The Government maintained that the applicant had not been prevented from exercising his right of individual petition under Article 34 of the Convention. However, he was able to do so only through his mother – his official guardian. Since his mother had never asked Mr Bartenev (the lawyer) to represent her son, he was not his legal representative in the eyes of the domestic authorities. Consequently, the authorities acted lawfully when not allowing him to meet the applicant in the hospital.

137. The applicant submitted that his right of individual petition has been breached. Thus, the hospital authorities prevented him from meeting his lawyer, confiscated writing materials from him and prohibited him to make or receive phone calls. The applicant was also threatened with the extension of his confinement if he continued his "litigious behaviour". When the Court indicated an interim measure, the hospital authorities refused to consider the decision of the Court under Rule 39 as legally binding. This position was later confirmed by the Russian courts. As a result, it was virtually impossible for the applicant to work on his case before the European Court during his whole stay in the hospital. Moreover, the applicant's lawyer was unable to assess the applicant's condition and collect information about the treatment the applicant was subjected to while in the psychiatric hospital.

B. The Court's assessment

1. Compliance with Article 34 before the indication of an interim measure

138. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see Akdivar and Others v. Turkey, judgment of 16 September 1996, Reports 1996-IV; see also Ergi v. Turkey judgment of 28 July 1998, Reports 1998-IV, § 105).

139. The Court notes that an interference with the right of individual petition may take different forms. Thus, in Boicenco v. Moldova (no. 41088/05, §§ 157 et seq., 11 July 2006) the Court found that the refusal by the authorities to let the applicant be examined by a doctor in order to substantiate his claims under Article 41 of the Convention constituted an interference with the applicant's right of individual petition, and, thus, was incompatible with Article 34 of the Convention.

140. In the present case the ban on the contacts with the lawyer lasted from the applicant's hospitalisation on 4 November 2005 until his discharge on 16 May 2006. Further, telephone calls and correspondence were also banned for almost all of that period. Those restrictions made it almost impossible for the applicant to pursue his case before the Court, and thus the application form was completed by the applicant only after his discharge from the hospital. The authorities could not have ignored the fact that the applicant had introduced an application with the Court concerning, inter alia, his confinement in the hospital. In such circumstances the authorities, by restricting the applicant's contacts with the outside world to such an extent, interfered with his rights under Article 34 of the Convention.

2. Compliance with Article 34 after the indication of an interim measure

141. The Court further notes that in March 2006 it indicated to the Government an interim measure under Rule 39. The Court requested the Government to allow the applicant to meet his lawyer on the premises of the hospital and under the supervision of the hospital staff. That measure was supposed to ensure that the applicant was able to pursue his case before this Court.

142. The Court is struck by the authorities' refusal to comply with that measure. The domestic courts which examined the situation found that the interim measure was addressed

to the Russian State as a whole, but not to any of its bodies in particular. The courts concluded that Russian law did not recognise the binding force of an interim measures indicated by the Court. Further, they considered that the applicant could not act without the consent of his mother. Therefore, Mr Bartenev (the lawyer) was not regarded as his lawful representative either in domestic terms, or for the purposes of the proceedings before this Court.

143. Such an interpretation of the Convention is contrary to the Convention. As regards the status of Mr Bartenev, it was not for the domestic courts to determine whether or not he was the applicant's representative for the purposes of the proceedings before the Court – it sufficed that the Court regarded him as such.

144. As to the legal force of an interim measure, the Court wishes to reiterate the following (Aoulmi v. France, no. 50278/99, § 107, ECHR 2006 ... (extracts)):

"Under the Convention system, interim measures, as they have consistently been applied in practice, play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted. Accordingly, in these conditions a failure by a respondent State to comply with interim measures will undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State's formal undertaking in Article 1 to protect the rights and freedoms set forth in the Convention... Indications of interim measures given by the Court ... permit it not only to carry out an effective examination of the application but also to ensure that the protection afforded to the applicant by the Convention is effective; such indications also subsequently allow the Committee of Ministers to supervise execution of the final judgment. Such measures thus enable the State concerned to discharge its obligation to comply with the final judgment of the Court, which is legally binding by virtue of Article 46 of the Convention".

In sum, an interim measure is binding to the extent that non-compliance with it may lead to a finding of a violation under Article 34 of the Convention. For the Court, it makes no difference whether it was the State as a whole or any of its bodies which refused to implement an interim measure.

145. The Court recalls in this respect the case of Mamatkulov and Askarov v. Turkey ([GC], nos. 46827/99 and 46951/99, §§ 92 et seq., ECHR 2005 I) in which the Court analysed the State's non-compliance with an interim measure indicated under Rule 39. The Court concluded that "the obligation set out in Article 34, in fine, requires the Contracting States to

refrain ... also from any act or omission which, by destroying or removing the subject matter of an application, would make it pointless or otherwise prevent the Court from considering it under its normal procedure" (§ 102).

146. By not allowing the applicant to communicate with his lawyer the authorities de facto prevented him from complaining to the Court, and this obstacle existed so long as the authorities kept the applicant in the hospital. Therefore, the aim of the interim measure indicated by the Court was "to avoid ... [a] situation that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted" (see Aoulmi, loc. cit).

147. The Court notes that the applicant was eventually released and met with his lawyer, and was thus able to continue the proceedings before this Court. The Court therefore finally had all the elements to examine the applicant's complaint, despite previous non-compliance with the interim measure. However, the fact that the individual actually managed to pursue his application does not prevent an issue arising under Article 34: should the Government's action make it more difficult for the individual to exercise his right of petition, this amounts to "hindering" his rights under Article 34 (see Akdivar and Others, cited above, §§ 105 and 254). In any event, the applicant's release was not in any way connected with the implementation of an interim measure.

148. The Court takes note that the Russian legal system may have lacked a legal mechanism for implementing interim measures under Rule 39. However, it does not absolve the defendant State from its obligations under Article 34 of the Convention. In sum, in the circumstances the failure of the authorities to comply with an interim measure under Rule 39 amounted to a breach of Article 34 of the Convention.

3. Conclusion

149. Having regard to the material before it, the Court concludes that, by preventing the applicant for a long period of time from meeting his lawyer and communicating with him, as well as by failing to comply with the interim measure indicated under Rule 39 of the Rules of Court, the Russian Federation was in breach of its obligations under Article 34 of the Convention.

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

150. 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.”

151. The applicant claimed 85,000 euros in respect of non pecuniary damage.

152. The Government considered these claims “fully unsubstantiated and anyway excessive”. Further, the Government claimed that it was the applicant's mother who was entitled to claim any amounts on behalf of the applicant.

153. The Court recalls that the applicant has legal standing in his own right within the Strasbourg proceedings and, consequently, can claim compensation under Article 41 of the Convention.

154. The Court considers that the question of the application of Article 41 is not ready for decision. Accordingly, it shall be reserved and the subsequent procedure fixed having regard to any agreement which might be reached between the Government and the applicant (Rule 75 § 1 of the Rules of Court).

3.6.4. The Court’s decision

1. Declares the complaints under Article 5 (concerning confinement to the psychiatric hospital), Article 6[23] (concerning incapacitation proceedings), Article 8[21] (concerning the applicant's incapacitation), Article 13[38] (concerning the absence of effective remedies), and Article 14[45] of the Convention (concerning the alleged discrimination) admissible, and the remainder of the application inadmissible;

2. Holds that there has been a violation of Article 6[23] of the Convention as regards the incapacitation proceedings;

3. Holds that there has been a violation of Article 8[21] of the Convention on account of the applicant's full incapacitation;

4. Holds that there has been a violation of Article 5 § 1[6] of the Convention as regards the lawfulness of the applicant's confinement in hospital;

5. Holds that there has been a violation of Article 5 § 4[43] of the Convention as regards the applicant's inability to obtain his release from the hospital;

6. Holds that there is no need to examine the applicant's complaint under Article 13[38] of the Convention;

7. Holds that there is no need to examine the applicant's complaint under Article 14[45] of the Convention;

8. Holds that the State failed to comply with its obligations under Article 34[10] of the Convention by hindering the applicant's access to the Court and not complying with an interim measure indicated by the Court in order to remove this hindrance;

9. Holds that the question of the application of Article 41[46] is not ready for decision;

accordingly,

(a) reserves the said question in whole;

(b) invites the Government and the applicant to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;

(c) reserves the further procedure and delegates to the President of the Chamber the power to fix the same if need be.

3.7.Case Of Shulepova V. Russia[10]

3.7.1. The procedure

1. The case originated in an application (no. 34449/03) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Ms Valentina Aleksandrovna Shulepova ("the applicant"), on 26 September 2003.

2. The applicant, who had been granted legal aid, was represented by Mr A. Koss, a lawyer practising in Kaliningrad. The Russian Government ("the Government") were represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant complained, in particular, of her allegedly unlawful detention in a psychiatric hospital and the unfairness of the proceedings by which the lawfulness of her detention had been examined.

4. On 28 November 2005 the President of the First Section decided to communicate the above complaints to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

3.7.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1934 and lives in the Kaliningrad Region.

1. The applicant's detention in a mental hospital

[10] First Section; Case Of Shulepova V. Russia; (Application No. 34449/03); Judgment Strasbourg; 11 December 2008; Final 11/03/2009

6. At the beginning of February 1999 the applicant complained to her doctor Ms K. about the neighbours, who had allegedly subjected her to electromagnetic emissions, attempted to contaminate her with HIV, created noises and draughts and tortured her in a multitude of other ways. She threatened to pour acid on them.

7. On 10 February 1999 the applicant was examined by a medical panel comprising two psychiatrists and three general practitioners affiliated with the Baltiysk Town Medical Association. The panel concluded that the applicant suffered from a paranoid personality disorder and was hallucinatory and aggressive. She was therefore dangerous to the public and to herself. The doctors also found that the applicant suffered from hypertension.

8. On the same day she was taken to the Kaliningrad Regional psychiatric hospital No. 1 (hereinafter "the hospital").

9. On 12 February 1999 the applicant was examined by the hospital psychiatrists, who diagnosed her with involutional paranoid psychosis and concluded that she needed compulsory treatment.

10. On the same day the hospital applied to a court for approval of the applicant's confinement.

11. On 16 February 1999 the Leningradskiy District Court of Kaliningrad ordered that the applicant should provisionally remain in the hospital until the application was examined. The hearing was scheduled for 18 February 1999.

12. On 18 February 1999 the hearing did not go ahead. The record indicated that the applicant was unable to appoint a representative owing to her grave mental state.

13. On 26 March 1999 the applicant consented to medical treatment. She remained in the hospital until 21 April 1999.

14. On 13 May 1999 the court proceedings were discontinued as the hospital had withdrawn its application.

2. Judicial review of the detention

15. After her discharge, the applicant complained to the prosecutor's office about her allegedly unlawful confinement.

16. By letter of 1 February 2000, the Head of the Law-Enforcement Supervision Department of the Kaliningrad Regional prosecutor's office acknowledged that from 16 to 26 March 1999 she had been unlawfully held in the hospital without a judicial decision and advised her that measures would be taken to remedy the situation.

17. On 11 April 2002 the Leningradskiy District Court informed the prosecutor's office that it would take measures to avoid similar violations in future and undertook to observe the time-limits for examining applications from hospitals.

18. In the meanwhile on 21 February 2000 the applicant sued doctor K. and the hospital in tort. She contested the findings of the medical panels of 10 and 12 February 1999, claiming that she had not suffered from any mental disorder and that it had not been necessary to confine her. She further argued that her detention had been unlawful as it had not been based on a court order. She sought compensation in respect of non-pecuniary damage. In reply, the hospital's representative argued that the medical findings in the applicant's case had been correct and her confinement lawful. He asked the court to reject the applicant's claims in full.

19. On 22 June 2000 the Leningradskiy District Court of Kaliningrad found that there had been no reason to question the findings of the medical panels and that the applicant's detention had been lawful.

20. On 25 October 2000 the Kaliningrad Regional Court quashed the judgment and remitted the case. It held that the first-instance court had omitted to address the applicant's criticism of the findings of the medical panels of 10 and 12 February 1999 and had failed to verify whether her confinement had been justified by her mental condition.

21. On 31 May 2001 the Leningradskiy District Court found that expert advice was necessary to assess the applicant's mental condition in February 1999. It commissioned the hospital's medical specialists to perform a psychiatric examination on the applicant. The experts were asked to determine whether the findings of the medical panels of 10 and 12 February 1999 had been correct and whether the applicant's state of mental health in February 1999 had warranted compulsory psychiatric treatment.

22. On 30 July 2002 the experts examined the applicant's medical file, in particular the reports of 10 and 12 February 1999, and concluded that the medical findings contained in those reports had been correct and that the applicant's involuntary placement into the hospital had been justified, taking into account her serious mental condition in February 1999.

23. The applicant challenged the experts' report. She claimed that the experts were biased because they were employees of the hospital and asked the court to dismiss the report.

24. On 15 January 2003 the Leningradskiy District Court dismissed the applicant's claim. In particular, with reference to the medical reports of 10 and 12 February 1999 and 30 July 2002, it held that the applicant's placement in the hospital had been necessary because she had been a danger to the public and to herself. The court held that the expert report of 30 July 2002 was admissible evidence because the experts had been informed that they would be criminally liable for perjury. Moreover, the panel of 30 July 2002 had not included the psychiatrists who had examined the applicant on 12 February 1999.

25. As to the lawfulness of the applicant's detention from 10 to 26 March 1999, the court found as follows:

"... in accordance with section 33(3) of the [Psychiatric Treatment Act] a judge ordered that [the applicant] should remain in the hospital until the decision [on the hospital's application for her confinement] had been taken. The hospital's application was not examined within five days as required by section 34(1) of the Act because, owing to her mental state, [the applicant] could not participate in the hearing or name her representative, whose presence was mandatory under section 34(4) of the Act...

Since the judicial decision committing [the applicant] to the hospital was not set aside or amended, and the hospital had no right to discharge [the applicant] in defiance of the order, the court considers that in those circumstances the hospital was not responsible for [the applicant's] involuntary confinement until 26 March 1999."

26. The applicant appealed. In her grounds of appeal she complained, in particular, that the experts who had produced the report of 30 July 2002 had been partial.

27. On 2 April 2003 the Kaliningrad Regional Court upheld the judgment, finding that it had been lawful and justified. As to the experts, it held that the judgment had not been based solely on the report of 30 July 2002, but was corroborated by other evidence.

II. RELEVANT DOMESTIC LAW

28. Psychiatric medical care in Russia is governed by the Law on Psychiatric Treatment and Associated Guarantees of Citizens' Rights, enacted on 2 July 1992 ("the Psychiatric Treatment Act").

29. An individual suffering from a mental disorder may be taken to a psychiatric hospital against his will or the will of his legal representative and without a court decision having been taken if the individual's examination or treatment may only be carried out by in-patient care, and the mental disorder is severe enough to give rise to (a) a direct danger to that individual or to others, or (b) the individual's helplessness, that is, an inability to take care of himself, or (c) a significant impairment in health as a result of a deteriorating mental condition, if the affected individual were to be left without psychiatric care (section 29).

30. A person placed in a psychiatric hospital on the grounds listed in section 29 shall be subject to compulsory examination within forty-eight hours by a panel of psychiatrists of the hospital. The panel is required to take a decision as to the necessity of confinement. If no reasons for confinement are established and the individual expresses no intention of remaining in the hospital, he must be released immediately. If confinement is considered necessary, a representative of the hospital where the person is held is required to file, within twenty-four hours, an application for compulsory confinement with a court having territorial jurisdiction over the hospital. The application must contain the grounds for involuntary confinement and must be accompanied by a reasoned conclusion of a panel of psychiatrists as to the necessity of the person's in-patient treatment in a psychiatric hospital. A judge who receives the application for a review must immediately order the person's detention in a psychiatric hospital for the term necessary for its examination (sections 32 and 33).

31. The judge is required to examine the application within five days of its receipt. The individual concerned has the right to participate in the hearing. If, according to the information provided by a representative of the psychiatric hospital, the individual's mental state does not allow him to take part in the hearing, the application must be examined by the judge on the hospital premises. The presence at the hearing of a public prosecutor, a representative of the psychiatric institution requesting confinement, and a representative of the individual concerned is mandatory (section 34). The Psychiatric Treatment Act does not contain any specific provisions for the appointment of a representative for the individual concerned.

32. After examination of the application on the merits, the judge must either allow or dismiss it. The judge's decision is subject to appeal within ten days by the person placed in the psychiatric hospital, his representative, the head of the psychiatric hospital, or by an organisation entitled by virtue of law or by its charter to protect citizens' rights, or by a public

prosecutor. The appeal shall be made in accordance with the rules established in the Code of Civil Procedure (Section 35).

33. Complaints of unlawful actions by medical staff may be made to a court, a supervising authority or a public prosecutor (section 47).

34. The use of expert evidence in court is governed by the Law on State Forensic Examinations ("the Forensic Examinations Act") enacted on 31 May 2003. It establishes that a forensic expert must be independent from the court, the parties to the proceedings and other interested parties (section 7).

3.7.3. The law

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

35. The applicant complained that she had been unlawfully detained in a psychiatric hospital from 10 February to 26 March 1999. She relied on Article 5 § 1 (e)[41] of the Convention, which reads as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants..."

A. Admissibility

36. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3[14] of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments by the parties

37. The applicant maintained that her deprivation of liberty had not been authorised "in accordance with a procedure prescribed by law". In particular, the hospital's application had

not been examined by a court within five days as required by domestic law. The decision of 16 February 1999 ordering her provisional detention had been made in her absence and in the absence of a representative. It could not therefore constitute a lawful basis for her detention.

38. The Government argued that the applicant's confinement had been necessary as she had been suffering from paranoid psychosis. On 10 and 12 February 1999 she had been examined by psychiatrists who had found her hallucinatory and aggressive. As she had threatened violence against her neighbours, the psychiatrists had concluded that she was dangerous to others and that it was necessary to commit her to a psychiatric institution. Her hypertension condition had also called for her placement in hospital to prevent her health from deteriorating. The necessity of her internment had been later reviewed and confirmed by experts and courts.

39. The Government further submitted that the applicant's detention had been duly authorised by a court, which had made an order on 16 February 1999 for her to remain in detention until the examination of the hospital's application for confinement. The application had never been examined owing to the applicant's serious mental condition which had prevented her from participating in the hearing or appointing a representative, whose presence was mandatory. In the Government's opinion, the court order of 16 February 1999 had provided a basis for the applicant's detention until 26 March 1999, the date on which she had consented to in-patient treatment.

2. The Court's assessment

(a) Whether the applicant was reliably shown to be "a person of unsound mind"

40. The Court reiterates that the term "a person of unsound mind" does not lend itself to precise definition since psychiatry is an evolving field, both medically and in social attitudes. However, it cannot be taken to permit the detention of someone simply because his or her views or behaviour deviate from established norms (see Winterwerp v. the Netherlands, judgment of 24 October 1979, Series A no. 33, § 37).

41. Detention of a person considered to be of unsound mind must be in conformity with the purpose of Article 5 § 1[6] of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion, and with the aim of the restriction contained in sub-paragraph (e). In this latter respect the Court reiterates that, according to its established case-law, an individual cannot be considered to be of "unsound mind" and deprived of his liberty unless the following three minimum conditions are satisfied: firstly, he must reliably be

shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see Johnson v. the United Kingdom, judgment of 24 October 1997, Reports of Judgments and Decisions 1997 VII, § 60, with further references).

42. No deprivation of liberty may be deemed in conformity with Article 5 § 1 (e) of the Convention if it has been ordered without seeking the opinion of a medical expert. It may be acceptable, in urgent cases or where a person is arrested because of his violent behaviour, that such an opinion be obtained immediately after the arrest. In all other cases a prior consultation is necessary. Where no other possibility exists, for instance due to a refusal of the person concerned to appear for an examination, at least an assessment by a medical expert on the basis of the file must be sought, failing which it cannot be maintained that the person has reliably been shown to be of unsound mind (see Varbanov v. Bulgaria, no. 31365/96, § 47, ECHR 2000 X).

43. Turning to the present case, the Court notes that before her confinement in a psychiatric hospital the applicant had been examined by a medical panel including two psychiatrists who had concluded that she suffered from a paranoid personality disorder, experienced hallucinations and was dangerous to the public and herself. Upon arrival at the hospital she was again examined by medical specialists, who confirmed that diagnosis (see paragraphs 7 and 9 above). The Court is therefore convinced that there was reliable and objective medical evidence showing that the applicant was of unsound mind. Moreover, given that she had threatened violence against her neighbours and was found to be aggressive, the Court accepts that her mental disorder warranted compulsory confinement. Finally, there is no reason to believe that the applicant was kept in confinement longer than her condition required.

44. The Court concludes from the above that the applicant was reliably shown to be "a person of unsound mind" within the meaning of Article 5 § 1 (e) of the Convention and that her mental disorder was of a kind and degree justifying her compulsory confinement during the entire period under consideration.

(b) Whether the applicant was deprived of her liberty "in accordance with a procedure prescribed by law"

45. The Court reiterates that the words "in accordance with a procedure prescribed by law" essentially refer back to domestic law; they state the need for compliance with the relevant procedure under that law. However, the domestic law must itself be in conformity with the

Convention, including the general principles expressed or implied therein. The notion underlying the term in question is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary (see Winterwerp, cited above, § 45).

46. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can, and should, exercise a certain power of review of such compliance (see Benham v. the United Kingdom, judgment of 10 June 1996, Reports 1996-III, § 41).

47. The applicant was involuntary held in a psychiatric hospital from 10 February to 26 March 1999. Before 16 February 1999 her detention had not been based on a judicial decision, while after that date she was kept in custody on the basis of a provisional detention order issued by the Lenigradskiy District Court. The Court will examine the lawfulness of the applicant's detention during these two periods.

48. As to the first period, the Court observes that the applicant was taken to a psychiatric hospital on 10 February 1999 after a medical panel concluded that she needed compulsory in-patient treatment. Two days later the hospital applied to a court for approval of her involuntary confinement. The Psychiatric Treatment Act required the court receiving such an application to issue a provisional detention order immediately (see paragraph 30 above). However, it was not until 16 February 1999, four days later, that the court made such an order. The Government did not provide any explanation for that delay. It follows that the applicant's detention at least from 13 to 16 February 1999 was incompatible with the procedure prescribed by domestic law.

49. As to the second period, the Court notes that on 16 February 1999 the Leningradskiy District Court issued a provisional detention order authorising the applicant's confinement during the period necessary for examination of the hospital's application. Under section 34 of the Psychiatric Treatment Act, the court was required to examine the hospital's application for confinement within five days of its receipt (see paragraph 31 above). In the present case the hospital's application was never examined.

50. The Court has already found a violation of Article 5 § 1 of the Convention in a similar case where the hospital's application for confinement was not examined within the five-day time-limit provided for in the Psychiatric Treatment Act. The Court found that that omission

rendered the applicant's detention unlawful (see Rakevich v. Russia, no. 58973/00, §§ 31-35, 28 October 2003).

51. The Court sees no reason to reach a different conclusion in the present case. It is not convinced by the Government's argument that the provisional detention order of 16 February 1999 provided a sufficient lawful basis for the applicant's detention until 26 March 1999. The order of 16 February 1999 was provisional in nature and was not attended by procedural guarantees. In particular, it was issued by a court without hearing the applicant or her representative. Its validity was limited to five days and its aim was to allow a period of time for the court to prepare for a hearing and an in-depth examination of the hospital's application with the participation of both parties. It could therefore serve as a basis for the applicant's detention only for five days after it had been issued. The Government did not point to any legal provision which permitted the applicant's detention after its expiry. It follows that the applicant's detention after the expiry of the five-day time-limit established in section 34 of the Psychiatric Treatment Act and until 26 March 1999 did not have a legal basis in domestic law. This conclusion is supported by the prosecutor's letter of 1 February 2000 acknowledging that the applicant's detention from 16 to 26 March 1999 had been unlawful (see paragraph 16 above).

52. As to the Government's argument that the application for confinement could not be examined due to the applicant's serious mental condition, which prevented her from participating in the hearing or appointing a representative, the Court notes that the Psychiatric Treatment Act envisaged situations where a person was too ill to participate in the hearing. It did not permit the courts to adjourn the hearing indefinitely, as was done in the applicant's case, but required them to provide for a representative and to hold a hearing on the hospital premises (see paragraph 31 above). The domestic authorities did not comply with the procedure prescribed by the Psychiatric Treatment Act.

53. There has therefore been a violation of Article 5 § 1 of the Convention.

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

54. The applicant complained that the proceedings concerning the lawfulness of her detention had been unfair because the court-appointed experts had been biased. She relied on Article 6 § 1 of the Convention which reads as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

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

B. Merits

1. Submissions by the parties

56. The applicant submitted that the experts appointed by the court to assess the necessity of her involuntary confinement in the hospital had been employees of that hospital. In her opinion, the proceedings had been rendered unfair by the experts' partiality.

57. The Government argued that the Forensic Examinations Act required experts to be independent and impartial (see paragraph 34 above). They bore personal responsibility for their findings and were not allowed to receive instructions from the parties or the court. In the Government's opinion, the mere fact that the experts who had given the expert opinion of 30 July 2002 had been employees of the hospital where the applicant had received treatment had not violated the principle of equality of arms. The panel had not included any of the experts who had examined the applicant on 12 February 1999. Moreover, the expert report of 30 July 2002 had not been the only piece of evidence before the court. The court had also relied on other medical documents and the parties' submissions.

2. The Court's assessment

58. The Court considers it appropriate to start its assessment, even in the absence of any disagreement between the parties as to the applicability of Article 6 § 1[8], with the question of whether the proceedings determined the applicant's civil rights and obligations.

59. The Court has earlier found in a number of cases that proceedings for review of lawfulness of detention of a person of unsound mind determined that person's civil rights. Thus, in the Aerts v. Belgium case the applicant had been detained under Article 5 § 1 (e) as a person of unsound mind. Following his release, he instituted proceedings to review the lawfulness of his detention and sought compensation. The Court found that Article 6 § 1 applied under its civil head to the proceedings because "the right to liberty is a civil right" (see Aerts v. Belgium, judgment of 30 July 1998, Reports of Judgments and Decisions 1998 V, § 59). In two subsequent cases, which also concerned proceedings relating to the lawfulness of detention in psychiatric institutions, the Court found Article 6 to be applicable

under its civil head with reference to the Aerts judgment. It dismissed the Government's objection of incompatibility ratione materiae despite the fact that the proceedings at issue concerned only the lawfulness of the detention without involving any related pecuniary claims (see Vermeersch v. France (dec.), no. 39277/98, 30 January 2001, and Laidin v. France (no. 2), no. 39282/98, §§ 73-76, 7 January 2003).

60. In the present case, as in the three above-mentioned cases, the applicant sought a judicial declaration that her detention in a mental hospital had been unlawful. Therefore, her civil right to liberty was at stake. In addition, she sought compensation for unlawful detention. The Court reiterates in this respect that the right to compensation is, by its very nature, of a civil character even where derived from public law (see Georgiadis v. Greece, judgment of 29 May 1997, Reports of Judgments and Decisions 1997 III, § 35, where the claims for compensation for unlawful detention were found to be civil in nature). The Court is therefore satisfied that the proceedings determined the applicant's civil rights.

61. The Court will next examine whether the appointment as experts of medical specialists employed by the respondent hospital rendered the proceedings unfair contrary to Article 6 § 1.

62. The Court reiterates that the appointment of experts is relevant in assessing whether the principle of equality of arms has been complied with. The mere fact that experts are employed by one of the parties does not suffice to render the proceedings unfair. Although this fact may give rise to apprehensions as to the neutrality of the experts, such apprehensions, while having a certain importance, are not decisive. The requirements of impartiality and independence enshrined in Article 6 of the Convention do not apply to experts. What is decisive, however, is the position occupied by the experts throughout the proceedings, the manner in which they performed their functions and the way the judges assessed the expert opinion (see Zarb v. Malta (dec.), no. 16631/04, 27 September 2005, and Lasmane v. Latvia (dec.), no. 43293/98, 6 June 2002). In ascertaining the expert's procedural position and his role in the proceedings, one must not lose sight of the fact that the opinion given by a court-appointed expert is likely to carry significant weight in the court's assessment of the issues within that expert's competence (see Sara Lind Eggertsdóttir v. Iceland, no. 31930/04, § 47, ECHR 2007 ..., and Bönisch v. Austria, 6 May 1985, § 33, Series A no. 92).

63. The applicant sued the hospital where she had been involuntarily confined as a person of unsound mind. She contested the diagnosis given by the hospital psychiatrists and their findings as to the necessity of her confinement. The domestic courts appointed the

psychiatrists employed by the same hospital as experts instructed to assess the correctness of their colleagues' findings. The court subsequently relied on their opinion when rejecting the applicant's claim.

64. The Court has already examined a similar situation in the case of Sara Lind Eggertsdóttir v. Iceland (cited above). In that case the applicant sued a hospital for medical negligence. The court ordered an expert examination, asking the employees of that hospital to assess the performance of their colleagues and determine whether they had been medically negligent in their treatment of the applicant. When rejecting the applicant's claim, the court relied on the experts' finding that their colleagues had not been negligent. The Court found a violation of Article 6 § 1 on account of non-compliance with the principle of equality of arms. It took account of three factors: the nature of the task entrusted to the experts, the experts' hierarchical position in the respondent hospital, and their role in the proceedings, in particular the weight attached by the court to their opinion. As to the first factor, the Court observed that the experts were called upon to assist the court in determining the question of their employer's liability. As to the second factor, the Court noted that the experts' superiors had taken a clear stance on the issue by denying the hospital's responsibility. This fact could justifiably give rise to the fear that the experts would be unable to act with proper neutrality. As to the third factor, the Court found that the opinion given by the experts was decisive evidence in the proceedings. It concluded that as a result of the appointment of the respondent's employees as experts who played a dominant role in the proceedings, the applicant's position had not been on a par with that of the respondent hospital in the manner required by the principle of equality of arms (see Sara Lind Eggertsdóttir, cited above, §§ 47-55).

65. A similar situation obtains in the present case. Indeed, the experts appointed by the court were employees of the respondent hospital and owed a general duty of obedience and loyalty to their employer. They were asked to assess the accuracy of the diagnosis given by their colleagues and to review their finding as to the necessity of the applicant's involuntary confinement. They were thereby required to analyse the performance of their colleagues with the view to assisting the court in the determination of their employer's liability. Given that the hospital's representative had clearly expressed the hospital's position that the medical findings in the applicant's case had been correct and that the applicant's claims had been unfounded, the applicant's apprehension as to the experts' neutrality can be considered as objectively justified.

66. As regards the experts' role in the proceedings, the Court observes that the main issue in the case was whether the findings of the medical panels of 10 and 12 February 1999 as to the necessity of the applicant's involuntary confinement had been correct. As the applicant contested those findings, the court appointed experts to review them. Having no medical qualifications, the judges of the court were bound to attach significant weight to the experts' opinion on the medical issue decisive for the outcome of the case. Indeed, the experts' opinion was the only evidence confirming the accuracy of the diagnosis made on 10 and 12 February 1999. It follows that the experts played a dominant role in the proceedings.

67. The Court further notes that the respondent hospital was not the only institution whose specialists possessed the requisite skills to perform a psychiatric examination of the applicant. The court could have obtained expert advice from psychiatrists employed by other psychiatric hospitals in the Kalinigrad region or other regions of Russia. Accordingly, there were no obstacles to finding independent experts (see, by contrast, Zarb, decision cited above, and Emmanuello v. Italy (dec.), no. 35791/97, 31 August 1999).

68. Finally, although it was open for the applicant to call an expert witness of her choice, the procedural position of that witness would not have been equal to the position of the court-appointed experts. Statements of court-appointed experts, who are by the nature of their status supposed to be a neutral and impartial auxiliary of the court, would carry greater weight in the court's assessment than an opinion of an expert witness called by a party (see Sara Lind Eggertsdóttir, cited above, § 49, and Bönisch, cited above, § 33).

69. The Court concludes from the above that by appointing the respondent's employees as experts, the domestic courts placed the applicant at a substantial disadvantage vis-à-vis the respondent hospital. Therefore, the principle of equality of arms has not been complied with.

70. Accordingly, there has been a violation of Article 6 § 1.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

71. Lastly, the applicant complained that the judicial proceedings had been excessively long.

72. The period to be taken into consideration in the present case began on 21 February 2000, when the applicant lodged her claims. It ended on 2 April 2003, when the Kaliningrad Regional Court gave final judgment in the case. The proceedings lasted slightly more than three years and one month. During that period the applicant's case was examined twice before two levels of jurisdiction. The length of the proceedings does not appear excessive. It follows

that this complaint must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

73. Article 41 of the Convention provides:

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

A. Damage

74. The applicant claimed 6,000 euros (EUR) in respect of non-pecuniary damage.

75. The Government considered that the claim was excessive and that the finding of a violation would in itself constitute sufficient just satisfaction.

76. The Court accepts that the applicant suffered distress and frustration resulting from her unlawful detention in a psychiatric hospital and unfair civil proceedings. The non-pecuniary damage sustained is not sufficiently compensated for by the finding of a violation of the Convention. However, the Court finds the amount claimed by the applicant excessive. Making its assessment on an equitable basis, it awards the applicant EUR 4,000 under this head, plus any tax that may be chargeable on that amount.

B. Costs and expenses

77. The applicant did not claim costs and expenses. Accordingly, there is no call to make an award under this head.

C. Default interest

78. 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.

3.7.4. The Court's decision

1. Declares the complaints concerning the alleged unlawfulness of the applicant's detention and the alleged unfairness of the judicial proceedings admissible and the remainder of the application inadmissible;

2. Holds that there has been a violation of Article 5 § 1 of the Convention;

3. Holds that there has been a violation of Article 6 § 1[8] of the Convention;

4. Holds

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2[9] of the Convention, EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement;

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

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

Chapter 4 Right to a fair trial. Selected case law.

4.1. Right to a fair trial.

According to the Article 6 of the European Convention:

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in

the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b to have adequate time and facilities for the preparation of his defence;

c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

4.2. Case of Frankowicz V. Poland[11]

4.2.1. The procedure

1. The case originated in an application (no. 53025/99) against the Republic of Poland lodged with the Court under Article 34[10] of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Ryszard Frankowicz ("the applicant"), on 22 January 1999.

[11] Fourth Section; Case Of Frankowicz V. Poland; (Application No. 53025/99); Strasbourg; 16 December 2008; Final 04/05/2009

2. The Polish Government were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that the disciplinary proceedings against him had been unfair in violation of Article 6[23] of the Convention and that there had been an interference with his right to freedom of expression in breach of Article 10 of the Convention.

4. On 6 April 2005 the President of the Fourth Section of the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3[26] of the Convention, it was decided to examine the merits of the application at the same time as its admissibility.

4.2.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1952 and lives in Tarnów, Poland.

6. The applicant is a gynaecologist. In August 1995 he set up a company which prepared medical reports at his clients' request.

7. On 12 March 1996 the applicant wrote a report entitled "Civil opinion" (opinia cywilna) on the treatment that Mr J.M. had undergone in the Regional Hepatology Clinic in Tarnów. The opinion described, in a detailed manner, the history of Mr J.M.'s medical treatment since the beginning of the 1980s. The report was based on Mr J.M.'s medical file obtained from the clinics of hepatology and dermatology where he had received treatment. The applicant also relied on the results of a recent medical examination, a biopsy, carried out at the applicant's initiative by the Cracow University Medical Academy. In his report the applicant established that the patient had been receiving treatment since 1983 at the Tarnów Clinic. However, in spite of the fact that his health had deteriorated and that he had been developing symptoms of liver damage, no specialised examination, that is, a biopsy, had been carried out. A recent liver biopsy, undertaken upon the applicant's recommendation at the Cracow University Medical Academy, had shown that the patient was suffering from aggressive and chronic hepatitis and cirrhosis (przewlekłe agresywne zapalenie wątroby z marskością wątroby). The applicant considered that the damage to Mr J.M.'s health, due to both his liver condition and dermatological problems, amounted to 90% thus making him eligible to receive the highest

group of invalidity allowance. With regard to the treatment received at the Tarnów Hepatology Clinic the applicant's report stated:

"...Despite [the patient's] chronic suffering, of which he had complained constantly during his regular visits, and which was confirmed by examinations indicating a chronic liver condition, the employees of the Clinic had failed to take the actions [necessary] for the health care of [the patient] and his diagnosis. So, despite indications, adequate diligence while diagnosing, informing and providing health care to [the patient] was not displayed."

The opinion also dealt with the treatment of Mr J.M.'s dermatological problems at the Tarnów Dermatology Clinic and concluded that it had been proper and diligent.

8. On 2 December 1996 the Tarnów Regional Attorney for Professional Liability (Okręgowy Rzecznik Odpowiedzialności Zawodowej) instituted disciplinary proceedings against the applicant. He was charged with unethical conduct, reference being made to the fact that the applicant's opinion had discredited the doctors who had been treating the patient. The Regional Attorney relied on Article 52 of the Polish Code of Medical Ethics (Kodeks Etyki Lekarskiej). Moreover, according to the Regional Attorney, in assessing a complicated therapy in which he did not specialise, the applicant had overstepped his professional competences. In his application of 10 March 1997 lodged with the Tarnów Regional Medical Court (Okręgowy Sąd Lekarski), in which he asked for a disciplinary punishment to be imposed on the applicant, the Attorney stated:

"In the present case the Attorney established that Dr Ryszard Frankowicz, by preparing and giving the patient an opinion in which he included judgments on the professional conduct of other doctors (working in the Tarnów Hepatology Clinic), obviously violated the well-established medical society rules of proper conduct between doctors.

Unfavourable arguments and analysis of professional actions expressed by one doctor in front of a patient always clearly discredit the doctor under scrutiny..."

"The Medical Council of the Tarnów Regional Medical Chamber finds that the entirety of the public behaviour of [the applicant] has no support in the medical profession and does not serve the rightly understood well-being of the patient. The disciplinary bodies of the Chamber will assess their attitudes in detail and draw appropriate conclusions (wyciągną stosowne wnioski). The Medical Council decided to take a position on the public activities of the above-mentioned doctors and the manner in which they have been exercising the medical profession given the exceptional departure from recognised and generally accepted rules and

given the possibility of their manipulating the perceptions and the behaviour of the local community."

9. On 11 June 1997 the Tarnów Regional Medical Court (Okręgowy Sąd Lekarski) held a hearing. The court was composed of three members, all doctors. The applicant, his wife, their representative and a representative of the Office of the Regional Attorney of Professional Liability were present at the hearing. However, soon after the opening of the hearing the applicant decided to leave the courtroom, objecting to the fact that the disciplinary court had allegedly violated a time-limit for examination of a case. The hearing continued in the applicant's absence as he had not decided to return and the court regarded his absence as unjustified.

10. On 17 June 1997 the Regional Medical Court found the applicant guilty of unethical conduct. The Court considered that the applicant, in his report, had expressed negative opinions of the professional conduct of doctors concerned and that he had conveyed these directly to the patient. In so doing, he had discredited the doctors in the eyes of the patient. His behaviour was therefore contrary to the principle of professional solidarity and, consequently, to the provisions of Article 52 of the Code of Medical Ethics. The court did not examine the truthfulness of the opinion at issue as it found that the question of whether it "reflected the reality" was "of no importance" for finding a violation of this provision of the Code. The disciplinary court also found that the applicant had violated Article 10 of the Code, as he had written an opinion concerning a branch of medicine in which he was not a specialist. The court found him guilty as charged and sentenced him to a reprimand (skazuje na karę nagany).

11. On 17 June 1997 the applicant challenged all members of the court, complaining that they had not been impartial. The applicant submitted that the independence and impartiality of the members of the disciplinary court had been open to doubt because it was possible that the Tarnów Governor could have put pressure on them. In addition the applicant complained about the way the hearing had been conducted, submitting that the President of the court had prevented him from putting all his questions and had dismissed his motions. On 20 June 1997 the Tarnów Regional Medical Court, sitting in a different composition, dismissed the applicant's challenge as manifestly ill-founded.

12. The applicant appealed on 30 June 1997. He argued that a doctor had a right to express freely his own opinion in conformity with his medical knowledge and his conscience and to inform his patient if he believed that the latter had been incorrectly treated or wrongly

diagnosed. The purpose of a doctor's work was the well-being of the patient and not professional solidarity with other doctors. The applicant further complained that his challenge to the members of the Regional Medical Court, and application to transfer the case to another town, had been dismissed. He submitted that two of the three members of the court were senior managers of the hospitals thus susceptible to pressure from the Tarnów Governor's office, the latter often being criticised by the applicant's association.

13. On 29 May 1998 the Supreme Medical Court (Naczelny Sąd Lekarski), upheld the first-instance court's decision. The court considered that the applicant's actions were highly reprehensible and harmful not only to the medical profession but also to the patient, as the opinion gave him to believe, groundlessly, that he had been the victim of an injustice. The court also firmly rejected the applicant's suggestion that his conviction had been the result of political pressure. A copy of that decision was served on the applicant on 30 July 1999.

II. RELEVANT DOMESTIC LAW

A. The Constitution of the Republic of Poland

14. The Constitution of 2 April 1997 entered into force on 17 October 1997.

Article 54 § 1 of the Constitution guarantees freedom of expression. It states, in so far as relevant:

"Everyone shall be guaranteed freedom to express opinions and to acquire and to disseminate information."

15. A right to lodge a constitutional complaint was introduced in Article 79 § 1 which provides as follows:

"In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Court for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution."

B. Code of Medical Ethics

16. Article 10 of the Polish Code of Medical Ethics, set out in Chapter I, entitled "Relations between a physician and his patient" (Postępowanie lekarza wobec pacjenta) reads, in so far as relevant:

“1. A physician should not exceed the limits of his or her professional competence when carrying out diagnosis, prophylaxis and treatment...”

17. Article 52 of Chapter III, entitled “Mutual relations between physicians” (Stosunki wzajemne między lekarzami) provides as follows:

“1. Physicians must show respect to each other.

2. A physician should not express an unfavourable opinion on the professional conduct of another physician or discredit him in any other way in the presence of a patient, his or her environment or [in the presence of] assisting staff.

3. All comments on the observed erroneous conduct of a physician should, in the first place, be passed on to him or her. Informing a medical court of the observed unethical behaviour or professional incompetence of another physician does not undermine the principle of professional solidarity.”

18. On 20 September 2003 Article 52 §2 was amended. It reads as follows:

“A physician should display particular caution in formulating opinions on the professional conduct of another doctor and in particular he should not in any way discredit him publicly.”

C. Law on Medical Chambers

19. According to section 1 of the Law of 17 May 1989 on Medical Chambers (Ustawa o Izbach Lekarskich), as it stood at the material time, the administrative units of medical self-government were the Supreme Medical Chamber (Naczelna Izba Lekarska) and regional medical chambers (okręgowe izby lekarskie). Section 19 provided that a regional medical chamber includes all physicians whose names are entered on its register.

20. Bodies of a regional medical chamber included, among others, a regional medical court (okręgowy sąd lekarski) and a regional attorney for professional liability (section 20). The Supreme Medical Court (Naczelny Sąd Lekarski) was a body of the Supreme Medical Chamber (section 31). According to section 7, the term of office of all bodies of medical chambers was four years.

21. Section 41 of the Law, in Chapter 6, entitled “Professional Liability” (Odpowiedzialność zawodowa), provided:

"Members of the medical self-government shall be professionally liable before medical courts for any conduct in breach of the principles of professional ethics and deontology and for any breach of the provisions governing the exercise of the medical profession."

Section 42 read, in so far as relevant:

"1. The medical court may impose the following penalties:

1) censure (upomnienie),

2) reprimand (nagana),

3) suspension from practice (zawieszenie prawa do wykonywania zawodu) for a period from six months to three years,

4) revocation of the right to practise medicine (pozbawienie prawa wykonywania zawodu).

2. A physician, on whom the Supreme Medical Court sitting at second instance has imposed any penalty referred to in subsections (3) or (4), has the right to lodge an appeal with the Supreme Court within 14 days from the date on which the [court's] decision has been served on him or her..."

22. According to section 46, matters of professional liability of medical practitioners were examined by regional medical courts and the Supreme Medical Court.

23. A physician on whom a reprimand or suspension from practice had been imposed lost eligibility for election to bodies of medical chambers until a notice of penalty was removed from the relevant register (section 47). The notice was removed from the register three years after the decision to impose a censure or reprimand became final (section 55).

24. According to section 54 the members of the Medical Courts were, in their adjudicating capacity, independent and should follow the law and the Code of Medical Ethics. Article 7 provided that the term of office of all bodies of the medical chambers was four years. As provided in section 56, the Supreme Medical Court, sitting as a second-instance court, included a judge of the Supreme Court appointed by the First President of the Supreme Court.

D. The Constitutional Court's judgment of 23 April 2008

25. On 23 April 2008 the Constitutional Court delivered a judgment (SK16/07) in which it found that Article 52 § 2 of the Code of Medical Ethics was unconstitutional in so far as it prohibited the truthful public assessment of the activity of a doctor by another doctor in the

public interest. The relevant provision, examined in its new wording which came into force in 2003, was not quashed by the Constitutional Court as only its particular interpretation was considered to breach the constitutional norm securing the freedom of expression.

4.2.3. The law

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

26. The Government argued that the applicant had failed to exhaust all the remedies available under Polish law as required by Article 35 § 1^{37} of the Convention. They noted that the applicant had not lodged a constitutional complaint against the relevant provisions of the 1989 Law on Medical Chambers.

As regards the applicant's complaint raised under Article 6 § 1^{8} of the Convention, the Government considered that the Constitutional Court would have been competent to examine whether the proceedings before the Medical Courts met the requirements of impartiality and independence. They submitted that a similar complaint concerning disciplinary proceedings for members of the Bar Association had been lodged with the Constitutional Court. However the Government failed to inform the Court about the outcome of these proceedings.

With regard to the applicant's complaint that his right to freedom of expression had been violated, the Government submitted that on 23 April 2008 the Constitutional Court had delivered a judgment finding that the provisions of the Code of Medical Ethics, which had been the basis for the applicant's conviction, had been unconstitutional. In the Government's opinion it proved that lodging a constitutional complaint with the Constitutional Court would have been an effective remedy in the applicant's case.

The Government also submitted that it had been open to the applicant to bring an action under Article 23 of the Civil Code to seek to establish that the proceedings against him had breached his personal rights protected by the Civil Code, and to seek damages.

27. The applicant contested the Government's arguments, maintaining that he had appealed against the domestic decisions in accordance with the law. In particular, he submitted that the remedies proposed by the Government were of a theoretical nature and not practical and effective. The constitutional complaint was an extraordinary remedy and he should not have been obliged to exhaust it. Moreover, he maintained that if any additional remedy had been

open to him, he should have been informed of this when the authorities gave the final domestic decision. Finally, as regards the possibility of his lodging a civil action, the applicant argued that he would have been required to prove that he had sustained damage by the unlawful action of an official, while the decisions given in his case had a legal basis in the domestic law.

28. The Court reiterates that Article 35[47] of the Convention, which sets out the rule on exhaustion of domestic remedies, provides for a distribution of the burden of proof. It is incumbent on the Government claiming non exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see Selmouni v. France [GC], no. 25803/94, § 76, ECHR 1999-V, and Mifsud v. France (dec.), no. 57220/00, § 15, ECHR 2002-VIII).

29. The Court notes that the Government's objection that the applicant had failed to exhaust domestic remedies since he should have lodged civil proceedings for compensation for breach of his personal rights is confined to a mere assertion and there are no further arguments or domestic court decisions indicating that recourse to such an action in the circumstances of the applicant's case would have offered any reasonable prospects of success.

As far as the Government's objection refers to the effectiveness of the constitutional complaint with respect to the applicant's allegations under Article 6 § 1[8] of the Convention, the Court notes that the Government relied on a press article about a constitutional complaint lodged in 2005 by members of the Bar Association. The Government failed to provide any additional information about this complaint or a relevant decision of the Constitutional Court.

30. As regards the Constitutional Court's judgment of 23 April 2008, the Court notes that it was delivered almost ten years after the proceedings in the present case ended. Any relevance that these proceedings might possibly have in respect of the present case is therefore reduced by the fact that it took place so long after the relevant time (see, for example, V. v. the United Kingdom [GC], no. 24888/94, § 57, ECHR 1999 IX). Moreover, the Constitutional Court examined the constitutionality of Article 52 § 2 of the Code of Medical Ethics in its wording as amended in 2003 and not as it stood at the material time. The Court also observes that the applicant was found guilty, in addition to Article 52 § 2, of a breach of Article 10 of the Code of Medical Ethics, the constitutionality of which was not examined by the Constitutional Court.

31. Furthermore, the Court observes that at the material time, in May 1998, the right to lodge an individual constitutional complaint was a new instrument introduced by the 1997 Constitution, in force since October 1997. At this early stage of its evolution there had been no case law of the Constitutional Court demonstrating the effectiveness of the individual complaint. Thus the Court considers that, in the particular circumstances of the present the case, the applicant did everything that could reasonably be expected of him to exhaust the national channels of redress (see Aksoy v. Turkey, 18 December 1996, § 54, Reports of Judgments and Decisions 1996-VI; Hansen v. Turkey, (dec) no. 36141/97, 19 June 2001).

32. It follows that the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

33. The applicant complained about a breach of Article 10[48] of the Convention, which reads as follows:

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

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

A. Admissibility

34. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3[14] of the Convention. It further notes that it is not inadmissible on any other grounds (see paragraph 32 above). It must therefore be declared admissible.

B. Merits

1. The parties' submissions

35. The applicant submitted in a general manner that, as a doctor, he should have had a right to state his opinion on the treatment received by his patient from another doctor. He argued that the medical court's decisions showed the hostile attitude of the medical authorities towards his community work, as he had been active in an association. The applicant also maintained that the reprimand by the Medical Court was an element of persecution by the medical authorities and was caused by the fact that he had been the President of the Association for the Protection of the Rights of Patients in Poland and had been fighting for the interests of patients.

The applicant argued that the reprimand ordered by the Medical Court was a harsh penalty as he had been prevented from applying for and taking up management functions in hospitals and public administration. He submitted that he had been the victim of a campaign launched against him by the medical society. As a result, he could not take a post of director in the Ministry of Health, had difficulties in finding a job, had to close down his private practice and was prevented from taking up an additional specialisation.

36. The Government submitted that there had been no interference with the applicant's right to freedom of expression. They maintained that the applicant had discredited another doctor before the patient and that he had prepared a critical opinion on the patient's medical treatment without having adequate medical specialisation and expertise. The Government reiterated that the applicant had been giving critical opinions on other doctors within his commercial activity, and thus the disciplinary courts had been right to punish him and thus prevent him from abusing the rights of other doctors any further. The Government maintained that the provision of Article 52 of the Code of Medical Ethics was aimed at maintaining good relations between doctors and preserving the principle of professional solidarity. While the Code of Medical Ethics does not prevent doctors from making critical statements on other practitioners, certain rules should be observed, for example a doctor should not discredit another colleague in the presence of the patient. The Government also maintained that the applicant did not have sufficient knowledge to comment on treatment relating to a field of medicine in which he had not practised. In consequence, the Medical Court had correctly imposed a reprimand on the applicant and thus prevented him from infringing ethical rules and rules regarding competition.

37. The penalty imposed on the applicant was necessary for the protection of other doctors' rights and reputation and was the most lenient possible. In sum, the interference was necessary to achieve a balance between the protection of patients' health, the interests of other

medical practitioners and the applicant's right to freedom of expression. The Government submitted that there had been no violation of Article 10[48] of the Convention.

2. The Court's assessment

(a) The general principles

38. The Court reiterates that freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, among many other authorities, Oberschlick v. Austria (no. 1), 23 May 1991, § 57, Series A no. 204, and Nilsen and Johnsen v. Norway [GC], no. 23118/93, § 43, ECHR 1999 VIII).

39. The Court would also point out that Article 10 guarantees freedom of expression to "everyone". The Court has held on many occasions that Article 10 applies to all kinds of information or ideas or forms of expression including when the type of aim pursued is profit-making or relates to a commercial activity of an applicant (see Casado Coca v. Spain, 24 February 1994, § 35, Series A no. 285 A, Barthold v. Germany, 25 March 1985, § 42, Series A no. 90 and Stambuk v. Germany, no. 37928/97, §§ 43-52, 17 October 2002).

40. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the publication held against the applicant and the general context of the publication. In particular, it must determine whether the interference in question was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see Sunday Times (no. 1) v. the United Kingdom, 26 April 1979, § 62, Series A no. 30). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

41. Under the Court's case-law, the States parties to the Convention have a certain margin of appreciation in assessing the necessity of an interference, but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them (see,

inter alia, markt intern Verlag GmbH and Klaus Beermann v. Germany, 20 November 1989, § 33, Series A no. 165 and Casado Coca, cited above, § 50).

(b) The application of the general principles to the above case

42. The Court must first determine whether the impugned conviction amounted to an "interference" with the exercise of the applicant's right to freedom of expression. It notes that the Government submitted that there had been no interference with the applicant's rights as the opinion in question had been made in the context of his commercial activity.

43. The Court observes that a disciplinary sanction had been imposed on the applicant for having prepared an opinion on the treatment received by a patient which was critical of another doctor. He had been sanctioned by the Medical Court for having breached the Code of Ethics and reprimanded. The Court points out that notice of the sanction remained in the applicant's file for 3 years and that it was not claimed by the parties that the penalty did not constitute a detriment to the applicant.

44. The Court reiterates that, contrary to the Government's opinion, matters relating to professional practice are not removed from the protection of Article 10 of the Convention (see paragraph 39 above). The Court thus considers that the applicant's conviction and disciplinary sanction for having expressed a critical opinion on medical treatment received by a patient amounted to an interference with his right to freedom of expression.

45. Such interference infringes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10. It must therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" to achieve such aims.

46. The Court finds, and this was not disputed, that the interference was "prescribed by law," the applicant's disciplinary sanction having been based on Articles 52 § 2 and 10 of the Code of Medical Ethics (see paragraph 10 above). The Court agrees with the Government that the interference with the applicant's right to freedom of expression was intended to pursue a legitimate aim referred to in Article 10 § 2[48] of the Convention, namely to protect the rights and reputation of others.

47. The Court will then examine whether the interference with the applicant's right to freedom of expression was necessary in a democratic society. The Court recalls that the applicant, a medical practitioner, wrote an opinion in which he criticised medical treatment

received by a patient. The disciplinary authorities considered the applicant guilty of unethical conduct in breach of the principle of professional solidarity, in violation of the Code of Medical Ethics.

48. The applicant based his report on the patient's medical file, and on the results of some additional medical examinations which the patient had undergone at his suggestion. The opinion was requested by the patient himself who turned to the applicant's company, which specialised in preparing assessments of medical treatment undertaken by patients. The opinion was then handed to the patient, who could use it for whatever purpose he intended. However there is no indication that it was subsequently published or otherwise made known to a wider public.

49. The Court has previously agreed, in the context of lawyers, members of the Bar, that the special nature of the profession practised by an applicant must be considered in assessing whether the restriction on the applicant's right answered any pressing need (see Steur v. the Netherlands, no. 39657/98, § 38, ECHR 2003 XI). Medical practitioners also enjoy a special relationship with patients based on trust, confidentiality and confidence that the former will use all available knowledge and means for ensuring the well-being of the latter. That can imply a need to preserve solidarity among members of the profession. On the other hand, the Court considers that a patient has a right to consult another doctor in order to obtain a second opinon about the treatment he has received and to expect a fair and objective evaluation of his doctor's actions.

50. The fact that the opinion in question was issued within the framework of the applicant's commercial activity, and was critical of another doctor, does not automatically deprive it of genuineness or objectivity. The Court observes that the domestic authorities, in finding that the applicant had discredited another doctor, did not make any serious assessment of the truthfulness of the statements included in the opinion (see Veraart v. the Netherlands, no. 10807/04, §§ 60 and 61, 30 November 2006). The Regional Medical Court found that, since no criticism of another doctor was permissible, the question of whether the applicant's report actually reflected reality had been without importance.

51. Such a strict interpretation by the disciplinary courts of the domestic law as to ban any critical expression in the medical profession is not consonant with the right to freedom of expression (see Stambuk, cited above, § 50). This approach to the matter of expressing a critical opinion of a colleague, even in the context of the medical profession, risks discouraging medical practitioners from providing their patients with an objective view of

their state of health and treatment received, which in turn could jeopardise the ultimate goal of the doctor's profession - that is to protect the health and life of patients.

52. Finally the Court notes that the domestic authorities did not examine whether the applicant had been defending a socially justified interest. The Court considers that the applicant's opinion was not a gratuitous personal attack on another doctor, but a critical assessment, from a medical point of view, of treatment received by his patient from another doctor. Thus, it concerned issues of public interest.

53. In conclusion the interference complained of was not proportionate to the legitimate aim pursued and, accordingly, was not "necessary in a democratic society" "for the protection of the rights of others". Consequently, it gave rise to a violation of Article 10 of the Convention.

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

54. The applicant complained that the Medical Courts which decided in the proceedings against him cannot be considered "an independent and impartial tribunal" as provided in Article 6 § 1 of the Convention, which reads as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

55. The Government contested that argument.

A. Applicability of Article 6 of the Convention

56. As a preliminary issue, the Court has to determine whether Article 6 of the Convention is applicable to the proceedings in issue. It is clear from the Court's case-law that where, as in the instant case, what is at stake is the right to continue to practise medicine as a private practitioner, disciplinary proceedings give rise to "contestations (disputes) over civil rights" within the meaning of Article 6 § 1 (see, among other authorities, König v. Germany, 28 June 1978, §§ 87–95, Series A no. 27; Le Compte, Van Leuven and De Meyere v. Belgium, 23 June 1981, §§ 41 51, Series A no. 43; Albert and Le Compte v. Belgium, 10 February 1983, §§ 25–29, Series A no. 58 and Gautrin and Others v. France, 20 May 1998, § 33, Reports 1998 III, Gubler v. France, no. 69742/01, § 24, 27 July 2006).

Moreover, the parties did not dispute before the Court that Article 6 § 1 is applicable to the circumstances of this case.

The Court thus finds that this Article, under its civil head, is applicable to the present case.

B. Admissibility

57. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3^{14} of the Convention. It further notes that it is not inadmissible on any other grounds (see paragraph 33 above). It must therefore be declared admissible.

C. Merits

1. The parties' submissions

58. The applicant submitted that there had been a violation of Article 6 § 1 of the Convention in that he had been deprived of the right to a fair trial by an impartial tribunal. He submitted that the judges sitting in the Regional and Supreme Medical Courts had not been independent, as those bodies had been composed of doctors, members of the Regional Medical Council, and thus represented the interests of the doctors' lobby. Only one of the five members of the Supreme Medical Court was a professional judge, delegated from the Supreme Court. However, such a judge would often follow the conclusions of the majority. Moreover, the applicant's case had not been heard at the later stage by an impartial tribunal as the domestic law did not provide for a right to appeal to a court against the decision of the Medical Court when it had imposed a penalty taking the form of a reprimand.

59. The Government submitted that the proceedings in the applicant's case had been conducted fairly and that the applicant had enjoyed all procedural guarantees under Article 6 § 1 of the Convention. The applicant had been represented and his case heard at two instances before Medical Courts which had been independent and impartial. As regards the personal impartiality of the members of the Medical Courts, the Government argued that they had been impartial and that there was no proof to the contrary. Although the applicant had attempted to challenge the members of the Medical Court, this challenge had not included any specific complaint or evidence pointing to a lack of impartiality; it had thus been dismissed as manifestly ill-founded. The Government, referring to the Albert and Le Compte case (cited above), submitted that it had been necessary for the members of the Medical Courts to have expertise in medicine. They had been independent in exercising their functions and had followed the law and the Code of Ethics. Moreover, one judge sitting in the Supreme Medical Court had been appointed by the Supreme Court. The Government concluded that there had been no violation of Article 6 § 1 of the Convention.

2. The Court's assessment

60. The Court reiterates that, even in instances where Article 6 § 1^8 of the Convention is applicable, conferring the duty of adjudicating on disciplinary offences on professional disciplinary bodies does not in itself infringe the Convention. Nonetheless, in such circumstances the Convention calls for at least one of the following two systems: either the professional disciplinary bodies themselves comply with the requirements of that Article, or they do not so comply but are subject to subsequent review by a judicial body which has full jurisdiction and does provide the guarantees of Article 6 § 1 (see Albert and Le Compte cited above, § 29, and Gautrin, cited above, § 57).

61. The applicant maintained that the Regional and Supreme Medical Courts, which decided his case, lacked independence and impartiality.

62. There are two tests for assessing whether a tribunal is impartial within the meaning of Article 6 § 1: the first consists in seeking to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, among other authorities, mutatis mutandis, Saraiva de Carvalho v. Portugal, 22 April 1994, § 33, Series A no. 286-B and Kyprianou v. Cyprus [GC], no. 73797/01, § 118, ECHR 2005 XIII and, a contrario, Brudnicka and Others v. Poland, no. 54723/00, § 41, ECHR 2005 II).

63. As regards the subjective approach, the Court reiterates that the personal impartiality of each member must be presumed until there is proof to the contrary. In the present case the applicant exercised his right to challenge the impartiality of the judges composing the Regional Medical Court on the ground that they might be subject to pressure from the Tarnów Governor (see paragraph 11 above). The Government maintained that the challenge had not been specified or substantiated. The Court considers that the substance of his challenge was that the disciplinary courts, being composed of medical practitioners and not professional judges, might be under pressure from their hierarchical superiors or local government. However, the applicant failed to provide any prima facie evidence that the Tarnów Governor had put, or attempted to put, pressure on the members of the Medical Court. Moreover, there is no indication of any personal prejudice or bias on the part of the members of the disciplinary courts and indeed the applicant does not suggest this.

As regards the manner in which the challenges to the three members of the Regional Medical Court were examined, the Court observes that they were dealt with by the court sitting in a

different composition (see in this connection Debled v. Belgium, 22 September 1994, § 37, Series A no. 292 B). The dismissal of the applicant's challenge to particular members of the court and the refusal to transfer the case to another region were adverted to by the applicant in his appeal. However, the Supreme Medical Court dismissed the appeal, considering as unfounded the allegation that the members of the Regional Court had been put under pressure when dealing with the applicant's case.

64. As to the issue of objective and structural impartiality, the Court observes that the members of the Medical Courts were elected from among medical practitioners for a period of four years and they acted not as representatives of medical self-government but in their personal capacity. Moreover, in the composition of the Supreme Medical Court there was one professional judge appointed by the Supreme Court (see paragraph 25 above). As for the impartiality of the members from an objective and organisational point of view, the applicant did not raise any additional, specific, complaints in this respect. In any event, there were sufficient safeguards to exclude any legitimate doubt about the Medical Courts impartiality (see, a contrario, Kyprianou, cited above, §§ 127 and 128).

65. The Court is also satisfied, and it has not been disputed by the parties, that both bodies were established by law, that is, the 1989 Law on Medical Chambers (see paragraph 20 above).

66. The Court finally notes that, at the material time, the decisions of the Medical Courts, if their consequence was suspension from practice and revocation of the right to practise, were open to appeal to the Supreme Court - which offered an additional safeguard as regards the requirements of Article 6 § 1 of the Convention.

67. Regard being had to all the circumstances examined above, the Court considers that the applicant's doubts about the independence and impartiality of the members of the Medical Courts that reprimanded him for having breached the Code of Medical Ethics have not been sufficiently substantiated (see Gubler v. France, no. 69742/01, § 30, 27 July 2006). Thus, there has been no violation of Article 6 § 1 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. 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

69. The applicant claimed 316,000 Polish zlotys (PLN) in respect of pecuniary damage. This sum covered loss of wages for the period of nine years during which he had difficulties practising medicine given the reprimand by the medical court and the hostility of the medical authorities towards him.

70. As to non-pecuniary damage, the applicant claimed PLN 10,000 by way of symbolic compensation for suffering endured by him and his family.

71. The Government submitted that the applicant's claim in relation to pecuniary damage, with respect to the loss of hypothetical income, did not have a causal link with the alleged violations of the Convention. With regard to non-pecuniary damage, the Government argued that the sum claimed by the applicant was excessive. They invited the Court to rule that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

72. With regard to pecuniary damage the Court finds that there is no causal link between the damage claimed and the violation found. It therefore dismisses this claim. The Court considers, however, that the applicant must have sustained non-pecuniary damage and that sufficient just satisfaction would not be provided solely by a finding of a violation of the Convention. It awards the applicant EUR 3,000 under this head.

B. Costs and expenses

73. The applicant did not claim reimbursement of any costs and expenses.

C. Default interest

74. 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.

4.2.4. The Court's decision

1. Declares the application admissible;

2. Holds that there has been a violation of Article 10[48] of the Convention;

3. Holds that there has been no violation of Article 6 § 1[8] of the Convention;

4. Holds

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2[9] of the Convention, EUR 3,000 (three thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into Polish zlotys at the rate applicable at the date of settlement;

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

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

4.3. Case of Miller V. Sweden[12]

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

4.3.1. The procedure

1. The case originated in an application (no. 55853/00) against the Kingdom of Sweden lodged with the Court under Article 34[10] of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swedish national, Mr Robert Edward Miller ("the applicant"), on 9 April 1999.

[12] Second Section; Case Of Miller V. Sweden; (Application No. 55853/00); Strasbourg 8 February 2005; Final 08/05/2005

2. The applicant was represented before the Court by Mr Ulf Jacobson, a juris candidate practising in Stockholm. The Swedish Government ("the Government") were represented by Mrs E. Jagander of the Ministry for Foreign Affairs as their Agent.

3. On 9 December 2003 the Court decided to communicate to the Government the complaint under Article 6 § 1 of the Convention concerning the refusal to hold an oral hearing. Under the provisions of Article 29 § 3[26] of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

4.3.2. The Facts

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1918 and lives in Stockholm.

Until his retirement in March 1983 he worked as a teacher for 17 hours per week.

5. On 26 August 1996 the applicant applied for disability benefits (handikappersättning) under Chapter 9, section 2 of the Social Insurance Act 1962 (Lagen om allmän försäkring, 1962:381 - hereinafter "the 1962 Act"). He claimed that, even before his 65th birthday in 1983, he had incurred extra costs due to his illness, Charcot-Marie-Tooth , from which he had suffered since the 1970's and which had been diagnosed in September 1982. In support of his claim, he submitted:

(i) A medical certificate dated 27 August 1996, produced by the applicant's general practitioner, Doctor P. Dekany, at the applicant's request, supporting his application for disability benefits. It stated that the doctor had known and treated the applicant since 1961, and that the Charcot-Marie-Tooth disease had started in the early 1970s involving difficulties in walking, problems of balance, dragging of the feet and the patient tripping over and falling continuously. The muscles in the legs and feet had considerably withered. The illness had attacked even the hands and arms, with withered muscles and reduced strength in the fingers. Because of multiple inconveniences, the patient's functional capacity had been strongly reduced; he needed help for heavier household tasks, the preparation of meals, the purchase of household goods, carrying heavier objects, and for personal hygiene. The patient had incurred extra costs for medical treatment, foot rails, soft shoes, home assistance, and to some extent

his food budget because of a limited ability to prepare meals; he also had to pay for the transportation service for disabled persons, and extra travel by personal car, because of his considerably reduced ability to walk.

(ii) A statement of 21 April 1997 by Doctor P. Dekany, reproducing extracts from the applicant's medical records for the period between 1975 and 1983, with a diagnosis of the Charcot-Marie-Tooth disease in September 1982;

(iii) A statement dated 23 March 1983 by Mr P.K. Thomas, Professor and Doctor of the Royal Free Hospital School of Medicine, University of London, which concluded:

"I quite agree that the diagnosis here is Charcot-Marie-Tooth disease. The clinical findings and the nerve conduction studies indicate that it can be classified as type II hereditary motor and sensory neuropathy. He does show some minor pyramidal signs in the legs, which may be associated. I have explained to Mr Miller that although his symptoms may continue slowly to deteriorate, this is unlikely ever to become a very serious incapacity so that he becomes unable to walk."

6. On 16 July 1997 the Social Insurance Office (försäkringskassan -hereinafter "the Office") of the County of Stockholm rejected the application, finding that the applicant's disability had not reached the level required under Chapter 9, section 2 before he turned 65 years of age. One member reserved his position, considering that the applicant's need for assistance before turning 65 should be investigated.

7. The applicant, represented by a lawyer, appealed to the County Administrative Court (länsrätten) of the County of Stockholm and requested that an oral hearing be held in his case because he wished to call as witnesses his personal doctor, the doctor appointed by the Office and all the members of the Office who had participated in the decision of his case.

On 15 January 1998 the County Administrative Court refused the request with reference to section 9 of the Administrative Court Procedure Act (Förvaltningsprocesslagen 1971:291 - hereinafter "the 1971 Act"). Its decision contained the following reasoning:

"Written material, which includes inter alia medical certificates and extracts from [the applicant's] medical journal, a multitude of submissions and other documents sent by [the applicant] as well as the diary notes made during the processing of the case before [the Office] ..., are available in the case. There are no uncertainties as regards, at least, the basis for the medical assessment. The uncertainty regarding [the applicant's] extra costs due to his

disability at the age of 65 can be clarified satisfactorily by [him] in writing. According to the documents, [the applicant's] requests and reasons therefore are clearly defined, as are the submissions by the respondent. Nor has [the applicant] pointed to circumstances which would benefit from being orally presented by him. Thus, there is no reason to assume that an oral hearing could add anything meaningful. The County Administrative Court therefore considers an oral hearing to be unnecessary and rejects the request to that effect. ...”

The County Administrative Court invited the applicant to mention any further circumstances he wished to invoke and to submit his final written observations in the case within two weeks. In response he reiterated his request for an oral hearing, relying on Article 6 of the Convention. He argued that the medical certificates needed to be clarified and that a witness account by his personal doctor would be important in order to establish the exact level of support that he had required at the age of 65. He also submitted that the members of the Office should have been asked to give evidence about their precise reasons for refusing his request.

8. By a judgment of 13 February 1998 the County Administrative Court rejected the applicant's appeal on the grounds that the medical and other evidence in the case showed that, even before he had reached the age of 65, he had for a considerable time been functionally impaired, but not to such a degree that, on an assessment of the overall need of assistance, he was entitled to disability benefit. The court noted that the applicant had “commented” (yttrat sig) on its rejection of his request for an oral hearing, but did not respond to his renewed request or his reasons invoked therein. In reaching this decision the County Administrative Court took note of a breakdown of additional costs allegedly caused by his disability, totalling SEK 18,100, which the applicant had initially submitted to the Social Insurance Office on 16 September 1996.

9. The applicant appealed against the lower court's judgment to the Stockholm Administrative Court of Appeal (kammarrätten) requesting it to quash the judgment and refer the case back for fresh examination. In the alternative, he requested the appellate court to find that he was entitled to disability benefits at a level corresponding to 36 % of the basic amount as of July 1994. He further requested that the court hold an oral hearing, on the same grounds as those he had presented to the lower court. He submitted that, by refusing to hold an oral hearing, the latter had breached Article 6^{8} of the Convention.

10. By a decision of 3 July 1998 the Administrative Court of Appeal rejected his request for an oral hearing, finding this unnecessary for determining whether to grant him leave to

appeal, and gave him two weeks to complete his submissions in writing. The applicant made further submissions and maintained his request for an oral hearing. On 29 September 1998 the Administrative Court of Appeal rejected his renewed request for an oral hearing and refused him leave to appeal.

11. On 13 October 1998 the Supreme Administrative Court (Regeringsrätten), observing that it did not normally hold oral hearings, rejected the applicant's request for a hearing and gave him three weeks within which to submit additional written observations. On 29 February 2000 it refused him leave to appeal.

In this connection the applicant was given a copy of an analysis presented to the Supreme Administrative Court by its legal secretary, which included an opinion to the effect that the County Administrative Court's refusal to hold a hearing was not deemed incompatible with the Convention.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Disability benefits

12. According to Chapter 9, section 2 of the 1962 Act (as in force until 1 January 2001, when the 1998 Act on Disability Benefits and Care Allowance - lagen (1998:703) om handikappersättning och vårdbidrag – entered into force), a person who was ill or handicapped was entitled to disability benefits, provided that, before reaching the age of 65, he or she had been functionally impaired for a considerable time and to such a degree that he or she needed time-consuming assistance from another person in everyday life or continuing assistance in order to be gainfully employed or otherwise had considerable extra expenses. The total need for support and assistance determined the eligibility for disability benefits and the amount of compensation. It was thus necessary to look at the whole situation of the person in question and to add together the need for different types of assistance and the extra expenses. According to the guidelines of the National Social Insurance Board (Riksförsäkringsverket; hereinafter “the Board”) the total cost of all extra needs due to the disability should attain at least 28.5% of a basic amount geared to the price index (basbelopp) in order to make the individual eligible for an allowance. In 1997 the basic amount was SEK 36,300. In 1983, when the applicant turned 65, it was SEK 19,400.

13. According to Chapter 9, section 3 of the 1962 Act (as in force at the material time), such benefits were granted on a yearly basis at a level of 69%, 53% or 36% of the basic amount,

depending on the extent to which the insured person was in need of assistance and the amount of extra expenses caused by the disability.

B. Procedure

14. A decision by the Social Insurance Office under the 1962 Act could form the subject of an appeal to the County Administrative Court, to the Administrative Court of Appeal and to the Supreme Administrative Court.

15. The procedure in the administrative courts was governed by the provisions of the 1971 Act. Section 9 provides:

"The proceedings shall be in writing.

An oral hearing may be held in regard to a certain issue, when there is reason to assume that that would assist in the proceedings or be conductive to the speedy determination of the case.

In the Administrative Court of Appeal and the County Administrative Court an oral hearing shall be held if requested by an individual party to the proceedings and if it is not unnecessary and there are no particular reasons against holding a hearing (I kammarrätt och länsrätt skall muntlig förhandling hållas, om enskild som för talan i målet begär det samt förhandlingen ej är obehövlig och ej heller särskilda skäl talar mot det)".

Under those circumstances it was not possible for an individual party to obtain an oral hearing on request in the proceedings before the Supreme Administrative Court.

16. From the case-law of the national courts, it appears that the grounds stated in the third paragraph of section 9 for refusing an oral hearing have been interpreted as being alternative rather than cumulative (see Regeringsrättens Årsbok 1997 ref 62).

17. According to the preparatory work to the 1971 Act, an oral hearing could be a valuable complement to the written proceedings and could benefit the examination of a case, in particular in two situations: firstly, when it was necessary to hear a witness, an expert or a party or when it was difficult for a party to present the case in writing and, secondly, when different positions in the case needed to be sorted out in order to eliminate unnecessary or pointless issues of dispute. In the latter case, the oral hearing takes on a preparatory character. It was stressed, however, that an oral hearing should not to be seen as an alternative to the written procedure but as a supplement to it (see Government Bill 1971:30, p. 535).

It was further stated, in respect of the third paragraph of section 9, that a party's request for an oral hearing should be given close consideration. However, such a request should not have a decisive influence on the matter, as the question whether an oral hearing was necessary was to be determined primarily on the basis of the available information in the case. However, other circumstances could be of relevance, for instance the importance for the party of the matter at stake or the possibility that an oral hearing could enhance the party's understanding of a future decision in the case. Nevertheless, if the case was of a trivial character or the costs of an oral hearing would be disproportionate to the value of what was at stake in the case, there could be reason not to hold an oral hearing (p. 537).

4.3.3. The law

I. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

18. The applicant complained that the lack of an oral hearing in his case, including the fact that he was denied an opportunity to have witnesses called to give evidence on his behalf, constituted a violation of Article 6 § 1^{8} of the Convention. Moreover, he complained under this provision that the competent courts had failed to carry out an examination of the merits of his Article 6 § 1 complaint. In so far as is relevant this provision reads:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

19. The Government disputed the above complaints and invited the Court to declare them inadmissible as being manifestly ill-founded. In any event, they submitted, there had been no violation of the Convention in this case.

A. Admissibility

20. In so far as the applicant complains under Article 6 § 1 about the lack of an oral hearing, the Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3^{14} of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

21. In so far as the applicant alleges a further violation of Article 6 § 1 on account of the alleged failure of the national courts to deal with his above complaint about the lack of an oral hearing, the Court notes that his allegation is not actually borne out by the facts. His claim that the County Administrative Court's refusal to hold an oral hearing had violated Article 6 § 1 was first entertained by the Administrative Court of Appeal, when refusing to hold a hearing and to grant him leave to appeal. Subsequently, the Supreme Administrative Court did consider the matter, as is evident from the information given to him on that occasion. This complaint must therefore be declared inadmissible as being manifestly ill-founded pursuant to Article 35 §§ 1 and 4[47] of the Convention.

B. Merits of the complaint about the lack of an oral hearing

1. The applicant's submissions

22. The applicant maintained that there were no exceptional reasons capable of justifying the refusal to grant him an oral hearing. His appeal against the Social Insurance Office's decision had raised both issues of fact and of law. These could not be determined solely on the basis of the medical records and opinions, since his claim for disability benefits was based not solely on his reduced functional capacity but also on his need for assistance and on the extra costs he had incurred. At an oral hearing the applicant would have been able to supplement the evidence by explaining his medical condition and its consequences in his daily life before he had reached the age of 65. Moreover, it would have enabled the national courts to put supplementary questions on these aspects to the applicant and to the witnesses he had requested be heard.

2. The Government's submissions

23. The Government were of the view that there were exceptional circumstances in this particular case that justified dispensing with an oral hearing. As could be seen from the County Administrative Court's reasoning in its decision of 15 January 1998, it had decided the issue in accordance with domestic law, in the light of the subject-matter to be determined by it and having regard to all the written material that was already available in the case. The main issue to be determined was whether the applicant's need for assistance and additional costs had reached the level required for a disability allowance under the 1962 Act. However, one prominent feature was that the assessment as to whether the applicant was entitled to a disability allowance had to be made in relation to a particular point in time in the past, namely when he had retired at the age of 65. That was in 1983, 13 years before the matter was

brought before the courts. This fact alone indicated that the relevant basis for the assessment was the written material from that time.

24. Although one could infer from the applicant's request to the County Administrative Court for an oral hearing that he wished to have witnesses called, it should be noted that he did not give any particular reasons, nor indicate the subject of the witness evidence or what he sought to demonstrate.

25. From the rather lengthy reasons that the County Administrative Court gave for its refusal to hold an oral hearing, it was evident that it regarded the written evidence on the applicant's condition at the relevant time as sufficient; there were no unclear points as far as the basis for the medical assessment was concerned. The applicant's claim and arguments were also clear. Any remaining uncertainties regarding his additional costs due to his impairment at the age of 65 could be clarified in writing. The principle established in the Court's case-law in the area of criminal proceedings that it was within the domain of the national courts to decide on the admissibility of evidence should also have a bearing in other areas.

26. None of the oral evidence requested by him before the national courts would have provided any information of relevance to the case in addition to that already available in the written evidence, which included the Social Security Office's case-file.

Hearing the persons who had taken part in the Office's decision would not have supported his case.

Nor would it have served the applicant to have the physician appointed by the Office heard. It was not his task to make an independent assessment of the applicant's state of health at the relevant time. He had no personal knowledge of the applicant and had not been involved in the treatment of his medical condition. Instead, his role had been to act as a medical adviser to the Office and his opinion had been available in the case.

Oral evidence from the applicant's own doctor about his state of health 15 years earlier would have been of limited value. It was highly unlikely that the doctor would have been able to add anything to what he had already noted at the time in the medical records presented in the case. It was clear from the medical opinion issued by the doctor in 1996 for the purpose of the applicant's request for disability benefits that the assessment contained therein - that the applicant was in need of some support and had incurred additional costs - referred to the applicant's situation in 1996. That assessment was irrelevant to the issue whether the applicant would have qualified for disability benefits in 1983. It was hardly likely that the doctor would

have been able to recall at an oral hearing the applicant's health status at a particular time in the past; he would have had to rely on the medical records that were already available to the County Administrative Court.

27. There was no indication that the applicant offered to give evidence himself. Even if he had done so, it should be stressed that none of the judges taking part in the case had or were expected to possess any medical expertise of their own, let alone the ability to make an assessment of their own regarding the applicant's medical status 15 years' earlier by meeting him in person.

2. The Court's assessment

28. It has not been argued, nor is there anything to suggest, that this case relating to the applicant's claim for benefits under the national social security scheme did not concern a dispute (contestation) over a "right" which could be said, on arguable grounds, to be recognised under domestic law. In particular, it could not be said that the applicant's claim was frivolous or vexatious or otherwise lacking in foundation (see Rolf Gustafsson v. Sweden, Reports of Judgments and Decisions 1997-IV, p. 1160, § 39 in fine). Nor is it disputed, and the Court is satisfied, that the right in question was "civil" in character in the autonomous sense of Article 6 § 1 of the Convention (see, for example, Duclos v. France, judgment of 17 December 1996, Reports, 1996-VI, pp. 2179-80, § 53). This provision is accordingly applicable; the only issue is whether there was a failure to comply with it on account of the refusal to hold an oral hearing in the case.

29. The Court reiterates that in proceedings before a court of first and only instance the right to a "public hearing" under Article 6 § 1 entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing (see, for instance, Fredin v. Sweden (no. 2), judgment of 23 February 1994, Series A no. 283-A, pp. 10–11, §§ 21–22; Fischer v. Austria, judgment of 26 April 1995, Series A no. 312, pp. 20–21, § 44; Stallinger and Kuso v. Austria, judgment of 23 April 1997, Reports 1997-II, pp. 679–80, § 51; Allan Jacobsson v. Sweden (no. 2) Reports 1998-I, pp. 168-169, § 46; Salomonsson v. Sweden, no. 38978/97, § 34, 12 November 2002; Lundevall v. Sweden, no. 38629/97, § 34, 12 November 2002; and Döry v. Sweden, no. 28394/95, 12 November 2002, § 37; Göç v. Turkey [GC], no. 36590/97, ECHR 2002-V, §§ 47-52).

The exceptional character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent

national court, not to the frequency of such situations. It does not mean that refusing to hold an oral hearing may be justified only in rare cases. For example, the Court has recognised that disputes concerning benefits under social security schemes are generally rather technical, often involving numerous figures, and their outcome usually depends on the written opinions given by medical doctors. Many such disputes may accordingly be better dealt with in writing than in oral argument. Moreover, it is understandable that in this sphere the national authorities should have regard to the demands of efficiency and economy. Systematically holding hearings could be an obstacle to the particular diligence required in social-security cases (see the following judgments cited above: Schuler-Zgraggen pp. 19-20, § 58; Salomonsson, § 38; Lundevall, § 38; and Döry, § 41).

30. The Court further reiterates that, provided a public hearing has been held at first instance, a less strict standard applies to the appellate level, at which the absence of such a hearing may be justified by the special features of the proceedings at issue. Thus, leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, although the appellant was not given an opportunity of being heard in person by the appeal or cassation court. Regard must be had to the nature of the national appeal system, to the scope of the appellate court's powers and to the manner in which the applicant's interests are actually presented and protected in the appeal, particularly in the light of the nature of the issues to be decided by it, and whether these raise any questions of fact or questions of law which cannot be adequately resolved on the basis of the case-file (see for instance Helmers v. Sweden, judgment of 29 October 1991, Series A no. 212-A, p. 16, § 36).

The Court considers that this less strict standard should also apply if an oral hearing has been waived at first instance and requested only on appeal. In the interests of the proper administration of justice, it is normally more expedient that a hearing be held at first instance rather than only before the appellate court (see the above-mentioned Döry judgment).

31. Turning to the particular circumstances of the present case, the Court observes from the outset that there can be no question of the applicant having waived any right to a hearing under Article 6 § 1 of the Convention (cf, Håkansson and Sturesson v. Sweden, judgment of 21 February 1990, Series A no. 171-A, p. 20, §§ 64 and 66; and Schuler-Zgraggen v. Switzerland, judgment of 24 June 1993, Series A no. 263, pp. 19-20, § 58). The applicant had already expressly requested an oral hearing at what, in the Court's view, was the most appropriate stage of the proceedings - at first instance before the County Administrative

Court. On this account alone the present case is more striking than those of the aforementioned Salomonsson and Lundevall judgments, where an oral hearing was not requested until the appeal to the Administrative Court of Appeal and where the Court nevertheless found a violation.

The applicant also made a request for an oral hearing to the Administrative Court of Appeal and the Supreme Administrative Court. Since both the Administrative Court of Appeal and the Supreme Administrative Court refused him leave to appeal, the County Administrative Court in fact became the first and only instance to examine the merits of his case. Therefore the only issue to be determined is whether the first instance court's refusal to hold an oral hearing was justified by exceptional circumstances.

32. In this regard the Court notes, by way of general observation, that proceedings before the Swedish administrative courts were in principle in writing. Pursuant to section 9 of the 1971 Administrative Court Procedure Act, before the Administrative Court of Appeal and the County Administrative Court, an oral hearing should be held if so requested by a party and if the competent court found that a hearing would neither be unnecessary nor dispensable for other particular reasons. According to the interpretation made by the Swedish courts, these two grounds for refusing a request to hold an oral hearing were alternative, not cumulative. Thus, in administrative-law cases heard on the merits by one level of jurisdiction only, there is an apparent discrepancy between the Convention case-law, according to which an oral hearing must be held unless there are exceptional reasons, and the lesser standard applied by the national court. The Court considers that the respondent State should take appropriate measures to ensure that it is the Convention standard that applies.

33. It should also be emphasised that the County Administrative Court had full jurisdiction to examine the issue raised in the applicant's appeal, namely whether he fulfilled the conditions for obtaining disability benefits under Chapter 9, section 2 of the 1962 Act. According to this provision it was a condition that, before reaching the age of 65, he must have been functionally impaired for a considerable time and to such a degree that he needed time-consuming assistance from another person in everyday life or continuing assistance in order to be gainfully employed or otherwise had considerable extra expenses. A person's eligibility for disability benefits was to be determined in the light of his or her “total need of support and assistance”, making it “necessary to look at the whole situation of the person in question and to add together the need for different types of assistance and the extra expenses”.

34. In addition, the medical certificates on which the applicant relied supported rather than contradicted his claim that he did fulfil the above conditions for disability pension, though did not conclusively deal with the issue. When the matter was before the Social Security Office, one member reserved his position and was in favour of remitting the case for further investigation of the applicant's need for assistance. The County Administrative Court, for its part, when refusing to hold an oral hearing, noted an uncertainty as to his extra costs due to disability but considered that this could be clarified, albeit in writing. When later determining the merits of the case, in the light of all the evidence, it conceded that before the age of 65 the applicant had for a considerable time been functionally impaired. But the County Administrative Court rejected his claim, finding that the degree of his disability did not reach the minimum required.

Therefore, in the Court's view, the question of the degree of disability was apparently not straightforward. For example, the Court is unable to accept the Government's argument that, because of the passage of time, oral evidence from the applicant's personal doctor was unlikely to add anything useful. On the contrary, it is not inconceivable that the doctor could have fleshed out at an oral hearing the various observations he had made in the relevant medical records, and could have given his opinion on their implications for the issues raised before the County Administrative Court.

Nor does it seem, either from the arguments and evidence submitted to the County Administrative Court or the latter's reasoning, that the issue of extra costs was clear-cut. For instance, it is not immediately apparent why the figures adduced (totalling SEK 18,100) did not reach the requisite minimum 28.5% of the basic amount (which in 1997 was SEK 36,300 and in 1983 was SEK 19,400).

The Court considers that the issues raised by the applicant's judicial appeal were not only technical in nature. In its view, the administration of justice would have been better served in the applicant's case by affording him a right to explain, on his own behalf or through his representative, his personal situation, taken as a whole at the relevant time, in a hearing before the County Administrative Court (see, mutatis mutandis, the above-cited Göç judgment, § 51).

35. In these circumstances it could hardly be said that the applicant's claim was incapable of giving rise to any issue of fact or of law which was of such a nature as to require an oral hearing for the determination of the case.

36. Finally, as regards the Government's submission that the applicant failed to give reasons for his request for an oral hearing, the Court observes that the applicant was not expressly invited by the County Administrative Court to explain his wish for an oral hearing. After the latter's refusal to hold an oral hearing the applicant stated that he considered that his medical certificates needed to be clarified and that oral evidence from his own doctor would be important for establishing the degree of his disability. Therefore the competent national court had sufficient elements to be in a position to consider the matter.

37. Against this background it cannot be said that the question whether the applicant, before the age of 65, fulfilled the legal conditions for the grant of a disability pension, was of such a nature as to dispense the County Administrative Court from the normal obligation to hold an oral hearing. Accordingly, the Court finds that there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. Article 41 of the Convention provides:

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

A. Damage

39. The applicant claimed SEK 10,000 in respect of non-pecuniary damage.

40. The Government were of the view that the finding of a violation would in itself constitute adequate just satisfaction. However, if the Court were to find that an award should be made under this heading, the Government would find the amount claimed acceptable.

41. The Court, making an assessment on an equitable basis, awards the applicant EUR 1,000 in respect of non-pecuniary damage.

B. Costs and expenses

42. The applicant requested the reimbursement of the legal fees incurred, as follows:

(a) SEK 20,000 for the work (16 hours at the rate of SEK 1,000 per hour plus 20% Value Added Tax (V.A.T.)) by his legal representative, Mr G. Antal, in the domestic proceedings;

(b) SEK 7,500 for the work (6 hours at the same rate) by the above lawyer in the Strasbourg proceedings until July 1999;

(c) SEK 78,750 for the work (42 hours at 1,500 SEK per hour, plus 20% V.A.T.) by Mr U. Jacobson, who took over as his legal representative in August 1999.

43. The Government did not object to the hourly rate but considered the number of hours claimed excessive. In the domestic proceedings, only costs referable to the oral hearing issue should be reimbursed and should not be reimbursed beyond SEK 4,000. In so far as costs before the Court were concerned, the Government considered 3 hours' work by Mr Antal and 17 hours work by Mr Jacobson to be reasonable. Thus, an award of SEK 28,500, V.A.T. included, would be reasonable in their view.

44. 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 in order to prevent or obtain redress for the violation found and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,000 in respect of items (a) and (b) and EUR 3,500 in respect of item (c) (both amounts being inclusive of V.A.T.).

C. Default interest

45. 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.

4.3.4. The Court’s decision

1. Declares unanimously the complaint concerning the lack of an oral hearing admissible and the remainder of the application inadmissible;

2. Holds by four votes to three that there has been a violation of Article 6 § 1^{8} of the Convention on account of the refusal to hold an oral hearing;

3. Holds by four votes to three

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2[9] of the Convention, the following amounts:

(i) EUR 1,000 (one thousand euros) in respect of non-pecuniary damage;

(ii) EUR 4,500 (four thousand five hundred euros) in respect of costs and expenses;

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

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

4.4. Case of Shtukaturov V. Russia

(case 3.6.)

Chapter 5 No punishment without law. Selected case law.

5.1. No punishment without law

.According to the Article 7 of the European Convention No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

5.2. Case of Klamecki V. Poland[13]

5.2.1. The procedure

1. The case originated in an application (no. 31583/96) against the Republic of Poland 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 a Polish national, Mr Ryszard Klamecki ("the applicant"), on 6 December 1995.

2. The applicant, who had been granted legal aid, was represented by Mr Z. Cichoń, a lawyer practising in Kraków. The Polish Government ("the Government") were represented by their Agent, Mr K. Drzewicki, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that, after having been arrested, he had not been brought before a judge; that his detention pending trial had exceeded a "reasonable time"; that the proceedings designed to review the lawfulness of his detention had not been adversarial; and that his right to respect for his correspondence and his family life had been violated.

4. The application was declared partly admissible by the Commission on 20 October 1997 and transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3^{7}, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

5. The application was allocated to the First Section of the Court (Rule 52 § 1^{49} of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1^{50} of the Convention) was constituted as provided in Rule 26 § 1^{51}.

6. By a decision of 30 April 2002, the Court declared the remainder application admissible.

[13] First Section; Case Of Klamecki V. Poland (No. 2); (Application No. 31583/96); Strasbourg 3 April 2003

5.2.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

A. Criminal proceedings against the applicant and his detention

7. On 22 November 1995 the Wrocław-Stare Miasto District Prosecutor (Prokurator Rejonowy) charged the applicant with fraud committed together with several accomplices and detained him on remand for three months in view of the reasonable suspicion that he had committed the offence in question and the risk that he might obstruct the proper course of the proceedings.

8. On an unknown later date the applicant appealed to the Wrocław-Śródmieście District Court (Sąd Rejonowy) against the order for his detention. On 27 November 1995 he lodged a pleading supplementing his appeal. In that pleading, he submitted that his detention had been imposed by a prosecutor, a party to the proceedings, whereas under the Convention detention had to be ordered either by a judge or by another officer exercising judicial power.

9. On 5 December 1995 a single judge, sitting as the Wrocław-Śródmieście District Court, dismissed the appeal, finding that the applicant's detention had an adequate legal basis. The applicant did not participate in the court session, whereas the Wrocław-Stare Miasto District Prosecutor did.

10. On 28 November and 14 December 1995 the applicant asked the Wrocław-Śródmieście District Court to appoint a defence lawyer for him. That application was granted on 19 January 1996.

11. On 11 December 1995 the applicant asked the Wrocław-Stare Miasto District Prosecutor to release him. The application was dismissed on 12 December 1995 by the prosecutor at first instance and on 30 December 1995 on appeal. The authorities held that there was a reasonable suspicion that the applicant had committed the offence with which he had been charged. They also considered that holding him in detention was necessary to secure the proper conduct of the proceedings.

12. On 21 December 1995 the applicant made a further application for release. He complained about the prison conditions and maintained that his continued detention had severely affected his health. The prosecution asked medical experts to examine the applicant.

The doctors made their report on 22 December 1995. They concluded that the applicant could receive adequate medical treatment in prison.

Basing themselves on that report, the authorities refused to release the applicant. The relevant decisions were made on 2 January 1996 by the prosecutor at first instance and on 24 January 1996 on appeal. The prosecutors, referring to the experts' report, held that the applicant's health did not militate decisively against his being kept in detention.

13. In the meantime, the Wrocław Regional Prosecutor (Prokurator Wojewódzki) took over the investigation from the Wrocław-Stare Miasto District Prosecutor.

14. On 5 February 1996 the applicant asked the Regional Prosecutor to release him in view of his bad health. He stressed that he was suffering from diabetes, high blood pressure and arteriosclerosis. He maintained that he did not receive proper medical treatment and diet in prison. The application was dismissed on 7 February 1996 by the prosecutor at first instance and on 21 February 1997 on appeal. The main ground on which the authorities relied was that, according to a medical report obtained on 6 February 1996, the applicant's general condition was not an obstacle to keeping him in detention.

15. On 15 February 1996, on an application made by the Wrocław Regional Prosecutor, the Wrocław-Śródmieście District Court prolonged the applicant's detention until 30 June 1996. The applicant appealed on 26 February 1996. He argued that he had never been brought before a judge at any stage of the proceedings relating to the lawfulness of his detention. On 1 March 1996 the Wrocław Regional Court (Sąd Wojewódzki) upheld the first-instance decision. The Wrocław Regional Prosecutor participated in the court session but neither the applicant nor his lawyer did.

16. On 18 March 1996 the applicant asked the Wrocław-Śródmieście District Court to release him under police supervision. The matter was referred to the Wrocław Regional Prosecutor because at the investigation stage only a prosecutor could deal with an application for release (see also paragraph 82). That application was rejected on 3 June 1996 at first instance and on 28 June 1996 on appeal. The prosecution considered that there was a reasonable suspicion that the applicant had committed the offence with which he had been charged. They also pointed out that there were no particular circumstances militating in favour of his release, as defined in Article 218 of the Code of Criminal Procedure.

17. On 6 May and 3 June 1996 the applicant again asked the Wrocław-Śródmieście District Court to release him under police supervision. Those applications, after having been referred

to the Wrocław Regional Prosecutor, were dismissed by that prosecutor on 28 June 1996 and, on appeal, on 14 July 1996. The authorities considered that the original grounds given for the applicant's detention were still valid.

18. On 25 June 1996, on an application by the Wrocław Regional Prosecutor, the Wrocław-Śródmieście District Court prolonged the applicant's detention until 30 September 1996.

19. On 25 July and 5 August 1996 the applicant made further applications for release under police supervision to the Wrocław Regional Court, claiming a breach of Article 5 § 3^7 of the Convention in that he was neither tried within a reasonable time nor released pending trial.

20. On 30 August 1996 the court held a session and, after having heard the submissions of the Wrocław Regional Prosecutor, dismissed the applications in view of the reasonable suspicion that the applicant had committed the offence with which he had been charged and the need to ensure the proper conduct of the proceedings.

21. The applicant appealed on 5 September 1996. He submitted that the proceedings concerning his applications for release were not adversarial because he could not take part in any court session at which those applications were examined, whereas the prosecution could put forward any arguments they wished in his absence. On 16 September 1996 the Wrocław Court of Appeal (Sąd Apelacyjny), after having heard the prosecutor's submissions, upheld the first-instance decision and the reasons given therefor.

22. Meanwhile, on 9 August 1996, the Wrocław-Śródmieście District Court had considered the applicant's request for release, in which he had alleged a breach of Article 5 § 3 of the Convention in that after having been arrested he had not been brought before a judge. The court dismissed the request and held, inter alia, that the fact that the detention had been imposed by the prosecutor, i.e. a party to the proceedings, was not a factor that would justify releasing him. On 31 October 1996, on an appeal filed by the applicant, the Wrocław Regional Court quashed the decision of 9 August 1996 and held that, in accordance with the Law of 4 August 1996 on Amendments to the Code of Criminal Procedure (see also "Relevant domestic law and practice" below), only a regional court was competent to deal with the applicant's application for release.

The Regional Court further examined that application and rejected it on the ground of the reasonable suspicion that the applicant had committed the offence with which he had been charged. It also considered that the need to ensure the proper course of the proceedings and the likelihood of a severe sentence to be imposed on the applicant justified his being held in

custody. The Wrocław Regional Prosecutor participated in the court session but neither the applicant nor his lawyer did.

23. The applicant appealed. On 22 November 1996 the Wrocław Court of Appeal held a session and, after having heard the prosecutor's opinion, upheld the first-instance decision and the reasons given therefor.

24. In the meantime, on 30 September 1996, the Wrocław Regional Prosecutor had lodged a bill of indictment with the Wrocław-Śródmieście District Court. The applicant was indicted together with 10 other persons on charges of aggravated fraud, appropriation of public property, receiving stolen goods, making a false declaration, and forgery. The case-file comprised 19 volumes.

25. The trial was listed for 18 and 19 December 1996. Meanwhile, on 21 November 1996 the court appointed a new lawyer for the applicant.

26. On 1 December 1996 the applicant asked the District Court to release him. He maintained that his detention had lasted an excessively long time and, what was more, he had previously been detained in other criminal proceedings for some two years. He had accordingly spent in custody in all more than three years. That, he stressed, had in reality amounted to serving a prison sentence. He relied on Article 5 § 3 of the Convention.

27. On 4 December 1996 his application was dismissed at first instance and on 31 December 1996 on appeal. The courts considered that the applicant should still be kept in custody in view of the severity of the sentence which might be imposed and the need to ensure the proper conduct of the proceedings.

28. On 18 December 1996 the court postponed the trial to 29 January 1997 because one of the applicant's co-defendants was ill.

29. On 19 December 1996 and, subsequently, on 13, 15 and 29 January 1997 the applicant made complaints about the conduct of his officially-appointed counsel and asked the trial court to appoint a new lawyer for him.

30. On 31 December 1996 the applicant again asked the court to release him under police supervision. On 7 January 1997 the application was dismissed in view of the need to ensure the proper conduct of the trial and the severity of the sentence that might be imposed on him.

31. On 15 January 1997 the applicant appealed, submitting that neither he nor his lawyer had been informed of, or summoned to, the court's session at which his application for release had been examined and that the relevant procedure did not comply with the requirements of Article 5 § 4 of the Convention. On the same day he asked the Regional Court to allow him to attend the session at which that court would deal with his appeal so that he could put forward his arguments.

32. On 17 January 1997 the Wrocław-Śródmieście District Court refused to proceed with the appeal since, under the recently amended provisions of the Code of Criminal Procedure, no appeal lay in law against a court decision on an application for release.

33. On 29 January 1997 the court postponed the trial to 20 February 1997 because a certain J.F., one of the applicant's co-defendants had failed to appear. The court severed the charges against J.F.

34. On 10 February and on 3, 10, 17 and 25 March, and on 1, 8 and 17 April 1997 the applicant made further unsuccessful applications for release under police supervision to the Wrocław-Śródmieście District Court. The applications were dismissed on 12 February and on 10, 12, 20 and 28 March, and on 4, 11 and 22 April 1997 respectively. The court considered that the applicant should still be kept in custody in view of the need to secure the proper conduct of the trial and the severity of the sentence which might be imposed, a sentence that ranged from 1 to 10 years' imprisonment.

35. On 20 February 1997 the trial was to start but the applicant made yet another complaint about the conduct of his officially-appointed counsel and the court adjourned the hearing, finding it necessary to appoint a new defence lawyer for him.

36. On 5 March 1997 the court adjourned the next hearing since E.Cz., one of the applicant's co-defendants, had failed to appear. The court ordered that E.Cz. would be brought by the police to the next hearing, which was listed for 19 March 1997. Yet on the latter date the trial was postponed because the presiding judge was ill.

37. The trial began on 10 April 1997. On 10 and 21 April 1997 the court heard evidence from the applicant.

38. At the hearing of 10 April 1997 the applicant again asked the court to release him under police supervision. The court rejected his application. It found that keeping him in custody was necessary to secure the proper conduct of the trial. The court also stressed that the

severity of the sentence that might be imposed on the applicant was an important factor that argued against releasing him.

39. Subsequently and throughout the trial, the applicant made numerous – but likewise unsuccessful – applications for release. Between 14 May and 4 December 1997 he made 26 such applications and appealed against each refusal. The courts reiterated the grounds they had previously given for his continued detention.

40. The applicant also repeatedly challenged the impartiality of the trial judges and complained about the conduct of the registry clerk who was responsible for the record of the trial. From 12 May to 1 December 1997 he made 16 applications for the judges to be disqualified from dealing with his case.

41. After the hearing that was held 10 April 1997 (see paragraph 37 above), the next one was listed for 21 May 1997. On that day, the court heard evidence from the applicant's wife.

42. Subsequently, the court made an application under Article 222 § 3 of the Code of Criminal Procedure (see paragraphs 90-91 below) to the Supreme Court (Sąd Najwyższy), asking it to prolong the applicant's and Cz.S.'s detention for 6 further months.

43. In the meantime, hearings set for 18 June and 3 July 1997, had been cancelled; the former because J.S., one of the applicant's co-defendants, had failed to appear, the latter because the District Prosecutor and another co-defendant, E.Cz. had not been present.

44. On 12 and 13 July 1997 a massive flood-wave inundated the South-West of Poland, severely affecting Wrocław. A considerable part of the city was washed away or destroyed.

45. On 14 July 1997 the applicant complained to the Wrocław-Śródmieście District Court that his health was deteriorating very rapidly and that he was seriously affected by the harsh prison conditions resulting from the flood in Wrocław. He asked for release.

46. On the same day the applicant made a petition to the President of the Wrocław Regional Court, the President of Wrocław-Śródmieście District Court and the Wrocław-Śródmieście District Court. He complained that on 12 and 13 July 1997 a flood-wave had inundated the prison building up to the third floor. The light, electricity and sewage systems had been destroyed. There had been no drinking water, food or washing facilities. He and his fellow inmates were, in his words, kept like animals in unventilated, overcrowded and stinking cells. He asserted that an official tolerance for that situation amounted to inhuman and degrading treatment.

47. Subsequent hearings, which were to be held on 6 and 27 August 1997, did not take place because, on the first date, the defence counsel for J.S. and Cz.S had not been present and, on the second, J.S.'s counsel had not appeared and the police had not brought E.Cz. from prison.

48. The next hearing, scheduled for 9 September 1997, was postponed to 13 October 1997 because E.Cz. failed to appear.

49. On 13 October 1997 the hearing was nevertheless adjourned since E.Cz. and one of the judges sitting in the trial chamber were absent. The presiding judge ordered, however, that E.Cz., on account of his repeated failure to comply with the court order, be searched for by a "wanted" notice and detained pending trial.

50. On the same day the court made the second application under Article 222 § 4 of the Code of Criminal Procedure to the Supreme Court, asking it to prolong the applicant's and Cz.S.'s detention for a further period of six months. In the reasoning, the court reiterated the grounds previously given for the applicant's detention. It further referred to the risk that he might induce witnesses to give false testimonies or to obstruct the trial by other unlawful means, and the likelihood of a heavy penalty being imposed on him. In that connection, the court stated that the applicant, when giving evidence, had refused to reveal names of certain clients of his company and stated that he would not do so unless he had considered it to be pertinent. The court next pointed out that the applicant's detention should continue because there were no special circumstances justifying his release, as defined in Article 218 of the Code of Criminal Procedure. It also stressed that it still needed to obtain voluminous evidence. In its opinion, all those above-mentioned obstacles made it impossible for it to give judgment within the terms referred to in Article 222 § 3 of the Code of Criminal Procedure.

51. On 27 October 1997 the applicant applied to the President of the Criminal Chamber of the Supreme Court, asking that he be brought to the session concerning the prolongation of his detention beyond the statutory time-limit, so that he could present his arguments. He relied on Article 6 § 3 (c) of the Convention and a number of constitutional provisions, notably those stipulating that self-executing provisions of an international treaty took priority over domestic law. He also complained that the District Court had not served a copy of the application of 13 October 1997 on him and that, in consequence, he could not contest effectively the grounds for the prolongation his detention given by that court.

52. On 3 November 1997 the applicant received a copy of that application. On 4 November 1997 he prepared a statement addressed to the President of the Criminal Chamber of the

Supreme Court and once again asked that he be brought from prison to the session concerning the prolongation of his detention. He also complained about the conduct of the presiding judge. He stressed that the judge was not fair in considering that he should be held in custody inasmuch as the trial had to be postponed only because of his released co-defendants' repeated failure to appear before the court. In that context, the applicant pointed out that the court would have avoided the delays caused by the conduct of those co-defendants if it had severed promptly the charges against them.

53. On 6 November 1997 the District Court cancelled a hearing as the Supreme Court had not yet examined the application of 13 October 1997 and had not returned the case-file.

54. On 13 November 1997 the Supreme Court held a session at which it dealt with that application. It prolonged the applicant's detention until 30 March 1998.

At the beginning of the session the Supreme Court considered the applicant's motion in which he asked it to be brought before it and allowed to present his arguments. The State Prosecutor (Prokurator Krajowy) was summoned to, and took part in, the session. The applicant's representative was not summoned. After having heard the Prosecutor's arguments (who opposed the motion), the Supreme Court rejected the applicant's request.

Referring to the grounds for the extension of the applicant's detention beyond the statutory time-limit, the Supreme Court held that the circumstances adduced by the District Court showed that it was likely that he would induce the witnesses to give false testimonies or otherwise obstruct the trial. It further found that, given the fact that the case was of a particular complexity and that the trial court had to obtain various evidence, the applicant should still be held in custody in order to secure the proper conduct of the trial. Lastly, the Supreme Court pointed out that despite the factors that had to date contributed to the prolongation of the trial, the District Court should nevertheless accelerate the proceedings.

55. The trial was to restart on 15 December 1997 but it was postponed to 12 January 1998 because the police had not brought E.Cz. from prison and J.S.'s counsel had not appeared before the court.

56. On 5 January 1998 the District Court dismissed the applicant's application for his detention to be lifted and replaced by another preventive measure. The court considered that the applicant should be held in custody because a severe penalty might be imposed on him. It stressed that the applicable sentence ranged from 1 to 10 years' imprisonment. It further considered that the fact that the applicant had refused to reveal the identity of some of his

company's clients showed that, had he been released, he would have induced witnesses to give false testimonies or otherwise obstructed the proper course of the trial.

57. On 12 January 1998 the court cancelled a hearing because the police had not brought the applicant and E.Cz. from prison. On the same day the applicant made an application for release, asking the court to vary the preventive measure imposed on him. He maintained that his prolonged detention was putting a severe strain on himself and on his family.

58. The applicant made a further, similar application on 19 January 1998, stating that he "would be very grateful if [he] could obtain an explanation as to what for and for whom [he] was needed to be prison". He submitted two further applications in January and two in February 1998.

The court dismissed those applications on 20, 28 and 30 January, and on 6 and 18 February 1998, respectively. The reasons for those decisions were in essence identical to those given for the decision of 5 January 1998 (see paragraph 56 above).

59. On 5 February 1998 the court cancelled a hearing. On 23 February 1998 it decided to conduct the trial again from the beginning and to rehear all evidence that had so far been obtained. The presiding judge read out the records of the evidence heard from the applicant on 10 and 21 April 1997.

60. On 9 March 1998 the applicant was released pending trial.

61. On 16 December 1999 the Wrocław-Śródmiescie District Court gave judgment. It convicted the applicant as charged and sentenced him to 3 years' imprisonment and a fine.

B. Censorship of correspondence

62. During his detention, the applicant received many letters, including those from his lawyers, without envelopes.

From 6 December 1995 to 21 July 1997 the applicant sent 61 letters to the Commission, of which 46 were opened and stamped "censored" (ocenzurowano) by the Polish authorities before being sent on.

63. On 9 February 1996 the Secretariat of the Commission sent to the applicant a letter together with an application form and the relevant enclosures. The official stamps made by the authorities indicated that the letter was delivered to Wrocław Prison on 4 March 1996,

sent to the Wrocław Regional Prosecutor on 5 March 1996, and opened and censored by that prosecutor on 6 March 1996.

64. On 18 March 1996 the applicant sent a letter to the Wrocław Regional Bar Council (Okręgowa Rada Adwokacka). On 20 March 1996 the authorities opened the letter and stamped it "censored".

65. In his letter of 15 April 1996 the applicant complained to the Commission that he would not be able to submit the application form within the period of six weeks referred to in the Commission's letter of 9 February 1996 because the authorities had opened and censored that letter and its delivery had been delayed. He also complained that the authorities of Wrocław prison had refused him any assistance in preparing copies of the relevant documents and that, for that reason, he could not submit the application within the prescribed time-limit. However, he filed the form on 15 March 1996. It was posted, with enclosures, on 15 May 1996. It was received at the Commission's secretariat on 24 May 1996.

66. On 14 August 1996 the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment sent a letter to the applicant. On 28 August 1996 the authorities opened the letter. The envelope bears the stamp "censored".

67. On 29 November and 2 December 1996 the applicant sent two letters to the Wrocław Court of Appeal. The envelopes were cut open. They bear the stamp "censored".

68. On 16 January 1997 the applicant sent a letter to his wife. The authorities opened that letter and put the stamp censored on it.

69. On 27 October and 4 and 12 November 1997 the applicant submitted to the prison authorities two letters addressed to the President of the Criminal Chamber of the Supreme Court. In the letter of 27 October 1997 he asked the Supreme Court to order that he be brought to the session concerning the examination of the application for his detention to be prolonged (see paragraph 51 above). All the envelopes bear the stamp "censored". The post-mark reveals that the letter of 27 October 1997 was sent out on 4 November 1997 and the two other letters on 25 November 1997.

70. On 27 November 1997 and on 5 January 1998 Mr Cichoń's law firm received letters from the applicant. The postmark on the envelope of the first letter is unreadable. The second letter was posted on 21 December 1997. On both envelopes there were hand-written notes made with a red marker. Those notes read: "censored".

71. On 1 December 1997 and 16 January 1998 the applicant handed in two further letters to the President of the Criminal Chamber of the Supreme Court to the prison authorities. On both envelopes there was a hand-written note that read: “censored”. The post-marks show that the letters were sent out on 8 December 1997 and on 23 January 1998, respectively.

C. Limitations imposed on the applicant's contact with his wife

72. On 10 August 1996 the Wrocław-Śródmieście District Court ordered that the applicant should not be allowed to have any personal contact with his wife in view of the fact that in the meantime she had been charged with fraud in which the applicant had also been involved. That restriction included a prohibition of supervised family visits and of communication by a prison internal phone. Before that date their personal contact had not been restricted.

73. On 30 January 1997 the applicant requested the Wrocław District Court to grant his wife a permit to visit him in prison as they had had no personal contact since 10 August 1996. The application was dismissed on 7 February 1997 without any reasons being given.

74. On 7 February 1997 the applicant complained to the President of the Wrocław Regional Court that not only had all his letters to his wife been censored but some of them also intercepted or delayed and that he had not even been allowed to make phone calls to his wife. He submitted that these facts taken together with the absolute prohibition on any personal contact with her had amounted to inhuman treatment.

75. On 10 February 1997 the applicant unsuccessfully requested the Wrocław-Śródmieście District Court to stop the censorship of his letters to his wife.

76. On 24 March 1997 the applicant, likewise unsuccessfully, asked the court to allow his wife to visit him in prison.

77. On 11 April 1997 he made a similar application, submitting that at the hearing of 10 April 1997 the court had heard evidence from him and he had explained all the circumstances relating to his the charges laid against his wife. The court dismissed the application on 18 April 1997. No reasons for that decision were given.

78. Subsequently, on 22 and 28 April and 8, 20 and 28 May 1997 the Wrocław-Śródmieście District Court, without giving any reasons for its decisions, dismissed five further applications in which the applicant asked to be allowed to see his wife. He argued that the prolonged and drastic restrictions on their contact were cruel and inhuman and had severely affected his family life. In his application of 22 May 1997, the applicant stressed that since the court had

heard evidence from his wife on 21 May 1997 (see also paragraph 41 above), there was no further justification to continue the harsh measures imposed on their personal contact. He relied on Articles 3 and 8 of the Convention.

79. On 16 June 1997 the Wrocław-Śródmieście District Court dismissed two further, similar applications made by the applicant on 5 and 12 June 1997, holding that the prohibition on any personal contact between him and his wife was justified by the risk that they might induce one another to give false testimonies before the court or obstruct the proper course of the proceedings.

80. The applicant's wife was allowed to visit him in prison on 9 August 1997. That visit took place in the presence of the prison guard.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Preventive measures, in particular, detention on remand

81. At the material time the rules governing detention on remand were contained in Chapter 24 of the Law of 19 April 1969 – Code of Criminal Procedure ("the Code") (Kodeks postępowania karnego) – entitled "Preventive measures" (Środki zapobiegawcze). The Code is no longer in force. It was repealed and replaced by the Law of 6 June 1997 (commonly referred to as the "New Code of Criminal Procedure"), which entered into force on 1 September 1998.

1. Imposition of detention on remand

82. Until 4 August 1996 (i.e. the date on which the Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes ("the 29 June 1995 Law") entered into force) at the investigation stage of criminal proceedings detention on remand was imposed by a prosecutor.

Article 210 §§ 1 and 2 of the Code (in the version applicable at the material time) stated:

"1. Preventive measures shall be imposed by the court; before a bill of indictment has been lodged with the competent court, the measures shall be imposed by the prosecutor.

2. A prosecutor may impose a preventive measure only with respect to a person who has been questioned in the case as a suspect. Before ordering detention on remand or deciding on bail the prosecutor shall personally hear the suspect."

83. A detainee could, under Article 212 § 2, appeal against a detention order made by a prosecutor to the court competent to deal with his case; however, he was not entitled to be brought before the court dealing with his appeal.

2. Grounds for applying preventive measures

84. The Code listed as "preventive measures", inter alia, detention on remand, bail and police supervision.

Article 209 set out the general grounds justifying imposition of the preventive measures. That provision read:

"Preventive measures may be imposed in order to ensure the proper conduct of proceedings if the evidence against the accused sufficiently justifies the opinion that he has committed a criminal offence."

85. Article 217 § 1 defined grounds for detention on remand. The relevant part of this provision, in the version applicable until 1 January 1996, provided:

"1. Detention on remand may be imposed if:

(1) there is a reasonable risk that an accused will abscond or go into hiding, in particular when he has no fixed residence [in Poland] or his identity cannot be established; or

(2) there is a reasonable risk that an accused will attempt to induce witnesses to give false testimony or to obstruct the proper course of proceedings by any other unlawful means; or

(3) an accused has been charged with a serious offence or has relapsed into crime in the manner defined in the Criminal Code; or

(4) an accused has been charged with an offence which creates a serious danger to society.

..."

On 1 January 1996 sub-paragraphs 3 and 4 of Article 217 § 1 were repealed and the whole provision was redrafted. From that date onwards the relevant sub-paragraphs read:

"(1) there is a reasonable risk that an accused will abscond or go into hiding, in particular when his identity cannot be established or he has no permanent abode [in Poland]; or

(2) [as it stood before 1 January 1996]."

Paragraph 2 of Article 217 provided:

"If an accused has been charged with a serious offence or an intentional offence [for the commission of which he may be] liable to a sentence of a statutory maximum of at least eight years' imprisonment, or if a court of first instance has sentenced him to at least three years' imprisonment, the need to continue detention in order to secure the proper conduct of proceedings may be based upon the likelihood that a heavy penalty will be imposed."

86. The Code set out the margin of discretion in maintaining a specific preventive measure. Articles 213 § 1, 218 and 225 of the Code were based on the precept that detention on remand was the most extreme preventive measure and that it should not be imposed if more lenient measures were adequate.

Article 213 § 1 provided:

"A preventive measure [including detention on remand] shall be immediately lifted or varied, if the basis for it has ceased to exist or new circumstances have arisen which justify lifting a given measure or replacing it with a more or less severe one."

Article 225 stated:

"Detention on remand shall be imposed only when it is mandatory; this measure shall not be imposed if bail or police supervision, or both of those measures, are considered adequate."

87. The provisions for "mandatory detention" (for instance, detention pending an appeal against a sentence of imprisonment exceeding three years) were repealed on 1 January 1996 by the Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes.

88. Finally, Article 218 stipulated:

"If there are no special reasons to the contrary, detention on remand should be lifted, in particular, if:

(1) it may seriously jeopardise the life or health of the accused; or

(2) it would entail excessively burdensome effects for the accused or his family."

3. Prolongation of detention beyond the statutory time-limits

89. Until 4 August 1996, i.e. the date on which the relevant provisions of the Law of 29 June 1995 entered into force, the law did not set any time-limits on detention on remand in the court proceedings.

Originally, the provisions setting out time-limits for detention were to enter into force on 1 January 1996; however, their entry into force was eventually postponed until 4 August 1996.

90. Article 222 of the Code of Criminal Procedure in the version applicable after 4 August 1996 provided, in so far as relevant:

"3. The whole period of detention on remand until the date on which the court of first instance gives judgment may not exceed one year and six months in cases concerning offences. In cases concerning serious offences [offences for the commission of which a person is liable to a sentence of a statutory minimum of at least three years' imprisonment] this period may not exceed two years.

4. In particularly justified cases the Supreme Court may, on an application made by the court competent to deal with the case, ... prolong detention on remand for a further fixed period exceeding the time-limits set out in paragraphs. 2 and 3, when it is necessary in connection with a suspension of the proceedings, a prolonged psychiatric observation of the accused, when evidence needs to be obtained from abroad or when the accused has deliberately obstructed the termination of the proceedings in the terms referred to in paragraph 3."

91. On 28 December 1996, by virtue of the Law of 6 December 1996, paragraph 4 of that Article was amended and the grounds for prolonging detention beyond the statutory time-limits included also:

"... other significant obstacles, which could not be overcome by the authorities conducting the proceedings..."

92. No appeal laid in law against the Supreme Court's decision on an application made under Article 222 § 4.

In cases where the Supreme Court dismissed such an application, a detainee had to be released. As long as it had not reached a decision, an application of the relevant court – which had a form of a decision ("postanowienie") – was as a basis for the continued detention.

B. Judicial authorities and prosecution

93. At the material time the relations between the authorities of the Polish State were set out in interim legislation, the Constitutional Act of 17 October 1992 (Mała Konstytucja). Article 1 of the Act affirmed the principle of the separation of powers in the following terms:

"The legislative power of the State shall be vested in the Sejm and the Senate of the Republic of Poland; the executive power shall be vested in the President of Poland and the Council of Ministers; and judicial power shall be vested in the independent courts."

94. The Law of 20 June 1985 (as amended) on the Structure of Courts of Law (Ustawa o ustroju sądów powszechnych) in the version applicable at the material time provided, in section 1:

"1. Courts of law shall dispense justice in the Republic of Poland.

2. Courts of law shall be courts of appeal, regional courts and district courts."

95. The Law of 20 June 1985 (as amended) on Prosecution Authorities (Ustawa o Prokuraturze) set out general principles concerning the structure, functions and organisation of prosecution authorities.

Section 1 of the Law, in the version applicable at the material time, stipulated:

"1. The prosecution authorities shall be the Prosecutor General, prosecutors and military prosecutors. Prosecutors and military prosecutors shall be subordinate to the Prosecutor General.

2. The Prosecutor General shall be the highest prosecution authority; his functions shall be carried out by the Minister of Justice."

96. Chapter III of the Code entitled: "Parties to proceedings, defence counsel, representatives of the victims and representatives of society" described a prosecutor as a party to criminal proceedings. Under all the relevant provisions of the Code taken together, a prosecutor performed investigative and prosecuting functions in the course of criminal proceedings. As regards the general position of the prosecution, at the material time they were not independent from the executive since the Minister of Justice carried out the duties of the Prosecutor General.

C. Proceedings relating to the lawfulness of detention on remand

97. At the material time there were three different legal avenues enabling a detainee to challenge the lawfulness of his detention: appeal to a court against a detention order made by a prosecutor; proceedings in which courts examined applications for prolongation of detention made by a prosecutor at the investigation stage and proceedings set in motion by a detainee's application for release.

As regards the last of these, Article 214 of the Code (in the version applicable at the material time) stated that an accused could at any time apply to have a preventive measure quashed or lifted. Such an application had to be decided by the prosecutor or, after the bill of indictment had been lodged, by the court competent to deal with the case, within a period not exceeding three days.

98. Under Article 88 of the Code of Criminal Procedure the presence of the parties at judicial sessions other than hearings was a matter for discretion of the court. Sessions concerning an application for release, a prosecutor's application for prolongation of detention or an appeal against a decision on detention on remand were held in camera. If the defendant asked for release at a hearing, the court made a decision either during the same hearing or at a subsequent session in camera.

99. At the material time the law did not give the detainee the right to participate in any court session concerning his detention on remand. In practice, only the prosecutor was informed of and could participate in such sessions. If he was present, he was entitled to adduce arguments before the court. The prosecutor's submissions were put on the record of the session (cf. Włoch v. Poland, no. 27785/95, judgment of 19 October 2000, §§ 69 73).

D. Censorship of a detainee's correspondence and rules concerning his contact with the outside world

100. Articles 82-90 of the Code of Execution of Criminal Sentences of 1969 (the Code is no longer in force; it was repealed and replaced by the “new” Code of Execution of Criminal Sentences of 5 August 1997, which entered into force on 1 September 1998) concerned the execution of detention on remand. Under Article 89 § 2 of the Code, a detainee might receive visitors in prison or might contact his family by prison internal phone provided that he had obtained permission in writing from the investigating prosecutor (at the investigation stage) or from the trial court (once the trial commenced). The authorities could order that a visit should take place in the presence of a prison guard.

101. Pursuant to the same provision, all correspondence of a detainee was, as a rule, censored, unless a prosecutor or a court decided otherwise. There was no legal means whereby a detainee could appeal against or, in any other way, contest censoring of his correspondence or the scope of that measure (cf. Niedbała v. Poland, no. 27915/95, judgment of 4 July 2000, §§ 33-36).

5.2.3. The law

I. ALLEGED VIOLATION OF THE RIGHT TO BE BROUGHT BEFORE A JUDGE, GUARANTEED UNDER ARTICLE 5 § 3^7 OF THE CONVENTION

102. The applicant alleged a breach of Article 5 § 3 of the Convention, submitting that his detention on remand had been ordered by the investigating prosecutor, who could not be considered a "judge" or an "officer authorised by law to exercise judicial power".

Article 5 § 3 of the Convention, in its relevant part, provides:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ..."

A. The parties' arguments

103. The applicant, relying on a number of examples from the Court's case law (in particular, the Huber v. Switzerland judgment of 23 October 1990, Series A no. 188, p. 18, § 43), maintained that there could be no doubt that the prosecutor who had detained him on remand had not offered guarantees of independence from the executive and the parties, as required under Article 5 § 3.

104. The Government submitted that even though it was true that the investigating prosecutor had ordered the applicant's detention, the lawfulness of that measure had later been examined by the Wrocław District Court on 5 December 1995. There had, therefore, been the necessary judicial control over the prosecutor's decision.

Moreover, given the position of a prosecutor in criminal proceedings and the fact that the prosecutors were under a general duty to remain impartial in those proceedings and that they

acted as guardian of the public interest, the applicant's detention had been imposed in compliance with the requirements of Article 5 § 3 of the Convention.

B. The Court's assessment

105. The Court recalls that in a number of its previous judgments – for instance, those in the cases of Niedbała v. Poland (cited above, §§ 48-57) and of Dacewicz v. Poland (no. 34611/97, judgment of 2 July 2002, § 21 et seq.) – it has already dealt with the question whether under the Polish legislation in force at the material time a prosecutor could be regarded as a "judicial officer" endowed with attributes of "independence" and "impartiality" required under Article 5 § 3.

The Court has found that a prosecutor did not offer these necessary guarantees because the prosecution authorities not only belonged to the executive branch of the State but also concurrently performed investigative and prosecution functions in criminal proceedings and were a party to such proceedings. Furthermore, it has considered that the fact that the prosecutors in addition acted as guardian of the public interest could not by itself confer on them the status of "officer[s] authorised by law to exercise judicial power".

106. The Court finds that the present case is similar to the above-mentioned precedents. It sees no reasons to come to a different conclusion in this case.

Consequently, it concludes that the applicant's right to be brought "before a judge or other officer authorised by law to exercise judicial power" was not respected.

107. There has therefore been a violation of Article 5 § 3 of the Convention in that respect.

II. ALLEGED VIOLATION OF THE RIGHT TO TRIAL WITHIN A REASONABLE TIME OR TO RELEASE PENDING TRIAL, GUARANTEED UNDER ARTICLE 5 § 3 OF THE CONVENTION

108. The applicant further complained that his detention on remand had been inordinately lengthy and, consequently, in breach of the "reasonable time" requirement laid down in Article 5 § 3.

The relevant part of Article 5 § 3 reads:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. The parties' arguments

109. The applicant considered that the authorities had failed to give valid reasons for holding him in custody for the relevant period. In that context, he stressed that the main ground relied on by the courts, namely the risk of his inducing witnesses to give false testimonies, had not been based on any concrete, true circumstance but the fact that he had not confessed his guilt. That fact should never have been held against him as he – like any defendant in criminal proceedings – had a right to make a plea of non-guilty.

110. Furthermore, the applicant argued, the likelihood that a severe penalty of imprisonment might be imposed on him could not justify the entire period of his detention, especially as the authorities had not even indicated a single piece of evidence suggesting that, had he been released, he would have absconded or evaded justice.

111. He went on to argue that the courts had never seriously considered the imposition of other, more lenient preventive measures on him, even though such alternative measures of ensuring an accused's presence at trial had explicitly been provided for by Polish law.

112. As to the conduct of the authorities, the applicant asserted that they had not shown any special diligence in handling his case. In particular, the trial had several times been adjourned because the District Court had not made arrangements securing the presence of all defendants before it.

In sum, he invited the Court to find that his right to trial or to release pending trial had not been respected.

113. The Government considered that the applicant's detention had not exceeded a "reasonable time".

To begin with, they stressed that the applicant had been detained in connection with the offences he had committed shortly after having been released from pre-trial detention (which had lasted nearly two years) in other criminal proceedings. That indicated that it had been necessary to hold him in custody to secure the proper conduct of the proceedings.

114. There had been, the Government added, further valid grounds warranting the applicant's continued detention, such as the complexity of his case and the serious nature of the offences with which he had been charged. Also, since he had refused to reveal the names of some of his company's clients, his own conduct had made it necessary to keep him in custody to

prevent the risk of his inducing witnesses to give false testimonies or otherwise obstructing the course of the trial.

115. The Government accepted that detention was not the only measure envisaged by the Code of Criminal Procedure to ensure the proper course of criminal proceedings. However, they argued that the trial court could not release the applicant on bail because his difficult financial situation had made it impossible for him to offer an appropriate security.

116. In conclusion, it was emphasised that the prolongation of the applicant's detention was a consequence of his own dilatory conduct, as shown by his numerous, manifestly unfounded challenges to the impartiality of the trial court, several applications for his officially-appointed lawyers to be replaced and appeals he had made against detention decisions.

B. The Court's assessment

1. Period to be taken into consideration

117. The applicant was detained on remand on 22 November 1995 and released on 9 March 1998 (see paragraphs 7 and 60 above). Accordingly, he spent in detention pending trial 2 years, 3 months and 16 days.

2. Reasonableness of the length of detention

118. The Court reiterates that the question of whether or not a period of detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, Kudła v. Poland [GC], no. 30210/96, §§ 110-111 with further references, ECHR 2000-XI).

It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of the above-mentioned requirement of public interest justifying a departure from the rule in Article 5 and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the well-documented facts stated by the applicant in his appeals that the

Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see Jabłoński v. Poland, no. 33492/96 § 80, 21 December 2000, unreported).

119. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings (ibid.)

120. The Court observes that in the present case the authorities first relied on the reasonable suspicion that the applicant had committed the offences with which he had been charged and the need to ensure the proper conduct of the proceedings. They repeated those grounds in nearly all their decisions (see paragraphs 7, 11, 16, 20, 22, 27, 30, 34, 38-39, 54 and 56 above). They also considered that the applicant should remain in custody because neither his health nor any other circumstance militated decisively against his being kept in detention (see paragraphs 12, 14 16 and 50 above).

121. Later, as the trial proceeded, the courts held that the severity of the anticipated sentence warranted his continued detention (see paragraphs 22, 27, 30, 34, 38-39 and 50 above). Lastly, they based their decisions on the risk that the applicant, if released, might induce witnesses to give false testimonies or otherwise obstruct the proper conduct of the trial. That risk was, in their view, justified by the fact that the applicant refused to reveal identity of certain clients of his company (see paragraphs 50, 54, 56 and 58 above).

122. The Court accepts that the suspicion against the applicant of having committed the offences with which he had been charged and the need to secure the proper conduct of the proceedings at their early stage may initially have justified his detention. However, it does not consider that those grounds, even taken with the fact that the authorities did not perceive the applicant's personal situation as decisively arguing against his being held in custody, can suffice to justify the entire period in issue.

The same holds true in respect to the likelihood that a severe sentence might have been imposed on the applicant. A hypothetical sentence ranging from 1 to 10 years' imprisonment must, with the passage of time, inevitably have called for the reassessment in the light of evidence that was progressively obtained by the court. In reality, the actual sentence, which

was 3 years' imprisonment (see paragraph 61 above), was at the lower end of the applicable scale.

As regards the argument that the applicant, given his refusal to identify some clients of his company, might induce witnesses to give false testimonies, the Court notes that the courts did not indicate any concrete circumstance capable of showing that the anticipated risk went beyond a merely theoretical possibility. The Court is not, therefore, persuaded by that argument, especially as it appears that there was no indication that in reality at any earlier stage of the proceedings the applicant tampered with evidence or made any attempt to induce witnesses to perjury.

123. The Court accordingly concludes that that the reasons given to justify the applicant's detention were not "sufficient" and "relevant", as required under Article 5 § 3^{7}.

124. There has accordingly been a violation of Article 5 § 3 of the Convention in that the applicant's right to trial within a reasonable time or to release pending trial was not respected.

III. ALLEGED VIOLATION OF ARTICLE 5 § 4^{43} OF THE CONVENTION

125. Relying on Article 5 § 4, the applicant complained that the proceedings relating to the lawfulness of his detention on remand had not been adversarial, as required under that provision.

Article 5 § 4 provides:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. The parties' arguments

126. The applicant maintained that the Polish authorities had been fully aware of the fact that under criminal legislation as applicable at the material time, habeas corpus proceedings had not been adversarial and had therefore failed to satisfy the Article 5 § 4 requirements. In that respect, the applicant recalled the fact that the new Code of Criminal Procedure, in its Article 249 § 5, explicitly laid down that a defence counsel for an accused had to be notified of, and could take part in, a session concerning the imposition of detention on remand, the examination of an appeal against the imposition or prolongation of detention and the prolongation of that measure. He further relied on a number of the Court's judgments on the

matter (e.g. the Toth v. Austria judgment of 12 December 1991, Series A no. 224, p. 23, §§ 83-84 and, mutatis mutandis, the Belziuk v. Poland judgment of 25 March 1998, Reports of Judgments and Decisions 1998-II, p. 571, §§-39).

127. The Government acknowledged that no provision of the Code of Criminal Procedure of 1969 allowed an accused or his lawyer to participate in a court session concerning the examination of an application for release. That did not mean that an accused had no opportunity to present his arguments as those could have, or had already, been set out in his application for release and had been duly considered by the court.

It was true, the Government added, that the prosecutors had taken part in a number of sessions concerning the applicant's applications for release (for instance, in sessions held on 9 and 30 August, 16 September and 31 December 1996). However, that fact could not in itself be decisive for a finding that the proceedings concerning the lawfulness of the applicant's detention had been unfair. In the Government' s submission, the applicant could have, and indeed had, presented arguments militating in favour of his release in writing or, if he had asked for release at a hearing, orally before the trial court.

They concluded from that that there had been no breach of Article 5 § 4 of the Convention.

B. The Court's assessment

128. The Court has already dealt with a number of Polish cases where the applicants made identical complaints about the lack of equality of arms in proceedings relating to their applications for release or to appeals against refusals to release them. In that regard, it would in particular refer to its judgments in the cases of Niedbała v. Poland (cited above §§ 48-57, 4 July 2000) and Włoch v. Poland (no. 27785/95, §§ 125-132; 19 October 2000, ECHR-2000-XI, p. 35-36; §§ 125-131), in which it has repeated the criteria established in its case-law in respect of the “fundamental guarantees of procedure applied in matters of deprivation of liberty” and has emphasised that one of the essential features of such a procedure is equality of arms between the prosecutor and the detained person.

129. In those judgments, the Court has also found that the impossibility for a detainee to attend the session of a court dealing with his detention, to respond to the prosecutor's submissions and to challenge – either himself or through his lawyer – grounds for his continued detention, an impossibility which was inherent in Polish legislation applicable at the material time, was incompatible with the requirements of Article 5 § 4.

130. The present case does not differ from the above-mentioned precedents. The applicant, despite his explicit requests for bringing him before the court, could not take part in virtually any procedure for the review of the lawfulness of detention and put forward arguments against holding him custody (see, in particular, paragraphs 9, 15, 20-23, 31, 51-52, 54 above). The fact that, as the Government argued, the applicant could make written submissions or ask for release at hearings (see paragraph 127 above), cannot, in the Court's view make up for the inherently non-adversarial nature of the review of the lawfulness of his detention.

131. There has accordingly been a violation of Article 5 § 4 of the Convention.

IV. ALLEGED VIOLATION OF THE RIGHT TO RESPECT FOR CORRESPONDENCE GUARANTEED UNDER ARTICLE 8 OF THE CONVENTION

132. The applicant also complained under Article 8[21] of the Convention that all his correspondence, including the letters to and from the lawyer representing him before the Commission and the Court, as well as the letters he sent to or received from the Commission, had been opened and censored and, in some instances, intercepted or delayed.

The relevant part of Article 8 reads:

"1. Everyone has the right to respect for ... his correspondence.

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

A. The parties' arguments

133. The applicant stressed that the relevant legislation had given the authorities a virtually unlimited power to interfere with his correspondence. He maintained that, even assuming that the authorities had intended to secure the proper conduct of the criminal proceedings in his case, the duration of that measure, as well as its scope and nature had by no means been necessary in a democratic society. The need to achieve the aim pursued by the authorities had not required them to read all his letters, notwithstanding whether they had been of strictly personal or of official character. In particular, there had been no reason whatsoever to open and read his correspondence to the lawyer representing him before the Commission and the Court, as such letters were privileged under Article 8 of the Convention.

The applicant concluded that his right to respect for his correspondence had been violated.

134. The Government submitted that during the criminal proceedings against the applicant his correspondence had been censored pursuant to Article 89 § 2 of the 1969 Code of the Execution of Criminal Sentences. However, the application of that measure had not involved any interference with the text of his letters and had not caused any delay in the delivery of his mail to the addressees.

135. The Government also underlined that there had been a particular reason to censor the applicant's correspondence with his wife because she had been charged in the same case. The authorities had therefore had to take steps to ensure the proper conduct of the trial and to eliminate the risk of them acting in collusion.

136. In conclusion, the Government considered that the censorship complained of had been carried out in compliance with Polish law and was justified under paragraph 2 of Article 8^{21} of the Convention.

B. The Court's assessment

137. The Court observes that the Government did not contest the fact that during the applicant's detention the authorities had routinely opened and censored his correspondence to all addressees, including the courts dealing with his case, the Commission and the lawyer representing him in the proceedings before the Court. That measure, they added, had been applied in accordance with Article 89 § 2 of the Code of the Execution of Criminal Sentences of 1969 (see paragraph 134 above).

It is, accordingly, common ground that in the present case there was an "interference by a public authority" with the applicant's right to respect for his correspondence, within the meaning of Article 8 § 2 of the Convention.

138. The Court further observes that in the above-mentioned case of Niedbała it has already examined the question whether an interference with a detainee's correspondence effected under the relevant domestic provision could be considered as being imposed "in accordance with the law" and in compliance with other requirements under Article 8 (see the Niedbała v. Poland judgment cited above, §§ 81-84). The Court found that it could not, holding as follows:

"81. ... Polish law, as it stood at the material time (see §§ 34 and 35 above), allowed for automatic censorship of prisoners' correspondence by the authorities conducting criminal

proceedings. Thus, the applicable provisions did not draw any distinction between the different categories of persons with whom the prisoners could correspond. Consequently, also the correspondence with the Ombudsman was subject to censorship. Moreover, the relevant provisions had not laid down any principles governing the exercise of this censorship. In particular, they failed to specify the manner and the time-frame within which it should be effected. As the censorship was automatic, the authorities were not obliged to give a reasoned decision specifying grounds on which it had been effected.

82. In the light of the foregoing considerations, the Court concludes that Polish law as it stood at the material time, did not indicate with reasonable clarity the scope and manner of exercise of discretion conferred on the public authorities in respect of control of prisoners' correspondence. It follows that the interference complained of was not "in accordance with the law".

83. Having regard to the foregoing conclusion, the Court does not consider it necessary in the instant case to ascertain whether the other requirements of paragraph 2 of Article 8 were complied with.

84. Consequently, the Court concludes that there has been a violation of Article 8 of the Convention."

139. The Court finds that the present case raises the same issue as that of Niedbała (see paragraphs 100-101 and 134 above). The only difference that the Court sees is the extent of the interference with the applicant's right to respect for his correspondence, which in this case was substantially bigger.

140. There has accordingly been a violation of Article 8[21] of the Convention.

V. ALLEGED VIOLATION OF THE RIGHT TO RESPECT FOR FAMILY LIFE, GUARANTEED UNDER ARTICLE 8 OF THE CONVENTION

141. The applicant also submitted that, on account of enduring and drastic restrictions imposed by the trial court on his personal contact with his wife, his right to respect for his family life had been violated.

Article 8, in its relevant part, provides:

"1. Everyone has the right to respect for his ... family life ...

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

A. The parties' arguments

142. The applicant argued that the restrictions in issue had been of a particularly severe nature and, as they had been combined with the censorship of the letters he had written to his wife, had made impossible for him to maintain any form of communication with her. Those restraints had moreover been applied for a very long time and without any consideration having been given to the possibility of enabling them to see each other in the presence of a prison guard.

In conclusion, the applicant asked the Court to find a violation of Article 8 of the Convention in that his right to respect for his family life had been violated.

143. The Government maintained that the restrictions on the applicant's personal contact with his wife had been applied in accordance with domestic law and that they had been necessary to ensure the proper conduct of the applicant's trial, in particular to eliminate the risk of his acting in collusion with his wife. They further submitted that when that risk had been lessened, i.e. when the court had heard evidence from the applicant and his wife, they had eventually been allowed to meet in the presence of the prison guard.

In view of the foregoing, the Government were of the opinion that the fact that the applicant had temporarily been deprived of personal contact with his wife had not given rise to a violation of Article 8 of the Convention.

B. The Court's assessment

1. General principles

144. The Court reiterates that detention, likewise any other measure depriving a person of his liberty, entails inherent limitations on his private and family life. However, it is an essential part of a detainee's right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family (see, mutatis mutandis, Messina v. Italy (no.2) no. 25498/94, § 61, 28 September 2000, unreported).

Such restrictions as limitations put on the number of family visits, supervision over those visits and, if so justified by the nature of the offence, subjection of a detainee to a special prison regime or special visit arrangements constitute an interference with his rights under Article 8 but are not, by themselves, in breach of that provision (ibid. §§ 62-63; see also X v. the United Kingdom, no. 8065/77, Commission decision of 3 May 1978, Decisions and Reports 14, p. 246).

Nevertheless, any restriction of that kind must be applied "in accordance with the law", must pursue one or more legitimate aims listed in paragraph 2 and, in addition, must be justified as being "necessary in a democratic society".

As to the latter criterion, the Court would further reiterate that the notion of "necessity" for the purposes of Article 8 means that the interference must correspond to a pressing social need, and, in particular, must remain proportionate to the legitimate aim pursued. Assessing whether an interference was "necessary" the Court will take into account the margin of appreciation left to the State authorities but it is a duty of the respondent State to demonstrate the existence of the pressing social need behind the interference (see, among other examples, McLeod v. the United Kingdom, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII, p. 2791, § 52; and Płoski v. Poland, no. 26761/95, § 35, 12 November 2002, unreported).

2. Application of the above principles to the present case

(a) Existence of interference

145. The Government did not contest before the Court that the restrictions on the applicant's personal contact with his wife constituted an "interference" with his family life (see paragraph 143 above). The Court sees no reason to hold otherwise.

(b) Whether the interference was "in accordance with the law"

146. The Court notes that the contested measure was applied under Article 89 § 2 of the 1969 Code of Execution of Criminal Sentences (see paragraph 100). It consequently holds that the interference was "in accordance with the law".

(c) Whether the interference pursued a "legitimate aim"

147. The Government maintained that the restrictions in issue had been necessary in order to secure the proper conduct of the criminal proceedings against the applicant, in particular, to eliminate the risk of the applicant and his wife acting in collusion.

The Court notes that the limitations on the applicant's contact with his wife were imposed after she had been charged with a related offence and on the grounds that there was a risk that they might induce each other to give false testimonies or obstruct the proper course of the trial (see paragraphs 72-79 above). The impugned measure can, accordingly, be considered as having been taken in pursuance of "the prevention of disorder and crime", which is a legitimate aim under Article 8.

(d) Whether the interference was "necessary in a democratic society"

148. It remains for the Court to ascertain whether the authorities struck a fair balance of proportionality between, on the one hand, the need to secure the process of obtaining evidence in the applicant's case and, on the other, his right to respect for his family life while in detention (see paragraph 144 above).

149. The Court observes at the outset that the applicant was forbidden to have any contact with his wife on 10 August 1996. That restriction involved the prohibition to communicate with her by a prison internal phone or to receive supervised family visits. It was maintained until 9 August 1997, i.e. for 1 year (see paragraphs 72-80 above). At the same time, their correspondence was censored, pursuant to the same provision which allowed for the limitations on their contact, i.e. Article 89 § 2 of the 1969 Code of Execution of Criminal Sentences (see paragraphs 74-75 and 100-101 above).

150. The Court accepts that, initially, the resort to that measure could be considered reasonably necessary from the point of view of the aims sought by the authorities, even though it inevitably resulted in harsh consequences for the applicant's family life.

However, with the passage of time and given the severity of those consequences, as well as the authorities' general obligation to assist the applicant in maintaining contact with his family during his detention, the situation called, in the Court's opinion, for a careful review of the necessity of keeping him in a complete isolation from his wife.

151. In that regard, the Court notes that the District Court did not give grounds for any but the first and the last of its numerous decisions refusing the applicant to see his wife (see paragraphs 72-79 above). Nor did that court consider any alternative means of ensuring that

their contact would not lead to any collusive action or otherwise obstruct the process of taking evidence, such as, for instance, subjection of their contact to supervision by a prison officer (see paragraphs 72-79 and 100 above) or to other restrictions as to the nature, frequency and duration of contact (see, a contrario, Kalashnikov v. Russia (dec.), no. 47095/99, ECHR-2001 ...).

Furthermore, the Court finds that the court heard evidence from the applicant's wife on 21 May 1997 but it maintained the prohibition of their personal contact for nearly 3 further months, despite the fact that during that time it did not proceed to obtain any evidence and the trial was adjourned (see paragraphs 41-43 and 78-80 above).

152. In the circumstances, and having regard to the duration and the nature of the restrictions on the applicant's contact with his wife as well as to the fact that they were combined with the censorship of their correspondence, the Court concludes that they went beyond what was necessary in a democratic society "to prevent disorder and crime". Indeed, the measure in question reduced the applicant's family life to the degree that can be justified neither by the inherent limitations involved in detention nor by the pursuance of the legitimate aim relied on by the Government. The Court therefore holds that the authorities failed to maintain a fair balance of proportionality between the means employed and the aim they sought to achieve.

3. Conclusion

153. There has, accordingly, been a violation of Article 8 of the Convention in regard to the applicant's right to respect for his family life.

VI. THE ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

154. Lastly, the applicant alleged that the censorship of his correspondence constituted a breach of Poland's obligation under Article 34, which reads:

"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."

A. The parties' arguments

155. The applicant maintained that the very fact of opening and reading his letters and his application to the Commission showed that Poland had not respected the obligations

undertaken under former Article 25[52] of the Convention, which was incorporated in its present Article 34[10].

156. The Government considered that the alleged censorship of the applicant's correspondence did not amount to a breach of Poland's obligations under that provision. They submitted that the applicant's correspondence with the Commission had not been held back by the authorities beyond the necessary time. There had moreover been no interference with the contents of his application or letters he had written to the Commission.

B. The Court's assessment

157. The Court takes note of the fact that, except for the censoring of his correspondence in itself, the applicant did not allege any particular interference with his right of individual petition by the Polish authorities. Nor did he claim that the authorities put any restrictions on his communicating freely with the Commission or, subsequently, the Court. Furthermore, save the applicant's initial, but eventually dispelled, doubts whether he would able to file his application in good time (see paragraph 65 above) he did not allege that the authorities had committed any direct or even indirect act designed to dissuade or discourage him from pursuing his Convention claims.

158. Having regard to its conclusion in paragraph 140 above, where the Court has found that the censorship of the applicant's correspondence constituted a violation of Article 8, the Court sees no cause to deal separately with the accompanying, but in its substance identical, complaint under Article 34.

159. It consequently holds that no separate issue arises under Article 34 of the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

160. 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

161. Under the head of pecuniary damage, the applicant claimed a sum of 44,500 Polish zlotys (PLN) [approx. EUR 10,800] for loss of earnings caused by his lengthy detention.

He also asked the Court to award him PLN 100,000 [approx. EUR 24,200] for moral suffering and distress resulting from a violation of his Convention rights. In that regard, the applicant in particular referred to anxiety and stressed he suffered because of his isolation from his wife and interference with his correspondence.

162. The Government considered that the sums in question were inordinately excessive. They requested the Court to rule that the finding of a violation would constitute in itself sufficient just satisfaction. In the alternative, they invited the Court to make an award of just satisfaction on the basis of its case-law in similar cases and national economic circumstances.

163. The Court's conclusion, on the material before it, is that the applicant has failed to show that the pecuniary damage pleaded was actually caused by his being held in custody for the relevant period. Consequently, there is no justification for making any award to him under that head.

164. On the other hand, the Court accepts that the applicant certainly suffered non-pecuniary damage – such as distress and frustration resulting from his protracted detention, from the prolonged impossibility of having contact with his wife and from the nature and scope of interference with his correspondence – which is not sufficiently compensated by the findings of violation of the Convention. Making its assessment on an equitable basis, the Court awards the applicant 13,000 euros under this hand.

B. Costs and expenses

165. The applicant, who received legal aid from the Council of Europe in connection with the presentation of his case, sought reimbursement of PLN 36,000 [approx. EUR 8,700] for costs and expenses incurred in the proceedings before the Court.

166. The Government invited the Court to make an award, if any, only in so far as the costs and expenses claimed were actually and necessarily incurred and were reasonable as to quantum.

167. The Court has assessed the claim in the light of the principles laid down in its case-law (Kudła v. Poland judgment cited above, § 168).

168. Applying the said criteria to the present case and making its assessment on an equitable basis, the Court considers it reasonable to award the applicant 5,500 euros for his costs and expenses together with any value-added tax that may be chargeable, less the 762 euros received by way of legal aid from the Council of Europe.

C. Default interest

169. 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.

5.2.4. The Court's decision

1. Holds that there has been a violation of Article 5 § 3[7] of the Convention (right to be brought promptly before a judge);

2. Holds that there has been a violation of Article 5 § 3 of the Convention (right to trial within reasonable time or release pending trial);

3. Holds that there has been a violation of Article 5 § 4[43] of the Convention;

4. Holds that there has been a violation of Article 8[21] of the Convention (right to respect for correspondence);

5. Holds that there has been a violation of Article 8 of the Convention (right to respect for family life);

6. Holds that no separate issue arises under Article 34[10] of the Convention;

7. Holds

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2[9] of the Convention, EUR 13,000 (thirteen thousand euros) in respect of non-pecuniary damage and EUR 5,500 (five thousand five hundred euros) in respect of costs and expenses, less EUR 762 (seven hundred sixty two euros) received from the Council of Europe, to be converted into Polish zlotys at the rate applicable at the date of settlement, plus any tax that may be chargeable on the above amounts; [Rectified on 8 September 2003. The phrase "to be converted into Polish zlotys at the rate applicable at the date of settlement" was missing in the former version of the judgment.]

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

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

5.3. Case of Kiyutin V. Russia[14]

5.3.1. The procedure

1. The case originated in an application (no. 2700/10) against the Russian Federation lodged with the Court under Article 34[10] of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of Uzbekistan, Mr Viktor Viktorovich Kiyutin ("the applicant"), on 18 December 2009.

2. The applicant was represented by Ms L. Komolova, a lawyer practising in Oryol. The Russian Government ("the Government") were represented by Mr G. Matyushkin, the Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had been victim of discrimination on account of his health status in his application for a Russian residence permit.

4. On 5 May 2010 the President of the First Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1[12] of the Convention).

5. Written submissions were received from Interights, the International Centre for the Legal Protection of Human Rights, which had been granted leave by the President to intervene as a third party (Article 36 § 2 of the Convention and Rule 44 § 2[53] of the Rules of Court).

[14] First Section; Case Of Kiyutin V. Russia (Application No. 2700/10) ; Strasbourg 10 March 2011; Final 15/09/2011

5.3.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in the Uzbek SSR of the Soviet Union in 1971 and acquired citizenship of Uzbekistan upon the collapse of the USSR.

7. In October 2002 his brother bought a house with a plot of land in the village of Lesnoy in the Oryol Region of Russia. In 2003 the applicant, his half-brother and their mother came from Uzbekistan to live there.

8. On 18 July 2003 the applicant married a Russian national and they had a daughter in January 2004.

9. In the meantime, in August 2003 the applicant applied for a residence permit. He was required to undergo a medical examination during which he tested positive for HIV. On account of that circumstance, his application for a residence permit was refused. The refusal was upheld at final instance by the Oryol Regional Court on 13 October 2004.

10. In April 2009 the applicant filed a new application for a temporary residence permit. Following his application, on 6 May 2009 the Federal Migration Service determined that he had been unlawfully resident in Russia (an offence under Article 18.8 § 1 of the Code of Administrative Offences) and imposed a fine of 2,500 Russian roubles.

11. By a decision of 26 June 2009, the Oryol Region Federal Migration Service rejected his application for a residence permit by reference to section 7 § 1 (13) of the Foreign Nationals Act, which restricted the issue of residence permits to foreign nationals who could not show their HIV negative status. The decision indicated that the applicant was to leave Russia within three days or be subject to deportation. The applicant challenged the refusal in court.

12. On 13 August 2009 the Severniy District Court of Oryol rejected his complaint, finding as follows:

"Taking into account that Mr V.V. Kiyutin is HIV-positive, the court considers that his application for temporary residence in the Russian Federation was lawfully rejected."

13. The applicant lodged an appeal, relying on the Constitutional Court's decision of 12 May 2006 (see paragraph 24 below) and the UN documents on AIDS prevention. On 16 September 2009 the Oryol Regional Court rejected his appeal in a summary fashion.

14. On 20 October 2009 the applicant underwent a medical examination at the Oryol Regional Centre for AIDS Prevention. He was diagnosed with the progressive phase of HIV, Hepatitis B and C, and prescribed highly active antiretroviral therapy (HAART) for life-saving indications.

15. On 25 November 2009 the Oryol Regional Court refused to institute supervisory-review proceedings and upheld the previous judgments as lawful and justified, finding:

"In his application for supervisory review Mr Kiyutin argued that the courts did not take into account his family situation and state of health when deciding on his application for a residence permit, which was at variance with the Constitutional Court's decision of 12 May 2006. This argument is not a ground for quashing the judicial decisions.

The applicable laws governing the entry and residence of foreign nationals in Russia do not require the law-enforcement authorities or the courts to determine the state of health of HIV-infected foreign nationals or the clinical stage of their disease for the purpose of deciding whether a residence permit may be issued.

When deciding on the issue of a temporary residence for a HIV-positive individual, the courts may, but are not obliged, to take into account the factual circumstances of a specific case on the basis of humanitarian considerations.

In addition, a foreign national who applies for a residence permit in Russia must produce a certificate showing his HIV-negative status; if the status is HIV-positive, the law prohibits the said permit from being issued."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. HIV Prevention Act (no. 38-FZ of 30 March 1995)

16. In the relevant part, the preamble to the Act reads: :

"Recognising that the chronic disease caused by the human immunodeficiency syndrome (HIV),

is spread widely throughout the world,

has grave socio-economic and demographic consequences for the Russian Federation,

poses a threat to personal, public and national security, and a threat to the existence of humankind,

calls for the protection of the rights and lawful interests of the population ..."

17. Pursuant to section 4 § 1, the State guarantees free medical assistance to Russian nationals who are infected with HIV.

18. Section 11 § 2 provides that foreign nationals and stateless persons who are in the Russian territory are to be deported once it is discovered that they are HIV-positive.

B. Foreign Nationals Act (no. 115-FZ of 25 July 2002)

19. Section 5 provides that foreign nationals who do not require a visa to enter the Russian Federation may stay in Russia for a period not exceeding ninety days and must leave Russia upon expiry of that period.

20. Section 6 § 3 (4) and (6.2) establishes that an alien who is married to a Russian national or who has a Russian child is eligible for a three-year residence permit, independently of the professional quotas determined by the Government.

21. Section 6 § 8 and Government Resolution no. 789 of 1 November 2002 define the list of documents that must be enclosed with an alien's application for a residence permit. Among other documents, an applicant must produce a medical certificate showing that he or she is not infected with HIV.

22. Section 7 contains the list of grounds for refusing a temporary residence permit or annulling a previously issued residence permit. In particular, an application for a residence permit will be refused if the foreigner is a drug-abuser or is unable to produce a certificate showing that he or she is not infected with HIV (paragraph 1 (13)).

C. Provision of medical assistance to foreign nationals

23. According to the Rules on the provision of medical assistance to foreign nationals in the Russian territory (Government Resolution no. 546 of 1 September 2005), only emergency treatment may be provided to foreign nationals free of charge (§ 3). Other medical assistance may be provided on a paid basis (§ 4).

D. Case-law of the Constitutional Court

24. On 12 May 2006 the Constitutional Court rejected a constitutional complaint introduced by the Ukrainian national X. who was HIV-positive and lived in Russia with his Russian wife and daughter (decision no. 155 O). Mr X. complained that section 11 § 2 of the HIV

Prevention Act and section 7 § 1 (13) of the Foreign Nationals Act violated his right to respect for his family life and his right to medical assistance and were also discriminatory.

25. The Constitutional Court held that the contested provisions were compatible with the Constitution as the restriction on temporary residence of HIV-infected foreign nationals had been imposed by the legislature for the protection of constitutional values, the principal one being the right to State protection of public health (§ 3.3).

26. Referring to the UN Declaration of Commitment on HIV/AIDS of 27 June 2001, the resolutions of the UN Commission on Human Rights and other international instruments prohibiting HIV-related discrimination, as well as this Court's case-law on expulsion of foreign nationals in general and HIV-infected foreigners in particular, the Constitutional Court emphasised the principle of proportionality of the measures adopted in pursuance of constitutional aims and noted:

"It follows that, confronted with a conflict between equally protected constitutional values, the law-enforcement authorities and courts may take into account, on the basis of humanitarian considerations, the factual circumstances of a specific case in determining whether a HIV-positive individual is eligible for temporary residence in the Russian Federation.

Thus, the provisions of section 11 § 2 of the HIV Prevention Act and section 7 § 13 of the Foreign Nationals Act do not exclude the possibility that the law-enforcement authorities and courts may – on the basis of humanitarian considerations – take into account the family situation, the state of health of the HIV-infected foreign national or stateless person, and other exceptional but meritorious circumstances in determining whether the person should be deported from the Russian Federation and whether he or she should be admitted for temporary residence in the Russian territory. In any event, the individual concerned should comply with the obligation to respect the legally imposed preventive measures aimed at curtailing the spread of HIV-infection." (§ 4.2)

E. Criminal Code

27. Article 122 provides for criminal liability for knowingly infecting another person with HIV or for knowingly exposing someone to the risk of HIV infection. These acts are punishable by deprivation of liberty of up to one year in duration.

III. RELEVANT INTERNATIONAL MATERIAL

28. On 27 June 2001 the United Nationals General Assembly adopted a Declaration of Commitment on HIV/AIDS (Resolution S-26/2) which provided, in particular:

"1. We, heads of State and Government and representatives of States and Governments, assembled at the United Nations ... to review and address the problem of HIV/AIDS in all its aspects, as well as to secure a global commitment to enhancing coordination and intensification of national, regional and international efforts to combat it in a comprehensive manner ...

13. Noting further that stigma, silence, discrimination and denial, as well as a lack of confidentiality, undermine prevention, care and treatment efforts and increase the impact of the epidemic on individuals, families, communities and nations and must also be addressed ...

16. Recognizing that the full realization of human rights and fundamental freedoms for all is an essential element in a global response to the HIV/AIDS pandemic, including in the areas of prevention, care, support and treatment, and that it reduces vulnerability to HIV/AIDS and prevents stigma and related discrimination against people living with or at risk of HIV/AIDS ...

31. Affirming the key role played by the family in prevention, care, support and treatment of persons affected and infected by HIV/AIDS, bearing in mind that in different cultural, social and political systems various forms of the family exist ...

HIV/AIDS and human rights

58. By 2003, enact, strengthen or enforce, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups, in particular to ensure their access to, inter alia, education, inheritance, employment, health care, social and health services, prevention, support and treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic ..."

29. The United Nations Commission on Human Rights first spoke out against HIV/AIDS-related discrimination and stigma in its Resolution no. 1995/44 ("The protection of human rights in the context of HIV and AIDS"), which was adopted at its 53rd meeting on 3 March 1995 and read in particular:

"1. Confirms that discrimination on the basis of AIDS or HIV status, actual or presumed, is prohibited by existing international human rights standards, and that the term 'or other status' in non-discrimination provisions in international human rights texts can be interpreted to cover health status, including HIV/AIDS;

2. Calls upon all States to ensure, where necessary, that their laws, policies and practices, including those introduced in the context of HIV/AIDS, respect human rights standards, including the right to privacy and integrity of people living with HIV/AIDS, prohibit HIV/AIDS-related discrimination and do not have the effect of inhibiting programmes for the prevention of HIV/AIDS and for the care of persons infected with HIV/AIDS ..."

The UNCHR upheld its stance against discrimination in the context of HIV/AIDS in its subsequent Resolution no. 2005/84, adopted at its 61st meeting on 21 April 2005.

30. Article 2 § 2 of the International Covenant on Economic, Social and Cultural Rights guarantees that the rights recognised therein "will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". In its General Comment on non-discrimination (no. 20, 2009), the Committee on Economic, Social and Cultural Rights has expressly included health status and specifically HIV status, among "other status" grounds referred to in Article 2 § 2:

"33. Health status refers to a person's physical or mental health. States parties should ensure that a person's actual or perceived health status is not a barrier to realizing the rights under the Covenant. The protection of public health is often cited by States as a basis for restricting human rights in the context of a person's health status. However, many such restrictions are discriminatory, for example, when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum."

31. The Parliamentary Assembly of the Council of Europe has touched upon the subject of HIV/AIDS in a number of documents. Recommendation 1116 (1989) on AIDS and human rights emphasised the following points:

"3. Noting that, although the Council of Europe has been concerned with prevention ever since 1983, the ethical aspects have been touched upon only cursorily;

4. Considering nevertheless that it is essential to ensure that human rights and fundamental freedoms are not jeopardised on account of the fear aroused by AIDS;

5. Concerned in particular at the discrimination to which some AIDS victims and even seropositive persons are being subjected ...

8. Recommends that the Committee of Ministers:

A. instruct the Steering Committee for Human Rights to give priority to reinforcing the non-discrimination clause in Article 14 of the European Convention on Human Rights, either by adding health to the prohibited grounds of discrimination or by drawing up a general clause on equality of treatment before the law ...

D. invite the member states of the Council of Europe: ...

3. not to refuse the right of asylum on the sole ground that the asylum-seeker is contaminated by the HIV virus or suffers from AIDS ...”

Resolution 1536 (2007) reaffirmed PACE’s commitment to combat all forms of discrimination against people living with HIV/AIDS:

“While emphasising that the HIV/Aids pandemic is an emergency at the medical, social and economic level, the Assembly calls upon parliaments and governments of the Council of Europe to:

9.1. ensure that their laws, policies and practices respect human rights in the context of HIV/Aids, in particular the right to education, work, privacy, protection and access to prevention, treatment, care and support;

9.2. protect people living with HIV/Aids from all forms of discrimination in both the public and private sectors ...”

32. The United Nations Convention on the Rights of Persons with Disabilities, which entered into force on 3 May 2008 and which Russia signed but not ratified, provides in particular:

Article 5 - Equality and non-discrimination

“2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds ...”

Article 18 - Liberty of movement and nationality

"1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

...

2. Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement ..."

Article 23 - Respect for home and the family

"1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others ..."

33. The UNAIDS/IOM (Joint United Nations Programme on HIV/AIDS/International Organization for Migration) statement on HIV/AIDS-related travel restrictions, June 2004, contained the following recommendations:

"1. HIV/AIDS should not be considered to be a condition that poses a threat to public health in relation to travel because, although it is infectious, the human immunodeficiency virus cannot be transmitted by the mere presence of a person with HIV in a country or by casual contact (through the air, or from common vehicles such as food or water). HIV is transmitted through specific behaviours which are almost always private. Prevention thus requires voluntary acts and cannot be imposed. Restrictive measures can in fact run counter to public health interests, since exclusion of HIV-infected non-nationals adds to the climate of stigma and discrimination against people living with HIV and AIDS, and may thus deter nationals and non-nationals alike from coming forward to utilize HIV prevention and care services. Moreover, restrictions against non-nationals living with HIV may create the misleading public impression that HIV/AIDS is a "foreign" problem that can be controlled through measures such as border controls, rather than through sound public health education and other prevention methods ...

3. Restrictions against entry or stay that are based on health conditions, including HIV/AIDS, should be implemented in such a way that human rights obligations are met, including the principle of non-discrimination, non-refoulement of refugees, the right to privacy, protection

of the family, protection of the rights of migrants, and protection of the best interests of the child. Compelling humanitarian needs should also be given due weight.

4. Any health-related travel restriction should only be imposed on the basis of an individual interview/examination. In case of exclusion, persons should be informed orally and in writing of the reasons for the exclusion.

5. Comparable health conditions should be treated alike in terms of concerns about potential economic costs relating to the person with the condition. Those living with HIV/AIDS who seek entry for short-term or long-term stays should not be singled out for exclusion on this financial basis.

6. Exclusion on the basis of possible costs to health care and social assistance related to a health condition should only be considered where it is shown, through individual assessment, that the person requires such health and social assistance; is likely in fact to use it in the relatively near future; and has no other means of meeting such costs (e.g. through private or employment-based insurance, private resources, support from community groups); and that these costs will not be offset through benefits that exceed them, such as specific skills, talents, contribution to the labour force, payment of taxes, contribution to cultural diversity, and the capacity for revenue or job creation.

7. If a person living with HIV/AIDS is subject to expulsion (deportation), such expulsion (deportation) should be consistent with international legal obligations including entitlement to due process of law and access to the appropriate means to challenge the expulsion. Consideration should be given to compelling reasons of a humanitarian nature justifying authorisation for the person to remain ..."

34. The International Guidelines on HIV/AIDS and Human Rights (2006 consolidated version), published by the Office of the UN High Commissioner for Human Rights and the UNAIDS, read in particular:

"102. The key human rights principles which are essential to effective State responses to HIV are to be found in existing international instruments ... Among the human rights principles relevant to HIV/AIDS are, inter alia:

- the right to non-discrimination, equal protection and equality before the law ...
- the right to freedom of movement ...

104. Under international human rights law, States may impose restrictions on some rights, in narrowly defined circumstances, if such restrictions are necessary to achieve overriding goals, such as public health, the rights of others, morality, public order, the general welfare in a democratic society and national security ...

105. Public health is most often cited by States as a basis for restricting human rights in the context of HIV. Many such restrictions, however, infringe on the principle of non-discrimination, for example when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum ...

127. There is no public health rationale for restricting liberty of movement or choice of residence on the grounds of HIV status. According to current international health regulations, the only disease which requires a certificate for international travel is yellow fever [footnote omitted]. Therefore, any restrictions on these rights based on suspected or real HIV status alone, including HIV screening of international travellers, are discriminatory and cannot be justified by public health concerns.

128. Where States prohibit people living with HIV from longer-term residency due to concerns about economic costs, States should not single out HIV/AIDS, as opposed to comparable conditions, for such treatment and should establish that such costs would indeed be incurred in the case of the individual alien seeking residency. In considering entry applications, humanitarian concerns, such as family reunification and the need for asylum, should outweigh economic considerations."

35. The Report on the International Task Team on HIV-related Travel Restrictions, convened by the UNAIDS in 2008, contained the following findings:

"The Task Team confirmed that HIV-specific restrictions on entry, stay and residence based on HIV status are discriminatory, do not protect the public health and do not rationally identify those who may cause an undue burden on public funds. In particular, the Task Team made the following findings:

- The Task Team found no evidence that HIV-related restrictions on entry, stay and residence protect the public health and was concerned that they may in fact impede efforts to protect the public health.

• Restrictions on entry, stay and residence that specify HIV, as opposed to comparable conditions, and/or are based on HIV status alone are discriminatory.

• Exclusion or deportation of HIV-positive people to avoid potential costs of treatment and support should be based on an individual assessment of the actual costs that are likely to be incurred, should not single out HIV, and should not override human rights considerations or humanitarian claims."

IV. COMPARATIVE DATA

36. In May 2009 UNAIDS, the Joint United Nations Programme on HIV/AIDS, published a survey Mapping of Restrictions on the entry, stay and residence of people living with HIV. The latest updated version of the survey (as of May 2010) is available on its web-site.

37. According to the survey, 124 countries, territories and areas world-wide have no HIV-specific restrictions on entry, stay or residence. The other 52 countries, territories or areas impose some form of restriction on the entry, stay and residence of people living with HIV based on their HIV status. The latter category includes seven Council of Europe Member States.

38. Not one of Council of Europe Member States refuses visa or entry for a short-term stay on account of the individual's HIV status. Three States (Armenia, Moldova and Russia) may deport individuals once their HIV positive status is discovered. Those States and three others (Andorra, Cyprus and Slovakia) require the person applying for a residence permit to show that he or she is HIV-negative. Finally, Lithuania requires a declaration as to whether the individual has a "disease threatening to public health".

5.3.3. The law

I. ALLEGED VIOLATION OF ARTICLE 14[45] OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8[21]

39. The applicant complained under Articles 8, 13[38], 14 and 15[25] of the Convention that the decision to refuse him authorisation to reside in Russia had been disproportionate to the legitimate aim of the protection of public health and had disrupted his right to live with his family. The Court notes that the focal point of the present application is the difference of treatment to which the applicant was subjected on account of his health status when applying

for a residence permit. Having regard to the circumstances of the case and bearing in mind that it is master of the characterisation to be given in law to the facts of the case (see Guerra and Others v. Italy, 19 February 1998, § 44, Reports of Judgments and Decisions 1998 I), the Court considers it appropriate to examine the applicant's grievances from the standpoint of Article 14 of the Convention, taken in conjunction with Article 8 (compare Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, § 70, Series A no. 94). Those provisions read:

Article 8

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

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

Article 14

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

A. Submissions by the parties

1. The Government

40. The Government submitted that the applicant still lived in the Oryol Region and that, given his family ties and health condition, he had not been deported. The refusal of a residence permit did not interfere with his right to respect for his family life and, even assuming that it did, such interference had a legal basis in section 7 § 1 (13) of the Foreign Nationals Act. It was also justified by the Russian authorities' concerns about the massive spread of the HIV epidemic and its socio-economic and demographic consequences in the Russian Federation, the threat it posed to personal, public and national security and to the existence of humankind, and the need to ensure the protection of the rights and lawful

interests of the population. The refusal of residence permit was a necessary measure directed at preventing and combating HIV infection.

41. The Government pointed out that the applicant had the right to remain in the Russian territory as long as he complied with the regulations on the entry, exit and stay of foreign nationals. As he was not eligible for a residence permit but did not need a visa to enter Russia for a period of up to ninety days, he could leave Russia every ninety days and then return. Moreover, the refusal of a residence permit did not prevent the applicant from conducting his family life in Uzbekistan, where his wife and daughter could join him (the Government referred to the cases of Slivenko v. Latvia [GC], no. 48321/99, ECHR 2003 X, and Abdulaziz, cited above).

42. In their additional observations, the Government submitted that the potential danger which the applicant presented for the general public was confirmed by the prevalence of the HIV infection in the world and also by the fact that he had been convicted of serious and particularly serious criminal offences in Uzbekistan. The domestic courts did not need to examine his individual situation or the information on his state of health or lifestyle because such considerations were legally irrelevant for determination of the present case.

2. The applicant

43. The applicant disputed the Government's submission that the domestic authorities had taken into account his state of health and family situation. He pointed out that these circumstances had not been mentioned in the domestic judgments and that the Constitutional Court's decision of 12 May 2006 had remained a mere declaration without practical effect. He believed that he had not been yet deported solely because of the "wait and see" attitude of the Russian authorities, who had initially awaited the outcome of the domestic proceedings and were now waiting for the Strasbourg Court's judgment. Besides, when referring to his health condition, the Government did not specify whether they meant the HIV infection in general or its recent complication in the form of aggravated tuberculosis, which required in-patient treatment and rendered him unfit for transport.

44. As regards the existence of an interference, the applicant submitted that section 5 of the Foreign Nationals Act limited his lawful stay in Russia to ninety days and that no further extension was possible by virtue of section 7, which required him to produce a certificate showing that he was HIV-negative. He learnt of the infection only after he had moved to Russia and married a Russian national and he could not therefore have foreseen that he would

not able to obtain residence in Russia. His entire family, including his mother, was in Russia and his wife and daughter were born there and he had solid social, economic and personal connections in Russia, whereas he had no relatives, work or accommodation in Uzbekistan. In the applicant's opinion, these elements distinguished his case from that of Slivenko v. Latvia, in which the Russian authorities had provided the head of the Slivenko family with a flat in Kursk.

45. On the proportionality of the alleged interference with his family life, the applicant emphasised that the Russian courts had proceeded from the presumption that he presented a grave danger to the Russian population's health. They did not analyse his lifestyle or explain why it could lead to an epidemic or pose a threat to the national security, public order or economic well-being of Russia, or undermine the rights and freedoms of others. He did not engage in promiscuous sexual contacts or in drug abuse and he respected the security measures appropriate for his health condition. That the Russian courts did not heed these circumstances was indicative of inadmissible discrimination on account of his health status.

3. The third party

46. Interights as the third party submitted firstly that the general non-discrimination provisions of the key universal and regional human rights treaties were interpreted as prohibiting discrimination on the basis of HIV or AIDS status, actual or presumed. This interpretation was adopted by the United Nations Committee on Human Rights, the Committee on Economic, Social and Cultural Rights, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and the Committee on the Rights of the Child. In the Declaration of Commitment on HIV/AIDS adopted by the UN General Assembly in August 2001, member states set out their commitment to adopt and enforce legislation aimed at eliminating all forms of discrimination against people living with HIV/AIDS. At European level, the Council of Europe Parliamentary Assembly called for reinforcement of Article 14 of the Convention with respect to people living with HIV/AIDS and for their enhanced protection in both public and private sectors.

47. Secondly, the third party argued that, in addition to the general anti-discrimination standards existing under international law, people living with HIV/AIDS should benefit from the prohibition on discrimination on account of disability existing in the Court's case-law and in other legal systems. The applicability of the disability anti-discrimination framework established under the Convention on the Rights of Persons with Disabilities to people living with HIV/AIDS was endorsed by the Office of the High Commissioner for Human Rights, the

World Health Organisation and the UN Programme on HIV/AIDS (UNAIDS) in their joint Disability and HIV Policy Brief (2009). The disability-based approach to HIV was further supported by the legislation and practice of many countries that had expressly or implicitly extended their disability laws to include HIV status (Canada, USA, the United Kingdom, Germany and Norway). In Glor v. Switzerland, this Court also recognised that Article 14 of the Convention protected against discrimination based on disability (no. 13444/04, § 80, ECHR 2009 ...).

48. International law does not recognise a right to settle in a foreign country and travel restrictions may not be illegitimate per se when applied in a neutral fashion; however, those same restrictions will be in breach of anti-discrimination standards if they single out persons living with HIV for differential treatment without an objective justification. In assessing whether a difference of treatment is justified, this Court had identified a number of particularly vulnerable groups – for instance, Roma, homosexuals, persons with mental disabilities – that suffered a history of prejudice and social exclusion, in respect of which the State has a narrower margin of appreciation. In the third party's submission, people living with HIV formed one such group, for they have suffered from widespread stigma and ostracism, including in the Council of Europe region, and the State should be afforded only a narrow margin of appreciation in choosing measures that subject persons living with HIV to differential treatment.

49. The third party identified two possible justifications for differential treatment on account of one's HIV status: the public health threat rationale and the public cost rationale. With regard to public health concerns, it pointed to the existing consensus among experts and international bodies working in the field of public health that such measures were ineffective in preventing the spread of HIV (reference was made to documents and statements by the World Health Organisation, the UN High Commissioner for Human Rights, the International Organisation for Migration, the UN High Commissioner for Refugees, the World Bank, the International Labour Organisation, the European Parliament and Commission). In 2008 the UNAIDS International Task Team on HIV-related Travel Restrictions found no evidence that HIV-related travel restrictions protected public health. Although HIV is a transmissible disease, it is not contagious in the sense of being spread by airborne particles or by casual contact, but rather by specific behaviour, such as unprotected sex or the use of contaminated syringes, which enables HIV-negative persons to take steps to protect themselves against transmission. The public-health justification was further undermined by the argument that travel restrictions did not apply to leaving and returning nationals or short-stay foreign

tourists. Such measures could also be harmful to the public health of the country's own nationals because they created a misplaced sense of security by portraying HIV/AIDS as a foreign problem and underplaying the need to engage in safe behaviour and because they prompted migrants to avoid HIV screening and to remain in the country illegally, which cut them off from HIV prevention and care services.

50. In the third party's view, national immigration policies demonstrated that most countries in the world shared the understanding that HIV-related travel restrictions were not an efficient measure to protect public health. This was implicitly borne out by the fact that a majority of states did not enforce any such restrictions and that a number of countries had recently lifted such restrictions and recognised that HIV did not pose a threat to public health (USA, China and Namibia). Other countries had considered the possibility of implementing HIV-related travel restrictions but ultimately rejected it, reflecting the absence of a rational connection between such measures and effective prevention (the United Kingdom, Germany). It was moreover acknowledged that less restrictive but more effective alternatives for the protection of public health were available and those included voluntary testing and counselling and information campaigns.

51. On the issue of preventing excessive spending in publicly funded health care systems, the third party pointed to the Court's finding in the case of G.N. and Others v. Italy (no. 43134/05, § 129, 1 December 2009), in which it held that in the context of health policies insufficient resources cannot be used as a justification for adopting measures based on arbitrary criteria. Immigration restrictions that single out HIV while omitting other equally costly conditions such as cardiovascular or kidney disease appear to be arbitrary and discriminatory. Furthermore, public cost-related restrictions should be based on the individualised assessment of a person's health and financial circumstances rather than on the mere presence of a certain medical condition. The third party referred in this connection to the recommendations contained in the UNAIDS/IOM statement (see paragraph 33 above) and the case-law of the Supreme Court of Canada, which held that if the need for potential services were considered only on the basis of the classification of the impairment rather than on its particular manifestation, the assessment would become general rather than individual and would result "in an automatic exclusion for all individuals with a particular disability, even those whose admission would not cause, or would not reasonably be expected to cause, excessive demands on public funds" (Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada, 2005 SCC 57, para. 56).

B. Admissibility

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

C. Merits

1. Applicability of Article 14, taken in conjunction with Article 8

(a) Whether the facts of the case fall "within the ambit" of Article 8

53. The Court reiterates at the outset that the right of an alien to enter or to settle in a particular country is not guaranteed by the Convention. Where immigration is concerned, Article 8 or any other Convention provision cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory (see Gül v. Switzerland, 19 February 1996, § 38, Reports 1996 I). Neither party contests this. However, even though Article 8 does not include a right to settle in a particular country or a right to obtain a residence permit, the State must nevertheless exercise its immigration policies in a manner which is compatible with a foreign national's human rights, in particular the right to respect for their private or family life and the right not to be subject to discrimination (see Abdulaziz, cited above, §§ 59-60, and Nolan and K. v. Russia, no. 2512/04, § 62, 12 February 2009).

54. As regards protection against discrimination, it is recalled that Article 14 only complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence because it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions (see, among many other authorities, Sahin v. Germany [GC], no. 30943/96, § 85, ECHR 2003-VIII). The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. What is necessary, and also sufficient, is that the facts of the case fall "within the ambit" of one or more of the Articles of the Convention or its Protocols (see Petrovic v. Austria, 27 March 1998, § 22, Reports 1998-II).

55. The applicant is an Uzbekistan national of Russian origin who has been living in Russia since 2003. Admittedly, not all settled migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy "family life" there within the meaning of Article 8 (see Maslov v. Austria [GC], no. 1638/03, § 63, 23 June 2008).

However, the concept of "family life" must at any rate include the relationships that arise from a lawful and genuine marriage (see Abdulaziz, cited above, § 62), such as that contracted by the applicant with his Russian spouse and in which their child was born. In these circumstances, the Court finds that the facts of the case fall "within the ambit" of Article 8 of the Convention.

(b) Whether the applicant's health status was "other status" within the meaning of Article 14

56. Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic, or "status", by which persons or groups of persons are distinguishable from one another (see Carson and Others v. the United Kingdom [GC], no. 42184/05, §§ 61 and 70, ECHR 2010 ..., and Kjeldsen, Busk Madsen and Pedersen v. Denmark, 7 December 1976, § 56, Series A no. 23). It lists specific grounds which constitute "status" including, inter alia, sex, race and property. However, the list set out in Article 14 is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "notamment") (see Engel and Others v. the Netherlands, 8 June 1976, § 72, Series A no. 22, and Carson, cited above, § 70) and the inclusion in the list of the phrase "any other status" (in French "toute autre situation"). The words "other status" have generally been given a wide meaning (see Carson, cited above, § 70) and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (see Clift v. the United Kingdom, no. 7205/07, §§ 56-58, 13 July 2010).

57. Following the disclosure of the applicant's HIV-positive status, it has become legally impossible for him to be admitted for lawful residence in Russia because of a legal provision that restricted issuance of residence permits to aliens who were unable to show their HIV-negative status. Although Article 14 does not expressly list a health status or any medical condition among the protected grounds of discrimination, the Court has recently recognised that a physical disability and various health impairments fall within the scope of this provision (see Glor, §§ 53-56, and G.N., § 119, both cited above). The Court notes the view of the UN Commission on Human Rights that the term "other status" in non-discrimination provisions in international legal instruments can be interpreted to cover health status, including HIV-infection (see paragraph 29 above). This approach is compatible with Recommendation 1116 (1989) by the Parliamentary Assembly of the Council of Europe, which called for reinforcement of the non-discrimination clause in Article 14 by including health among the prohibited grounds of discrimination (see paragraph 31 above) and with the UN Convention on the Rights of Persons with Disabilities which imposed on its State parties a general

prohibition of discrimination on the basis of disability (see paragraph 32 above). Accordingly, the Court considers that a distinction made on account of one's health status, including such conditions as HIV infection, should be covered – either as a form of disability or alongside with it – by the term "other status" in the text of Article 14 of the Convention.

58. It follows that Article 14 of the Convention, taken in conjunction with Article 8, is applicable.

2. Compliance with Article 14, taken in conjunction with Article 8

(a) Whether the applicant was in an analogous position to other aliens

59. The Court has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in analogous, or relevantly similar, situations (see D.H. and Others v. the Czech Republic [GC], no. 57325/00, § 175, ECHR 2007, and Burden v. the United Kingdom [GC], no. 13378/05, § 60, ECHR 2008 ...).

60. As the spouse of a Russian national and father of a Russian child, the applicant was eligible to apply for a residence permit by virtue of his family ties in Russia (see paragraph 20 above). For his application to be completed, he needed to submit to HIV-testing and enclose a certificate showing that he was not infected with HIV (see paragraph 21 above). After the test revealed his HIV-positive status, his application for a residence permit was rejected on account of the absence of the mandatory HIV clearance certificate. This was the only ground referred to in the decisions of the Russian Migration Service and the Russian courts (see paragraphs 11 to 13 above). In so far as the Government claimed that the applicant also posed a threat to public order because he had been previously convicted of serious crimes in Uzbekistan, the Court observes that their allegation was not supported with any specific evidence or documents and that the domestic authorities had obviously refused him a residence permit because of his HIV status rather than because of any criminal history he may have had.

61. The Court therefore considers that the applicant can claim to be in a situation analogous to that of other foreign nationals for the purpose of an application for a residence permit on account of their family ties in Russia.

(b) Whether the difference in treatment was objectively and reasonably justified

62. Once the applicant has shown that there has been a difference in treatment, it is then for the respondent Government to show that the difference in treatment could be justified (see

Chassagnou and Others v. France [GC], nos. 25088/94, 28331/95 and 28443/95, §§ 91-92, ECHR 1999 III). Such justification must be objective and reasonable or, in other words, it must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject-matter and the background (see Burden, § 60; Carson, § 61, and Clift, § 43, all cited above).

63. If a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibited the individualised evaluation of their capacities and needs (see Alajos Kiss v. Hungary, no. 38832/06, § 42, ECHR 2010 ...). In the past the Court has identified a number of such vulnerable groups that suffered different treatment on account of their sex (see Abdulaziz, cited above, § 78, and Burghartz v. Switzerland, 22 February 1994, § 27, Series A no. 280 B), sexual orientation (see Schalk and Kopf v. Austria, no. 30141/04, § 97, ECHR 2010 ..., and Smith and Grady v. the United Kingdom, nos. 33985/96 and 33986/96, § 90, ECHR 1999 VI), race or ethnicity (see D.H., cited above, § 182, and Timishev v. Russia, nos. 55762/00 and 55974/00, § 56, ECHR 2005 XII), mental faculties (see Alajos Kiss, cited above, § 42, and, mutatis mutandis, Shtukaturov v. Russia, no. 44009/05, § 95, 27 March 2008), or disability (see Glor, cited above, § 84).

64. From the onset of the epidemic in the 1980s, people living with HIV/AIDS have suffered from widespread stigma and exclusion, including within the Council of Europe region (see, in particular, Recommendation 1116 (1989) on AIDS and human rights, and point 9.2 of Resolution 1536 (2007), both cited in paragraph 31 above). In the early years of the epidemic when HIV/AIDS diagnosis was nearly always a lethal condition and very little was known about the risk of transmission, people were scared of those infected due to fear of contagion. Ignorance about how the disease spreads has bred prejudices which, in turn, has stigmatised or marginalised those who carry the virus. As the information on ways of transmission accumulated, HIV infection has been traced back to behaviours – such as same-sex intercourse, drug injection, prostitution or promiscuity – that were already stigmatised in

many societies, creating a false nexus between the infection and personal irresponsibility and reinforcing other forms of stigma and discrimination, such as racism, homophobia or misogyny. In recent times, despite considerable progress in HIV prevention and better access to HIV treatment, stigma and related discrimination against people living with HIV/AIDS has remained a subject of great concern for all international organisations active in the field of HIV/AIDS. The UN Declaration of Commitment on HIV/AIDS noted that the stigma "increase[d] the impact of the epidemic on individuals, families, communities and nations" (see paragraph 28 above) and UN Secretary General Mr Ban Ki-moon acknowledged that "to greater or lesser degrees, almost everywhere in the world, discrimination remain[ed] a fact of daily life for people living with HIV" (6 August 2008). The Court therefore considers that people living with HIV are a vulnerable group with a history of prejudice and stigmatisation and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on the basis of their HIV status.

65. The existence of a European consensus is an additional consideration relevant for determining whether the respondent State should be afforded a narrow or a wide margin of appreciation (see Dickson v. the United Kingdom [GC], no. 44362/04, § 81, ECHR 2007 XIII, and S.L. v. Austria, no. 45330/99, § 31, ECHR 2003 I (extracts)). Where there is a common standard which the respondent State has failed to meet, this may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases (see Tănase v. Moldova [GC], no. 7/08, § 176, ECHR 2010 ..., and Demir and Baykara v. Turkey [GC], no. 34503/97, § 85, 12 November 2008). The Court observes that, out of forty-seven Member States of the Council of Europe, only six States require an individual applying for a residence permit to submit negative HIV test results, that one State requires a declaration to that effect, and that only three States make provision for the deportation of aliens who are found to be HIV-positive (see paragraphs 37 and 38 above). The other Contracting States do not impose any restrictions on the entry, stay or residence of people living with HIV on account of their HIV status. It appears therefore that the exclusion of HIV-positive applicants from residence does not reflect an established European consensus and has little support among the Council of Europe member States. Accordingly, the respondent State is under an obligation to provide a particularly compelling justification for the differential treatment of which the applicant complained to have been a victim.

66. The Government put forward a number of aims pursued by the impugned restriction which appeared to follow closely the text of the preamble to the HIV Prevention Act (see paragraphs 16 and 40 above). They did not explain how the alleged threats to national security

and to the existence of humankind were relevant to the applicant's individual situation, what socio-economic or demographic consequences his presence in the Russian territory could entail or why the refusal of a residence permit would enhance the protection of the rights and interests of others. It transpires nevertheless from the Constitutional Court's decision that the restriction on temporary residence of HIV-infected foreign nationals had the aim of ensuring the protection of public health (see paragraph 25 above). Whilst that aim is without doubt legitimate, this does not in itself establish the legitimacy of the specific treatment afforded to the applicant on account of his health status. It has to be ascertained whether there is a reasonable relationship of proportionality between the aim pursued and the means employed.

67. The Court has consistently held that it takes into account relevant international instruments and reports in order to interpret the guarantees of the Convention and to establish whether there is a common standard in the field. It is for the Court to decide which international instruments and reports it considers relevant and how much weight to attribute to them (see Tănase, § 176, and Demir and Baykara, §§ 85-86, both cited above). In the present case the Court considers undoubtedly relevant the third party's submission on the existing consensus among experts and international bodies active in the field of public health, which agreed that travel restrictions on people living with HIV could not be justified by reference to public health concerns. The World Health Organization rejected travel restrictions as an ineffective way to prevent the spread of HIV as long ago as 1987 (Report on the Consultation on International Travel and HIV Infection, 2-3 March 1987). The same view has since been expressed by the UN High Commissioner for Human Rights (see the extracts from the International Guidelines on HIV/AIDS and Human Rights, cited in paragraph 34 above), the International Organization for Migration (see the UNAIDS/IOM statement, cited in paragraph 33 above), the UN High Commissioner for Refugees (UNHCR, Note on HIV/AIDS and the Protection of Refugees, IDPs and Other Persons of Concern, 2006), the World Bank (Legal Aspects of HIV/AIDS, 2007), and, most recently, the International Labour Organization (ILO Recommendation concerning HIV and AIDS and the World of Work, no. 200, 2010). At the European level, the European Parliament and the European Commission acknowledged that "there are no objective reasons for a travel ban on HIV infected people" (Resolution of 22 May 2008). The respondent Government, for their part, did not adduce any expert opinions or scientific analysis that would be capable of gainsaying the unanimous view of international experts.

68. Admittedly, travel restrictions are instrumental for the protection of public health against highly contagious diseases with a short incubation period, such as cholera or yellow fever or,

to take more recent examples, severe acute respiratory syndrome (SARS) and "bird flu" (H5N1). Entry restrictions relating to such conditions can help to prevent their spread by excluding travellers who may transmit these diseases by their presence in a country through casual contact or airborne particles. However, the mere presence of a HIV-positive individual in a country is not in itself a threat to public health: HIV is not transmitted casually but rather through specific behaviours that include sexual intercourse and sharing of syringes as the main routes of transmission. This does not put prevention exclusively within the control of the HIV-infected non-national but rather enables HIV negative persons to take steps to protect themselves against the infection (safer sex and safer injections). Excluding HIV-positive non-nationals from entry and/or residence in order to prevent HIV transmission is based on the assumption that they will engage in specific unsafe behaviour and that the national will also fail to protect himself or herself. This assumption amounts to a generalisation which is not founded in fact and fails to take into account the individual situation, such as that of the applicant. Besides, under Russian law any form of behaviour by an HIV positive person who is aware of his or her HIV-status that exposes someone else to the risk of HIV infection is in itself a criminal offence punishable by deprivation of liberty (see paragraph 27 above). The Government did not explain why these legal sanctions were not considered sufficient to act as a deterrent against the behaviours that entail the risk of transmission.

69. Furthermore, it appears that Russia does not apply HIV-related travel restrictions to tourists or short-term visitors. Nor does it impose HIV tests on Russian nationals leaving and returning to the country. Taking into account that the methods of HIV transmission remain the same irrespective of the duration of a person's presence in the Russian territory and his or her nationality, the Court sees no explanation for a selective enforcement of HIV-related restrictions against foreigners who apply for residence in Russia but not against the above-mentioned categories, who actually represent the great majority of travellers and migrants. There is no reason to assume that they are less likely to engage in unsafe behaviour than settled migrants. In this connection the Court notes with great concern the Government's submission that the applicant should have been able to circumvent the provisions of the Foreign Nationals Act by leaving and re entering Russia every ninety days. This submission casts doubt on the genuineness of the Government's public-health concerns relating to the applicant's presence in Russia. In addition, the existing HIV tests to which an applicant for Russian residence must submit will not always identify the presence of the virus in some newly infected persons, who may happen to be in the time period during which the test does not detect the virus and which may last for several months. It follows that the application of

HIV related restrictions only in the case of prospective long-term residents is not an effective approach in preventing the transmission of HIV by HIV positive migrants.

70. The differential treatment of HIV-positive long-term settlers as opposed to short-term visitors may be objectively justified by the risk that the former could potentially become a public burden and place an excessive demand on the publicly-funded health care system, whereas the latter would seek treatment elsewhere. However, such economic considerations for the exclusion of prospective HIV-positive residents are only applicable in a legal system where foreign residents may benefit from the national health care scheme at a reduced rate or free of charge. This is not the case in Russia: non-Russian nationals have no entitlement to free medical assistance, except emergency treatment, and have to pay themselves for all medical services (see paragraph 23 above). Thus, irrespective of whether or not the applicant obtained a residence permit in Russia, he would not be eligible to draw on Russia's public health care system. Accordingly, the risk that he would represent a financial burden on Russian health care funds was not convincingly established.

71. Finally, it is noted that travel and residence restrictions on persons living with HIV may not only be ineffective in preventing the spread of the disease, but may also be actually harmful to the public health of the country. Firstly, migrants would remain in the country illegally so as to avoid HIV screening, in which case their HIV-status would be unknown both to the health authorities and to migrants themselves. This would prevent them from taking the necessary precautions, avoiding unsafe behaviour and accessing HIV prevention information and services. Secondly, the exclusion of HIV-positive foreigners may create a false sense of security by encouraging the local population to consider HIV/AIDS as a "foreign problem" that has been taken care of by deporting infected foreigners and not allowing them to settle, so that the local population feels no need to engage in safe behaviour.

72. In the light of the foregoing, the Court finds that, although the protection of public health was indeed a legitimate aim, the Government were unable to adduce compelling and objective arguments to show that this aim could be attained by the applicant's exclusion from residence on account of his health status. A matter of further concern for the Court is the blanket and indiscriminate nature of the impugned measure. Section 7 § 1 (13) of the Foreign Nationals Act expressly provided that any application for residence permit would be refused if the applicant was unable to show his or her HIV-negative status. Section 11 § 2 of the HIV Prevention Act further provides for deportation of non-nationals who have been found to be HIV-positive. Neither provision left any room for an individualised assessment based on the

facts of a particular case. Although the Constitutional Court indicated that the provisions did not exclude the possibility of having regard to humanitarian considerations in exceptional cases (see the decision of 12 May 2006 cited in paragraph 24 above), it is not clear whether that decision gave the domestic authorities discretion to override the imperative regulation of section 7 § 1 (13) of the Foreign Nationals Act.

73. In the instant case, the Federal Migration Service, the District Court and then the Regional Court gave no heed to the Constitutional Court's position. Although the statement of appeal expressly relied on the decision of 12 May 2006 and relevant international instruments, the courts rejected the applicant's application for a residence permit solely by reference to the legal requirements of the Foreign Nationals Act, without taking into account the actual state of his health or his family ties in Russia. In rejecting the applicant's request for supervisory review, the Regional Court expressly stated that the courts were not obligated to have regard to any humanitarian considerations and that the provisions of section 7 § 1 (13) requiring the production of a HIV-negative certificate cannot in any event be disregarded (see paragraph 15 above). The Government confirmed in their final submissions to the Court that the applicant's individual situation was of no legal relevance and that the domestic courts had not been required to take into account the information on his health or family ties (see paragraph 42 above). The Court considers that such an indiscriminate refusal of residence permit, without an individualised judicial evaluation and solely based on a health condition, cannot be considered compatible with the protection against discrimination enshrined in Article 14 of the Convention (see, mutatis mutandis, Alajos Kiss v. Hungary, no. 38832/06, § 44, ECHR 2010 ...).

74. Taking into account that the applicant belonged to a particularly vulnerable group, that his exclusion has not been shown to have a reasonable and objective justification, and that the contested legislative provisions did not make room for an individualised evaluation, the Court finds that the Government overstepped the narrow margin of appreciation afforded to them in the instant case. The applicant has therefore been a victim of discrimination on account of his health status, in violation of Article 14 of the Convention taken together with Article 8.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

75. The applicant also complained under Article 6 § 1 of the Convention that the domestic courts did not inform him that he had the right to ask for an examination of his complaint in private and that they did not order a closed session of their own motion.

76. The Court considers that, although the applicant had no legal background and was not represented, he could have stated his wish to have his case heard behind closed doors in plain language or at least mentioned this wish in his statement of claim. Lacking any indication of the applicant's preference as to the type of proceedings, the domestic courts were under no obligation to exclude the public of their own motion. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. 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

78. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

79. The Government submitted that the claim was excessive.

80. The Court accepts that the applicant suffered distress and frustration because of discrimination against him on account of his health status. Making its assessment on an equitable basis, the Court awards the applicant EUR 15,000, plus any tax that may be chargeable on it.

B. Costs and expenses

81. The applicant also claimed 14,700 Russian roubles for legal costs and translation expenses.

82. The Government submitted that reimbursement was possible only in respect of the costs and expenses incurred in the Strasbourg proceedings.

83. Under the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award

the sum of EUR 350 for costs and expenses incurred in the domestic and Strasbourg proceedings, plus any tax that may be chargeable to the applicant.

C. Default interest

84. 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.

5.3.4. The Court's decision

1. Declares the complaint concerning the refusal of a residence permit admissible and the remainder of the application inadmissible;

2. Holds that there has been a violation of Article 14^{45} of the Convention, taken in conjunction with Article 8^{21};

3. Holds

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2^{9} of the Convention, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage and EUR 350 (three hundred and fifty euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant on these amounts, to be converted into Russian roubles at the rate applicable at the date of settlement;

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

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

Chapter 6 Right to respect for private and family life. Selected case law

6.1. Right to respect for private and family life

According to the Article 8 of the European Convention everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic 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.

6.2. Case of Tysiąc V. Poland[15]

6.2.1. The procedure

1. The case originated in an application (no. 5410/03) against the Republic of Poland lodged with the Court under Article 34[10] of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Ms Alicja Tysiąc ("the applicant"), on 15 January 2003.

2. The applicant, who had been granted legal aid, was represented by Ms M. Gąsiorowska and Ms A. Wilkowska-Landowska, lawyers practising in Warsaw and Sopot respectively, assisted by Ms A. Coomber and Ms V. Vandova of Interights, London. The Polish

[15] Fourth Section; Case Of Tysiąc V. Poland; (Application No. 5410/03); Strasbourg 20 March 2007; Final 24/09/2007

Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that the circumstances of her case had given rise to violations of Article 8[21] of the Convention. She also relied on Article 3[39]. The applicant further complained under Article 13[38] that she did not have an effective remedy at her disposal. She also submitted, relying on Article 14[45] of the Convention, that she had been discriminated against in realising her rights guaranteed by Article 8.

4. By a decision of 7 February 2006, following a hearing on admissibility and the merits (Rule 54 § 3[54] of the Rules of Court), the Chamber declared the application admissible. It decided to join to the merits of the case the examination of the Government's preliminary objection based on non exhaustion of domestic remedies.

5. The applicant and the Government each filed further observations (Rule 59 § 1[2]). The parties replied in writing to each other's observations. In addition, third-party comments were received from the Center for Reproductive Rights, based in New York, the Polish Federation for Women and Family Planning, together with the Polish Helsinki Foundation for Human Rights, Warsaw, the Forum of Polish Women, Gdańsk, and the Association of Catholic Families, Cracow, which had been given leave by the President to intervene in the written procedure (Article 36 § 2[55] of the Convention and Rule 44 § 2[56]).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 February 2006 (Rule 59 § 3[3]).

The Court heard addresses by Mrs Gręziak, Mr Wołąsiewicz, Ms Wilkowska-Landowska, Ms Gąsiorowska, Prof. Chazan and Prof. Szaflik.

6.2.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1971 and lives in Warsaw.

8. Since 1977 the applicant has suffered from severe myopia, the degree of which was established at -0.2 in the left eye and -0.8 in the right eye. Before her pregnancy, she was

assessed by a State medical panel, for social-insurance purposes, as suffering from a disability of medium severity.

9. The applicant became pregnant in February 2000. She had previously had two children, both born by Caesarean section. As the applicant was worried about the possible impact of the delivery on her health, she decided to consult her doctors. She was examined by three ophthalmologists (Dr M.S., Dr N.S.-B., Dr K.W.). It transpired from the documents submitted by the applicant that Dr M.S. had recommended that the applicant have frequent check-ups and avoid physical exertion. Dr N.S.-B. stated that the applicant should consider sterilisation after the birth. All of them concluded that, due to pathological changes in the applicant's retina, the pregnancy and delivery constituted a risk to her eyesight. However, they refused to issue a certificate for the pregnancy to be terminated, despite the applicant's requests, on the ground that the retina might detach itself as a result of pregnancy, but that it was not certain.

10. Subsequently, the applicant sought further medical advice. On 20 April 2000 Dr O.R.G., a general practitioner (GP), issued a certificate stating that her third pregnancy constituted a threat to the applicant's health as there was a risk of rupture of the uterus, given her two previous deliveries by Caesarean section. She further referred to the applicant's short-sightedness and to significant pathological changes in her retina. These considerations, according to the GP, also required that the applicant should avoid physical strain which in any case would hardly be possible as at that time the applicant was raising two small children on her own. The applicant understood that on the basis of this certificate she would be able to terminate her pregnancy lawfully.

11. On 14 April 2000, in the second month of the pregnancy, the applicant's eyesight was examined. It was established that she needed glasses to correct her vision in both eyes by 24 dioptres.

12. Subsequently, the applicant contacted a State hospital, the Clinic of Gynaecology and Obstetrics in Warsaw, in the area to which she was assigned on the basis of her residence, with a view to obtaining the termination of her pregnancy. On 26 April 2000 she had an appointment with Dr R.D., Head of the Gynaecology and Obstetrics Department of the clinic.

13. Dr R.D. examined the applicant visually and for a period of less than five minutes, but did not examine her ophthalmological records. Afterwards he made a note on the back of the certificate issued by Dr O.R.G. that neither her short sightedness nor her two previous deliveries by Caesarean section constituted grounds for therapeutic termination of the

pregnancy. He was of the view that, in these circumstances, the applicant should give birth by Caesarean section. During the applicant's visit Dr R.D. consulted an endocrinologist, Dr B., whispering to her in the presence of the applicant. The endocrinologist co-signed the note written by Dr R.D., but did not talk to the applicant.

14. The applicant's examination was carried out in a room with the door open to the corridor, which, in the applicant's submission, did not provide a comfortable environment for a medical examination. At the end of the appointment, Dr R.D. told the applicant that she could have as many as eight children if they were delivered by Caesarean section.

15. As a result, the applicant's pregnancy was not terminated. The applicant gave birth to the child by Caesarean section in November 2000.

16. After the delivery, her eyesight deteriorated badly. On 2 January 2001, approximately six weeks after the delivery, she was taken to the emergency unit of the Ophthalmological Clinic in Warsaw. While doing a counting-fingers test, she was only able to see from a distance of three metres with her left eye and five metres with her right eye, whereas before the pregnancy she had been able to see objects from a distance of six metres. A reabsorbing vascular occlusion was found in her right eye and further degeneration of the retinal spot was established in the left eye.

17. According to a medical certificate issued on 14 March 2001 by an ophthalmologist, the deterioration of the applicant's eyesight had been caused by recent haemorrhages in the retina. As a result, the applicant is currently facing a risk of going blind. Dr M.S., the ophthalmologist who examined the applicant, suggested that she should be learning braille. She also informed the applicant that, as the changes to her retina were at a very advanced stage, there were no prospects of having them corrected by surgical intervention.

18. On 13 September 2001 the disability panel declared the applicant to be significantly disabled, while previously she had been recognised as suffering from a disability of medium severity. It further held that she needed constant care and assistance in her everyday life.

19. On 29 March 2001 the applicant lodged a criminal complaint against Dr R.D., alleging that he had prevented her from having her pregnancy terminated as recommended by the GP on a medical ground which constituted one of the exceptions to a general ban on abortion. She complained that, following the pregnancy and delivery, she had sustained severe bodily harm by way of almost complete loss of her eyesight. She relied on Article 156 § 1 of the Criminal Code, which lays down the penalty for the offence of causing grievous bodily harm, and also

submitted that, under the applicable provisions of social-insurance law, she was not entitled to a disability pension as she had not worked the requisite number of years before the disability developed because she had been raising her children.

20. The investigation of the applicant's complaint was carried out by the Warsaw-Śródmieście district prosecutor. The prosecutor heard evidence from the ophthalmologists who had examined the applicant during her pregnancy. They stated that a safe delivery by Caesarean section had been possible.

21. The prosecutor further requested the preparation of an expert report by a panel of three medical experts (ophthalmologist, gynaecologist and specialist in forensic medicine) from the Białystok Medical Academy. According to the report, the applicant's pregnancies and deliveries had not affected the deterioration of her eyesight. Given the serious nature of the applicant's sight impairment, the risk of retinal detachment had always been present and continued to exist, and the pregnancy and delivery had not contributed to increasing that risk. Furthermore, the experts found that in the applicant's case there had been no factors militating against the applicant's carrying her baby to term and delivering it.

22. During the investigations neither Dr R.D. nor Dr B., who had co signed the certificate of 26 April 2000, were interviewed.

23. On 31 December 2001 the district prosecutor discontinued the investigations, considering that Dr R.D. had no case to answer. Having regard to the expert report, the prosecutor found that there was no causal link between his actions and the deterioration of the applicant's vision. He observed that this deterioration "had not been caused by the gynaecologist's actions, or by any other human action".

24. The applicant appealed against that decision to the Warsaw regional prosecutor. She challenged the report drawn up by the experts from the Białystok Medical Academy. In particular, she submitted that she had in fact been examined by only one of the experts, namely the ophthalmologist, whereas the report was signed by all of them. During that examination use had not been made of all the specialised ophthalmological equipment that would normally be used to test the applicant's eyesight. Moreover, the examination had lasted only ten minutes. The other two experts who had signed the report, including a gynaecologist, had not examined her at all.

25. She further emphasised inconsistencies in the report. She also submitted that, before the second and third deliveries, the doctors had recommended that she be sterilised during the

Caesarean section to avoid any further pregnancies. She argued that, although the deterioration of her eyesight was related to her condition, she felt that the process of deterioration had accelerated during the third pregnancy. She submitted that there had been a causal link between the refusal to terminate her pregnancy and the deterioration of her vision. The applicant also complained that the prosecuting authorities had failed to give any consideration to the certificate issued by her GP.

26. She further pointed out that she had been unable to familiarise herself with the case file because the summaries of witnesses' testimonies and other documents were written in a highly illegible manner. The prosecutor, when asked for assistance in reading the file, had repeatedly refused to assist, even though he had been aware that the applicant was suffering from very severe myopia. The applicant had been unable to read the documents in the case file, which had affected her ability to exercise her procedural rights in the course of the investigation.

27. On 21 March 2002 the Warsaw regional prosecutor, in a one-paragraph decision, upheld the decision of the district prosecutor, finding that the latter's conclusions had been based on the expert report. The regional prosecutor countered the applicant's argument that she had not been examined by all three experts, stating that the other two experts had relied on an examination of her medical records. He did not address the procedural issue raised by the applicant in her appeal.

28. Subsequently, the decision not to prosecute was transmitted to the Warsaw-Śródmieście District Court for judicial review.

29. In a final decision of 2 August 2002, not subject to a further appeal and numbering twenty-three lines, the District Court upheld the decision to discontinue the case. Having regard to the medical expert report, the court considered that the refusal to terminate the pregnancy had not had a bearing on the deterioration of the applicant's vision. Furthermore, the court found that the haemorrhage in the applicant's eyes had in any event been likely to occur, given the degree and nature of the applicant's condition. The court did not address the procedural complaint which the applicant had made in her appeal against the decision of the district prosecutor.

30. The applicant also attempted to bring disciplinary proceedings against Dr R.D. and Dr B. However, those proceedings were finally discontinued on 19 June 2002, the competent

authorities of the Chamber of Physicians finding that there had been no professional negligence.

31. Currently, the applicant can see objects only from a distance of approximately 1.5 metres and is afraid of going blind. On 11 January 2001 the social-welfare centre issued a certificate to the effect that the applicant was unable to take care of her children as she could not see from a distance of more than 1.5 metres. On 28 May 2001 a medical panel gave a decision certifying that she suffered from a significant disability. She is at present unemployed and in receipt of a monthly disability pension of 560 Polish zlotys. She is raising her three children alone.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

32. Article 38 of the Constitution reads as follows:

"The Republic of Poland shall ensure the legal protection of the life of every human being."

33. Article 47 of the Constitution reads:

"Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life."

B. The 1993 Law on family planning (protection of the human foetus and conditions permitting pregnancy termination) and related statutes

34. The Law on family planning (protection of the human foetus and conditions permitting pregnancy termination) ("the 1993 Act"), which is still in force, was passed by Parliament in 1993. Section 1 provided at that time that "every human being shall have an inherent right to life from the moment of conception".

35. This Act provided that legal abortion was possible only until the twelfth week of pregnancy where the pregnancy endangered the mother's life or health; or prenatal tests or other medical findings indicated a high risk that the foetus would be severely and irreversibly damaged or suffering from an incurable life-threatening disease; or there were strong grounds for believing that the pregnancy was a result of rape or incest.

36. On 4 January 1997 an amended text of the 1993 Act, passed on 30 June 1996, came into force. Section 1(2) provided that "the right to life, including the prenatal stage thereof, shall

be protected to the extent laid down by law". This amendment provided that pregnancy could also be terminated during the first twelve weeks where the mother either suffered from material hardship or was in a difficult personal situation.

37. In December 1997 further amendments were made to the text of the 1993 Act, following a judgment of the Constitutional Court given in May 1997. In that judgment the court held that the provision legalising abortion on grounds of material or personal hardship was incompatible with the Constitution as it stood at that time .

38. Section 4a of the 1993 Act, as it stands at present, reads, in its relevant part:

"(1) An abortion can be carried out only by a physician where

1. pregnancy endangers the mother's life or health;

2. prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease;

3. there are strong grounds for believing that the pregnancy is a result of a criminal act.

(2) In the cases listed above under sub-paragraph 2, an abortion can be performed until such time as the foetus is capable of surviving outside the mother's body; in cases listed under sub-paragraph 3 above, until the end of the twelfth week of pregnancy.

(3) In the cases listed under sub-paragraphs 1 and 2 above the abortion shall be carried out by a physician working in a hospital.

...

(5) Circumstances in which abortion is permitted under subsection (1), sub-paragraphs 1 and 2, above shall be certified by a physician other than the one who is to perform the abortion, unless the pregnancy entails a direct threat to the woman's life."

39. An Ordinance issued by the Minister of Health on 22 January 1997 on qualifications of doctors authorised to perform abortions contains two substantive sections. In its section 1, the requisite qualifications of doctors who can perform legal abortions in the circumstances specified in the 1993 Act are stipulated. Section 2 of that Ordinance reads:

"The circumstances indicating that pregnancy constitutes a threat to the woman's life or health shall be attested by a consultant specialising in the field of medicine relevant to the woman's condition."

40. Section 37 of the 1996 Medical Profession Act provides that in the event of any diagnostic or therapeutic doubts a doctor may, on his or her own initiative or upon a patient's request and if he or she finds it reasonable in the light of requirements of medical science, obtain an opinion of a relevant specialist or arrange a consultation with other doctors.

C. Criminal offence of abortion performed in contravention of the 1993 Act

41. Termination of pregnancy in breach of the conditions specified in the 1993 Act is a criminal offence punishable under Article 152 § 1 of the Criminal Code. Anyone who terminates a pregnancy in violation of the Act or assists in such a termination may be sentenced to up to three years' imprisonment. The pregnant woman herself does not incur criminal liability for an abortion performed in contravention of the 1993 Act.

D. Provisions of the Code of Criminal Procedure

42. A person accused in criminal proceedings, if he or she cannot afford lawyers' fees, may request legal aid under Article 78 § 1 of the Code of Criminal Procedure. Under Articles 87 § 1 and 88 § 1 of that Code, a victim of an alleged criminal offence is similarly entitled to request that legal aid be granted to him or her for the purpose of legal representation in the course of criminal investigations and proceedings.

E. Offence of causing grievous bodily harm

43. Article 156 § 1 of the Criminal Code of 1997 provides that a person who causes grievous bodily harm shall be sentenced to between one and ten years' imprisonment.

F. Civil liability in tort

44. Articles 415 et seq. of the Civil Code provide for liability in tort. Under these provisions, whoever by his or her fault causes damage to another person is obliged to redress it.

45. Pursuant to Article 444 of the Civil Code, in cases of bodily injury or harm to health, a perpetrator shall be liable to cover all pecuniary damage resulting therefrom.

G. Case-law of the Polish courts

46. In a judgment of 21 November 2003 (V CK 167/03), the Supreme Court held that unlawful refusal to terminate a pregnancy where it had been caused by rape, namely in circumstances provided for by section 4a(1)3 of the 1993 Act, could give rise to a compensation claim for pecuniary damage sustained as a result of such refusal.

47. In a judgment of 13 October 2005 (IV CJ 161/05), the Supreme Court expressed the view that a refusal of prenatal tests in circumstances where it could be reasonably surmised that a pregnant woman ran a risk of giving birth to a severely and irreversibly damaged child, namely in circumstances set out by section 4a(1)2 of the 1993 Act, gave rise to a compensation claim.

III. RELEVANT NON-CONVENTION MATERIAL

A. Observations of the ICCPR Committee

48. The Committee, having considered in 1999 the fourth periodic report on the observance of the United Nations International Covenant on Civil and Political Rights submitted by Poland, adopted the following conclusions (Document CCPR/C/SR.1779):

"11. The Committee notes with concern: (a) strict laws on abortion which lead to high numbers of clandestine abortions with attendant risks to life and health of women; (b) limited accessibility for women to contraceptives due to high prices and restricted access to suitable prescriptions; (c) the elimination of sexual education from the school curriculum; and (d) the insufficiency of public family planning programmes. (Arts. 3, 6, 9 and 26)

The State Party should introduce policies and programmes promoting full and non-discriminatory access to all methods of family planning and reintroduce sexual education at public schools."

49. The Polish government, in their fifth periodic report submitted to the Committee (CCPR/C/POL/2004/5), stated:

"106. In Poland data about abortions relate solely to abortions conducted in hospitals, i.e. those legally admissible under a law. The number of abortions contained in the present official statistics is low in comparison with previous years. Non-governmental organisations on the basis of their own research estimate that the number of abortions conducted illegally in Poland amounts from 80,000 to 200,000 annually.

107. It follows from the Government's annual Reports of the execution of the [1993] Law [which the Government is obliged to submit to the Parliament] and from reports of non-governmental organisations that the Law's provisions are not fully implemented and that some women, in spite of meeting the criteria for an abortion, are not subject to it. There are refusals to conduct an abortion by physicians employed in public health-care system units who invoke the so-called conscience clause, while at the same time women who are eligible

for a legal abortion are not informed about where they should go. It happens that women are required to provide additional certificates, which lengthens the procedure until the time when an abortion becomes hazardous for the health and life of the woman. There [are] no official statistical data concerning complaints related to physicians' refusals to perform an abortion. ... In the opinion of the Government, there is a need to [implement] already existing regulations with respect to the ... performance of abortions."

50. The Committee, having considered Poland's fifth periodic report at its meetings held on 27 and 28 October and 4 November 2004, adopted in its concluding observations (Document CCPR/C/SR.2251) the following relevant comments:

"8. The Committee reiterates its deep concern about restrictive abortion laws in Poland, which may incite women to seek unsafe, illegal abortions, with attendant risks to their life and health. It is also concerned at the unavailability of abortion in practice even when the law permits it, for example in cases of pregnancy resulting from rape, and by the lack of information on the use of the conscientious objection clause by medical practitioners who refuse to carry out legal abortions. The Committee further regrets the lack of information on the extent of illegal abortions and their consequences for the women concerned. ...

The State Party should liberalise its legislation and practice on abortion. It should provide further information on the use of the conscientious objection clause by doctors, and, so far as possible, on the number of illegal abortions that take place in Poland. These recommendations should be taken into account when the draft Law on parental awareness is discussed in Parliament."

B. Observations of non-governmental organisations

51. In a report prepared by ASTRA Network on Reproductive Health and Rights in Central and Eastern Europe for the European Population Forum, Geneva, held on 12 to 14 January 2004, it is stated that:

"The anti-abortion law which was in force in Poland since 1993 resulted in many negative consequences for women's reproductive health, such as:

– many women who are entitled to legal abortions are often denied this right in their local hospitals;

– abortions on social grounds are not stopped but simply pushed 'underground', as women seeking abortions can find a doctor who would perform it illegally or go abroad;

– the effects of the law are felt primarily on the poorest and uneducated members of the society, as illegal abortions are expensive.

Lack of knowledge about family planning lowers women's quality of life. Their sexuality is endangered either by constant fear of unwanted pregnancies or by seeking unsafe abortion[s].

There is a strong disapproval and obstruction toward[s] those who choose abortions under the few conditions that still allow for it to occur. Doctors and hospitals frequently misguide or misinform women, who are legally entitled to terminate pregnancies, thereby placing the health of the women at serious risk.

Doctors (and even whole hospitals, even though they have no right to do so) often refuse [to perform] abortion[s] in hospitals they work in, [invoking the] so-called clause of conscience – the right to refuse [to perform] abortion[s] due to one's religious beliefs or moral objections – or even giving no justifications, creating problems as long ... as it is needed to make performing [an] abortion impossible under the law. There exists however a well organised abortion underground – terminations are performed illegally in private [clinics], very often by the same doctors who refuse [to perform] abortions in hospitals. The average cost of [an] abortion is ca 2000 [Polish zlotys] (equivalent [to the] country's average gross salary). [The] Federation for Women and Family Planning estimates that the real number of abortions in Poland amounts to 80,000 to 200,000 each year."

C. Synthesis Report of the European Union Network of Independent Experts on Fundamental Rights

52. In its report entitled "Conclusions and Recommendations on the Situation of Fundamental Rights in the European Union and its Member States in 2004" dated 15 April 2005, the Network stated, inter alia:

"While acknowledging that there is [as] yet no settled case-law in international or European human rights law concerning where the adequate balance must be struck between the right of the [woman] to interrupt her pregnancy on the one hand, as a particular manifestation of the general right to the autonomy of the person underlying the right to respect for private life, and the protection of the potentiality of human life on the other hand, the Network nevertheless expresses its concern at a number of situations which, in the view of the independent experts, are questionable in the present state of the international law of human rights.

A woman seeking abortion should not be obliged to travel abroad to obtain it, because of the lack of available services in her home country even where it would be legal for her to seek abortion, or because, although legal when performed abroad, abortion in identical circumstances is prohibited in the country of residence. This may be the source of discrimination between women who may travel abroad and those who, because of a disability, their state of health, the lack of resources, their administrative situation, or even the lack of adequate information ... may not do so. A [woman] should not be seeking abortion because of the insufficiency of support services, for example for young mothers, because of lack of information about support which would be available, or because of the fear that this might lead to the loss of employment: this requires, at the very least, a close monitoring of the pattern of abortions performed in the jurisdictions where abortion is legal, in order to identify the needs of the persons resorting to abortion and the circumstances which ought to be created in order to better respond to these needs. ... Referring to the Concluding Observations adopted on 5 November 2004 by the Human Rights Committee upon the examination of the report submitted by Poland under the International Covenant on Civil and Political Rights (CCPR/CO/82/POL/Rev. 1, para. 8), the Network notes that a prohibition on non-therapeutic abortion or the practical unavailability of abortion may in fact have the effect of raising the number of clandestine abortions which are practised, as the women concerned may be tempted to resort to clandestine abortion in the absence of adequate counselling services who may inform them about the different alternatives opened to them. ...

Where a State does choose to prohibit abortion, it should at least closely monitor the impact of this prohibition on the practice of abortion, and provide this information in order to feed into an informed public debate. Finally, in the circumstances where abortion is legal, women should have effective access to abortion services without any discrimination."

6.2.3. The law

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

53. Pursuant to Article 35 § 1[47] of the Convention, the Court may only deal with a matter after all domestic remedies have been exhausted.

54. In this connection, the Government argued that the applicant had failed to exhaust all the remedies available under Polish law as required by Article 35 § 1 of the Convention.

55. The Government referred to the Court's case-law to the effect that there were certain positive obligations under the Convention which required States to draw up regulations compelling hospitals to adopt appropriate measures for the protection of their patients' lives. They also required an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession could be determined and those responsible made accountable (see Powell v. the United Kingdom (dec.), no. 45305/99, ECHR 2000 V). That positive obligation did not necessarily require the provision of a criminal law remedy in every case. In the specific sphere of medical negligence the obligation could, for instance, also be satisfied if the legal system afforded victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages, to be obtained (see Calvelli and Ciglio v. Italy [GC], no. 32967/96, § 51, ECHR 2002 I).

56. The Government further asserted that the Polish legal system provided for legal avenues which made it possible to establish liability on the part of doctors for any damage caused by medical malpractice, either by way of criminal proceedings or by civil compensation claims. In the applicant's case, a compensation claim would have offered good prospects of success.

57. The Government referred in that connection to the provisions of the Civil Code governing liability in tort. They further referred to two judgments given by the civil courts against the background of the 1993 Act. In the first judgment, given by the Supreme Court on 21 November 2003, the court had held that the unlawful refusal to terminate a pregnancy caused by rape had given rise to a compensation claim. In the second the Łomża Regional Court had dismissed, on 6 May 2004, a claim for non-pecuniary damages filed by parents who had been refused access to prenatal tests and whose child had been born with serious malformations.

58. The applicant submitted that, under the Court's case-law, she should not be required to have recourse both to civil and criminal remedies in respect of the alleged violation of Article 8 of the Convention. If there was more than one remedy available, the applicant need not exhaust more than one (see Yağcı and Sargın v. Turkey, 8 June 1995, §§ 42-44, Series A no. 319 A). She further referred to a judgment in which the Court had found that the applicants, having exhausted all possible means available to them in the criminal-justice system, were not required, in the absence of a criminal prosecution in connection with their complaints, to embark on another attempt to obtain redress by bringing an action for damages (see Assenov

and Others v. Bulgaria, 28 October 1998, § 86, Reports of Judgments and Decisions 1998 VIII).

59. The applicant argued that pursuing civil proceedings would not be effective in her case. To date, there had been no final judgment of a Polish court in a case in which compensation had been awarded for damage to a woman's health caused by a refusal of a therapeutic abortion allowed under the 1993 Act. She emphasised that the two cases referred to by the Government post-dated her petition to the Court under Article 34 of the Convention. Importantly, they were immaterial to her case because they concerned situations fundamentally different from the applicant's, both as to the facts and law: one related to a claim for damages arising from the unlawful refusal of an abortion where the pregnancy had been caused by rape; the second concerned a claim for damages arising from the refusal of a prenatal examination.

60. Finally, she pointed out that under the Court's case-law it was for an applicant to select the legal remedy most appropriate in the circumstances of the case (see Airey v. Ireland, 9 October 1979, § 23, Series A no. 32). Effective deterrence against grave attacks on personal integrity (such as rape in M.C. v. Bulgaria, no. 39272/98, ECHR 2003-XII), where fundamental values and essential aspects of private life were at stake, required the effective application of criminal-law provisions (ibid., §§ 124, 148 53, and X and Y v. the Netherlands, 26 March 1985, §§ 23-24, Series A no. 91). In the circumstances, the criminal remedy chosen by the applicant was the most appropriate one.

61. The Court reiterates that, in its decision on the admissibility of the application, it joined to the merits of the case the examination of the question of exhaustion of domestic remedies (see paragraph 4 above). The Court confirms its approach to the exhaustion issue.

II. THE MERITS OF THE CASE

A. Alleged violation of Article 3[39] of the Convention

62. The applicant complained that the facts of the case gave rise to a breach of Article 3 of the Convention which, in so far as relevant, reads as follows:

"No one shall be subjected to ... inhuman or degrading treatment ... "

63. The Government disagreed.

64. The applicant submitted that the circumstances of the case had amounted to inhuman and degrading treatment in breach of Article 3 of the Convention.

65. She argued that treatment was degrading if it aroused in its victim "feelings of fear, anguish and inferiority capable of humiliating and debasing them" (see Ireland v. the United Kingdom, 18 January 1978, § 167, Series A no. 25). The failure of the State to make a legal abortion possible in circumstances which threatened her health, and to put in place the procedural mechanism necessary to allow her to have this right realised, meant that the applicant was forced to continue with a pregnancy for six months knowing that she would be nearly blind by the time she gave birth. The resultant anguish and distress and the subsequent devastating effect of the loss of her eyesight on her life and that of her family could not be overstated. She had been a young woman with a young family already grappling with poor eyesight and knowing that her pregnancy would ruin her remaining ability to see. As predicted by her doctor in April 2000, her eyesight has severely deteriorated, causing her immense personal hardship and psychological distress.

66. The Court reiterates its case-law on the notion of ill-treatment and the circumstances in which the responsibility of a Contracting State may be engaged, including under Article 3 of the Convention by reason of the failure to provide appropriate medical treatment (see, among other authorities, İlhan v. Turkey [GC], no. 22277/93, § 87, ECHR 2000 VII, mutatis mutandis). In the circumstances of the instant case, the Court finds that the facts alleged do not disclose a breach of Article 3. The Court further considers that the applicant's complaints are more appropriately examined under Article 8 of the Convention.

B. Alleged violation of Article 8 of the Convention

67. The applicant complained that the facts of the case had given rise to a breach of Article 8 of the Convention. Her right to due respect for her private life and her physical and moral integrity had been violated both substantively, by failing to provide her with a legal therapeutic abortion, and as regards the State's positive obligations, by the absence of a comprehensive legal framework to guarantee her rights.

Article 8 of the Convention, in so far as relevant, reads as follows:

"1. Everyone has the right to respect for his private ... life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests

of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions

(a) The Government

68. The Government first emphasised that pregnancy and its interruption did not, as a matter of principle, pertain uniquely to the sphere of the mother's private life. Whenever a woman was pregnant, her private life became closely connected with the developing foetus. There could be no doubt that certain interests relating to pregnancy were legally protected (see Brüggemann and Scheuten v. Germany, no. 6959/75, Commission's report of 12 July 1977, Decisions and Reports (DR) 10, p. 100). Polish law also protected the foetus and therefore allowed for termination of a pregnancy under the 1993 Act only in strictly defined circumstances. The Government were of the view that, in the applicant's case, the conditions for lawful termination on health grounds as defined by that Act had not been satisfied.

69. The Government argued that in so far as the applicant had submitted that her pregnancy had posed a threat to her eyesight because of her severe myopia, only a specialist in ophthalmology could decide whether an abortion was medically advisable. The ophthalmologists who had examined the applicant during her pregnancy had not considered that her pregnancy and delivery constituted any threat to her health or life. The intention of the doctors had actually been to protect the applicant's health. They had concurred in their opinions that the applicant's child should be delivered by Caesarean section, which had ultimately happened.

70. The Government stressed that there existed a delivery possibility which had not posed any threat to the applicant's health. Hence, under the 1993 Act the doctors had not been authorised to issue a medical certificate permitting abortion. Consequently, the applicant had been unable to obtain an abortion as her situation had not complied with the conditions laid down by that Act.

71. In so far as the applicant argued that no procedure was available under the Polish law to assess the advisability of a therapeutic abortion, the Government disagreed. They referred to

the provisions of the Minister of Health's Ordinance of 22 January 1997 and argued that this Ordinance provided for a procedure governing decisions on access to a therapeutic abortion.

72. The Government further stated that section 37 of the 1996 Medical Profession Act made it possible for a patient to have a decision taken by a doctor as to the advisability of an abortion reviewed by his or her colleagues. Lastly, had the applicant been dissatisfied with decisions given in her case by the doctors, she could have availed herself of the possibilities provided for by administrative law.

73. The Government concluded that it was open to the applicant to challenge the medical decisions given in her case by having recourse to procedures available under the law.

(b) The applicant

74. The applicant disagreed with the Government's argument that, under the case law of the Convention institutions, the legal protection of life afforded by Article 2 extended to foetuses. Under that case-law, "[t]he life of the foetus [was] intimately connected with, and [could not] be regarded in isolation of, the life of the pregnant woman" (see X. v. the United Kingdom, no. 8416/79, Commission decision of 13 May 1980, DR 19, p. 244). The Court itself had observed that legislative provisions as to when life commenced fell within the State's margin of appreciation, but it had rejected suggestions that the Convention ensured such protection. It had noted that the issue of such protection was not resolved within the majority of the Contracting States themselves and that there was no European consensus on the scientific and legal definition of the beginning of life (see Vo v. France [GC], no. 53924/00, § 82, ECHR 2004 VIII).

75. The applicant complained that the facts of the case had given rise to a breach of Article 8 of the Convention. As to the applicability of this provision, the applicant emphasised that the facts underlying the application had concerned a matter of "private life", a concept which covered the physical and moral integrity of the person (see X and Y v. the Netherlands, cited above, § 22).

76. The applicant argued that in the circumstances of the present case her Article 8 rights had been violated both substantively, by failing to provide her with a legal abortion, and with respect to the State's positive obligations, by the absence of a comprehensive legal framework to guarantee her rights by appropriate procedural means.

77. As to the first limb of this complaint, the applicant argued that the very special facts of this case had given rise to a violation of Article 8. She had been seeking to have an abortion in the face of a risk to her health. The refusal to terminate the pregnancy had exposed her to a serious health risk and amounted to a violation of her right to respect for her private life.

78. The applicant countered the Government's suggestion that her condition had not been such as to meet the requirements for a lawful abortion on the medical grounds set forth in section 4a of the 1993 Act, in that it had not been established that the deterioration of her vision after the delivery had been a direct result of the pregnancy and birth. She stressed that this issue had, in any event, been irrelevant for the assessment of the case because the 1993 Act provided that it was merely the threat to the pregnant woman's health which made an abortion legal. The actual materialisation of such a threat was not required.

In any event, and regrettably, in the applicant's case this threat had materialised and brought about a severe deterioration of her eyesight after the delivery.

79. The applicant further emphasised that the interference complained of had not been "in accordance with the law" within the meaning of Article 8[21] of the Convention. Section 4a of the 1993 Act allowed a termination where the continuation of a pregnancy constituted a threat to the mother's life or health. Hence, the applicant had had a legal right under Polish law to have an abortion on health grounds.

80. As to the second limb of her complaint, relating to the positive obligations of the State, the applicant considered that the facts of the case had disclosed a breach of the right to effective respect for her private life. The State had been under a positive obligation to provide a comprehensive legal framework regulating disputes between pregnant women and doctors as to the need to terminate a pregnancy in cases of a threat to a woman's health. However, there was no effective institutional and procedural mechanism by which such cases were to be adjudicated and resolved in practice.

81. The applicant emphasised that the need for such a mechanism had been and remained acute. The provisions of the 1997 Ordinance and of the 1996 Medical Profession Act, relied on by the Government, had not provided clarity because all these provisions had been drafted in the broadest terms. They provided that doctors could make referrals for therapeutic abortion, but gave no details as to how that process worked or within what time frame. Critically, there had been no provision for any meaningful review of, or scope for challenge of, a doctor's decision not to make a referral for termination.

82. The applicant further stressed that section 4a of the 1993 Act, in so far as it contained an exemption from the rule that abortion was prohibited, related to a very sensitive area of medical practice. Doctors were hesitant to perform abortions necessary to protect the health of a woman because of the highly charged nature of the abortion debate in Poland. Furthermore, they feared damage to their reputation if it was found out that they had performed a termination in circumstances provided for under section 4a. They might also fear criminal prosecution.

83. The applicant argued that as a result of the State's failure to put in place at least some rudimentary decision-making procedure, the process in her case had not been fair and had not afforded due respect for her private life and her physical and moral integrity.

84. The applicant submitted that the onus was on the State to ensure that medical services required by pregnant women and available in law were available in practice. The legal system in Poland, viewed as a whole, had been operating with the opposite effect, offering a strong disincentive to the medical profession to provide the abortion services that were available in law. The flexibility that the law appeared to afford in determining what constituted a "threat to a woman's health" within the meaning of section 4a of the 1993 Act and the lack of adequate procedures and scrutiny contrasted with the strict approach under the criminal law penalising doctors for carrying out unlawful abortions.

85. The applicant contended that in the present case where there had been a fundamental disagreement between her, a pregnant woman fearful of losing her eyesight as a result of a third delivery, and doctors, it had been inappropriate and unreasonable to leave the task of balancing fundamental rights to doctors exclusively. In the absence of any provision for a fair and independent review, given the vulnerability of women in such circumstances, doctors would practically always be in a position to impose their views on access to termination, despite the paramount importance their decisions have for a woman's private life. The circumstances of the case revealed the existence of an underlying systemic failure of the Polish legal system when it came to determining whether or not the conditions for lawful abortion obtained in a particular case.

2. The third-party interveners' submissions

(a) The Center for Reproductive Rights

86. The Center for Reproductive Rights submitted, in its comments to the Court of 23 September 2005, that the central issue in the present case was whether a State Party which

had by law afforded women a right to choose abortion in cases where pregnancy threatened their physical health, but failed to take effective legal and policy steps to ensure that eligible women who made that choice could exercise their right, violated its obligations under Article 8 of the Convention. It was of the opinion that States undertaking to allow abortion in prescribed circumstances have a corresponding obligation to ensure that the textual guarantee of abortion in their national laws is an effective right in practice. To that end, States should take effective steps to ensure women's effective access to services. These steps include the institution of procedures for appeal or review of medical decisions denying a woman's request for abortion.

87. Poland's lack of effective legal and administrative mechanisms providing for appeal or review of medical professionals' decisions in cases where they determine that the conditions for termination of pregnancy have not been met were inconsistent with the practice of many other member States. The establishment of an appeals or review process in countries across Europe, such as Bulgaria, Croatia, the Czech Republic, Denmark, Finland, Norway, Slovakia, Slovenia or Sweden, reflected a common understanding of the need to protect women's right to legal abortion in situations where a health-care provider denies such a request, including in cases where a woman's health was at risk.

88. Most laws and regulations on abortion appeals processes had strict time limits within which such appeals and reviews had to be decided, recognising the inherent time-sensitive nature of abortion procedures and the inability of regular administrative review or other legal processes to respond in a timely manner. While such time limitations implicitly obliged the medical professional denying the request for abortion to forward medical records of a woman immediately to the review or appeals body, some laws had explicit language requiring doctors to do so. In certain countries the appeals or review body had to inform the woman where the abortion would be performed should her appeal be granted. Where an appeal or review body found that the conditions for a termination of pregnancy had not been met, some laws required a written notice to the woman of the decision. In all countries, appeals procedures did not need to be followed when pregnancy posed a threat to the health or life of the pregnant woman. In certain member States, such as Norway and Sweden, a rejected request for abortion was automatically examined by a review body. In Norway, a committee was formed by the county medical officer, which also includes the pregnant woman.

89. They indicated that the legislation of many member States contained express language underscoring a woman's rights to dignity and autonomous decision making within the context

of requests for and provision of abortion services. They referred to Norwegian and French legislation which strongly emphasised the woman's autonomy and active participation throughout the process in which access to abortion was decided.

90. They concluded that in Poland the lack of a timely appeals process undermined women's right to have access to reproductive health care, with potentially grave consequences for their life and health. It also denied women the right to an effective remedy as guaranteed by Article 13 of the Convention.

(b) The Polish Federation for Women and Family Planning and the Polish Helsinki Foundation for Human Rights

91. The Polish Federation for Women and Family Planning and the Polish Helsinki Foundation for Human Rights stated, in their submissions of 6 October 2005, that the case essentially concerned the issue of inadequate access to therapeutic abortion which was permissible when one of the conditions enumerated in section 4a of the 1993 Act was met. They emphasised that it often happened in practice in Poland that physicians refused to issue a certificate required for a therapeutic abortion, even when there were genuine grounds for issuing one. It was also often the case that when a woman obtained a certificate, the physicians to whom she went to obtain an abortion questioned its validity and the competence of the physicians who issued it and eventually refused the service, sometimes after the time-limit for obtaining a legal abortion set by law had expired.

92. The fact that under Polish law abortion was essentially a criminal offence, in the absence of transparent and clearly defined procedures by which it had to be established that a therapeutic abortion could be performed, was one of the factors deterring physicians from having recourse to this medical procedure. Hence, the chances of negative decisions in respect of therapeutic abortion were high.

93. There were no guidelines as to what constituted a "threat to a woman's health or life" within the meaning of section 4a. It appeared that some physicians did not take account of any threat to a woman's health as long as she was likely to survive the delivery of a child. In addition, there was a problem with assessing whether a pregnancy constituted a threat to a woman's health or life in cases of women suffering from multiple and complex health problems. In such situations it was not clear who should be recognised as a specialist competent to issue the medical certificate referred to in section 2 of the 1997 Ordinance.

94. The Polish law did not foresee effective measures to review refusals of abortion on medical grounds. As a result, women denied an abortion on health grounds did not have any possibility of consulting an independent body or to have such decisions reviewed.

95. To sum up, the current practice in Poland as regards the application of the guarantees provided for by section 4a of the 1993 Act ran counter to the requirements of Article 8 of the Convention.

(c) The Forum of Polish Women

96. The Forum of Polish Women argued, in its submissions of 3 November 2005, that the rights guaranteed by Article 8 of the Convention imposed on the State an obligation to refrain from arbitrary interference, but not an obligation to act. This provision of the Convention aimed essentially to protect an individual against arbitrary activities of public authorities (see Kroon and Others v. the Netherlands, 27 October 1994, § 31, Series A no. 297 C). For that reason alone, it was not possible to derive from this provision an obligation to have medical interventions performed, in particular when the medical intervention consisted of abortion.

97. It further asserted that in the context of abortion it could not be said that pregnancy belonged exclusively to the sphere of private life. Even assuming that the legal issues involved in pregnancy could be assessed under Article 8 of the Convention, the States could enact legal restrictions in the private sphere if such restrictions served the aim of protecting morals or the rights and freedoms of others. In the hitherto interpretation of this provision, the Court had not challenged the view that the rights of the foetus should be protected by the Convention.

98. In particular, the Court had not ruled out the possibility that in certain circumstances safeguards could be extended to the unborn child (see Vo, cited above, § 85). The Polish legal system ensured constitutional protection of the life of the foetus, based on the concept that a human life has to be legally protected at all stages of development. The 1993 Act accepted exceptions to this principle of legal protection of human life from the moment of conception.

99. However, contrary to the applicant's arguments, under the applicable Polish legislation, there was no right to have an abortion, even when exceptions from the general prohibition on abortion provided by section 4a of the 1993 Act were concerned. This provision had not conferred on a pregnant woman any right to abortion, but only abrogated the general unlawfulness of abortion under Polish law in situations of conflict between the foetus's right to life and other interests. In any event, the mere fact that abortion was lawful in certain

situations, as an exception to a general principle, did not justify a conclusion that it was a solution preferred by the State.

100. The intervener further argued that under the 1997 Ordinance the determination of the conditions in which abortion on medical grounds could be performed was left to medical professionals. Circumstances indicating that pregnancy constituted a threat to a woman's life or health had to be attested by a consultant specialising in the field of medicine relevant to the woman's condition. However, a gynaecologist could refuse to perform an abortion on grounds of conscience. Therefore, a patient could not bring a doctor to justice for refusing to perform an abortion and hold him or her responsible for a deterioration in her health after the delivery.

101. Finally, it was of the view that a threat of the deterioration of a pregnant woman's health resulting from pregnancy could not be concluded retrospectively if it had occurred after the birth of a child.

(d) The Association of Catholic Families

102. The Association of Catholic Families argued, in its observations of 20 December 2005, that the applicant had erred in law in her contention that the Convention guaranteed a right to abortion. In fact, the Convention did not guarantee such a right. On the contrary, Article 2 guaranteed the right to life, which was an inalienable attribute of human beings and formed the supreme value in the hierarchy of human rights. Further, the Court in its case law opposed the right to life to any hypothetical right to terminate life (see Pretty v. the United Kingdom, no. 2346/02, ECHR 2002 III).

3. The Court's assessment

(a) The scope of the case

103. The Court notes that in its decision on admissibility of 7 February 2006, it declared admissible the applicant's complaints under Articles 3, 8, 13, and 14 taken in conjunction with Article 8. Thus, the scope of the case before the Court is limited to the complaints which it has already declared admissible (see, among many authorities, Sokur v. Ukraine, no. 29439/02, § 25, 26 April 2005).

104. In this context, the Court observes that the applicable Polish law, the 1993 Act, while prohibiting abortion, provides for certain exceptions. In particular, under section 4a(1)1 of that Act, abortion is lawful where pregnancy poses a threat to the woman's life or health, as certified by two medical certificates, irrespective of the stage reached in pregnancy. Hence, it

is not the Court's task in the present case to examine whether the Convention guarantees a right to have an abortion.

(b) Applicability of Article 8 of the Convention

105. The Court first observes that it is not disputed between the parties that Article 8 is applicable to the circumstances of the case and that it relates to the applicant's right to respect for her private life.

106. The Court agrees. It first reiterates that legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus (see Brüggemann and Scheuten, cited above, Commission's report, p. 100).

107. The Court also reiterates that "private life" is a broad term, encompassing, inter alia, aspects of an individual's physical and social identity, including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world (see, among many other authorities, Pretty, cited above, § 61). Furthermore, while the Convention does not guarantee as such a right to any specific level of medical care, the Court has previously held that private life includes a person's physical and psychological integrity and that the State is also under a positive obligation to secure to its citizens their right to effective respect for this integrity (see Glass v. the United Kingdom, no. 61827/00, §§ 74-83, ECHR 2004 II; Sentges v. the Netherlands (dec.) no. 27677/02, 8 July 2003; Pentiacova and Others v. Moldova (dec.), no. 14462/03, ECHR 2005-I; Nitecki v. Poland (dec.), no. 65653/01, 21 March 2002; and, mutatis mutandis, Odièvre v. France [GC], no. 42326/98, ECHR 2003 III). The Court notes that in the case before it a particular combination of different aspects of private life is concerned. While the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must – in case of a therapeutic abortion – also be assessed against the positive obligations of the State to secure the physical integrity of mothers to be.

108. The Court finally observes that the applicant submitted that the refusal of an abortion had also amounted to an interference with her rights guaranteed by Article 8. However, the Court is of the view that the circumstances of the applicant's case and in particular the nature of her complaint are more appropriately examined from the standpoint of the respondent State's above-mentioned positive obligations alone.

(c) General principles

109. The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. Any interference under the first paragraph of Article 8 must be justified in terms of the second paragraph, namely as being "in accordance with the law" and "necessary in a democratic society" for one or more of the legitimate aims listed therein. According to settled case-law, the notion of necessity implies that the interference corresponds to a pressing social need and in particular that it is proportionate to one of the legitimate aims pursued by the authorities (see, for example, Olsson v. Sweden (no. 1), 24 March 1988, § 67, Series A no. 130).

110. In addition, there may also be positive obligations inherent in an effective "respect" for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures (see, among other authorities, X and Y v. the Netherlands, cited above, § 23).

111. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both the negative and positive contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts, the State enjoys a certain margin of appreciation (see, among other authorities, Keegan v. Ireland, 26 May 1994, § 49, Series A no. 290, and Różański v. Poland, no. 55339/00, § 61, 18 May 2006).

112. The Court observes that the notion of "respect" is not clear cut, especially as far as those positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Nonetheless, for the assessment of positive obligations of the State it must be borne in mind that the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see Iatridis v. Greece [GC], no. 31107/96, § 58, ECHR 1999 II; Carbonara and Ventura v. Italy, no. 24638/94, § 63, ECHR 2000 VI; and Capital Bank AD v. Bulgaria, no. 49429/99, § 133, 24 November 2005). Compliance with requirements imposed by the rule of law presupposes that the rules of domestic law must provide a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention (see Malone v. the United

Kingdom, 2 August 1984, § 67, Series A no. 82, and, more recently, Hasan and Chaush v. Bulgaria [GC], no. 30985/96, § 84, ECHR 2000 XI).

113. Finally, the Court reiterates that in the assessment of the present case it should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see Airey v. Ireland, 9 October 1979, § 24, Series A no. 32). While Article 8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by this provision that the relevant decision making process is fair and such as to afford due respect to the interests safeguarded by it. What has to be determined is whether, having regard to the particular circumstances of the case and notably the nature of the decisions to be taken, an individual has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests (see, mutatis mutandis, Hatton and Others v. the United Kingdom [GC], no. 36022/97, § 99, ECHR 2003 VIII).

(d) Compliance with Article 8 of the Convention

114. When examining the circumstances of the present case, the Court must have regard to its general context. It notes that the 1993 Act prohibits abortion in Poland, providing only for certain exceptions. A doctor who terminates a pregnancy in breach of the conditions specified in that Act is guilty of a criminal offence punishable by up to three years' imprisonment (see paragraph 41 above).

According to the Polish Federation for Women and Family Planning, the fact that abortion was essentially a criminal offence deterred physicians from authorising an abortion, in particular in the absence of transparent and clearly defined procedures determining whether the legal conditions for a therapeutic abortion were met in an individual case.

115. The Court also notes that in its fifth periodic report to the ICCPR Committee, the Polish government acknowledged, inter alia, that there had been deficiencies in the manner in which the 1993 Act had been applied in practice (see paragraph 49 above). This further highlights, in the Court's view, the importance of procedural safeguards regarding access to a therapeutic abortion as guaranteed by the 1993 Act.

116. A need for such safeguards becomes all the more relevant in a situation where a disagreement arises as to whether the preconditions for a legal abortion are satisfied in a given case, either between the pregnant woman and her doctors, or between the doctors themselves.

In the Court's view, in such situations the applicable legal provisions must, first and foremost, ensure clarity of the pregnant woman's legal position.

The Court further notes that the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case. The provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this effect. Once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.

117. In this connection, the Court reiterates that the concepts of lawfulness and the rule of law in a democratic society command that measures affecting fundamental human rights be, in certain cases, subject to some form of procedure before an independent body competent to review the reasons for the measures and the relevant evidence (see, among other authorities, Rotaru v. Romania [GC], no. 28341/95, §§ 55-63, ECHR 2000 V). In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures (see AGOSI v. the United Kingdom, 24 October 1986, § 55, Series A no. 108, and, mutatis mutandis, Jokela v. Finland, no. 28856/95, § 45, ECHR 2002 IV). In circumstances such as those in issue in the instant case, such a procedure should guarantee to a pregnant woman at least the possibility to be heard in person and to have her views considered. The competent body should also issue written grounds for its decision.

118. In this connection the Court observes that the very nature of the issues involved in decisions to terminate a pregnancy is such that the time factor is of critical importance. The procedures in place should therefore ensure that such decisions are timely so as to limit or prevent damage to a woman's health which might be occasioned by a late abortion. Procedures in which decisions concerning the availability of lawful abortion are reviewed post factum cannot fulfil such a function. In the Court's view, the absence of such preventive procedures in the domestic law can be said to amount to the failure of the State to comply with its positive obligations under Article 8 of the Convention.

119. Against this general background, the Court observes that it is not in dispute that the applicant suffered from severe myopia from 1977. Even before her pregnancy she had been officially certified as suffering from a disability of medium severity (see paragraph 8 above).

Having regard to her condition, during her third pregnancy the applicant sought medical advice. The Court observes that a disagreement arose between her doctors as to how the pregnancy and delivery might affect her already fragile vision. The advice given by the two ophthalmologists was inconclusive as to the possible impact of the pregnancy on the applicant's condition. The Court also notes that the GP issued a certificate stating that her pregnancy constituted a threat to her health, while a gynaecologist was of a contrary view.

The Court stresses that it is not its function to question the doctors' clinical judgment as regards the seriousness of the applicant's condition (see, mutatis mutandis, Glass, cited above, § 87). Nor would it be appropriate to speculate, on the basis of the medical information submitted to it, on whether their conclusions as to whether her pregnancy would or would not lead to a deterioration of her eyesight in the future were correct. It is sufficient to note that the applicant feared that the pregnancy and delivery might further endanger her eyesight. In the light of the medical advice she obtained during the pregnancy and, significantly, the applicant's condition at that time, taken together with her medical history, the Court is of the view that her fears cannot be said to have been irrational.

120. The Court has examined how the legal framework regulating the availability of a therapeutic abortion in Polish law was applied to the applicant's case and how it addressed her concerns about the possible negative impact of pregnancy and delivery on her health.

121. The Court notes that the Government referred to the Ordinance of the Minister of Health of 22 January 1997 (see paragraph 71 above). However, the Court observes that this Ordinance only stipulated the professional qualifications of doctors who could perform a legal abortion. It also made it necessary for a woman seeking an abortion on health grounds to obtain a certificate from a physician "specialising in the field of medicine relevant to [her] condition".

The Court notes that the 1997 Ordinance provides for a relatively simple procedure for obtaining a lawful abortion based on medical considerations: two concurring opinions of specialists other than the doctor who would perform an abortion are sufficient. Such a procedure allows for taking relevant measures promptly and does not differ substantially from solutions adopted in certain other member States.

However, the Ordinance does not distinguish between situations in which there is full agreement between the pregnant woman and the doctors – where such a procedure is clearly practicable – and cases where disagreement arises between the pregnant woman and her

doctors, or between the doctors themselves. The Ordinance does not provide for any particular procedural framework to address and resolve such controversies. It only obliges a woman to obtain a certificate from a specialist, without specifying any steps that she could take if her opinion and that of the specialist diverged.

122. It is further noted that the Government referred also to section 37 of the 1996 Medical Profession Act (see paragraph 72 above). This provision makes it possible for a doctor, in the event of any diagnostic or therapeutic doubts, or upon a patient's request, to obtain a second opinion of a colleague. However, the Court notes that this provision is addressed to members of the medical profession. It only specifies the conditions in which they could obtain a second opinion of a colleague on a diagnosis or on the treatment to be followed in an individual case. The Court emphasises that this provision does not create any procedural guarantee for a patient to obtain such an opinion or to contest it in the event of disagreement. Nor does it specifically address the situation of a pregnant woman seeking a lawful abortion.

123. In this connection, the Court notes that in certain State Parties various procedural and institutional mechanisms have been put in place in connection with the implementation of legislation specifying the conditions governing access to a lawful abortion (see paragraphs 86 87 above).

124. The Court concludes that it has not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case. It created for the applicant a situation of prolonged uncertainty. As a result, the applicant suffered severe distress and anguish when contemplating the possible negative consequences of her pregnancy and upcoming delivery for her health.

125. The Court is further of the opinion that the provisions of the civil law on tort as applied by the Polish courts did not afford the applicant a procedural instrument by which she could have vindicated her right to respect for her private life. The civil-law remedy was solely of a retroactive and compensatory character. It could only, if the applicant had been successful, have resulted in the courts granting damages to cover the irreparable damage to her health which had come to light after the delivery.

126. The Court further notes that the applicant requested that criminal proceedings against Dr R.D. be instituted, alleging that he had exposed her to grievous bodily harm by his refusal to terminate her pregnancy. The Court first observes that for the purposes of criminal

responsibility it was necessary to establish a direct causal link between the acts complained of – in the present case, the refusal of an abortion – and the serious deterioration of the applicant's health. Consequently, the examination of whether there was a causal link between the refusal of leave to have an abortion and the subsequent deterioration of the applicant's eyesight did not concern the question whether the pregnancy had constituted a "threat" to her health within the meaning of section 4a of the 1993 Act.

Crucially, the examination of the circumstances of the case in the context of criminal investigations could not have prevented the damage to the applicant's health from arising. The same applies to disciplinary proceedings before the organs of the Chamber of Physicians.

127. The Court finds that such retrospective measures alone are not sufficient to provide appropriate protection for the physical integrity of individuals in such a vulnerable position as the applicant (see Storck v. Germany, no. 61603/00, § 150, ECHR 2005 V).

128. Having regard to the circumstances of the case as a whole, it cannot therefore be said that, by putting in place legal remedies which make it possible to establish liability on the part of medical staff, the Polish State complied with the positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion.

129. The Court therefore dismisses the Government's preliminary objection and concludes that the authorities failed to comply with their positive obligations to secure to the applicant the effective respect for her private life.

130. The Court concludes that there has been a breach of Article 8 of the Convention.

C. Alleged violation of Article 13 of the Convention

131. The applicant complained that the facts of the case gave rise to a breach of Article 13 of the Convention.

Article 13 reads as follows:

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

132. The Government submitted that Polish law provided for a procedure governing medical decisions concerning abortion on medical grounds. They referred to the 1993 Act and to the

Ordinance of the Minister of Health of 22 January 1997. They further referred to section 37 of the 1996 Medical Profession Act. They argued that it provided for the possibility of reviewing a therapeutic decision taken by a specialist.

133. The applicant submitted that the Polish legal framework governing the termination of pregnancy had proved to be inadequate. It had failed to provide her with reasonable procedural protection to safeguard her rights guaranteed by Article 8 of the Convention.

134. Article 13 has been consistently interpreted by the Court as requiring a remedy in domestic law in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, Boyle and Rice v. the United Kingdom, 27 April 1988, § 54, Series A no. 131). In the present case, there has been a finding of a violation of Article 8, and the complaint under Article 13[38] must therefore be considered.

135. However, the Court observes that the applicant's complaint about the State's failure to put in place an adequate legal framework allowing for the determination of disputes arising in the context of the application of the 1993 Act in so far as it allowed for legal abortion essentially overlaps with the issues which have been examined under Article 8. The Court has found a violation of this provision on account of the State's failure to meet its positive obligations. It holds that no separate issue arises under Article 13 of the Convention.

D. Alleged violation of Article 14 of the Convention taken in conjunction with Article 8

136. The applicant complained that the facts of the case gave rise to a breach of Article 14 of the Convention taken in conjunction with Article 8. In her case, Article 8 was applicable and therefore Article 14 could be relied on.

Article 14 of the Convention reads as follows:

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

1. The parties' submissions

(a) The applicant

137. The applicant pointed out that the Court had repeatedly held that the accessory nature of Article 14 of the Convention meant that a complaint about discrimination had to fall within the scope of a Convention right.

138. The applicant further argued that she had not been given a meaningful opportunity to participate in the investigations, despite the fact that the prosecuting authorities had been fully aware of the problems with her eyesight. It was her near-blindness which had formed the very basis of her complaint that a criminal offence had been committed. In such a situation, she argued, the failure to provide her with effective access to the documents of the criminal investigation or another form of assistance had prevented her from participating effectively in the proceedings.

The applicant was of the view that the investigation carried out by the authorities had been characterised by a number of important failings. Firstly, the first-instance prosecutor had not heard evidence from a crucial witness in the case, namely Dr R.D. Secondly, the prosecutor's decision to discontinue the investigation had relied heavily on the report submitted by three experts from the Białystok Medical Academy. However, this report could not be viewed as reliable as it had been prepared on the basis of a short examination of the applicant by only one of the experts (an ophthalmologist). The other two experts had limited themselves to an examination of the applicant's medical records. Thirdly, the applicant had effectively been precluded from exercising her procedural rights, such as submitting requests to obtain evidence in support of her complaint. This had been caused by the authorities' failure to accommodate in any way the applicant's disability which had prevented her from reading the case file of the investigation. Fourthly, the district prosecutor had not given any consideration to the certificate issued by the GP, Dr O.R.G., and had failed to consider the fact that the doctors had recommended sterilisation to the applicant before the second and third delivery.

The applicant submitted that the reasoning of the second instance prosecutor had failed to address essential arguments which she had raised in her appeal. The authorities had attached little weight to her particular vulnerability as a disabled person suffering from a very severe eyesight impairment bordering on blindness. She maintained that, as a result, she had not been involved in the investigation to a degree sufficient to provide her with the requisite protection of her interests.

139. The applicant concluded that the failure of the authorities to accommodate reasonably her disability during the investigations had amounted to discrimination on the ground of her disability.

(b) The Government

140. The Government argued firstly that a violation of substantive rights and freedoms protected by the Convention would first have to be established before a complaint of a violation of Article 14 taken in conjunction with a substantive provision of the Convention could be examined.

141. The Government were further of the view that the investigations of the applicant's complaint that a criminal offence had been committed in connection with the refusal to perform an abortion were conducted with diligence. The prosecutor had questioned all witnesses who could submit evidence relevant to the case. The prosecutor had not interviewed Dr R.D. because he had not considered it necessary in view of the fact that three experts had stated in their opinion that there had been no causal link between the refusal to terminate the pregnancy and the subsequent deterioration of the applicant's eyesight.

142. The Government argued that the decision to discontinue the investigations had been justified since it had been based on that expert opinion. They stressed in this connection that the experts had been acquainted with the applicant's medical records.

143. The Government further submitted that on 6 June 2001 the applicant had been informed by the prosecutor of her rights and obligations as a party to criminal proceedings. Thus, she had known that if she had had any problem examining the case file because of her bad eyesight, she could at any stage of the proceedings have applied for a legal aid lawyer to be assigned to the case.

2. The Court's assessment

144. The Court, having regard to its reasons for finding a violation of Article 8 above and for rejecting the Government's preliminary objection, does not consider it necessary to examine the applicant's complaints separately under Article 14 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

145. 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

146. The applicant argued that the outcome of the events complained of had been extremely severe. She had become almost blind and had been officially declared to be significantly disabled. She needed constant care and assistance in her everyday life. She had also been told that her condition was irreversible. The loss of her eyesight had had a devastating effect on her ability to take care of her children and to work.

147. The applicant claimed compensation for pecuniary damage in the amount of 36,000 euros (EUR) (144,000 Polish zlotys (PLN)). This sum consisted of the estimated future medical expenses she would be obliged to bear in connection with her condition. She estimated her expenditure on adequate medical treatment to be approximately PLN 300 per month. This amount covered regular medical visits, at a cost of approximately PLN 140 per visit, and also medication (including antidepressants) which the applicant was required to take in order to prevent a further deterioration of her condition. The total expenditure has been estimated on the basis of the assumption of a life expectancy of 79 years in Poland as adopted by the World Health Organisation.

148. The applicant further requested the Court to award her compensation in the amount of EUR 40,000 for the non pecuniary damage she had suffered, which consisted of pain, suffering, distress and anguish she had experienced and continued to experience in connection with the circumstances complained of.

149. The Government were of the view that the applicant had not sustained pecuniary damage in the amount claimed, which was purely speculative and exorbitant. It was impossible to assess the medical expenses, if any, that would be incurred by the applicant in the future.

150. As to the applicant's claim for non pecuniary damage, the Government submitted that it was excessive and should therefore be rejected.

151. The Court observes that the applicant's claim for pecuniary damage was based on the alleged negative impact on her health suffered as a result of the refusal to terminate the pregnancy. In this connection, it notes that it has found that it cannot speculate on whether the doctors' conclusions as to whether the applicant's pregnancy would or would not lead to a future deterioration of her eyesight were correct (see paragraph 119 above). Consequently, the Court rejects the applicant's claim for just satisfaction for pecuniary damage.

152. On the other hand, the Court, having regard to the applicant's submissions, is of the view that she must have experienced considerable anguish and suffering, including fear about her physical capacity to take care of another child and to ensure its welfare and happiness, which would not be satisfied by a mere finding of a violation of the Convention. Having regard to the circumstances of the case seen as a whole and deciding on an equitable basis, the Court awards the applicant EUR 25,000 for non pecuniary damage.

B. Costs and expenses

153. The applicant claimed reimbursement of the costs and expenses incurred in the proceedings before the Court. The applicant had instructed two Polish lawyers and two lawyers from Interights, the International Centre for the Legal Protection of Human Rights in London, to represent her before the Court.

154. She argued that it had been well-established in the Court's case law that costs could reasonably be incurred by more than one lawyer and that an applicant's lawyers could be situated in different jurisdictions (see Kurt v. Turkey, 25 May 1998, Reports 1998 III, and Yaşa v. Turkey, 2 September 1998, Reports 1998 VI). Certain consequences flow from the involvement of foreign lawyers. The fee levels in their own jurisdiction may be different from those in the respondent State. In Tolstoy Miloslavsky v. the United Kingdom, the Court stated that "given the great differences at present in rates of fees from one Contracting State to another, a uniform approach to the assessment of fees ... does not seem appropriate" (13 July 1995, § 77, Series A no. 316 B).

155. The applicant claimed, with reference to invoices her lawyers had submitted, EUR 10,304 in respect of fees and costs incurred in connection with work carried out by Ms Gąsiorowska and Ms Wilkowska-Landowska. The legal fees, in the amount of EUR 10,050, corresponded to 201 hours spent in preparation of the applicant's submissions in the case, at an hourly rate of EUR 50. The applicant further submitted that the costs incurred in connection with the case, in the amount of EUR 254, consisted of travel expenses and accommodation for Ms Wilkowska-Landowska in connection with the hearing held in the case. The applicant further claimed reimbursement, again with reference to an invoice, of legal fees and costs incurred in connection with work carried out by Ms Coomber and Ms Vandova, in the total amount of EUR 11,136. The legal fees corresponded to 98 hours spent in preparation of the applicant's submissions, at an hourly rate of EUR 103.60. The total amount of legal fees claimed by the applicant was therefore EUR 21,186. The applicant relied on invoices of legal fees submitted to the Court. Further costs, in the amount of EUR 959,

consisted of travel expenses and accommodation incurred in connection with the hearing held in the case before the Strasbourg Court.

156. The Government requested the Court to decide on the reimbursement of legal costs and expenses only in so far as these costs and expenses were actually and necessarily incurred and were reasonable as to quantum. The Government further submitted that the applicant had not submitted invoices in respect of accommodation costs or travel expenses claimed by her representatives. In any event, the Government were of the view that the amounts claimed by the applicant were exorbitant, bearing in mind the costs awarded by the Court in similar cases.

157. The Government also requested the Court to assess whether it was reasonable for the applicant to receive reimbursement of legal costs and expenses borne by four lawyers.

158. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, Nikolova v. Bulgaria [GC], no. 31195/96, § 79, ECHR 1999-II, and Smith and Grady v. the United Kingdom (just satisfaction), nos. 33985/96 and 33986/96, § 28, ECHR 2000 IX). In the light of the documents submitted, the Court is satisfied that the legal costs concerned in the present case have actually been incurred.

159. As to the amounts concerned, the Court first points out that it has already held that the use of more than one lawyer may sometimes be justified by the importance of the issues raised in a case (see, among many other authorities, The Sunday Times v. the United Kingdom (Article 50), 6 November 1980, § 30, Series A no. 38). The Court notes, in this connection, that the issues involved in the present case have given rise to a heated and ongoing legal debate in Poland. It further refers to its finding in its admissibility decision that the issues linked to the exhaustion of domestic remedies were complex enough to be examined together with the merits of the case (see paragraph 61 above). It is also relevant to note in this connection the scarcity of relevant case-law of the Polish courts. The Court is further of the view that the Convention issues involved in the case were also of considerable novelty and complexity.

160. On the whole, having regard both to the national and the Convention law aspects of the case, the Court is of the opinion that they justified recourse to four lawyers.

161. On the other hand, while acknowledging the complexity of the case, the Court is however not persuaded that the number of hours' work claimed by the applicant can be said to

be a fair reflection of the time actually required to address the issues raised by the case. As to the hourly rates claimed, the Court is of the view that they are consistent with domestic practice in both jurisdictions where the lawyers representing the applicant practise and cannot be considered excessive.

162. However, the Court notes that all four lawyers attended the hearing before the Court. It does not consider that this part of the expenses can be said to have been "necessarily" incurred, given that the applicant had been granted legal aid for the purpose of the proceedings before the Court.

163. The Court, deciding on an equitable basis and having regard to the details of the claims submitted, awards the applicant a global sum of EUR 14,000 in respect of fees and expenses. This amount is inclusive of any value-added tax which may be chargeable, less the amount of EUR 2,442.91 paid to the applicant by the Council of Europe in legal aid.

C. Default interest

164. 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.

6.2.4. The Court's decision

1. Dismisses unanimously the Government's preliminary objection;

2. Holds unanimously that there has been no violation of Article 3[39] of the Convention;

3. Holds by six votes to one that there has been a violation of Article 8[21] of the Convention in that the State failed to comply with its positive obligations to secure to the applicant the effective respect for her private life;

4. Holds unanimously that it is not necessary to examine separately whether there has been a violation of Article 13[38] of the Convention;

5. Holds unanimously that it is not necessary to examine separately the applicant's complaint under Article 14[45] of the Convention taken in conjunction with Article 8;

6. Holds unanimously

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2[9] of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable:

(i) EUR 25,000 (twenty-five thousand euros) in respect of non pecuniary damage;

(ii) EUR 14,000 (fourteen thousand euros) in respect of costs and expenses, less EUR 2,442.91 (two thousand four hundred and forty-two euros and ninety-one cents) paid to the applicant by the Council of Europe in legal aid;

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

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

Done in English, and notified in writing on 20 March 2007, pursuant to Rule 77 §§ 2 and 3[53] of the Rules of Court.

6.3. Case of Szuluk V. The United Kingdom[16]

6.3.1. The procedure

1. The case originated in an application (no. 36936/05) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34[34] of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Edward Szuluk ("the applicant"), on 14 October 2005.

[16] Fourth Section; Case Of Szuluk V. The United Kingdom; (Application No. 36936/05);Strasbourg 2 June 2009;Final 02/09/2009

2. The applicant, who had been granted legal aid, was represented by Mr J. Scott, a lawyer practising at Langleys Solicitors in York. The United Kingdom Government ("the Government") were represented by their Agent, Ms H. Moynihan of the Foreign and Commonwealth Office, London.

3. The applicant alleged that the monitoring of his medical correspondence whilst he was in prison breached his right to respect for his correspondence and private life under Article 8 of the Convention.

4. On 7 February 2008 the President of the Chamber decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

6.3.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1955 and is currently in prison in Staffordshire.

1. The applicant's brain haemorrhage and initial confidentiality of his medical correspondence

6. On 30 November 2001 the applicant was sentenced by a Crown Court to a total of fourteen years' imprisonment for conspiracy to supply Class A drugs and two offences of possession of a Class A drug with intent to supply.

7. On 6 April 2001, while on bail pending trial, the applicant suffered a brain haemorrhage for which he underwent surgery. On 5 July 2002 he underwent further surgery. Following his discharge back to prison, he required monitoring and was required to go to hospital every six months for a specialist check-up by a neuro-radiologist.

8. In 2002 the applicant was held in a high security prison which held category A (high risk) prisoners as well as category B prisoners such as himself. As a result, he fell within the provisions of a general order, Prison Service Order (PSO) 1000 which applied to all prisoners of whatever security category who were being "held in a unit which held category A prisoners" (see paragraph 28 below).

9. The applicant wished to correspond confidentially with his specialist to ensure that he would receive the necessary medical treatment and supervision in prison. He expressed his

concerns about his medical correspondence with his external specialist being read and applied to the prison governor for a direction that such correspondence should be accorded confidentiality.

10. On 18 September 2002 the governor of the prison in which the applicant was being detained agreed to the applicant's request. It was decided that the applicant's medical correspondence would not be read provided certain conditions were met. All outgoing and incoming mail was to be marked "medical in confidence." Outgoing correspondence would be checked to ensure that it was being sent to a nominated address and incoming mail was to be marked with a distinctive stamp of the relevant health authority.

2. Subsequent monitoring of the applicant's correspondence

11. The prison governor subsequently reconsidered his decision after seeking advice from HM Prison Service Headquarters. On 28 November 2002 the prison governor informed the applicant that he had been advised that it was necessary to examine his medical correspondence for illicit enclosures. All correspondence between the applicant and his external medical specialist would be directed, unopened, to the prison medical officer. The latter would examine the content of the envelope in order to ascertain its medical status and then reseal it. Incoming and outgoing correspondence would then be sent to the applicant and his medical specialist respectively.

12. The applicant contested the decision to monitor his medical correspondence. He was concerned that his attempts to confirm that he was receiving adequate treatment in hospital might be regarded by the prison medical officer as criticism and that this might inhibit his relationship with his external medical specialist.

3. Judicial review proceedings

13. On 4 August 2003 the applicant applied for leave to apply for judicial review of the prison governor's decision of 28 November 2002. On 20 February 2004 the presiding High Court judge, Mr Justice Collins, allowed the applicant's claim for judicial review.

14. The Prison Service had submitted, inter alia, that it would be difficult to make the necessary arrangements to permit medical correspondence to remain confidential. They argued that there were a large number of health bodies with which a prisoner might wish to correspond and that some health bodies might lack franking machines that would enable prisons to identify the authenticity of the sender.

15. Mr Justice Collins concluded that there were exceptional circumstances in the applicant's case. The exceptional circumstances were said to be the life-threatening nature of the applicant's condition and his desire to ensure that his treatment in prison did not affect him adversely. The applicant, understandably, wanted to obtain reassurance from the medical specialist who was involved in treating him and from whom he required continual medical care, in the form of biannual specialist observations. Mr Justice Collins also found that the initial decision of the prison governor to enable the applicant to correspond on a confidential basis with his specialist indicated that it was reasonable to permit such confidential correspondence. The evidence of the Prison Service as to the practical problems involved in making arrangements to enable confidential medical correspondence were not directly material in an exceptional case such as the present one.

16. In the circumstances, and emphasising that this was a case which turned on its own exceptional facts, Mr Justice Collins considered it appropriate to quash the prison governor's decision of 28 November 2002. He granted the applicant a declaration that "the governor of whatever prison the [applicant] resides [in] should make a decision in accordance with the principles made in light of this judgment."

4. The proceedings before the Court of Appeal

17. On 29 October 2004 the Court of Appeal allowed the appeal by the Secretary of State and the prison governor. Lord Justice Sedley gave the judgment of the Court. It was noted that there was no dispute that the reading of prisoners' correspondence was governed by law, and that it was directed to the prevention of crime and the protection of the rights and freedoms of others. The issue to be decided was whether, in the language of Article 8 § 2[21] of the Convention, the reading of the applicant's correspondence was proportionate. While the prison governor's initial decision to allow confidentiality to the applicant's medical correspondence with his external specialist strongly suggested that its exemption from Chapter 36.21 of PSO 1000 would be a perfectly reasonable course, the onus still remained on the applicant to establish that anything more invasive would constitute a disproportionate interference with his Article 8[21] rights.

18. The Court of Appeal concluded that though the procedure set out in the prison governor's letter of 28 November 2002 amounted to an interference with the applicant's right to respect for his correspondence, the interference was justified and proportionate under Article 8 § 2 of the Convention. It considered that though it was of course possible to verify the existence, address and qualifications of the applicant's medical specialist (whose bona fides was not in

question), there was no way of ensuring that the latter would not be intimidated or tricked into transmitting illicit messages. While the same was true of, for example, the secretarial staff of MPs (Members of Parliament), the importance of unimpeded correspondence with MPs outweighed the risk. By contrast, as regards correspondence with doctors, the prisoner's health was the concern and the immediate responsibility of the Prison Medical Service. Though it may well be the case that allowing the prison medical officer to read the prisoner's correspondence with an outside medical practitioner might lead the former to "encounter criticism of his own performance", it was inherently unlikely that this would carry the same degree of risk that might attend the reading by a discipline officer of a letter of complaint to the Prisons Ombudsman. Moreover, if it related to the prisoner's well-being it was probable that the prison medical officer ought in any event to know about it.

19. The Court of Appeal concluded that the monitoring of the applicant's medical correspondence was a proportionate interference with his Article 8 rights, although it did not exclude the possibility that in another case it might be disproportionate to refuse confidentiality to medical correspondence in the prison context. The Court of Appeal based its conclusion on the following factors. First, the monitoring of the applicant's medical correspondence answered legitimate and pressing policy objectives which were clearly stated in Chapter 36.1 of PSO 1000 (see paragraph 28 below). Secondly, short of withdrawing all scrutiny, they considered that there was no less invasive measure available to the prison service. Thirdly, the reading of the applicant's medical correspondence which was limited to the prison medical officer was not in their view excessive. Fourthly, the process by which the measure had been decided upon was not found to be arbitrary. In particular, it had not been the result of the rigid application of a policy. The withdrawal of monitoring had not only been considered but had been implemented until, upon reconsideration, monitoring had been resumed. The interference in question had not denied the essence of the applicant's Article 8 rights as it related to one correspondent only (the external medical specialist) and it confined the interference to a medically qualified reader (the prison medical officer). It was recognised that there was an inescapable risk of abuse, for example, if the applicant's prison life or treatment was made more difficult because of what he was observed to be writing. However, the risk, having been minimised by virtue of confining surveillance to the prison medical officer, was outweighed by the aforementioned factors.

5. Petition to the House of Lords

20. On 18 April 2005 the applicant's petition for leave to appeal was refused by the House of Lords on the ground that the petition did not raise an arguable point of law of general public importance.

6. The applicant's current conditions of imprisonment

21. Since 22 May 2007 the applicant has been located in a Category B prison in Staffordshire.

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. The Secretary of State is responsible for the management of the prison system in England and Wales (Prison Act 1952, sections 1 and 4).

23. Until November 2007 each prison was required to appoint a medical officer (Prison Act 1952, section 7(1)). The medical officer was a prison officer who had to be a registered medical practitioner (Prison Act 1952, section 4). This requirement was removed by section 25(1) of the Offender Management Act 2007 which came into force on 1 November 2007. Prison healthcare is now generally integrated with, and commissioned by, the National Health Service (NHS).

24. Section 47(1) of the Prison Act 1952 authorises the Secretary of State to make rules for the regulation and management of prisons and for the classification, treatment, employment, discipline and control of persons required to be detained therein. Such rules are made by statutory instrument, laid before Parliament, and are subject to annulment in pursuance of a resolution of either House of Parliament (Prison Act 1952, section 52(1) and the Criminal Justice Act 1967, section 66(4)).

25. Prisoners are classified in accordance with directions of the Secretary of State (Prison Rules SI 1999/728 rule 7(1)). Prisoners are classified in accordance with Prison Service Order (PSO) 0900. Paragraph 1.1.1 of PSO 0900 contains the definitions of the four categories of prisoner (A, B, C and D). Category A is applied to prisoners whose escape would be highly dangerous to the public or the police or the security of the State, no matter how unlikely that escape might be, and for whom the aim must be to make escape impossible. Category B is applied to prisoners for whom the very highest conditions of security are not necessary, but for whom escape must be made very difficult.

26. Rule 34 of the Prison Rules is headed “Communications Generally” It provides as relevant:

"(1) Without prejudice to sections 6 and 19 of the Prison Act 1952 and except as provided by these Rules, a prisoner shall not be permitted to communicate with any person outside the prison, or such person with him, except with the leave of the Secretary of State or as a privilege under rule 8.

(2) Notwithstanding paragraph (1) above, and except as otherwise provided in these Rules, the Secretary of State may impose any restriction or condition, either generally or in a particular case, upon the communications to be permitted between a prisoner and other persons if he considers that the restriction or condition to be imposed—

(a) does not interfere with the convention rights of any person; or

(b) (i) is necessary on grounds specified in paragraph (3) below;

(ii) reliance on the grounds is compatible with the convention right to be interfered with; and

(iii) the restriction or condition is proportionate to what is sought to be achieved.

(3) The grounds referred to in paragraph (2) above are—

(a) the interests of national security;

(b) the prevention, detection, investigation or prosecution of crime;

(c) the interests of public safety;

(d) securing or maintaining prison security or good order and discipline in prison;

(e) the protection of health or morals;

(f) the protection of the reputation of others;

(g) maintaining the authority and impartiality of the judiciary; or

(h) the protection of the rights and freedoms of any person.

... (8) In this rule – ...

(c) references to convention rights are to the convention rights within the meaning of the Human Rights Act 1998."

27. Rule 39 of the Prison Rules deals with correspondence with legal advisers and courts and provides that such correspondence may only be opened, read or stopped by the governor in

accordance with the provision of that rule, namely when the governor has cause to believe either that the correspondence contains an illicit enclosure or that its contents endanger prison security or the safety of others or are otherwise of a criminal nature.

28. Chapter 36.1 of PSO 1000, which was applicable at the relevant time and which dealt with prisoner communications in connection with those who were in Category A, or who were in prisons which held Category A prisoners, provided as follows:

"Prison management must provide facilities for prisoners to maintain contact with family and friends. Prisoners' rights to respect for their private and family life and correspondence are also protected by Article 8 of the European Convention on Human Rights. The Prison Service's duty to protect the public allows us to interfere in this privacy in order to minimise the possibility that, in communicating with the outside world, prisoners:

(i) plan escapes or disturbances,

(ii) jeopardise the security and good order of the prison;

(iii) engage in offences against criminal law or prison discipline;

(iv) jeopardise national security;

(v) infringe the rights and freedoms of others."

29. Chapter 36.21 of PSO 1000 read:

"All correspondence, other than correspondence protected by PR39 [that is correspondence with legal advisors] or that with the Samaritans, must be read as a matter of routine in the following cases:

(i) all prisoners of whatever security category, held in a unit which itself holds Category A prisoners."

30. Chapter 36.22 continued as follows:

"Routine reading is necessary in these cases in order to prevent escape and, in the case of Category A prisoners, in the interests of public safety. It is also necessary in preventing crime and disorder, for the protection of the rights and freedoms of others, and, in some cases, necessary in the interests of national security or the economic well being of the country."

31. Prison Service Order 4411 ("PSO 4411") is entitled "Prisoner Communications: Correspondence". It came into operation on 5 September 2007. So far as is material to the present case it reflects the practice and procedure in operation between 2002 to 2004.

32. Special treatment was at the relevant time and still is given to various forms of correspondence apart from that with legal advisers, specifically covered by rule 39 of the Prison Rules and that with the Samaritans, specifically mentioned in chapter 36.21 of PSO 1000. Correspondence with, inter alia, the courts, the Bar Council, the Law Society, the Criminal Cases Review Commission, the Office for the Supervision of Solicitors, the Office of the Parliamentary Commissioner, the Office of the Legal Services Ombudsman, the Probation Ombudsman, the Commission for Racial Equality and with Members of Parliament are generally treated as confidential.

33. PSO 4411 introduced a new category of correspondence subject to confidential handling arrangements. Chapter 5.1 includes the Healthcare Commission as one of the bodies with which a prisoner is entitled to correspond confidentially. The Healthcare Commission is the independent watchdog for healthcare in England. It assesses and reports on the quality of services provided by the NHS and the independent health care sector.

III. RELEVANT INTERNATIONAL MATERIAL

34. Chapter III, paragraph 34 of the CPT's (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) Standards published in October 2006 states the following:

"While in custody, prisoners should be able to have access to a doctor at any time, irrespective of their detention regime ... The health care service should be so organised as to enable requests to consult a doctor to be met without undue delay.

Prisoners should be able to approach the health care service on a confidential basis, for example, by means of a message in a sealed envelope. Further, prison officers should not seek to screen requests to consult a doctor."

35. Paragraph 50 of the CPT Standards provides:

"Medical secrecy should be observed in prisons in the same way as in the community."

6.3.3. The law

I. ALLEGED VIOLATION OF ARTICLE 8[21] OF THE CONVENTION

36. The applicant complained that the prison authorities had intercepted and monitored his medical correspondence in breach of Article 8 of the Convention, which reads as follows:

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

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

37. The Government contested that argument.

A. Admissibility

38. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3[47] of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

39. The Government accepted that the checking of the applicant's correspondence with his external medical specialist amounted to an interference with his right to respect for his correspondence under Article 8 § 1 of the Convention.

40. Relying on the judgment of the Court of Appeal (particularly its findings set out in paragraph 19 above), the Government submitted that the interference was justified and proportionate under Article 8 § 2 of the Convention. They argued that the applicable legal framework provided clear and structured guidance on the matter, which paid full regard to the requirements of the Convention. They asserted that the procedure devised was tailored to the circumstances of the applicant's case. Moreover, the disclosure of the applicant's medical

correspondence was limited to the prison medical officer who was himself bound by duties of medical confidentiality. They distinguished the present case, which involved a circumscribed reading of a single category of a prisoner's correspondence by the prison medical officer, from cases which involved a blanket reading of prisoners' correspondence (such as Petra v. Romania, 23 September 1998, § 37, Reports of Judgments and Decisions 1998 VII and Jankauskas v. Lithuania, no. 59304/00, §§ 21-22, 24 February 2005) which had been held to be in breach of Article 8 of the Convention.

41. The applicant argued that the monitoring of his correspondence was disproportionate. There was no suggestion in the Government's observations of any specific ground to suggest that he was likely to abuse correspondence with his doctor. PSO 4411, to which the Government referred as being the policy governing correspondence, recognised that prisoners could correspond on a confidential basis with a number of bodies including the Healthcare Commission (which considered complaints concerning medical treatment) and the Samaritans (who provided counselling for the suicidal). According to PSO 4411, such correspondence could only be opened where there were reasonable grounds to believe that it contained an illicit enclosure.

42. The applicant further contended that there was an obvious risk that monitoring of medical correspondence would inhibit what a prisoner conveyed, thereby harming the quality of advice received. It was such concerns that had led to legal correspondence being accorded confidentiality. PSO 4411 demonstrated that prison security was not undermined by enabling prisoners to write on a confidential basis to lawyers and other professionals such as the Healthcare Commission. It was difficult to see why the risk of abuse of correspondence with doctors should be any higher than the risk of abuse involved in correspondence with lawyers.

2. The Court's assessment

43. The Court notes that it is clear, and indeed not contested, that there was an “interference by a public authority” with the exercise of the applicant's right to respect for his correspondence guaranteed by Article 8 § 1[21]. Such an interference will contravene Article 8 unless it is “in accordance with the law”, pursues one or more of the legitimate aims referred to in paragraph 2 and is “necessary in a democratic society” in order to achieve them (see, among other authorities, Silver and Others v. the United Kingdom, 25 March 1983, Series A no. 61, § 84, Campbell v. the United Kingdom, 25 March 1992, Series A no. 233, § 34, Petrov

v. Bulgaria, no. 15197/02, § 40, 22 May 2008 and Savenkovas v. Lithuania, no. 871/02, § 95, 18 November 2008).

44. It further observes that it is accepted by the parties that the reading of the applicant's correspondence was governed by law and that it was directed to the prevention of crime and the protection of the rights and freedoms of others (see paragraph 17 above). The issue that falls to be examined is whether the interference with the applicant's correspondence was "necessary in a democratic society".

45. The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether an interference is "necessary in a democratic society" regard may be had to the State's margin of appreciation (see, amongst other authorities, Campbell, cited above, § 44, Petrov v. Bulgaria § 44 cited above and Dickson v. the United Kingdom [GC], no. 44362/04, § 77, ECHR 2007). While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention.

46. In assessing whether an interference with the exercise of the right of a convicted prisoner to respect for his correspondence was "necessary" for one of the aims set out in Article 8 § 2, regard has to be paid to the ordinary and reasonable requirements of imprisonment. Some measure of control over prisoners' correspondence is called for and is not of itself incompatible with the Convention (see Silver and Others, cited above, § 98, Kwiek v. Poland, no. 51895/99, § 39, 30 May 2006 and Ostrovar v. Moldova, no. 35207/03, § 105, 13 September 2005, among other authorities). However, the Court has developed quite stringent standards as regards the confidentiality of prisoners' legal correspondence. In paragraph 43 of its judgment in the case of Petrov v. Bulgaria (cited above), the Court enunciated its principles as regards legal correspondence in the prison context as follows:

"correspondence with lawyers ... is in principle privileged under Article 8 of the Convention and its routine scrutiny is not in keeping with the principles of confidentiality and professional privilege attaching to relations between a lawyer and his client (see Campbell, cited above, §§ 47 and 48). The prison authorities may open a letter from a lawyer to a prisoner solely when they have reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose. The letter should, however, only be opened and should not be read. Suitable guarantees preventing the reading of the letter should be

provided, such as opening the letter in the presence of the prisoner. The reading of a prisoner's mail to and from a lawyer, on the other hand, should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as "reasonable cause" will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication is being abused (see Campbell, cited above, § 48)."

47. In the present case, the interference took the form of the monitoring of the applicant's correspondence with his external specialist doctor, which concerned his life-threatening medical condition. The Court recalls the case of Z. v. Finland, judgment of 25 January 1997, Reports of Judgments and Decisions 1997–I, in which it emphasised that:

"the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general.

Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health..."

48. Moreover, as the Court has recognised in its case-law under Article 3^{39} of the Convention, notwithstanding the practical demands of imprisonment, detainees' health and well-being must be adequately served by, amongst other things, providing them with the requisite medical assistance (see in this regard, Hurtado v. Switzerland, judgment of 28 January 1994, Series A no. 280-A, opinion of the Commission, § 79 and Mouisel v. France, no. 67263/01, § 40, ECHR 2002 IX). In this context, the Court refers also to the CPT's standards as regards the importance of medical confidentiality in the prison context (see paragraphs 34 and 35 above).

49. Turning to the facts of the case, the Court considers it significant that the applicant is suffering from a life-threatening condition for which he has required continuous specialist

medical supervision by a neuro radiologist since 2002. In this connection, it takes note of the Court of Appeal's recognition that the monitoring of the applicant's medical correspondence with his specialist, albeit limited to the prison medical officer, involved an "inescapable risk of abuse". It further notes that the Court of Appeal was careful not to exclude the possibility that in another case it might be disproportionate to refuse confidentiality to a prisoner's medical correspondence (see paragraph 19 above) and its acceptance that allowing the prison medical officer to read such correspondence might lead him to encounter criticism of his own performance, which in turn could create difficulties in respect of the applicant's prison life and treatment. It should not be overlooked that the prison medical officer, although a registered medical practitioner was, until the coming into force of section 25 (1) of the Offender Management Act 2007, a prison officer. This has now changed as all prison health-care is now provided by an external NHS general practitioner (GP) (see paragraph 23 above).

50. This being so, the Court notes the applicant's submission before the domestic courts and before this Court that the monitoring by the prison medical officer of his correspondence with his medical specialist inhibited their communication and prejudiced reassurance that he was receiving adequate medical treatment whilst in prison. Given the severity of the applicant's medical condition, the Court, like Mr Justice Collins upon hearing the applicant's claim for judicial review, finds the applicant's concerns and wish to check the quality of the treatment he was receiving in prison to be understandable.

51. On that account, the Court notes the observations of both Mr Justice Collins and the Court of Appeal that the prison governor's initial decision to grant the applicant's medical correspondence confidentiality indicated, or in the exact words of the Court of Appeal, "strongly suggested" that it "would be a perfectly reasonable course" (see paragraphs 15 and 17 above). It further takes into consideration the procedure that had been first established by the prison governor on 18 September 2002, whereby the applicant's medical correspondence would not be read provided that certain conditions were met (see paragraph 10 above). It is accepted that there were never any grounds to suggest that the applicant had ever abused the confidentiality afforded to his medical correspondence in the past or that he had any intention of doing so in the future. Furthermore, the Court considers it relevant that, although the applicant was detained in a high security prison which also held Category A (high risk prisoners), he was himself always defined as Category B (prisoners for whom the highest security conditions are not considered necessary, see paragraph 25 above).

52. Furthermore, the Court does not consider the Prison Service's arguments as to the general difficulties involved in facilitating confidential medical correspondence for prisoners (see paragraph 14 above) to be of particular relevance to this case. In the present case, the applicant only wished to correspond confidentially with one named medical specialist and the Court of Appeal accepted that her address and qualifications were easily verifiable. Moreover, the specialist in question appeared to have been willing and able to mark all correspondence with the applicant with a distinctive stamp, and had demonstrably done so prior to the prison governor's revision of his decision on 28 November 2002. The Court does not share the Court of Appeal's view that the risk that the applicant's medical specialist, whose bona fides was never challenged, might be "intimidated or tricked" into transmitting illicit messages was sufficient to justify the interference with the applicant's Article 8 rights in the exceptional circumstances of the present case. This is particularly so since the Court of Appeal further acknowledged that though the same risk was inherent in the case of secretarial staff of MPs (see paragraph 18 above), the importance of unimpeded correspondence with MPs outweighed that risk.

53. In light of the severity of the applicant's medical condition, the Court considers that uninhibited correspondence with a medical specialist in the context of a prisoner suffering from a life-threatening condition should be afforded no less protection than the correspondence between a prisoner and an MP. In so finding, the Court refers to the Court of Appeal's concession that it might, in some cases, be disproportionate to refuse confidentiality to a prisoner's medical correspondence and the changes that have since been enacted to the relevant domestic law. The Court also has regard to the submissions of the applicant on this point, namely that the Government have failed to provide sufficient reasons why the risk of abuse involved in correspondence with named doctors whose exact address, qualifications and bona fides are not in question should be perceived as greater than the risk involved in correspondence with lawyers.

54. In view of the above, the Court finds that the monitoring of the applicant's medical correspondence, limited as it was to the prison medical officer, did not strike a fair balance with his right to respect for his correspondence in the circumstances.

55. There has accordingly been a violation of Article 8 of the Convention.

2. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. Article 41 of the Convention provides:

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

A. Damage

57. The applicant claimed 10,000 pounds sterling (GBP) (approximately 11,450 euros (EUR)) in respect of non-pecuniary damage.

58. The Government submitted that the amount claimed was excessive. They noted that in previous Article 8 cases, which involved interference with a prisoner's correspondence, the finding of a violation was considered sufficient to constitute just satisfaction for the applicant and no damages were awarded.

59. The Court considers that in the particular circumstances of the case, the finding of a violation would not constitute just satisfaction for non pecuniary damage sustained by the applicant. Having regard to the violation found and ruling on an equitable basis, the Court awards the applicant EUR 1,000 in respect of non-pecuniary damage (see Čiapas v. Lithuania, no. 4902/02, § 30, 16 November 2006 and Zborowski v. Poland (no. 2), no. 45133/06, § 48, 15 January 2008).

B. Costs and expenses

60. The applicant also claimed GBP 6,253.25 (approximately EUR 7,162) for the costs and expenses incurred before the Court.

61. The Government contended that the applicant's claims for legal costs incurred seemed excessive for this type of case, particularly since his solicitors were not based in London. They suggested that the sum of GBP 4,500 (approximately 5,062 EUR) for legal costs would be a more reasonable figure.

62. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 6,000 for the proceedings before this Court.

C. Default interest

63. 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.

6.3.4. The Court's decision

1. Declares the application admissible;

2. Holds that there has been a violation of Article 8[21] of the Convention;

3. Holds

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2[57] of the Convention, EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 6,000 (six thousand euros) for costs and expenses, plus any tax that may be chargeable to the applicant, to be converted into pounds sterling at the rate applicable at the date of settlement;

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

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

6.4. Case of S. H. And Others V. Austria[17]

6.4.1. The procedure

1. The case originated in an application (no. 57813/00) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Austrian nationals, Ms S. H., Mr D.H., Ms. H. E.-G. and Mr M.G. ("the applicants"), on 8 May 2000. The President of the Chamber acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Mr H.F. Kinz and Mr W.L. Weh, both lawyers practising in Bregenz. The Austrian Government ("the Government") were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicants alleged in particular that the provisions of the Austrian Artificial Procreation Act prohibiting the use of ova from donors and sperm from donors for in vitro fertilisation, the only medical techniques by which they could successfully conceive children, violated their rights under Article 8 of the Convention read alone and in conjunction with Article 14.

4. By a decision of 15 November 2007 the Court declared the applications partly admissible.

5. Third-party comments were received from the German Government, which had exercised its right to intervene (Article 36 § 1^{1} of the Convention and Rule 44 § 1 (b)[58]).

6. A hearing on the merits of the application took place in public in the Human Rights Building, Strasbourg, on 28 February 2008 (Rule 59 § 3^{3}).

There appeared before the Court:

(a) for the Government

[17] First Section; Case Of S. H. And Others V. Austria;(Application No. 57813/00); Strasbourg 1 April 2010; Referral To The Grand Chamber 04/10/2010

6.4.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants were born in 1966, 1962, 1971 and 1971 respectively and live in L. and R.

8. The first applicant is married to the second applicant and the third applicant to the fourth applicant.

9. The first applicant suffers from fallopian-tube-related infertility (eileiterbedingter Sterilität). The second applicant, her husband, is also infertile.

10. The third applicant suffers from agonadism (Gonadendysgenesie), which means that she does not produce ova at all. Thus she is completely infertile but has a fully developed uterus. The fourth applicant, her husband, in contrast to the second applicant, can produce sperm fit for procreation.

11. On 4 May 1998 the first and third applicants lodged an application (Individualantrag) with the Constitutional Court (Verfassungsgerichtshof) for a review of the constitutionality of section 3(1) and section 3(2) of the Artificial Procreation Act (Fortpflanzungsmedizingesetz - see Relevant domestic law below).

12. The applicants argued before the Constitutional Court that they were directly affected by the above provisions. The first applicant submitted that she could not conceive a child by natural means; thus the only way open to her and her husband would be in vitro fertilisation using sperm from a donor. That medical technique was, however, ruled out by section 3(1) and section 3(2) of the Artificial Procreation Act. The third applicant submitted that she was also infertile. Suffering from agonadism, she did not produce ova at all. Thus, the only way open to her of conceiving a child was to resort to a medical technique of artificial procreation referred to as heterologous embryotransfer, which would entail implanting into her uterus an embryo conceived with ova from a donor and sperm from the fourth applicant. However, that method was not allowed under the Artificial Procreation Act.

13. The first and third applicants argued before the Constitutional Court that the impossibility of using the above-mentioned medical techniques for medically assisted conception was a breach of their rights under Article 8 of the Convention. They also relied on Article 12 of the Convention and on Article 7 of the Federal Constitution, which guarantees equal treatment.

14. On 4 October 1999 the Constitutional Court held a public hearing in which the first applicant, assisted by counsel, participated.

15. On 14 October 1999 the Constitutional Court decided on the first and third applicants' request. The Constitutional Court found that their request was partly admissible in so far as the wording concerned their specific case. In this respect, it found that the provisions of section 3 of the Artificial Procreation Act, which prohibited the use of certain procreation techniques, was directly applicable to the applicants' case without it being necessary for a decision by a court or administrative authority to be taken.

16. As regards the merits of their complaints the Constitutional Court considered that Article 8 was applicable in the applicants' case. Although no case-law of the European Court of Human Rights existed on the matter, it was evident, in the Constitutional Court's view, that the decision of spouses or a cohabiting couple to conceive a child and make use of medically assisted procreation techniques to that end fell within the sphere of protection under Article 8.

17. The impugned provisions of the Artificial Procreation Act interfered with the exercise of this freedom in so far as they limited the scope of permitted medical techniques of artificial procreation. As for the justification of such an interference, the Constitutional Court observed that the legislature, when enacting the Artificial Procreation Act, had tried to find a solution by balancing the conflicting interests of human dignity, the right to procreation and the well-being of children. Thus, it had enacted as leading features of the legislation that, in principle, only homologous methods – such as using ova and sperm from the spouses or the cohabiting couple itself – would be allowed and only methods which did not involve a particularly sophisticated technique and were not too far removed from natural means of conception. The aim was to avoid the forming of unusual personal relations such as a child having more than one biological mother (a genetic mother and one carrying the child) and to avoid the risk of exploitation of women.

18. The use of in vitro fertilisation as opposed to natural procreation raised serious issues as to the well-being of children thus conceived, their health and their rights, and also touched upon the ethical and moral values of society and entailed the risk of commercialisation and selective reproduction (Zuchtauswahl).

19. Applying the principle of proportionality under Article 8 § 2, however, such concerns could not lead to a total ban on all possible medically assisted procreation techniques, as the

extent to which public interests were concerned depended to a large extent on whether a heterologous or homologous technique was used.

20. In the Constitutional Court's view, the legislator had not overstepped the margin of appreciation afforded to member States when it established the permissibility of homologous methods as a rule and insemination using donor sperm as an exception. This compromise reflected the current state of medical science and the consensus in society. It did not mean, however, that these criteria were not subject to developments which the legislator would have to take into account in the future.

21. The legislator had also not neglected the interests of men and women who had to avail themselves of artificial procreation techniques. Besides strictly homologous techniques it had accepted insemination using sperm from donors. Such a technique had been known and used for a long time and would not bring about unusual family relationships. Further, the use of these techniques was not restricted to married couples but also included cohabiting couples. In so far, however, as homologous techniques were not sufficient for the conception of a child the interests of the individuals concerned ran counter to the above-mentioned public interest.

22. The Constitutional Court also found that for the legislator to prohibit heterologous techniques, while accepting as lawful only homologous techniques, was in accordance with the prohibition of discrimination as contained in the principle of equality. The difference in treatment between the two techniques was justified because, as pointed out above, the same objections could not be raised against the homologous method as against the heterologous one. As a consequence the legislator was not bound to apply strictly identical regulations to both. Also, the fact that insemination with donor sperm was allowed while ova donation was not did not raise a discrimination issue because again, as pointed out above, there was no risk of creating unusual relationships which might adversely affect the well-being of a future child as there was with heterologous insemination.

23. Since the impugned provisions of the Artificial Procreation Act were in line with Article 8 of the Convention and the principle of equality under the Federal Constitution, there had also been no breach of Article 12 of the Convention.

24. This decision was served on the first and third applicants' lawyer on 8 November 1999.

II. RELEVANT NON-CONVENTION MATERIAL

A. Domestic law: the Artificial Procreation Act

25. The Artificial Procreation Act (Fortpflanzungsmedizingesetz, Federal Law Gazette 275/1992) regulates the use of medical techniques for inducing conception of a child by means other than copulation (section 1(1)).

26. These methods comprise: (i) introduction of sperm into the reproductive organs of a woman, (ii) unification of ovum and sperm outside the body of a woman, (iii) introduction of viable cells into the uterus or fallopian tube of a woman and (iv) introduction of ovum cells or ovum cells with sperm into the uterus or fallopian tube of a woman (section 1(2)).

27. Medically assisted procreation is allowed only within a marriage or a relationship similar to marriage, and may only be carried out if every other possible and reasonable treatment aimed at inducing pregnancy through intercourse has failed or has no reasonable chance of success (section 2).

28. Under section 3(1), only ova and sperm from spouses or from persons living in a relationship similar to marriage (Lebensgefährten) may be used for the purpose of medically assisted procreation. In exceptional circumstances, sperm from a third person may be used for artificial insemination when introducing sperm into the reproductive organs of a woman (section 3(2)). In all other circumstances, and in particular for the purpose of in vitro fertilisation, the use of sperm by donors is prohibited.

29. Under section 3(3), ova or viable cells may only be used for the woman from whom they originate. Thus ova donation is always prohibited.

30. The further provisions of the Artificial Procreation Act stipulate, inter alia, that medically assisted procreation may only be carried out by specialised physicians and in specially equipped hospitals or surgeries (section 4) and with the express and written consent of the spouses or cohabiting persons (section 8).

31. In 1999 the Artificial Procreation Act was supplemented by a Federal Act Establishing a Fund for Financing In-vitro Fertilisation Treatment (Bundesgesetz mit dem ein Fonds zur Finanzierung der In-vitro-Fertilisiation eingerichtet wird – Federal Law Gazette Part I No. 180/1999) in order to subsidise in–vitro fertilisation treatment allowed under the Artificial Procreation Act.

B. The position in other countries

32. On the basis of the material available to the Court, including the document “Medically-assisted Procreation and the Protection of the Human Embryo Study on the Solution in 39

States" (Council of Europe, 1998) and the replies by the member States of the Council of Europe to the Steering Committee on Bioethics' "Questionnaire on Access to Medically-assisted Procreation" (Council of Europe, 2005), it would appear that IVF treatment is regulated by primary or secondary legislation in Austria, Azerbaijan, Bulgaria, Croatia, Denmark, Estonia, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, the Netherlands, Norway, the Russian Federation, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom. In Belgium, the Czech Republic, Finland, Ireland, Malta, Lithuania, Poland, Serbia and Slovakia such treatment is governed by clinical practice, professional guidelines, royal or administrative decree or general constitutional principles.

33. The study in particular sets out the position of domestic law as regards seven different artificial procreation techniques: artificial insemination within a couple, in vitro fertilisation within a couple, artificial insemination by sperm donor, ova donation, ova and sperm donation, embryo donation and intracytoplasmic sperm injection (an in vitro fertilization procedure in which a single sperm is injected directly into an egg).

34. As far as can be seen, sperm donation is currently prohibited only in three countries: Italy, Lithuania and Turkey, which all ban heterologous assisted fertilisation as a whole. Countries allowing sperm donation do not generally distinguish in their regulations between the use of sperm for artificial insemination and for in vitro fertilisation. As regards the donation of ova, it is prohibited in Croatia, Germany, Norway and Switzerland, in addition to the three countries mentioned above. Since Germany in practice allows donation of sperm only for non-in vitro fertilisation, the legal situation is quite similar to the situation in Austria.

35. In a number of countries, such as Cyprus, Luxembourg, Malta, Finland, Poland, Portugal and Romania, where the matter is not regulated, the donation of both sperm and ova is used in practice.

36. A comparison between the Council of Europe study of 1998 and a survey conducted by the International Federation of Fertility Societies of 2007 shows that in the field of medically assisted procreation legal provisions are developing quickly. In Denmark, France and Sweden sperm and ova donation, which was previously prohibited, is now allowed since the entry into force of new legal provisions in 2006, 2004 and 2006 respectively. In Norway sperm donation for in vitro fertilisation has been allowed since 2003, but not ova donation.

C. Council of Europe Instruments

37. Principle 11 of the principles adopted by the ad hoc committee of experts on progress in the biomedical sciences, the expert body within the Council of Europe which preceded the present Steering Committee on Bioethics (CAHBI, 1989), states:

"1. In principle, in vitro fertilisation shall be effected using gametes of the members of the couple. The same rule shall apply to any other procedure that involves ova or in vitro or embryos in vitro. However, in exceptional cases defined by the member states, the use of gametes of donors may be permitted. "

38. The Convention on Human Rights and Biomedicine of 1997 does not deal with the question of donation of gametes, but forbids to use a medically assisted reproduction technique to choose the sex of a child. Its Article 14 reads as follows:

"The use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided."

39. The Additional Protocol to the above Convention, on Transplantation of Organs and Tissues of Human Origin, of 2002, which promotes donation of organs, expressly excludes from its scope reproductive organs and tissues.

6.4.3. The law

I. ALLEGED VIOLATION OF ARTICLE 14[45] OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 8[21]

40. The applicants complained that the prohibition of heterologous artificial procreation techniques for in vitro fertilisation laid down by section 3(1) and section 3(2) of the Artificial Procreation Act had violated their rights under Article 14 read in conjunction with Article 8.

41. These provisions, in so far as relevant, read as follows:

Article 14: Prohibition of discrimination

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

Article 8: Right to respect for private and family life

"1. Everyone has the right to respect for his private and family life ...

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

A. Submissions by the parties

1. The applicants

42. The applicants submitted that Article 8 of the Convention was applicable and therefore also Article 14. Because of the special importance of the right to found a family and the right to procreation, the Contracting States enjoyed no margin of appreciation at all in regulating these issues. The decisions to be taken by couples wishing to make use of artificial procreation concerned their most intimate sphere and therefore the legislature should show particular restraint in regulating these matters.

43. All the arguments raised by the Government in defence of the impugned legislation were directed against artificial procreation in general and were therefore not persuasive when it came to accepting some procreation techniques while rejecting others. The risk of exploitation of female donors, to which the Government referred, was not relevant in circumstances such as those in the present case. To combat any potential abuse in the Austrian situation, it was enough to forbid remunerated ova or sperm donation; such a prohibition existed in Austria.

44. The system applied under the Artificial Procreation Act was incoherent and illogical, since heterologous forms of medically assisted procreation were not prohibited in general but exceptions were made for sperm donation in relation to specific techniques. The reasons for this difference in treatment were not persuasive. Furthermore, it was not clear why the legislation in force allowed for artificial insemination with donor sperm, while it categorically prohibited ova donation. In particular the distinction made between insemination with sperm from donors and in vitro fertilisation with donor sperm was incomprehensible. Thus, the impugned legislation constituted discrimination prohibited by Article 14.

2. The Government

45. The Government submitted that Article 14 complemented the other substantive provisions of the Convention and its Protocols. Since the applicability of Article 8 of the Convention was not disputed, and they referred in this respect to the findings of the Austrian Constitutional Court, Article 14, read in conjunction with those provisions, applied as well.

46. The Government submitted further that, according to the Court's case-law, a difference in treatment was discriminatory for the purpose of Article 14 if it had no objective and reasonable justification, that is, if it did not pursue a "legitimate aim" or if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. However, Contracting States enjoyed a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justified different treatments in law. The prohibition of in vitro fertilisation with sperm or ova from a donor was objectively and reasonably justified. The prohibition which pursued the legitimate aim of protecting the health and well-being of the women and children concerned as well as safeguarding general ethics and the moral values of society, was also proportionate.

47. Even though the right to respect for private life also comprised the right to fulfil the wish for a child, it did not follow that the State was under an obligation to permit indiscriminately all technically feasible means of reproduction or even to provide such means. In making use of the margin of appreciation afforded to them, the States had to decide for themselves what balance should be struck between the competing interests in the light of the specific social and cultural needs and traditions of their countries. The Austrian legislature had struck a fair balance, taking into account all the interests concerned. Such a balance allowed for medically assisted procreation while at the same time providing for certain limits where the current stage of medical and social development did not yet permit a legal authorisation of in vitro fertilisation with the sperm or ova of third persons, as desired by the applicants. Therefore the Artificial Procreation Act was characterised by the intention to prevent negative repercussions and potential misuses and to employ medical advances only for therapeutic purposes and not for other objectives such as "selection" of children, as the legislature could not and should not neglect the existing unease among large sections of society about the role and possibilities of modern reproductive medicine.

48. After thorough preparation the legislature had found an adequate solution in a controversial area, taking into account human dignity, the well-being of the child and the right to procreation. In vitro fertilisation opened up far-reaching possibilities for a selective choice of ova and sperm, which might finally lead to selective reproduction (Zuchtauswahl). This

raised essential questions regarding the health of children thus conceived and born, touching especially upon the general ethics and moral values of society.

49. In the discussion in Parliament it had been pointed out that ova donation might lead to problematic developments such as exploitation and humiliation of women, in particular of those from an economically disadvantaged background. Pressure might be put on a female donor who otherwise would not be in a position to afford an in vitro fertilisation to fulfil her own wish for a child.

50. In vitro fertilisation also raised the question of unusual relationships in which the social circumstances deviated from the biological ones, namely, the division of motherhood into a biological aspect and an aspect of "carrying the child" and perhaps also a social aspect. Finally, one had also to take into account that children had a legitimate interest in being informed about their actual descent, which, with donated sperm and ova, would in most cases be impossible. With the use of donated sperm and ova within the framework of medically assisted procreation, the actual parentage of a child was not revealed in the register of births, marriages and deaths and the legal protective provisions governing adoptions were ineffective in the case of medically assisted procreation. The reasons for allowing artificial insemination, as set out in the explanatory report to the Government's bill on the Artificial Procreation Act, were that because it was such an easily applicable procreation method, compared with others, it could not be monitored effectively. Also, this technique had already been in use for a long time. Thus, a prohibition of this simple technique would not have been effective and consequently would not constitute a suitable means of pursuing the objectives of the legislation effectively.

51. The Government therefore concluded that the prohibition of in vitro fertilisation with sperm or ova from a donor was objectively and reasonably justified. The prohibition, which pursued the legitimate aim of protecting the health and well-being of the women and children concerned as well as safeguarding general ethics and the moral values of society, was also proportionate. Accordingly, the applicants had not been discriminated against.

B. Third party submissions by the German Government

52. The German Government submitted that under section 1(1) of the German Embryo Protection Act (Embryonenschutzgesetz) it was a punishable offence to place inside a woman an egg not produced by her.

53. The prohibition was supposed to protect the child's welfare by ensuring the unambiguous identity of the mother. Biologically, only women were capable of carrying a child to term. Splitting motherhood into a genetic and a biological mother would result in two women having a part in the creation of a child. This would be an absolute novelty in nature and in the history of mankind. In legal, historical and cultural terms, the unambiguousness of motherhood represented a fundamental and basic social consensus and, for this reason alone, was considered indispensable by German legislators. In addition, the relationship with the mother was assumed to be important for the child's discovery of identity. As a result, the child would have extreme difficulties in coping with the fact that in biological terms two women had a part in his or her existence. Split motherhood and the resulting ambiguousness of the mother's identity might jeopardise the development of the child's personality and lead to considerable problems in his or her discovery of identity. It was therefore contrary to the child's welfare.

54. Another danger was that the biological mother, being aware of the genetic background, might hold the egg donor responsible for any illness or handicap of the child and reject him or her. A conflict of interests between the genetic and biological mother could unfold to the detriment of the child. For the donor, making ova available was a complicated and invasive procedure which might result in a physical and psychological burden and a medical risk for the donor. Another conflict which might arise and strain the genetic and biological mothers' relationships with the child was that a donated egg might result in the recipient getting pregnant while the donor herself failed to get pregnant by means of in vitro fertilisation.

55. For the aforementioned reasons, split motherhood was considered to be a serious threat to the welfare of the child which justified the existing prohibitions under the Embryo Protection Act.

C. The Court's assessment

1. Applicability of Article 14 in conjunction with Article 8

56. The Government accepted that Article 8 was applicable to the case and consequently they did not dispute the applicability of Article 14 of the Convention. In this respect they referred to the findings of the Constitutional Court which, in its judgment of 14 October 1999, held that the decision of spouses or a cohabiting couple to conceive a child and to make use for that end of medically assisted procreation techniques fell within the sphere of protection of Article 8.

57. The applicants agreed with the Government as to the applicability of Article 14 read in conjunction with Article 8 of the Convention.

58. The Court reiterates that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, inter alia, the right to establish and develop relationships with other human beings (see Niemietz v. Germany, judgment of 16 December 1992, Series A no. 251 B, p. 33, § 29), the right to "personal development" (see Bensaid v. the United Kingdom, no. 44599/98, § 47, ECHR 2001 I) or the right to self-determination as such (see Pretty v. the United Kingdom, no. 2346/02, § 61, ECHR 2002 III). It encompasses elements such as names (see Burghartz v. Switzerland, judgment of 22 February 1994, Series A no. 280 B, p. 28, § 24), gender identification, sexual orientation and sexual life, which fall within the personal sphere protected by Article 8 (see, for example, Dudgeon v. the United Kingdom, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41, and Laskey, Jaggard and Brown v. the United Kingdom, judgment of 19 February 1997, Reports of Judgments and Decisions 1997-I, p. 131, § 36), and the right to respect for the decisions both to have and not to have a child (see Evans v. the United Kingdom [GC], no. 6339/05, § 71, ECHR 2007 IV).

59. In the case of Dickson v. the United Kingdom, which concerned the refusal of facilities for artificial insemination to the applicants, a prisoner and his wife, the Court found that Article 8 was applicable in that the artificial insemination facilities at issue concerned their private and family lives which notions incorporate the right to respect for their decision to become genetic parents (Dickson v. the United Kingdom [GC], no. 44362/04, § 66, ECHR 2007 XIII with further references).

60. The Court therefore considers that the right of a couple to conceive a child and to make use of medically assisted procreation for that end comes within the ambit of Article 8, as such a choice is clearly an expression of private and family life. Article 8 of the Convention therefore applies to the present case.

61. With regard to Article 14, which was relied on in the present case, the Court reiterates that it only complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions (see, among many other authorities, Sahin v. Germany [GC], no. 30943/96, § 85, ECHR 2003 VIII). The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary but it is also sufficient for the facts of the case to

fall “within the ambit” of one or more of the Articles of the Convention (see Petrovic v. Austria, judgment of 27 March 1998, Reports 1998 II, § 22 and Burden v. United Kingdom [GC], no. 13378/05 §58, ECHR 2008-...).

62. Since the applicants complain that they are victims of a difference in treatment which lacks objective and reasonable justification as required by Article 14 of the Convention, that provision, taken in conjunction with Article 8, is applicable.

2. Compliance with Article 14 in conjunction with Article 8

63. The applicants claim to be in a similar or analogous position to other couples who wish to avail themselves of medically assisted procreation techniques but who, owing to their medical condition, do not need ova donation or sperm donation for in vitro fertilisation. The applicants therefore were subject to a difference in treatment. Regard must be had to the aim behind that difference in treatment and, if the aim was legitimate, to whether the different treatment was justified.

64. The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, which means that it does not pursue a “legitimate aim” or that there is no “reasonable proportionality between the means employed and the aim sought to be realised” (see, inter alia, Petrovic, cited above, § 30; and Salgueiro da Silva Mouta v. Portugal, no. 33290/96, § 29..., ECHR 1999 IX). In that connection the Court observes that the Convention is a living instrument, to be interpreted in the light of present-day conditions (see, inter alia, Johnston and Others v. Ireland, 18 December 1986, § 53, Series A no. 112).

65. The Court reiterates further that Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see Van Raalte v. the Netherlands, 21 February 1997, § 39, Reports of Judgments and Decisions 1997-I). The scope of this margin will vary according to the circumstances, the subject matter and the background (see Petrovic, cited above, § 38).

66. The applicants submitted that because of the special importance of the right to found a family and the right to procreation, the Contracting States enjoyed no margin of appreciation at all in regulating these issues.

67. In the Government's view the Austrian legislator, in devising the framework for artificial procreation and for deciding in that context which procreation techniques were allowed, had a

particularly wide margin of appreciation which was a decisive element in assessing whether a difference of treatment in otherwise similar situations pursued a legitimate aim

68. The Court notes that in the field of medically assisted procreation there is no uniform approach to this question among the State Parties to the Convention (see Council of Europe, Medically Assisted Procreation and the Protection of the Human Embryo – Comparative Study on the Situation in 39 States, June 1998, CDBI/INF (98) 8). Medically assisted procreation is regulated in detail in some countries, to a certain extent in others and in further countries not at all. If legislation exists in a country, there is a broad variety of techniques which are allowed and forbidden. As far as can be seen, the same situation as in Austria exists under German law. Donation of sperm is prohibited in Italy, Lithuania and Turkey, while donation of ova is prohibited in Croatia, Germany, Italy, Lithuania, Norway, Switzerland and Turkey.

69. Since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is no clear common ground amongst the Member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one (see X, Y and Z v. the United Kingdom, 22 April 1997, § 44, Reports of Judgments and Decisions 1997 II). The State's wide margin in principle extends both to its decision to intervene in the area and, once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests (see Evans, cited above § 75). However, the differences in the approaches adopted by the Contracting States do not, as such, make any solution reached by a legislature acceptable. It does not absolve the Court from carefully examining the arguments discussed in the legislative process and from examining whether the arguments advanced by the Government for justifying the difference of treatment in issue are relevant and sufficient. In doing so the Court finds that the situation of the first and second applicants and that of the third and fourth applicants have to be examined separately.

a. The Third and Fourth Applicants (ova donation)

70. The third applicant is completely infertile and does not produce ova at all while her husband, the fourth applicant, can produce sperm fit for procreation. It is not in dispute that owing to their medical conditions only in vitro fertilisation with the use of ova from a donor would allow the applicant couple to fulfil their wish for a child of which at least one of the applicants is the genetic parent. However the prohibition of heterologous artificial procreation

techniques for in vitro fertilisation laid down by section 3(1) of the Artificial Procreation Act, which prohibits sperm donation rules out this possibility. There is no exception to this rule.

71. The Court has established in its case-law that, in order for an issue to arise under Article 14, there must be a difference in the treatment of persons in relevantly similar situations (D.H. and Others v. the Czech Republic [GC], no. 57325/00, § 175, ECHR 2007). Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (Stec and Others v. the United Kingdom [GC], nos. 65731/01 and 65900/01, §§ 51-52, ECHR 2006-VI; Burden, cited above, § 60).

72. Thus, the Court has to examine whether the difference in treatment between the third and fourth applicants and a couple which, for fulfilling its wish for a child may make use of artificial procreation techniques without resorting to ova donation, has an objective and reasonable justification, that is, if it does pursue a legitimate aim or if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

73. The Government argued that the prohibition of ova donation for in vitro fertilisation adopted by the Austrian legislature pursued a legitimate aim and was proportionate. In their view the Austrian legislature struck a fair balance between the public and private interests involved. They argue that the legislature had to set certain limits on the possibilities offered by the medical techniques of artificial procreation because it had to take account of the morally and ethically sensitive nature and unease existing among large sections of society as to the role and possibilities of modern reproductive medicine.

74. The Court considers that concerns based on moral considerations or on social acceptability are not in themselves sufficient reasons for a complete ban on a specific artificial procreation technique such as ova donation. Such reasons may be particularly weighty at the stage of deciding whether or not to allow artificial procreation in general, and the Court would emphasise that there is no obligation on a State to enact legislation of the kind and to allow artificial procreation. However, once the decision has been taken to allow artificial procreation and notwithstanding the wide margin of appreciation afforded to the Contracting States, the legal framework devised for this purpose must be shaped in a coherent manner

which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention.

75. The Government argued further that medically advanced techniques of artificial procreation such as in vitro fertilisation carried the inherent risk of not being employed only for therapeutic purposes but for other objectives such as the "selection" of children; in vitro fertilisation posed such a risk. In addition, they submitted that there was a risk that ova donation might lead to the exploitation and humiliation of women, in particular from an economically disadvantaged background, as pressure might be put on a woman to donate who otherwise would not be in a position to afford an in vitro fertilisation in order to fulfil her own wish for a child.

76. The Court considers that the risks associated with new techniques in a sensitive field like medically assisted procreation must be taken seriously and that it is in the first place for the domestic legislator to assess these risks after carefully weighing the different public and private interests involved and the dangers which might be faced. However, a complete ban on the medical technique at issue would not be proportionate unless, after careful reflection, it was deemed to be the only means of effectively preventing serious repercussions. In the present case the Court is not persuaded that a complete ban was the only means at the disposal of the Austrian legislature. Given that the Artificial Procreation Act reserves this kind of intervention to specialised medical doctors, who have particular knowledge and experience in this field and are themselves bound by the ethical rules of their profession, and that the Act provides for further safeguards in order to minimise the risk, the Court finds that the prohibition of ova and sperm donation for in vitro fertilisation cannot be considered the only or the least intrusive means of achieving the aim pursued.

77. As regards the argument of risk of exploitation of women and abuse of these techniques, the Court considers that this is an argument which does not specifically concern the procreation techniques at issue but seems to be directed against artificial procreation in general. Furthermore, potential abuse, which undoubtedly has to be combated, is not a sufficient reason for prohibiting a specific procreation technique as a whole, if there exists the possibility to regulate its use and devise safeguards against abuse. In this respect the Court observes that under Austrian law remuneration of ova and sperm donation is prohibited by law.

78. At the hearing the Government also pointed out that obtaining ova for the purpose of donation was a risky and serious medical intervention which had serious repercussions for the

donor. The Court appreciates that the Austrian legislature makes an effort to avoid unnecessary health risks but it notes in the first place that in case of homologous in vitro fertilisation the risk incurred by the woman from whom the ova are taken must be the same and this medical intervention is one allowed by the Artificial Procreation Act. In so far as the argument is linked to those concerning the risk of an abuse of ova donation or its commercialisation, the Court considers that the arguments given above are also valid in this context.

79. The Government also submitted that in vitro fertilisation raised the question of unusual relationships in which the social circumstances deviated from the biological ones, namely the division of motherhood into a biological aspect and the aspect of "carrying the child" and perhaps also a social aspect.

80. The Court observes that, according to the Constitutional Court's decision of 14 October 1999, the Austrian legislator was guided by the idea that medically assisted procreation should take place similarly to natural procreation, in particular that the basic principle of civil law – mater semper certa est, pater est quem nuptiae demonstrant – should be maintained by avoiding the possibility that two persons could claim to be the biological mother of one and the same child and to avoid disputes between a biological and a genetic mother in the wider sense.

81. The aim of maintaining legal certainty in the field of family law by keeping a long-standing principle of this field of law as one of its basic features certainly has its merits. Nevertheless, unusual family relations in a broad sense are well known to the legal orders of the Contracting States. Family relations which do not follow the typical parent-child relationship based on a direct biological link, are nothing new and have already existed in the past, since the institution of adoption, which creates a family relationship between persons which is not based on descent but on contract, for the purpose of supplementing or replacing biological family relations. From this matter of common knowledge the Court would conclude that there are no insurmountable obstacles to bringing family relations which would result from a successful use of the artificial procreation techniques at issue into the general framework of family law and other related fields of law.

82. The Government relied on a further argument militating against the permission of ova and sperm donation for in vitro fertilisation, namely that children had a legitimate interest in being informed about their actual descent, which, with donated sperm and ova, would in most

cases be impossible as the actual parentage of a child was not revealed in the births, marriages and deaths register.

83. The Court is not persuaded by this argument either. In this respect it reiterates that respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality (see, for example, Mikulić v. Croatia, no. 53176/99, §§ 53-54, ECHR 2002-I, and Gaskin v. the United Kingdom, judgment of 7 July 1989, Series A no. 160, p. 16, §§ 36-37, 39). This includes obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents (see Jäggi v. Switzerland, no. 58757/00, § 25, ECHR 2006-..., and Odièvre v. France [GC], no. 42326/98, § 29, ECHR 2003-III).

84. However, such a right is not an absolute one. In the case of Odièvre, cited above, which concerned anonymous birth and the impossibility for the applicant to obtain information about her biological parents, the Court found no breach of Article 8 of the Convention because the French legislator had achieved a proper balance between the public and private interests involved (see Odièvre, cited above, § 49). The Court therefore considers that the Austrian legislator could also find an appropriate and properly balanced solution between competing interests of donors requesting anonymity and any legitimate interest in obtaining information of a child conceived through artificial procreation with donated ova or sperm.

85. In conclusion the Court finds that the Government have not submitted a reasonable and objective justification for the difference in treatment between the third and fourth applicants, who are prevented by the prohibition of ova donation for artificial procreation under Section 3 of the Artificial Procreation Act from fulfilling their wish for a child, and a couple which may make use of artificial procreation techniques without resorting to ova donation. Accordingly, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8 as regards the third and fourth applicants.

b. The First and Second Applicants (sperm donation)

86. The first applicant suffers from fallopian-tube-related infertility and the second applicant, her husband, is also infertile. It is not in dispute that owing to their medical conditions only in vitro fertilisation with the use of sperm from a donor would allow the applicant couple to fulfil their wish for a child of which at least one of the applicants is the genetic parent.

87. However the prohibition of heterologous artificial procreation techniques for in vitro fertilisation laid down by section 3(1) of the Artificial Procreation Act, which, in the circumstances of the first and second applicant, rules out sperm donation excludes this possibility. At the same time section 3 (2) of that Act allows sperm donation for in vivo fertilisation.

88. Therefore, the Court has to examine whether the difference in treatment between the first and second applicants who, for fulfilling their wish for a child could only resort to sperm donation for in vitro fertilisation and a couple which lawfully may make use of sperm donation for in vivo fertilisation, has an objective and reasonable justification, that is, if it does pursue a legitimate aim or if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

89. The Court observes at the outset that this artificial procreation technique combines two techniques which taken alone are allowed under the Artificial Procreation Act, namely in vitro fertilisation with the gametes of the couple on the one and sperm donation on the other hand. Thus, a prohibition of the combination of these lawful techniques requires, in the Court's view, particularly persuasive arguments by the Government.

90. The Court considers that the various arguments advanced by the Government in order to justify the prohibition of ova donation are of little relevance for the examination of the prohibition at issue. Some relate to concerns against artificial procreation in general, while there is no complete ban under Austrian law. Some, like preventing the exploitation of women in vulnerable situations, limiting potential health risks for ova donors and preventing the creation of unusual family relations because of split motherhood simply do not apply. Some, like the risk of eugenic selection and problems stemming from the legitimate interest of children conceived through gamete donation to be informed of their actual descent, are directed against sperm donation, which, however, is allowed for the purpose of in vivo fertilisation.

91. In justifying the prohibition of sperm donation the Government has submitted a further argument. The reasons given for justifying this difference in treatment between in vitro fertilisation and artificial insemination were that the latter technique had already been in use for a considerable time when the Artificial Procreation Act entered into force and, because it was easy to handle and did not necessarily require the assistance of a trained medical surgeon, compliance with a prohibition would have been impossible to monitor.

92. It must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" (see, inter alia, Folgerø and Others v. Norway [GC], no. 15472/02, § 100, ECHR 2007-..., and Salduz v. Turkey [GC], no. 36391/02, § 51, 27 November 2008). The Court must therefore take into account the effectiveness of a given instance of interference when assessing whether there exists a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Thus, the Court finds that it is legitimate to take also into account whether the interference envisaged by the State would be an effective means of pursuing a legitimate goal.

93. Even if one were to accept this argument submitted by the Government as a question of mere efficiency it must be balanced against the interests of private individuals involved. In this respect the Court reiterates that where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see Evans, cited above, § 77; X. and Y. v. the Netherlands, judgment of 26 March 1985, Series A no. 91, §§ 24 and 27; Dudgeon, cited above, § 52 and Christine Goodwin v. the United Kingdom [GC], no. 28957/95, § 90, ECHR 2002-VI). In the Court's view the wish for a child is one such particularly important facet and, in the circumstances of the case, outweighs arguments of efficiency. Thus, the prohibition at issue lacked a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

94. The Court therefore finds that the difference in treatment between the first and second applicants who, for fulfilling their wish for a child could only resort to sperm donation for in vitro fertilisation and a couple which lawfully may make use of sperm donation for in vivo fertilisation, had no objective and reasonable justification and was disproportionate. Accordingly, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8 as regards the first and second applicants.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

95. The applicants also complained that the prohibition of heterologous artificial procreation techniques for in vitro fertilisation laid down by section 3(1) and 3(2) of the Artificial Procreation Act had violated their rights under Article 8 of the Convention.

96. In the circumstances of the present case the Court considers that in view of the considerations under Article 14 read in conjunction with Article 8 of the Convention no separate issue arises under Article 8 of the Convention alone.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

97. Article 41[46] 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

98. Without distinguishing between pecuniary and non-pecuniary damages the applicants claimed a sum of EUR 20,000 for each applicant couple. They submitted that as a consequence of the prohibition under the Artificial Procreation Act they had suffered great emotional distress. In addition, they had been forced to obtain the necessary treatment in other countries where it was readily available, as a result of which they had incurred considerable additional costs. Eventually they had had to abandon their wish to have children of their own and resort to adoption, which had also been a difficult and painful decision.

99. In so far as the applicants claimed non-pecuniary damages, the Government refrained from any comment as the suffering of the applicants did not lend itself to any evaluation in terms of money. In so far as the applicants appeared to be claiming an award in respect of pecuniary damage, the Government submitted that there was no causal link between the violation found and the damages claimed as regards the costs for treatment undergone and expenses incurred for adoption.

100. The Court does not discern any causal link between the violation found and the claim in respect of pecuniary damage. Accordingly, no award can be made under this head. However, the applicants have undoubtedly sustained non-pecuniary damage. Making an assessment on an equitable basis, the Court awards each applicant couple EUR 10,000 as compensation for non-pecuniary damage.

B. Costs and expenses

101. The applicants claimed EUR 15,000 per applicant for costs and expenses incurred both in the domestic proceedings and the proceedings before the Court.

102. The Government considered this claim excessive and, on the basis of their own calculation, were only ready to pay compensation for procedural costs in an amount of EUR

22,000 (inclusive of VAT) for representation of all applicants in the domestic proceedings and in the proceedings before the Court.

103. The Court observes that the applicants have not submitted any bills which would justify awarding a higher amount than the one accepted by the Government. Accordingly, the Court awards under this head EUR 18,333 for costs and expenses incurred by all applicants in the proceedings before the domestic instances and the Court for both lawyers appearing before the Court.

C. Default interest

104. 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.

6.4.4. The Court's decision

1. Holds by five votes to two that there has been a violation of Article 14[45] of the Convention read in conjunction with Article 8 as regards the third and fourth applicants;

2. Holds by six votes to one that there has been a violation of Article 14 of the Convention read in conjunction with Article 8 as regards the first and second applicants;

3. Holds unanimously that it is not necessary to examine the application also under Article 8 of the Convention;

4. Holds unanimously

(a) that the respondent State is to pay each applicant couple, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2[9] of the Convention, EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage and to pay all the applicants EUR 18,333 (eighteen thousand three-hundred and thirty-three euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

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

5. Dismisses unanimously the remainder of the applicants' claim for just satisfaction.

6.5. Case of Kiyutin V. Russia

(Chapter 5, 5.3)

6.6. Case of R.R. V. Poland[18]

6.6.1. The procedure

1. The case originated in an application (no. 27617/04) against the Republic of Poland lodged with the Court under Article 34[10] of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Ms R.R. ("the applicant"), on 30 July 2004. The President of the Chamber acceded to the applicant's request not to have her name disclosed (Rule 47 § 3[59] of the Rules of Court).

2. The applicant was represented by Ms Monika Gąsiorowska and Ms Irmina Kotiuk, lawyers practising in Warsaw, assisted by Ms Christina Zampas. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that the circumstances of her case had given rise to violations of Article 8 of the Convention. She also invoked Article 3[39] of the Convention. The applicant further complained under its Article 13 that she did not have an effective remedy at her disposal.

4. The parties replied in writing to each other's observations.

5. In addition, third-party comments were received from the United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, from the International Federation of Gynaecology and Obstetrics and from the International Reproductive and Sexual Health Law Programme, University of Toronto, Canada, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2[54]).

[18] Fourth Section; Case Of R.R. V. Poland; (Application No. 27617/04); Strasbourg 26 May 2011; Request For Referral To The Grand Chamber Pending

6.6.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1973.

7. Early in December 2001 the applicant visited Dr S.B. in a hospital in T., in the region covered by the then Małopolska Regional Medical Insurance Fund (replaced later by the countrywide National Health Fund). Having performed an ultrasound scan, Dr S.B. estimated that the applicant was in the 6th or 7th week of pregnancy.

8. On 2 January 2002, in the 11th week of her pregnancy, the applicant – who was at that time 29 years old, was married and had two children – was registered as a pregnant patient in her local clinic.

9. On 23 January and 20 February 2002 ultrasound scans were performed, in the 14th and 18th weeks of the applicant's pregnancy. On the latter date Dr S.B. estimated that it could not be ruled out that the foetus was affected with some malformation and informed the applicant thereof. The applicant told him that she wished to have an abortion if the suspicion proved true.

10. The Government submit that in January and February 2002 the applicant visited Dr S.B. at a private clinic. They argue that such an institution had no right to issue a referral to any public health institution.

11. The applicant disagrees. She first submits that at the material time Dr S.B. worked both at a public hospital in T. – where she visited him in December 2001 and in February 2002, after the second scan – and at a non-public clinic. She further submits that the Polish health care system is composed of so-called public health units and non-public health units. The latter, most often being first contact and basic care institutions, have financing contracts with the public National Health Fund (and had such contracts with its predecessors, the Regional Medical Insurance Funds, at the material time). Medical services available in non-public clinics are partly financed by public funds, constituted by premiums paid by all persons covered by the universal system of health insurance. Doctors working for non-public units have the same rights and duties to provide health care to patients as doctors employed by public units, including a right to refer a patient to a public unit.

12. Subsequently, the applicant went to a hospital in T. The results of a third ultrasound scan performed in that hospital confirmed the likelihood that the foetus was suffering from some malformation. A genetic examination by way of amniocentesis was recommended by Dr O., in order to confirm or dispel this suspicion.

13. On 28 February 2002 the applicant had another ultrasound scan in a private clinic in Łódź. She had no referral from Dr S.B. and had therefore to pay for the service herself. Under the applicable laws, her expenditure could not be reimbursed. The results of that scan confirmed the likelihood that the foetus was affected with an unidentified malformation. Genetic tests were recommended again.

14. She was subsequently received by Professor K.Sz. in Łódź, a specialist in clinical genetics. A genetic test was again recommended. Professor K.Sz. recommended that the applicant should obtain a formal referral from her family doctor, S.B., to have the test carried out in a public hospital in Łódź, which was outside her region covered by the then Universal Medical Insurance Fund.

Subsequently, Dr S.B. refused to issue a referral, because in his view the foetus' condition did not qualify the applicant for an abortion under the provisions of the 1993 Act (see paragraph 66 below).

15. The Government submit that no reference to the possibility of the foetus being affected with Edwards syndrome was ever made.

16. The applicant disagrees. She submits that during that visit she was told that the scan gave rise to a suspicion of either Edwards or Turner syndrome.

17. In the first week of March 2002 the applicant and her husband visited Dr S.B. during his night duty at the hospital in T. They demanded termination of the pregnancy. He refused and indicated that the results of the ultrasound scan could not be treated as a sole ground for diagnosis that the foetus was affected with severe malformation. He proposed having a panel of doctors from the same hospital review his decision. The applicant refused.

18. On 11 March 2002 the applicant was admitted to a public hospital in T., within her region covered by the National Health Insurance Fund, and requested advice. She was told that a decision on termination could not be taken at that hospital and was referred to a university hospital in Kraków, to a pathological pregnancies ward, in another region of the Fund, for further diagnosis ("w celu dalszej diagnostyki").

19. During the applicant's stay in the hospital in T. a hospital lawyer was asked to give an opinion with a view to ensuring that the laws on the availability of legal abortion were respected. The applicant was also told that termination of pregnancy would entail a serious risk to her life and that the two caesarean births which she had previously had constituted the most important risk factor in deciding whether she should have a genetic test at all.

20. On 14 March 2002, immediately after being discharged from the T. hospital, the applicant travelled 150 kilometres to Kraków. She went to see Dr K.R. at Kraków University Hospital. He criticised her for contemplating a termination. She was also informed that the hospital categorically refused to carry out abortions and that no abortions had ever been performed there for the last 150 years. She was also refused a genetic examination, Dr K.R. being in the opinion that it was not necessary in her case. She stayed in the hospital for three days and had another ultrasound scan performed, the results of which were inconclusive. Urine and blood tests were also performed. She was discharged on 16 March 2002. The applicant's discharge record stated that the foetus was affected with developmental abnormalities ("wady rozwojowe płodu"). The same was stated in a medical certificate signed by Dr K.R. He recommended genetic testing in order to establish the character of the ailment.

21. On 21 March 2002 the applicant again contacted Professor K.Sz., who had examined her in February. Another ultrasound scan performed in a private clinic where Professor K.SZ. received patients confirmed the suspicion of malformation. The applicant obtained a referral from the professor to the Mother and Child Hospital in Łódź, but he informed her that he was in fact not competent to issue it. The professor told her that in order to have a genetic test carried out in Łódź, which was outside her region, she needed a referral issued by a doctor practising in her region and, in addition, an approval by a regional insurance fund, together with an undertaking that it would reimburse the costs of the test to the regional fund where the test was to be performed. The professor advised her to report to the Łódź hospital as an emergency patient, claiming that she was about to miscarry, as it was likely that she would then be admitted to that hospital.

22. Subsequently, on 22 March 2002, the applicant asked Dr K.R. for a referral.

The Government submit that Dr K.R. could not refer the applicant for a genetic test in Kraków because neither the University Hospital nor any other hospital in Kraków carried out such tests as a routine procedure. The applicant disagrees. She submits that Dr K.R. told her that she would not obtain the referral for testing because if the results were positive she would want to have an abortion.

23. Afterwards, on the same day, she again unsuccessfully asked Dr S.B. for a referral to the Łódź hospital.

24. The Government submit that the applicant obtained from him a referral to the same Kraków University Hospital where she had already been hospitalised between 11 and 14 March. The applicant disagrees and submits that no referral was issued to her.

The Court notes this discrepancy in the parties' submissions and notes that no copy of that referral has been submitted to it.

25. On 24 March 2002 the applicant went to the Łódź Mother and Child Hospital.

26. The Government submit that she went to the hospital with a referral issued by Professor K.Sz.

27. The applicant disagrees. She submits that she went to that hospital without a referral, as advised, and was admitted as an emergency patient.

28. Genetic test (amniocentesis) was performed there on 26 March 2002, in the 23rd week of pregnancy, and the applicant was told that she had to wait two weeks for the results.

29. The Government submit that the tests were carried out despite the fact that the applicant had not sought from the Małopolska section of the medical insurance fund any approval for financing them.

30. The applicant was discharged from the Łódź hospital on 28 March 2002. Before the results were available, on 29 March 2002 the applicant, increasingly desperate as by then she was very afraid that the foetus was suffering from severe genetic abnormalities, reported to the T. hospital, where she submitted a written request for an abortion. Dr G.S. told her that he could not take such a decision himself. He had to speak with the consultant.

31. By a letter of 29 March 2002 the applicant requested the hospital in T. to terminate the pregnancy, referring to the provisions of the 1993 Act. She requested that in case of a negative reply it should be made in writing "as soon as possible".

32. On 3 April 2002 the applicant went to that hospital again and was told that the consultant could not see her because he was ill. The visit was rescheduled for 10 April 2002. On the same day she wrote a letter of complaint to the director of the T. hospital, submitting that she had not received adequate treatment and that she felt that the doctors were intentionally

postponing all decisions in her case so that she would be unable to obtain an abortion within the time-limit provided for by law.

33. On 9 April 2002 she again requested doctors at the T. hospital to carry out an abortion. She referred to the results of the genetic tests which she had received on that date. The certificate, established by Professor K.Sz., confirmed that the karyotype indicated the presence of Turner syndrome. The certificate further read:

"A chromosomal aberration and an ultrasound image were established, indicating the presence of congenital defects which can have a serious impact on the child's normal development. Further handling of the case under the provisions of the 1993 law on termination of pregnancy can be envisaged. A relevant decision should be taken with due regard to the parents' opinion".

The doctors in the T. hospital refused to carry out an abortion, Dr G.S. telling her that it was too late by then as the foetus was able at that stage to survive outside the mother's body.

34. On 11 April 2002 the applicant again complained in writing to the Director of the T. hospital about the manner in which her case had been handled and about the procrastination on the part of Dr G.S.

35. In April 2002 the applicant and her husband submitted a number of complaints to various health care system institutions. In a reply from the Ministry of Health, dated 16 May 2002, it was stated that "it was impossible to establish on the basis of the available documents why the genetic tests were postponed until 28 February 2002 when the foetus had already become capable of surviving outside the mother's body."

36. On 29 April 2002 she received a reply from the T. hospital to her complaints of 29 March 2002 and 3 April 2002. The letter contained an account of the facts of the case and quoted provisions of the 1993 Act. No assessment of the lawfulness of the conduct of the medical staff involved was made.

37. On 11 July 2002 the applicant gave birth to a baby girl affected with Turner syndrome.

38. On 31 July 2002 the applicant requested the prosecuting authorities to institute criminal proceedings against the persons involved in handling her case. She alleged serious failure on the part of the doctors, acting as public agents, to safeguard her interests protected by law, on account of their failure to perform timely prenatal examinations. As a result, the applicant had been denied information on the foetus' condition and, consequently, divested of the

possibility to decide for herself whether or not she wished to terminate her pregnancy in the conditions provided for by law, and she had been forced to continue it.

39. On 16 December 2002 the Tarnów District Prosecutor discontinued the investigations, finding that no criminal offence had been committed. The prosecutor relied on an expert opinion prepared by the Białystok Medical University, according to which under the 1993 Act legal abortion was possible only when foetal malformation was severe. It was not possible to assess whether malformations of a foetus were severe enough to justify an abortion until the foetus was able to live on its own outside the mother's body. It concluded that in the applicant's case an abortion would have been possible until the 23rd week of pregnancy. The applicant appealed.

40. On 22 January 2003 the Regional Prosecutor allowed her appeal and ordered that the investigation be re-opened. Additional medical evidence was taken during the investigation. On 5 December 2003 the prosecutor again discontinued the investigation, finding that no criminal offence had been committed.

41. The applicant appealed, complaining, inter alia, that the prosecuting authorities had failed to address the critical issue of whether, in the circumstances of the case, genetic tests should have been carried out in order to obtain a diagnosis of the foetus' condition. Instead the investigation had focused on whether or not the applicant had a right to an abortion under the applicable law.

42. Ultimately, on 2 February 2004, the competent court upheld the decision of the prosecuting authorities. The court held that doctors employed in public hospitals did not have the quality of "public servants", which in the circumstances of the case was a necessary element for the commission of the criminal offence of breach of duty by a public servant.

43. On 11 May 2004 the applicant filed a civil lawsuit with the Kraków Regional Court against doctors S.B., G.S. and K.R. and against the Krakow and T. hospitals. She argued that the doctors dealing with her case had unreasonably procrastinated in their decision on her access to genetic tests and had thereby failed to provide her with reliable and timely information about the foetus' condition. They had also failed to establish the foetus' condition in time for her to make an informed decision as to whether or not to terminate the pregnancy. As a result of an unjustified delay in obtaining relevant information she had been divested of the possibility of exercising an autonomous choice as to her parenthood.

The applicant further argued that the laws in force authorised abortion in specific situations. However, that right had been denied her as a result of difficulties in obtaining timely access to genetic tests and the lengthy delay before she had ultimately obtained such access.

The applicant referred to section 4 (a) 1.2 of the 1993 Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act and to Articles 23 and 24 of the Civil Code guaranteeing so called personal rights.

The applicant argued that the circumstances in which the determination of her access to genetic testing had been decided had breached her personal rights and dignity and had deeply humiliated her. No regard had been had to her views and feelings.

She also claimed compensation from Dr S.B. for hostile and disparaging statements about her character and conduct which he had made in a press interview about her case. He had disclosed to the public details about her and the foetus' health covered by medical secret and told the journalist that the applicant and her husband were bad and irresponsible parents.

44. She claimed just satisfaction in a total amount of PLN 110,000 for breach of her rights as a patient and her personal rights. She also sought a declaration that the three medical establishments were responsible in respect of future costs to be borne by the applicant in connection with her daughter's treatment.

45. On 28 October 2004 the Tarnów District Court found S.B. guilty of having disclosed to the public, in an interview he had given to the press, information covered by medical secrecy, including the fact that she had envisaged the termination of the pregnancy. It conditionally discontinued the proceedings against him and fixed a period of probation.

46. On 19 October 2005 the Kraków Regional Court awarded the applicant PLN 10,000 against S.B., finding that in a press interview published in November 2003 he had disclosed information relating to the applicant's health and private life in connection with her pregnancy. He had also made disrespectful and hurtful comments about the applicant's conduct and personality.

47. The court dismissed the remaining claims which she had lodged against doctors G.S. and K.R. and against the hospitals. The courts found that the applicant's personal and patient's rights had not been breached by either of these doctors or the hospitals. There had been no procrastination on the doctors' part in the applicant's case. Under the World Health Organisation standards termination was permissible only until the 23rd week of pregnancy,

whereas the applicant had reported to the hospitals concerned when she was already in the 23rd week of pregnancy, and on 11 April 2002 she had been in the 24th week. Hence, neither her right to decide about her parenthood nor her rights as a patient had been breached in such a way as to place the defendants at fault.

48. On 12 December 2005 the applicant appealed. She submitted that the right to health-related information was protected both by Article 24 of the Civil Code, providing for legal protection of personal rights, and by section 19 of the Medical Institutions Act of 1992. In her case doctors S.B., K.R. and G.S. had been of the view that genetic tests were relevant to establishing the foetus' condition, but had not given her the necessary referral. K.R. had not been able to cite any legal basis for his refusal. G.S. had stated before the court that he had not issued a referral because the applicant had not asked for one. However, it was for a doctor with the required professional knowledge to decide what tests were called for in a given medical situation. The testimony given by the defendants had clearly shown that their conduct in the case had failed to comply with the applicable legal provisions. The doctors had tried to shift the responsibility for the way in which her case had been handled to the applicant, despite the obvious fact that the fundamental responsibility for the proper handling of a medical case lay with them as health professionals. The doctors had also been well aware, as shown by the evidence which they had given, that the applicant had been desperate, in reaction to information that the foetus might be affected with a genetic disorder.

49. The applicant submitted that the doctors' conduct had breached the law, in particular section 2 (a) of the 1993 Act in so far as it imposed on the authorities an obligation to ensure unimpeded access to prenatal information and testing, in particular in cases of increased risk or suspicion of a genetic disorder or development problem, or of an incurable life threatening ailment. The applicant had therefore had such a right, clearly provided for by the applicable law, but the defendants had made it impossible for her to enjoy that right.

50. On 28 July 2006 the Kraków Court of Appeal dismissed the applicant's appeal and upheld the first-instance judgment, endorsing the conclusions of the lower court.

51. On 11 July 2008 the Supreme Court allowed her cassation appeal, quashed the judgment of the appellate court in its entirety on grounds of substance and ordered that the case be re-examined.

The Supreme Court observed that the applicant's claim was two-pronged: it was based firstly on the failure to refer her for genetic testing and, secondly, on the breach of her right to take an informed decision which resulted from this failure.

52. As to the first part of her claim, the Supreme Court observed that it was not open to doubt (and had been confirmed by an expert opinion prepared for the purposes of the criminal investigation) that only genetic testing could confirm or dispel suspicions that the foetus was affected with Turner syndrome. The doctors concerned had known of the procedure. They were obliged, under the Medical Institutions Act 1992 (ustawa o zakładach opieki zdrowotnej), insofar as it guaranteed patients' rights, to refer the applicant for genetic testing of their own motion, without her asking for it. Under the same Act, the applicant had a legally protected right to obtain adequate information about the foetus' health. Had the doctors had conscientious objections to issuing a referral, they should have informed the applicant thereof and referred her to another practitioner who would have referred her for the testing, in accordance with the applicable laws on the medical profession governing the relevant procedure, but they had failed to do so.

53. The procedures governing the carrying out of genetic tests and their financing by various parts of the then Medical Insurance Fund, applicable at the material time, could not be validly relied on as exempting doctors from issuing a referral, in particular as those procedures were not of a statutory character and could not be plausibly relied on to justify restricting the applicant's rights as a patient. The obligation to refer the applicant had not, contrary to the courts' position, ended on the date when legal abortion of a foetus affected with suspected malformation was no longer possible (that is, after the 22nd week), since there were no legal – or medical – grounds on which to automatically link genetic testing with access to legal abortion. Furthermore, at the material time there had been no temporal limitation in law on the carrying out of these tests during pregnancy. It was only in 2004 that an ordinance had been enacted under which genetic testing became available only until the 22nd week of pregnancy.

54. The Supreme Court considered that there were therefore good reasons to accept that the doctors dealing with the applicant's case had breached her personal rights within the meaning of Article 24 of the Civil Code and her patient's rights guaranteed by the Medical Institutions Act. They had been aware that only genetic testing was capable of determining the foetus' genetic situation, but had still refused a referral; instead they had sent her for various tests carried out in a hospital setting which were not relevant to such a diagnosis.

Moreover, the lower courts had erred in their finding that the applicant had not suffered non-pecuniary damage as a result of the doctors' acts. Such damage had been caused by the distress, anxiety and humiliation she had suffered as a result of the manner in which her case had been handled.

55. As to the second part of the applicant's claim, the Supreme Court observed that it transpired from the case-law of the Supreme Court (IV CK 161/05, judgment of 13 October 2005; see paragraph 80 below) that a right to be informed about the foetus' health and to take informed decisions, in the light of that information, as to whether to continue the pregnancy or not was a personal right within the meaning of the Civil Code. If a child affected with a genetic problem was born as a result of failure to carry out genetic testing, a claim for just satisfaction (zadośćuczynienie) arose on the parent's part. The lower courts had erred in that they had found that there was no adequate causal link between the doctors' conduct in the applicant's case and the fact that she had not had access to legal abortion. In this respect the court noted that there had been enough time between the 18th week of the pregnancy, when the suspicions had arisen, and the 22nd, when the time-limit for legal abortion had expired, to carry out genetic testing. When the tests had finally been carried out, the applicant had received the results two weeks later. The tests should therefore have been carried out immediately after the suspicions had arisen, but instead, as a result of procrastination on the part of doctors S.B., G.S. and K.R., they had ultimately been conducted much later.

56. The court finally held that the amount of PLN 10,000 to be paid by doctor S.B. for denigrating statements he had made in a press interview about the applicant was, in the circumstances of the case, manifestly inadequate.

57. Hence, the judgment had to be quashed and the case remitted for re examination in its entirety.

58. On 30 October 2008 the Kraków Court of Appeal gave a judgment. It stated, referring to the findings of the Supreme Court, that Dr S.B. had failed to refer the applicant for genetic testing as soon as the suspicions as to the foetus' condition had arisen. He had referred her twice to the Kraków hospital, despite the fact that she had already been at that hospital and that no genetic tests had been carried out at that time. The court held that the applicant's claim of PLN 20,000 should therefore be allowed.

59. It further amended the judgment of the first-instance court by increasing to PLN 30,000 the just satisfaction to be paid to the applicant by S.B. for breach of her personal rights in making denigrating public statements about her in the press.

60. In so far as the action was directed against the T. hospital, the court held that the applicant had not received a proper diagnosis. Dr G.S., working at the T. hospital, had not referred her for genetic testing, but only to Kraków hospital, even though he had been aware that genetic testing was not carried out there. When the applicant had eventually received the results of the tests and, relying on them, had asked G.S. on 29 March 2002 to perform an abortion, a written negative reply had been served on her a month later, namely on 29 April 2002.

61. In respect of Kraków University Hospital, the court noted that when the applicant had been admitted there on 14 March 2002, she had already had the results of the scan made by Professor K.Sz. in Łódź, which strongly indicated that the foetus was affected with Turner syndrome. In such circumstances, the hospital was under an obligation to carry out tests in order to either confirm or dispel these suspicions, but had failed to do so. Other tests had been carried out instead, concerning a possible inflammatory condition of the foetus, which were irrelevant for the diagnosis of Turner syndrome. The hospital had exposed the applicant to unnecessary stress, while the correct diagnosis had not been made. The defendants had been aware that time was of the essence in the availability of legal abortion, but had failed to accelerate their decision-taking. The hospitals were liable for the negligent acts of their employees in so far as it was their duty to provide the applicant with full information about any genetic disorder of the foetus and how it might affect its development and to do so in time for her to prepare herself for the prospect of giving birth to a child with a genetic disorder. Moreover, the doctors had failed to make any record of their refusals and the grounds for them, an obligation imposed on them by section 39 of the Medical Profession Act.

62. As Kraków University Hospital had a higher referral level, its liability was more serious as a high level of professional skill could have been reasonably expected of it. The applicant had legitimately expected that she would obtain diagnostic and therapeutic treatment of the requisite quality, whereas her case had in fact been handled with unjustifiable delays.

63. Having regard to the defendants' failure to respect the applicant's rights, the court awarded the applicant PLN 5,000 against T. Hospital of St. Lazarus and PLN 10,000 against Kraków University Hospital, and dismissed the remainder of her appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

64. Article 38 of the Constitution reads as follows:

"The Republic of Poland shall ensure the legal protection of the life of every human being."

65. Article 47 of the Constitution reads:

"Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life."

B. The 1993 Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act and related statutes

66. The Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act, which is still in force, was passed by Parliament in 1993. Section 1 provided at that time that "every human being shall have an inherent right to life from the moment of conception".

Section 2 (a) of the 1993 Act reads:

"The State and local administration shall ensure unimpeded access to prenatal information and testing, in particular in cases of increased risk or suspicion of a genetic disorder or development problem or of an incurable life-threatening ailment."

67. Section 4(a) of the 1993 Act reads, in its relevant part:

"1. An abortion can be carried out only by a physician where

1) pregnancy endangers the mother's life or health;

2) prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life threatening ailment;

3) there are strong grounds for believing that the pregnancy is a result of a criminal act.

2. In the cases listed above under 2), an abortion can be performed until such time as the foetus is capable of surviving outside the mother's body; in cases listed under 3) above, until the end of the twelfth week of pregnancy.

3. In the cases listed under 1) and 2) above the abortion shall be carried out by a physician working in a hospital. ...

5. Circumstances in which abortion is permitted under paragraph 1, sub-paragraphs 1) and 2) above shall be certified by a physician other than the one who is to perform the abortion, unless the pregnancy entails a direct threat to the woman's life."

68. An ordinance issued by the Minister of Health on 22 January 1997, on qualifications of doctors authorised to perform abortions, contains two substantive sections. In its section 1, the requisite qualifications of doctors authorised to perform legal abortions in the conditions specified in the 1993 Act are stipulated. Section 2 of the Ordinance reads:

"The circumstances indicating that pregnancy constitutes a threat to the woman's life or health shall be attested by a consultant specialising in the field of medicine relevant to the woman's condition."

69. On 21 December 2004 the Minister of Health enacted an Ordinance on Certain Medical Services (rozporządzenie Ministra Zdrowia w sprawie zakresu świadczeń opieki zdrowotnej). An Appendix No. 3 to this Ordinance, entitled Scope of Medical Prenatal Services (...) (Zakres lekarskich badań prenatalnych (...)) read, in so far as relevant:

"1. Prenatal tests are to be understood as examinations and diagnostic procedures carried out in respect of pregnant women during the first and second trimesters of pregnancy where there is an increased risk of genetic ailment or malformation, but not later than in the 22nd week of pregnancy.

2. Prenatal tests comprise: 1) non-invasive examinations [including ultrasound scans and biochemical tests [marking of serum levels in a pregnant woman's blood]; 2) invasive tests [including biopsy of the trophoblast and amniocentesis].

3. Prenatal tests are recommended, in particular, where ... 5) results of the ultrasound scan carried out during the pregnancy indicate an increased risk of the foetus being affected with a chromosomal aberration or other malformation."

C. Relevant provisions of the Criminal Code

70. Termination of pregnancy in breach of the conditions specified in the 1993 Act is a criminal offence punishable under Article 152 § 1 of the Criminal Code. Anyone who terminates a pregnancy in violation of the Act or assists such a termination may be sentenced

to up to three years' imprisonment. The pregnant woman herself does not incur criminal liability for an abortion performed in contravention of the 1993 Act.

71. Under Article 157 (a) 1, causing physical damage to an unborn child is a criminal offence punishable by a fine, by limitation of liberty, or by imprisonment of up to two years.

D. Patients' rights

72. At the relevant time, patients rights were provided for by the Medical Institutions Act 1992 (ustawa o zakładach opieki zdrowotnej). Its section 19 (2) provided that a patient had a right to obtain information about his or her condition.

E. Rights and obligations of doctors

73. Under section 39 of the Medical Profession Act (ustawa o zawodzie lekarza), a doctor may refuse to carry out a medical service, invoking her or his objections on the ground of conscience. He or she is obliged to inform the patient where the medical service concerned can be obtained and to register the refusal in the patient's medical records. Doctors employed in health care institutions are also obliged to inform their supervisors of the refusal in writing.

74. Section 31.1 of the Medical Profession Act 1996 provides that physicians are under an obligation to provide to the patient, or his or her representative, comprehensible information about his or her health, diagnosis, proposed and possible diagnostic and therapeutic methods, foreseeable consequences of a decision to have recourse to them or not, and about possible results of therapy and prognosis.

75. Section 37 of the 1996 Medical Profession Act provides that in the event of any diagnostic or therapeutic doubts, a doctor may, on his or her own initiative or at a patient's request and if he or she finds it reasonable in the light of the requirements of medical science, obtain an opinion of a relevant specialist or arrange a consultation with other doctors.

F. Civil liability in tort

76. Articles 415 et seq. of the Polish Civil Code provide for liability in tort. Under this provision, whoever by his or her fault causes damage to another person, is obliged to redress it.

77. Pursuant to Article 444 of the Civil Code, in cases of bodily injury or harm to health, a perpetrator shall be liable to cover all pecuniary damage resulting therefrom.

78. Under Article 448 of the Civil Code, a person whose personal rights have been infringed may seek compensation. That provision, in its relevant part, reads:

"The court may grant an adequate sum as pecuniary compensation for non pecuniary damage (krzywda) suffered by anyone whose personal rights have been infringed. Alternatively, the person concerned, without prejudice to the right to seek any other relief that may be necessary to remove the consequences of the infringement sustained, may ask the court to award an adequate sum for the benefit of a specific social interest. ..."

G. Case-law of the Polish courts

79. In a judgment of 21 November 2003 (V CK 167/03) the Supreme Court held that unlawful refusal to terminate a pregnancy where it had been caused by rape, that is to say in circumstances provided for by section 4 (a) 1.3 of the 1993 Act, could give rise to a compensation claim for pecuniary damage sustained as a result of such refusal.

80. In a judgment of 13 October 2005 (IV CJ 161/05) the Supreme Court expressed the view that a refusal of prenatal tests in circumstances where it could be reasonably surmised that a pregnant woman ran a risk of giving birth to a severely and irreversibly damaged child, that is to say in circumstances set out by section 4 (a) 1.2 of that Act, gave rise to a compensation claim.

H. Relevant non-Convention material

1. Texts adopted within the Council of Europe

81. On 21 June 1990 the Committee of Ministers of the Council of Europe adopted Recommendation No. R (90) 13 on prenatal genetic screening, prenatal genetic diagnosis and associated genetic counselling. The recommendation contains, inter alia, the following principles:

"The Committee of Ministers [...] noting that in recent decades considerable progress has been achieved in detecting genetic abnormalities in the child to be born, through genetic screening and through prenatal diagnosis of pregnant women, but also noting the fears that these procedures arouse;

Considering that women of childbearing age and couples should be fully informed and educated about the availability of, the reasons for and risks of such procedures;

Convinced that the genetic diagnosis and screening must always be accompanied by appropriate genetic counselling but that such counselling should in no cases be of a directive nature and must always leave the woman of childbearing age fully informed to take a free decision; ...

Recommends that the governments of the member States adopt legislation in conformity with the Principles contained in this Recommendation or take any other measures to ensure their implementation.

"Prenatal diagnosis" is the term used to describe tests used to confirm or exclude whether an individual embryo or foetus is affected by a specific disorder.

Principle 1 : No prenatal genetic screening and/or prenatal genetic diagnosis tests should be carried out if counselling prior to and after the tests is not available.

Principle 2 : Prenatal genetic screening and/or prenatal genetic diagnosis tests undertaken for the purpose of identifying a risk to the health of an unborn child should be aimed only at detecting a serious risk to the health of the child. ...

Principle 4 : The counselling must be non-directive; the counsellor should under no condition try to impose his or her convictions on the persons being counselled but inform and advise them on pertinent facts and choices. ...

Principle 9 : In order to protect the woman's freedom of choice, she should not be compelled by the requirements of national law or administrative practice to accept or refuse screening or diagnosis. In particular, any entitlement to medical insurance or social allowance should not be dependent on the undergoing of these tests.

Principle 10 : No discriminatory conditions should be applied to women who seek prenatal screening or diagnostic testing or to those who do not seek such tests, where these are appropriate."

82. In 2008 the Parliamentary Assembly of the Council of Europe adopted Resolution 1607 (2008) "Access to safe and legal abortion in Europe". This resolution, in so far as relevant, reads:

"1. The Parliamentary Assembly reaffirms that abortion can in no circumstances be regarded as a family planning method. Abortion must, as far as possible, be avoided. All possible

means compatible with women's rights must be used to reduce the number of both unwanted pregnancies and abortions.

2. In most of the Council of Europe member states the law permits abortion in order to save the expectant mother's life. Abortion is permitted in the majority of European countries for a number of reasons, mainly to preserve the mother's physical and mental health, but also in cases of rape or incest, of foetal impairment or for economic and social reasons and, in some countries, on request. The Assembly is nonetheless concerned that, in many of these states, numerous conditions are imposed and restrict the effective access to safe, affordable, acceptable and appropriate abortion services. These restrictions have discriminatory effects, since women who are well informed and possess adequate financial means can often obtain legal and safe abortions more easily.

3. The Assembly also notes that, in member states where abortion is permitted for a number of reasons, conditions are not always such as to guarantee women effective access to this right: the lack of local health care facilities, the lack of doctors willing to carry out abortions, the repeated medical consultations required, the time allowed for changing one's mind and the waiting time for the abortion all have the potential to make access to safe, affordable, acceptable and appropriate abortion services more difficult, or even impossible in practice.

4. The Assembly takes the view that abortion should not be banned within reasonable gestational limits. A ban on abortions does not result in fewer abortions but mainly leads to clandestine abortions, which are more traumatic and increase maternal mortality and/or lead to abortion "tourism" which is costly, and delays the timing of an abortion and results in social inequities. The lawfulness of abortion does not have an effect on a woman's need for an abortion, but only on her access to a safe abortion.

...

6. The Assembly affirms the right of all human beings, in particular women, to respect for their physical integrity and to freedom to control their own bodies. In this context, the ultimate decision on whether or not to have an abortion should be a matter for the woman concerned, who should have the means of exercising this right in an effective way.

7. The Assembly invites the member states of the Council of Europe to:

7.1. decriminalise abortion within reasonable gestational limits, if they have not already done so;

7.2. guarantee women's effective exercise of their right of access to a safe and legal abortion;

7.3. allow women freedom of choice and offer the conditions for a free and enlightened choice without specifically promoting abortion;

7.4. lift restrictions which hinder, de jure or de facto, access to safe abortion, and, in particular, take the necessary steps to create the appropriate conditions for health, medical and psychological care and offer suitable financial cover ..."

83. The provisions of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine), adopted in Oviedo, Spain, on 4 April 1997, in so far as relevant, read:

"Article 5 – General rule

An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. ...

Article 10 – Private life and right to information

Everyone has the right to respect for private life in relation to information about his or her health.

Everyone is entitled to know any information collected about his or her health. However, the wishes of individuals not to be so informed shall be observed."

2. The texts adopted within the United Nations

84. The Polish Government, in their fifth periodic report submitted to the Committee (CCPR/C/POL/2004/5), stated:

"106. In Poland data about abortions relate solely to abortions conducted in hospitals, i.e. those legally admissible under a law. The number of abortions contained in the present official statistics is low in comparison with previous years. Non governmental organisations on the basis of their own research estimate that the number of abortions conducted illegally in Poland amounts to 80,000 to 200,000 annually.

107. It follows from the Government's annual Reports of the execution of the [1993] Law [which the Government is obliged to submit to the Parliament] and from reports of non-governmental organisations, that the Law's provisions are not fully implemented and that some women, in spite of meeting the criteria for an abortion, are not subject to it. There are refusals to conduct an abortion by physicians employed in public health care system units who invoke the so-called conscience clause, while at the same time women who are eligible for a legal abortion are not informed about where they should go. It happens that women are required to provide additional certificates, which lengthens the procedure until the time when an abortion becomes hazardous for the health and life of the woman. There [are] no official statistical data concerning complaints related to physicians' refusals to perform an abortion. ... In the opinion of the Government, there is a need to [implement] already existing regulations with respect to the ... performance of abortions."

85. The United Nations Human Rights Committee considered the fifth periodic report of Poland (CCPR/C/POL/2004/5) at its 2240th and 2241st meetings (CCPR/C/SR.2240 and 2241), held on 27 and 28 October 2004 and adopted the concluding observations which, in so far as relevant, read:

"8. The Committee reiterates its deep concern about restrictive abortion laws in Poland, which may incite women to seek unsafe, illegal abortions, with attendant risks to their life and health. It is also concerned at the unavailability of abortion in practice even when the law permits it, for example in cases of pregnancy resulting from rape, and by the lack of information on the use of the conscientious objection clause by medical practitioners who refuse to carry out legal abortions. The Committee further regrets the lack of information on the extent of illegal abortions and their consequences for the women concerned (art. 6).

The State party should liberalize its legislation and practice on abortion. It should provide further information on the use of the conscientious objection clause by doctors, and, so far as possible, on the number of illegal abortions that take place in Poland. These recommendations should be taken into account when the draft Law on Parental Awareness is discussed in Parliament."

86. The Committee on the Elimination of Discrimination against Women (CEDAW), at its 37th session, held from 15 January to 2 February 2007, considered the combined fourth and fifth periodic report (CEDAW/C/POL/4-5) and the sixth periodic report of Poland (CEDAW/C/POL/6). It formulated the following concluding comments:

“24. ... The Committee is concerned about the lack of official data and research on the prevalence of illegal abortion in Poland and its impact on women’s health and life.

... 25. The Committee urges the State party to take concrete measures to enhance women’s access to health care, in particular to sexual and reproductive health services, in accordance with article 12 of the Convention and the Committee’s general recommendation 24 on women and health. It calls on the State party to conduct research on the scope, causes and consequences of illegal abortion and its impact on women’s health and life. It also urges the State party to ensure that women seeking legal abortion have access to it, and that their access is not limited by the use of the conscientious objection clause.”

3. The International Federation of Gynaecology and Obstetrics

87. The objective of the International Federation of Gynaecology and Obstetrics (FIGO) is to promote sexual and reproductive health and rights through educational research and advocacy activities. In 1991 its Ethics Committee issued a statement on Ethical Issues Concerning Prenatal Diagnosis of Disease in the Conceptus. It states that:

“Prenatal diagnosis has become an established service in the care of pregnant women. Further advances, especially at the molecular level, will expand the accuracy and diagnostic scope of manifest disease in later life. Such information may lead to termination of pregnancy, genetic engineering or to adjustments in future life style. There is also the potential danger of stigmatization or discrimination against the parent or the child identified as affected by some disorder or potential disorder. ...

A potential benefit of prenatal diagnosis is the rejection of the diseased conceptus when requested by the woman and permitted by the law. The legal position and the likely attitude of the woman to termination of pregnancy should be ascertained in advance.

Prior to undertaking diagnostic procedures, women should be counseled about the risks and benefits of the technique to be used. Such counseling should be factual, respectful of the woman’s view, and non-coercive. Consent should be obtained for the use of the procedure.

Women should not be denied the availability of prenatal diagnosis because they will not agree in advance to pregnancy termination as an option. Nor should the techniques be withheld on social or financial grounds.

Knowledge of prenatally diagnosed disease should not be used as justification for withholding normal medical support or services during pregnancy, at birth, or thereafter, which are desired by the parents.

Equity requires that these important diagnostic services are made as widely available as possible. ..."

88. The FIGO Ethics Committee's 1991 statement on Ethical Aspects of Termination of Pregnancy Following Prenatal diagnosis states, inter alia, that:

"3. Knowledge acquired by prenatal diagnosis allows for the possibility of termination of pregnancy in those countries where this is legal. This raises serious ethical questions with regard to the degree of abnormality and the reduction in quality of life which may justify this course of action. The attitude of the parents, particularly the woman, after counseling, is of major importance in reaching a decision. It is unethical for anyone to bring pressure to bear on the couple with a view to their accepting a particular option.

4. Doctors should be aware of the desire of parents for a "perfect baby". However, this wish is unrealistic and parents should be counselled accordingly.

5. Termination should be discouraged when the disorder is treatable and will not necessarily affect the future quality of life.

6. In enabling parents to reach an appropriate decision the primary concern should be the quality of life and the longevity of the individual. A second consideration must be the effect that the birth and life of such a child might have on the woman herself and on her family. In this regard consideration must also be given to the effect of the termination of the pregnancy on the physical and/or psychological health of the woman and her family. A third concern is the availability of resources and support for long-term care."

89. The Committee's 1994 statement on the Ethical Framework for Gynecologic and Obstetric Care requires that:

"3. when decisions regarding medical care are required, women be provided with full information on available medical alternatives including risks and benefits. Informing women and obtaining their input and consent, or dissent, should be a continuing process.

4. If a physician is either unable or unwilling to provide a desired medical service for non-medical reasons, he or she should make every effort to achieve appropriate referral."

6.6.3. The law

90. The applicant complained that the facts of the case had given rise to a breach of Article 3 of the Convention which, insofar as relevant, reads as follows:

"No one shall be subjected to ... inhuman or degrading treatment... "

91. The applicant further complained that the facts of the case had given rise to a breach of Article 8 of the Convention. Her right to respect for her private life and her psychological and moral integrity had been violated by the authorities' failure to provide her with access to genetic tests in the context of her uncertainty as to whether the foetus was affected with a genetic disorder and also by the absence of a comprehensive legal framework to guarantee her rights.

Article 8 of the Convention, insofar as relevant, reads as follows:

"1. Everyone has the right to respect for his private ... life ...

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

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. The applicant's status as a victim

1. The parties' submissions

92. The Government first submitted that the applicant had rejected their friendly settlement proposal. In their view, she had therefore lost her status as a victim of a breach of her rights guaranteed by the Convention.

They further submitted that she had lost that status also because the Kraków Court of Appeal, in its judgment of 30 October 2008, awarded her PLN 65,000 and that judgment subsequently became final.

93. The Government argued that the Supreme Court, in its judgment of 11 July 2008, had held that the right to family planning and the related right to legally terminate the applicant's pregnancy on conditions provided for by Polish law had to be regarded as a personal right within the meaning of the Civil Code. These rights were therefore to be seen as falling within the ambit of Articles 3 and 8 of the Convention. The Supreme Court and the Court of Appeal had thereby acknowledged that the applicant's rights had been breached and afforded redress to her.

94. The applicant argued that the violations of the Convention in her case had resulted from the lack of review procedures available in connection with the doctors' refusal to provide her with prenatal diagnosis and care and from the unregulated and chaotic practice of conscientious objection under Polish law, which formed the basis of her complaints under the Convention. She further emphasised that she had received insufficient compensation for the breaches of her rights.

In addition, the domestic courts had failed to address the systemic shortcomings of Poland's health care and legal system disclosed by her case. She referred to the case of M.A v. the United Kingdom (no. 35242/04, ECHR 2005 – VIII) where a family judge had apologised for the failures in the child care system which had come to light against the background of an individual case, had carried out an explicit and detailed analysis of the system's shortcomings and had made a list of recommendations to avoid repetition of similar violations. She argued that this should have served as a model approach for dealing with her case.

95. The applicant concluded that, in any event, the damages awarded to her on the domestic level should not be used as a means of avoiding the State's compliance with its obligations under the Convention.

2. The Court's assessment

96. In so far as the Government referred to the friendly settlement negotiations between the parties, the Court first reiterates that in accordance with Article 38 § 2[60] of the Convention, friendly settlement negotiations are confidential and without prejudice to the parties' arguments in the contentious proceedings. Pursuant to Rule 62[61] of the Rules of Court, no written or oral communication and no offer or concession made in the framework of the

attempt to secure a friendly settlement may be referred to or relied on in the contentious proceedings. In any event, in the present case the applicant refused the terms of the proposed settlement. Her refusal to settle the case has therefore no incidence on her victim status (see, Chebotarev v. Russia, no. 23795/02, § 20, 22 June 2006, mutatis mutandis; Nina Kazmina and Others v. Russia, nos. 746/05, 13570/06, 13574/06, 13576/06 and 13579/06 (Sect. 1) (Eng), § 25, 13 January 2009; Tahsin Acar v. Turkey (preliminary issue) [GC], no. 26307/95, § 74, ECHR 2003 VI).

97. The Court reiterates that it falls, firstly, to the national authorities to redress any violation of the Convention. In this regard, the question whether an applicant can claim to be a victim of the violation alleged is relevant at all stages of the proceedings under the Convention (see, inter alia, Siliadin v. France, no. 73316/01, § 61, ECHR 2005-VII, and Scordino v. Italy (no. 1) [GC], no. 36813/97, § 179, ECHR 2006 V). An applicant's status as a victim of a breach of the Convention may depend on compensation being awarded at domestic level on the basis of the facts about which he or she complains before the Court (see Normann v. Denmark (dec.), no. 44704/98, 14 June 2001; and Jensen and Rasmussen v. Denmark (dec.), no. 52620/99, 20 March 2003). The adequacy of that redress falls to be assessed in the light of all the circumstances of the case seen as a whole (see, mutatis mutandis, Dubjaková v. Slovakia (dec.), no. 67299/01, 19 October 2004). The applicant's victim status also depends on whether the domestic authorities have acknowledged, either expressly or in substance, the breach of the Convention. Only when those two conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application (see Eckle v. Germany, judgment of 15 July 1982, Series A no. 51, p. 32, §§ 69 et seq., and Jensen v. Denmark (dec.), no. 48470/99, ECHR 2001 X).

98. The Court has therefore to examine whether the national authorities have acknowledged, either expressly or in substance, the breach of the rights protected by the Convention.

99. It notes in this connection that the applicant, in her civil case brought before the domestic courts, complained about the doctors' failure to refer her for the purposes of genetic testing and about the resultant breach of her right to make an informed decision as to the continuation of pregnancy (see paragraph 43 above).

100. Furthermore, she complained that her personal rights, including her right to respect for personal dignity, had been breached as a result of the manner in which the issue of her access to genetic tests had been determined (see paragraph 43 above).

101. The Court observes that the Supreme Court, in its judgment of 11 July 2008, held that the right of a pregnant woman to be informed about the foetus' health in a timely manner and to take informed decisions in the light of that information as to whether to continue the pregnancy or not was a personal right within the meaning of the Civil Code. The Supreme Court found that the legal assessment of the doctors' conduct in connection with the applicant's access to genetic testing made by the lower courts was untenable. It accordingly quashed, in its entirety, the judgment of the Kraków Court of Appeal, given on 28 July 2008. As a result, in its subsequent – and final – judgment of 30 October 2008 the Kraków Court of Appeal reversed its previous position and acknowledged that the applicant's patient's and personal rights had been breached.

102. The Court notes that in its judgment the Supreme Court had shown a thorough understanding of the legal issues arising in the case and interpreted them in a manner showing regard for the applicant's dignity and personal autonomy, values protected by the provisions of the Polish Civil Code. It carefully weighed them against other interests involved in the case. In particular, the Supreme Court emphasised a patient's right of access to information relevant to her or his health, including about the foetus' condition. It also held that the applicant had suffered distress, anxiety and humiliation as a result of the manner in which her case had been handled (see paragraph 54 above).

103. As to the first set of issues raised by the applicant's case (see paragraph 99 above) the Court notes that the applicant submitted them to the Court, alleging that they had given rise to a breach of Article 8 of the Convention (see paragraph 91 above). The Court considers that this part of the Government's objection is closely linked to the substance of the applicant's complaint under this provision and that its examination should therefore be joined to the merits of that complaint.

104. In so far as the Government's objection as to the applicant's victim status also concerns the applicant's complaint under Article 3 of the Convention (see paragraph 90 above), the Court is of the view that the amounts awarded at the domestic level must be viewed against the background of the case seen as a whole. The civil case concerned the protection of the applicant's dignity. The issues involved in the case were therefore of the utmost importance for her.

105. It is in this context that the adequacy of the award made in the civil proceedings must be assessed. The courts awarded the applicant PLN 65,000 for all three kinds of complaints

which she had made in respect of the way in which she had been treated by the health professionals.

106. However, the Court observes that that amount covered also her claim for defamation against S.B., one of the doctors who had made disparaging statements about her in a press interview. He was ordered to pay PLN 50,000, of which PLN 30,000 concerned the claims arising in connection with the interview. Only the amount of PLN 20,000 concerned the same issues as those examined by the Court in the present case and arising in connection with the circumstances surrounding Dr S.B.'s failure to issue to the applicant a prompt referral for genetic testing.

107. The Court further notes that the applicant was also awarded PLN 5,000 against the hospital in T. and PLN 10,000 against the Kraków University Hospital in respect of the breach of her rights as a patient. These amounts have to be added to the sum of PLN 20,000 referred to in the above paragraph. In sum, the amount of the domestic award relevant for the case before the Court in its entirety was therefore PLN 35,000.

108. The Court notes that in the case of Tysiąc v. Poland it examined whether the Polish State had complied with its positive obligation under Article 8 of the Convention to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a legal abortion. It awarded to the applicant EUR 25,000 in respect of a breach of this provision. This amount was almost three times higher than that awarded by the domestic courts in the present case in respect of the applicant's complaints made both under Article 3 and Article 8 of the Convention. The Court is therefore of the view that, having regard to the circumstances of the case, the amount of PLN 35,000 cannot be regarded as financial redress commensurate with the nature of the damage alleged by the applicant (compare and contrast Caraher v. the United Kingdom (dec.), no. 24520/94, ECHR 2000 I).

109. The Court finds that the applicant has not ceased to be a victim of a breach of Article 3[39] of the Convention within the meaning of Article 34[10] of the Convention. The Government's objection in this respect is accordingly dismissed.

3. Exhaustion of domestic remedies

110. The Government submitted that the applicant had failed to exhaust relevant domestic remedies. The Polish legal system provided for legal avenues which made it possible, either by means of criminal proceedings or civil compensation claims, to establish liability on the part of doctors for any damage caused by medical malpractice.

111. They argued that Article 8 of the Convention did not entail a duty for the State either to establish a general preventive mechanism for review of medical decisions, or to create an appeal procedure regarding access to medical services, even where access to another medical service hinged on a prior diagnostic service. This was also the case for medical services where the time factor was crucial, such as chemotherapy, for instance, as well as services which were essential in order to prevent serious health damage or even death. There were no reasons for departing from this general rule where medical decisions could help to determine whether a foetus was suffering from possible genetic malformation.

112. Furthermore, the State's choice between creating preventive measures or retroactive ones, such as civil or criminal liability, depended on assumptions made by public powers with respect to a conflict between the rights of a pregnant woman and those of an unborn child. The obligations imposed by Article 8 did not exclude perceiving the life of an unborn child as of such crucial value as to render acceptable a risk of wrongful medical diagnosis concerning the existence – or otherwise – of conditions which would make an abortion lawful. Likewise, such a perception of the interests involved could also justify limiting the legal avenues for challenging such a diagnosis to retroactive ones. Obviously, only a woman who wished to terminate her pregnancy would resort to a potential review mechanism in relation to a medical diagnosis impinging on the foetus' rights. As a result, only an unborn child would bear the risk of such a diagnosis being incorrect.

113. The Government further submitted that the applicant should have resorted to a constitutional complaint to challenge the provisions of the 1993 Act. The Court had already held a constitutional complaint to be an effective and sufficient domestic remedy.

114. The applicant submitted that the civil proceedings did not provide sufficient and effective remedies with respect to the breaches alleged. Procedures in which decisions concerning the availability of lawful abortion were reviewed post factum could not fulfil such a function (Tysiąc, cited above, § 118). Retrospective measures alone were not sufficient to provide appropriate protection for the physical and psychological integrity of individuals in such a vulnerable position as the applicant (Tysiąc, § 124). The available legal framework as applicable at the material time did not contain any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met (Tysiąc, § 127).

115. She further argued that she had sought information on the health of the foetus, through prenatal genetic examination, which would have enabled her to make an informed decision,

based on medical evidence, as to whether to continue her pregnancy or not. Instead, due to systemic problems in the health care system and, in particular, the State's failure to implement existing laws on conscientious objection and on access to prenatal health care services and to lawful abortion, the doctors had intentionally denied her timely information and health services that should have been considered normal and accessible, lawful and appropriate in the circumstances of her case. Delaying prenatal diagnostic testing also delayed the taking of potential informed decision as to whether to request a termination of pregnancy, to which the applicant was entitled, ultimately making abortion impossible.

116. In so far as the Government refer to a constitutional complaint as a remedy relevant in the applicant's circumstances, the Court is of the view that such a complaint would not have been an effective means of protecting the applicant's right to respect for her private life for the following reasons.

The Court notes, firstly, that it has already dealt with the question of the effectiveness of the Polish constitutional complaint (Szott-Medyńska v. Poland (dec.), no. 47414/99, 9 October 2003; Pachla v. Poland (dec.), no 8812/02, 8 November 2005; Wypych v. Poland (dec.), no. 2428/05, 25 October 2005). It examined its characteristics and, in particular, found that the constitutional complaint was an effective remedy for the purposes of Article 35 § 1 of the Convention only in situations where the alleged violation resulted from the direct application of a legal provision considered by the complainant to be unconstitutional. In the present case, the complaints raised by the applicant cannot be said to have originated from any single legal provision or even from a well-defined set of provisions. They rather resulted from the way in which the laws were applied in practice to her case. However, it follows from the case-law of the Polish Constitutional Court that it lacks jurisdiction to examine the way in which the provisions of domestic law were applied in an individual case.

117. Furthermore, the Court has already held that the constitutional courts were not the appropriate fora for the primary determination as to whether a woman qualifies for an abortion which is lawfully available in a State. In particular, this process would amount to requiring the constitutional courts to resolve through evidence, largely of a medical nature, whether a woman had established the existence of circumstances in which legal abortion could be sought under the 1993 Act (see, mutatis mutandis, A, B and C v. Ireland [GC], no. 25579/05, § 258, 16 December 2010).

118. The Court therefore dismisses the Government's preliminary objection as regards the applicant's failure to exhaust domestic remedies by not lodging a constitutional complaint.

119. Furthermore, the Court considers that the Government's objection concerning the alleged failure to exhaust domestic remedies by way of pursuing a compensation claim before the civil courts is closely linked to the substance of the applicant's complaints under Article 8 § 1 read together with Article 13 of the Convention, and should be joined to the merits of the case.

120. The Court further notes that the application is not manifestly ill founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

II. THE MERITS

121. The Court will first set out the submissions received from third parties who were granted leave to intervene in the case (A.). It will then examine the merits of the applicant's complaints under Articles 3, 8 and 13 of the Convention (B., C. and D.).

A. Third parties' submissions

1. Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the office of the United Nations High Commissioner for Human Rights

122. Because the decision to continue or terminate a pregnancy had a profound effect on a woman's private life, including her physical and moral integrity, any interference with this decision must be analysed in light of the woman's right to privacy. This was true regardless of whether the interference directly affected the woman's access to legal abortion or affected it indirectly, by denying her the prerequisite healthcare she needed in order to make a decision regarding continuation or termination of the pregnancy. Numerous international conventions broadly recognised a woman's right to the highest attainable standard of health, including access to appropriate reproductive care. Privacy was particularly important in the case of sexual and reproductive healthcare, which must be provided in a manner consistent with women's rights to personal autonomy.

123. Access to prenatal genetic examinations touched upon reproductive health-related aspects of the right to privacy. Access to information was particularly important in the context of health, as individuals cannot make meaningful healthcare decisions without access to health related information. Accurate knowledge of an individual's health status was necessary

to enable that individual to understand her health care options and protect her bodily integrity by deciding which health care treatment she would avail herself of.

124. This right to information applied with regard to a woman's own reproductive status, knowledge of which was particularly important if women were to be empowered to preserve their bodily integrity by making reproductive health care decisions. Pregnant women might need access to prenatal examinations in order to obtain accurate information about their own health and the health of their foetus, particularly where there were other indications of genetic malformation. Genetic examinations were often the most reliable method for detecting foetal genetic defects.

125. States must allow individuals to make health care decisions in an active and informed manner. Genetic examinations were one important source of information on foetal health. Obstructing access to examinations necessary to make reproductive decisions interfered with women's reproductive health care decision-making. Without information about whether a foetus was healthy or severely malformed, a woman could not make crucial decisions regarding prenatal treatment or whether to carry the foetus to term. When a country permitted abortion in cases of foetal genetic defect, women must have access to prenatal genetic examinations in order to exercise their right to a legal abortion.

126. One way in which States interfered with a woman's right to decide on a legal abortion was to make such abortions unavailable in practice. The Human Rights Committee had expressed concern regarding States that professed to grant women access to legal abortion but allowed practices to continue that interfered with actual access to abortion services.

127. Where a State allowed providers to conscientiously object to providing health services, it must ensure that it had other adequate procedures in place to safeguard women's ability to effectively exercise their rights under Article 8[21] of the Convention, including the right to an abortion where legal and the right to information regarding their health status.

128. The consensus among UN Treaty Monitoring Bodies and international health organisations was that the right of a health care provider to conscientiously object to the provision of certain health care services must be carefully regulated so that it did not effectively deny a woman the right to obtain such services which were guaranteed by the law, in this case pursuant to Article 8 of the European Convention.

2. International Reproductive and Sexual Health Law Programme of the Law Faculty, University of Toronto

129. The protection of prenatal life was an important social and moral value in all Contracting Parties. However, it must be asked whether protecting this value was a legitimate reason to deny women access to prenatal tests that will assist them, rather than their doctors, to make informed decisions as to whether to pursue consequent treatment.

130. There was widespread regional and international recognition of the importance of ensuring women's right to equal access to health care systems generally, and access to timely diagnostic treatment and lawful abortion.

131. Where uniform European standards existed regarding women's timely access to medically-indicated diagnostic tests and consequent lawful treatment, Contracting Parties' margin of appreciation was greatly diminished.

132. The stereotype that motherhood was women's natural role and destiny was discriminatory when it implied that all women should be treated only as mothers or potential mothers, and not according to their individual needs not to become mothers at certain points in their lives. When Contracting Parties incorporated such a stereotype into the delivery of health care services, it disadvantaged women. Discriminatory stereotypes limited the ability of individual women to make autonomous decisions about their health and their private and family life that could conflict with their role as mothers or future mothers.

133. Women should not be conditioned by State agents' withholding of available medical services that could diagnose severe foetal abnormalities when the law allowed them the private choice to terminate such pregnancies.

134. Accordingly, unjust denial or obstruction of diagnostic services on the basis of a woman's express intention to terminate a pregnancy was an interference with private life. A pregnant woman's suffering was too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision had been in the course of our history and culture. The destiny of the woman must be shaped to a large extent by her own conception of her spiritual imperatives and her place in society.

135. Women's private choices of the design and composition of their families should not be at the disposal of health care professionals or institutions that determine the allocation of available health care resources, or that seek to advance sex-specific norms based on religious or cultural ideologies through the denial of available diagnostic services in order to prevent outcomes of which they disapprove.

136. Women's human right to control their own bodies affected their capacity to serve their families, including dependent children and often dependent elderly family members. The design and composition of women's family life, including how they proportioned resources of time and energy among healthy and disabled children, and among children and elderly family members, was a matter of deep personal and emotional significance.

137. There was a wide consensus that in the administration of health care systems, Contracting Parties were obligated positively to ensure reasonable availability of diagnostic services to enable patients to have the information necessary to make medical decisions significant for their health and family well being.

138. This principle of free and informed decision-making was found in codes of medical ethics and was reflected in national laws, court decisions of Contracting Parties, international legal norms and their application, and international guidelines on medical practice.

139. Doctors can exploit their professional authority to treat female patients according to their own beliefs and sex-based stereotypes, rather than according to the actual needs of such patients. When patients were treated in ways unrelated to their own medical needs, and to their own priorities and aspirations, but rather as a means to advance doctors' own ends, there was a form of degrading treatment. Denying women the exercise of reproductive autonomy through obstructing timely access to prenatal diagnostic tests might likewise violate Article 3. Any resulting involuntary continuation of a legally terminable pregnancy, and the birth of a child with severe abnormalities, would constitute a form of inhuman and degrading treatment.

140. Contracting Parties must account for the particular sex specific vulnerabilities of women seeking prenatal genetic diagnosis. Such women often had existing dependent children for whom they had to care. They faced a very stressful decision, perhaps one of the most difficult decisions in their lives. As a result, they required non-judgmental counseling that enabled them to think through their particular life circumstances, personal values and priorities, usually under severe time constraints.

141. When Contracting Parties, in regulating health care systems, subjected pregnant women, faced with the possibility of births of children with severe abnormalities, to circuitous or obstructive means to obtain information or treatment, with the effect that they were denied opportunities to make timely decisions about legal abortion services, there was a violation of Article 14 of the Convention in relation to its Article 3.

142. Contracting Parties should be required to observe guidelines on the provision of prenatal genetic diagnosis. Such guidelines should include the ethical principle to consider first the well-being of the patient, and to ensure that this principle was implemented, irrespective of the sex of the patient.

3. The International Federation of Gynaecology and Obstetrics

143. The International Federation of Gynaecology and Obstetrics (FIGO) submitted that it could be useful for the Court to be aware of the Federation's and its Ethics Committee's findings and recommendations on women's access to medically indicated prenatal tests and exercise of reproductive choice, and on practitioners' exercise of rights of conscientious objection in a manner consistent with equal respect for the conscientious convictions of their colleagues and patients. The FIGO Ethics Committee recognised that some physicians might present false diagnostic or clinical reasons to decline to afford patients indicated care to which the physicians object, rather than "provide public notice of professional services they decline to undertake".

B. Alleged violation of Article 3 of the Convention

1. The parties' submissions

144. The Government submitted that on no occasion had the applicant been subjected to treatment which would result in a breach of Article 3 of the Convention. The applicant might have felt some stress or discomfort, but the treatment complained of had not approached the threshold of severity sufficient for it to fall within the ambit of this provision. Even assuming that the applicant's conversations with some doctors could have been stressful or unpleasant, or that the doctors had expressed their views in a rude or impolite manner, as the applicant seemed to consider, this did not raise any issue under Article 3.

In so far as the applicant was of the view that the doctors had treated her in a dismissive and contemptuous manner, repeatedly criticising her for her efforts to obtain access to prenatal testing and for the fact that she had envisaged a termination, the Government argued that nothing in the facts of the case suggested behaviour contrary to Article 3 of the Convention. The applicant's allegations of an intentional failure to provide necessary medical treatment had no basis in the facts of the case.

The Government rejected the supposition that inhuman or degrading treatment could result from the State's failure to enact what the applicant perceived as adequate legislation.

145. The applicant complained under Article 3 of the Convention that she had been subjected to inhuman and degrading treatment as a result of the doctors' intentional failure to provide necessary medical treatment in the form of timely prenatal examinations that would have allowed her to take a decision as to whether to continue or terminate her pregnancy within the time-limit laid down by the 1993 Act. She also complained that the doctors had treated her in a dismissive and contemptuous manner, repeatedly criticising her for her efforts to have prenatal tests carried out and for the fact that she had envisaged an abortion as a possible solution to her predicament.

146. The applicant submitted that the repeated and intentional denial of timely medical care had been aimed at preventing her from having recourse to a legal abortion. The way in which she had been treated by the medical staff, including but not limited to degrading remarks related to her seeking medical information and tests which she had been legally entitled to receive, her unnecessary confinement for days in the Kraków hospital without explanation, only to conduct simple tests unrelated to genetic testing, and the unavailability of genetic testing within large areas of the country, as admitted by the State, had been humiliating and degrading and had had a continuing impact on the applicant's life.

147. The applicant further argued that she had been under additional duress because she had been aware that if the malformation had been severe enough she would seek a legal abortion, but could only do so within the time-limits allowed by law. Her husband had also wished for a legal abortion in the event of malformation of the foetus. She had known that had she been unable to obtain an abortion, she would be faced with having to raise a child affected with a lifelong ailment. This set of circumstances had caused her much distress and anxiety. The doctors had known about the time restrictions and about her position on terminating her pregnancy, but they had manipulated her and procrastinated, despite the obvious fact that termination of pregnancy was more dangerous later than earlier. Furthermore, Dr S.B.'s contemptuous attitude towards the applicant had been clearly shown in his interview.

2. The Court's assessment

(a) General principles

148. According to the Court's well-established case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and

state of health of the victim (see, among many other authorities, Price v. the United Kingdom, no. 33394/96, § 24, ECHR 2001-VII; Kupczak v. Poland, no. 2627/09, § 58, 25 January 2011; Jalloh v. Germany [GC], no. 54810/00, § ..., ECHR 2006 IX).

149. Treatment has been held by the Court to be "inhuman" because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see Labita, Labita v. Italy [GC], no. 26772/95, § 120, ECHR 2000 IV).

150. Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, among many other authorities, Iwańczuk v. Poland, no. 25196/94, § 51, 15 November 2001; Wiktorko v. Poland, no. 14612/02, § 45, 31 March 2009).

151. Although the purpose of such treatment is a factor to be taken into account, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3. For example, the Court has found violations of that provision in many cases where the authorities dealt with requests to provide information of crucial importance for the applicants, for example about the whereabouts and fate of their missing relatives, disclosing a callous disregard for their vulnerability and distress (see, among many other authorities, Kukayev v. Russia, no. 29361/02, §§ 102 106; 15 November 2007; Takhayeva and Others v. Russia, no. 23286/04, §§ 102-104, 18 September 2008).

152. Moreover, it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under Article 3 by reason of their failure to provide appropriate medical treatment (see, for example, Powell v. the United Kingdom (dec.), no. 45305/99, ECHR 2000-V).

(b) Application of the principles to the circumstances of the case

153. Turning to the circumstances of the present case, the Court observes that the results of the ultrasound scan carried out in the 18th week of the applicant's pregnancy confirmed the likelihood that the foetus was affected with an unidentified malformation (see paragraph 9 above). Following that scan the applicant feared that the foetus was affected with a genetic disorder and that, in the light of the results of subsequent scans her fears cannot be said to have been without foundation. She tried, repeatedly and with perseverance, through numerous visits to doctors and through her written requests and complaints, to obtain access to genetic

tests which would have provided her with information confirming or dispelling her fears; to no avail. For weeks she was made to believe that she would undergo the necessary tests. She was repeatedly sent to various doctors, clinics and hospitals far from her home and even hospitalised for several days for no clear clinical purpose (see paragraph 20 above). The Court finds that the determination of whether the applicant should have access to genetic testing, recommended by doctors in light of the findings of the second ultrasound scan, was marred by procrastination, confusion and lack of proper counselling and information given to the applicant.

Ultimately, it was only by following the advice given by Professor K.Sz., the only doctor who was sympathetic to her plight, that the applicant obtained admission to a hospital in Łódź by means of subterfuge. She reported to that hospital as an emergency patient and finally had the tests conducted in the 23rd week of her pregnancy, on 26 March 2002. The applicant obtained the results on 9 April 2002, two weeks later.

154. The Court notes that it was not in dispute that it was possible only by means of genetic tests to establish, objectively and in the manner dictated by modern medical science and technology, whether the initial diagnosis was correct. Indeed, this was never challenged either by the Government in the proceedings before the Court or by the defendants in the domestic civil proceedings.

155. The Court further notes that it has not been argued, let alone shown, that at the material time genetic testing as such was unavailable for lack of equipment, medical expertise or funding. On no occasion was the applicant told that it was impossible to carry out the tests for any kind of technical or material reasons.

156. In this connection, the Court cannot but note that the 1993 Act determining the conditions permitting termination of pregnancy expressly and unequivocally provides, and provided at the relevant time, for the State's obligation to ensure unimpeded access to prenatal information and testing. Section 2 (a) of this Act imposed such an obligation on the State and local administration in particular in cases of suspicion of genetic disorder or development problems. This obligation covered all cases in which such suspicion arose in respect of a pregnancy, with no distinction whatsoever being drawn in the Act based on the severity of the suspected ailment (see paragraph 66 above).

157. The Court further observes that the Medical Profession Act clearly provides and provided at the material time for a general obligation for doctors to give patients

comprehensible information about their condition, the diagnosis, the proposed and possible diagnostic and therapeutic methods, the foreseeable consequences of a decision to have recourse to them or not, the possible results of the therapy and about the prognosis (see paragraph 74 above). Likewise, the Medical Institutions Act, applicable at the material time, provided for patients' right to obtain comprehensive information on their health (see paragraph 72 above). Hence, there was an array of unequivocal legal provisions in force at the relevant time specifying the State's positive obligations towards pregnant women regarding their access to information about their health and that of the foetus.

158. However, there is no indication that the legal obligations of the State and of the medical staff regarding the applicant's patient's rights were taken into consideration by the persons and institutions dealing with the applicant's requests to have access to genetic testing.

159. The Court notes that the applicant was in a situation of great vulnerability. Like any other pregnant woman in her situation, she was deeply distressed by information that the foetus could be affected with some malformation. It was therefore natural that she wanted to obtain as much information as possible so as to find out whether the initial diagnosis was correct, and if so, what was the exact nature of the ailment. She also wanted to find out about the options available to her. As a result of the procrastination of the health professionals as described above, she had to endure weeks of painful uncertainty concerning the health of the foetus, her own and her family's future and the prospect of raising a child suffering from an incurable ailment. She suffered acute anguish through having to think about how she and her family would be able to ensure the child's welfare, happiness and appropriate long-term medical care. Her concerns were not properly acknowledged and addressed by the health professionals dealing with her case. The Court emphasises that six weeks elapsed between 20 February 2002 when the first ultrasound scan gave rise, for the first time, to a suspicion regarding the foetus' condition and 9 April 2002 when the applicant finally obtained the information she was seeking, confirmed by way of genetic testing. No regard was had to the temporal aspect of the applicant's predicament. She obtained the results of the tests when it was already too late for her to make an informed decision on whether to continue the pregnancy or to have recourse to legal abortion as the time limit provided for by section 4 (a) paragraph 2 had already expired.

160. The Court is further of the view that the applicant's suffering, both before the results of the tests became known and after that date, could be said to have been aggravated by the fact

that the diagnostic services which she had requested early on were at all times available and that she was entitled as a matter of domestic law to avail herself of them.

It is a matter of great regret that the applicant was so shabbily treated by the doctors dealing with her case. The Court can only agree with the Polish Supreme Court's view that the applicant had been humiliated (see paragraph 54 above).

161. The Court is of the view that the applicant's suffering reached the minimum threshold of severity under Article 3 of the Convention.

162. The Court concludes that there has therefore been a breach of that provision.

C. Alleged violation of Article 8 of the Convention

1. The parties' submissions

(a) The Government

163. The Government submitted that pregnancy and its interruption did not, as a matter of principle, pertain uniquely to the sphere of the mother's private life. Whenever a woman was pregnant, her private life became closely connected with the developing foetus. There could be no doubt that certain interests relating to pregnancy were legally protected (Eur. Comm. HR, Brüggemann and Scheuten v. Germany, Report of 12 July 1977, DR 10, p. 100). Polish law protected the human foetus in the same manner as the mother's life and it therefore allowed for termination of pregnancy only in the circumstances prescribed in the 1993 Act. The Government were of the view that in the applicant's case the conditions for lawful termination had not been met.

164. The Government argued that in the applicant's case the Court should not focus solely on the question of whether the applicant had been deprived of her right to receive genetic counselling. They stressed that ultimately the applicant had obtained access to a prenatal genetic examination, as requested.

165. If the applicant was of the view that as a result of the delay in having access to genetic tests she had been deprived of the possibility of terminating her pregnancy, then the question arose whether in her case such a possibility genuinely existed on the basis of the Act. However, this could not be determined with the requisite clarity, as at the material time there had been no consensus in Poland as to whether Turner syndrome could be said to be a serious enough malformation within the meaning of the 1993 Act to justify a legal abortion.

Moreover, the medical expert opinion prepared for the purposes of the criminal investigation indicated that Turner syndrome did not qualify as either a severe or a life-threatening condition. Hence, the doctors involved in the applicant's case could not have issued a certificate authorising termination.

Insofar as the applicant seemed to imply that another foetal malformation – Edwards syndrome – had been suspected, her medical records did not show this to have been the case. In any event, if the applicant relied primarily on what she perceived as her right to have an abortion on the grounds of foetal malformation, the Government were of the view that such a right could not be derived from the State's positive obligation to guarantee adequate health care. Furthermore, according to the Government's submission, any genetic examination of the foetus had at that time to be performed prior to the 22nd week of pregnancy.

166. The Government further submitted that they strongly disagreed with the reasoning adopted by the Court in its judgment in the case of Tysiąc v. Poland, concerning the potential threat to the pregnant woman's health caused by pregnancy and by the refusal of termination. However, even if the present case were to be assessed from the point of view of the principles developed in that judgment, no support could be found therein for the applicant's position. The question of voluntary termination of pregnancy for eugenic reasons, concerned in the present case, could not be derived from the State's positive obligations to provide adequate medical care.

167. If, on the other hand, the applicant held the State responsible for the delay in her access to genetic testing, the Government argued that she herself had contributed to that delay as she had insisted on having genetic testing carried out in a particular hospital, in Łódź, outside her region. This had inevitably led to the prolongation of the relevant procedures.

168. The Government further referred to the provisions of the Minister of Health's Ordinance of 22 January 1997 (see paragraph68 above), arguing that it provided for a procedure governing decisions on access to abortion. They further stated that section 37 of the Medical Professions Act 1996 made it possible for a patient to have a decision taken by a doctor as to the advisability of an abortion reviewed by his or her colleagues. In the present case, Dr S.B. had offered the applicant the possibility of convening a panel of doctors to examine her case, but the applicant had refused.

169. Lastly, the Government argued that the applicant should have availed herself of the procedural possibilities provided for by administrative law. The public health institutions

should be considered as administrative agencies, subject to the provisions of the Code of Administrative Procedure. Consequently, the refusal of admission to a hospital for the purposes of a voluntary termination constituted an administrative decision of the hospital's management and, as such, was subject to administrative supervision procedures provided for by that Code.

(b) The applicant

170. The applicant submitted that the public powers' failure to implement laws and regulations governing access to prenatal examinations and termination of pregnancy in the context of sections 2 (2) (a) and 4(a) of the 1993 Act, including the lack of procedures to ensure whether the conditions for a lawful abortion under section 4 (a) had been met, and the failure to implement and oversee the laws governing the practice of conscientious objection, resulted in insufficient protection of her rights guaranteed by the Convention.

171. The 1993 Act itself did not contain any procedural provisions. The 1997 Ordinance, referred to by the Government, did not provide for any particular procedural framework to address and resolve controversies arising in connection with the availability of lawful abortion. Section 37 of the Physicians' Act did not provide for review of medical decisions, but simply granted doctors discretion to seek a second opinion from a colleague. It did not provide for a mechanism which could be invoked by a patient. Insofar as the Government relied on the administrative procedure, diagnostic or therapeutic decisions were not decisions in the administrative sense and could not be challenged under the provisions of the Code of Administrative Procedure.

172. The applicant further referred to the Council of Europe's Committee of Ministers' Recommendation No. R (90)13 to Member States on Prenatal Genetic Screening, Prenatal Genetic Diagnosis, and Associated Genetic Counselling (see paragraph 81 above). It stated that where there was an increased risk of passing on a serious genetic disorder, access to preconception counselling and diagnostic services should be readily available. Moreover, the applicant argued that many Council of Europe member States included prenatal examinations as part of routine obstetric services. When an ultrasound scan indicated a possibility of the foetus having a genetic disorder, genetic counselling and examination were made available according to detailed guidelines adopted through State regulations. In the present case, however, the applicant had been unable to obtain timely access to genetic testing, which clearly contravened the applicable principles.

173. The applicant submitted that the violation of her rights had originated also in the unregulated practice of conscientious objection. The refusal of the Kraków University Hospital to provide certain services on grounds of conscientious objection constituted a failure to ensure the availability and accessibility of reproductive health services. The public health care institutions, being public entities, had a duty to provide legal health services to the public. The State had a duty to ensure that the laws governing conscientious objection were complemented by implementing regulations or guidelines balancing the medical staff's right to object against the patient's rights to obtain access to lawful medical services.

174. Furthermore, the applicant emphasised that in any event health care providers should not be allowed to rely on conscientious objection in respect of diagnostic services. In the present case Doctors K.R. and S.B. had effectively refused to provide diagnostic care out of concern that the applicant, having obtained the diagnostic results, might seek the termination of her pregnancy. The applicant submitted that under the established medical doctrine of informed consent, patients should be informed of all risks, benefits and alternatives to treatment in order to make a free and informed decision in their best interest. Refusing to diagnose a potentially serious illness on the basis that the diagnosis might subsequently lead to a therapeutic act to which the doctor concerned objected on grounds of conscience was incompatible with the very concept of conscientious objection.

175. The applicant argued that this confusion was clearly demonstrated also by the Government's argument that the decision whether to give the applicant access to genetic testing hinged on whether the termination of pregnancy was considered safe in her circumstances and, also, on whether the time-limits for termination of pregnancy provided for by the 1993 Act were respected. The Government had further stated that any genetic examination of a foetus should be performed prior to the 22nd week of pregnancy (see paragraph 164 above). These statements clearly implied the existence in medical practice in Poland at the material time of a misconception that all women, including the applicant, seeking to undergo prenatal genetic examination did so solely for the purpose of terminating their pregnancies. As a result, because of the politically charged climate surrounding abortion, women were often unable to obtain access to prenatal genetic testing.

176. The applicant had also been denied adequate and timely medical care in the form of prenatal genetic examinations. Such testing would have made it possible to establish whether in her case the conditions existed for a lawful termination of pregnancy within the meaning of the 1993 Act. This breach of the Convention had occurred because the State had failed to

provide a legal framework regulating disagreements between a pregnant woman and doctors as to the need to have prenatal genetic tests carried out or to terminate pregnancy (see, in the latter respect, the case of Tysiąc v. Poland, cited above, § 121). Nor was a procedure available for having decisions taken by doctors in respect of a woman's request for termination of pregnancy reviewed or supervised, even on grounds of foetal abnormalities. The State was under a positive obligation to create a legal mechanism for handling such cases, including the provision of a precise time-frame within which a decision should be taken. However, the Polish State had failed in its duty.

The applicant referred in this connection also to the lack of adequate regulations and oversight in cases such as hers, where doctors or public medical institutions refused to provide medical services and invoked the conscience clause.

177. Under the applicable law, in order to be lawful, an abortion on grounds of foetal abnormality had to be carried out before the foetus became viable, which was normally thought to be in the 24th week of pregnancy. In the applicant's case, the absence of a proper procedural framework had resulted in procrastination, with the result that during her pregnancy she had suffered growing fear, anguish and uncertainty. She had also been denied a right to a legal abortion which she had under domestic law.

178. She finally submitted that she had given birth to child suffering from a severe ailment who required life-long medical care. As a result, her life and that of her family had been irremediably and negatively affected, not only by her suffering over the fate of her ill daughter, but also by the necessity of providing her with special day-to-day care and organising regular specialised medical care, which was costly and relatively difficult to obtain in Poland. She submitted that bringing up and educating a severely ill child had taken a toll on her mental health and well-being, as well as that of her other two children. Her husband had left her after the baby had been born.

3. The Court's assessment

(a) Applicability of Article 8 of the Convention

179. The Court first observes that it is not disputed between the parties that Article 8 is applicable to the circumstances of the case in so far as it relates to the applicant's right to respect for her private life.

180. The Court reiterates that “private life” is a broad concept, encompassing, inter alia, the right to personal autonomy and personal development (see, among many other authorities, Bensaid v. the United Kingdom, no. 44599/98, § 47, ECHR 2001-I). The Court has held that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees (see Pretty v. the United Kingdom, no. 2346/02, § 61, ECHR 2002-III). The notion of private life concerns subjects such as gender identification, sexual orientation and sexual life (Dudgeon v. the United Kingdom, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41, and Laskey, Jaggard and Brown v. the United Kingdom, judgment of 19 February 1997, Reports of Judgments and Decisions 1997-I, p. 131, § 36) a person’s physical and psychological integrity (Tysiąc v. Poland, cited above, § 107, ECHR 2007 IV). The Court has also held that the notion of private live applies to decisions both to have or not to have a child or to become parents (Evans v. the United Kingdom [GC], no. 6339/05, § 71, ECHR 2007 IV).

181. The Court has previously found, citing with approval the case-law of the former Commission, that the decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy. Consequently, also legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus (Eur.Comm. HR, Bruggeman and Scheuten v. Germany, cited above; Boso v. Italy (dec.), no. 50490/99, ECHR 2002 VII; Vo v. France [GC], no. 53924/00, § 76, ECHR 2004 VIII; Tysiąc, cited above, §§ 106-107; A, B and C v. Ireland [GC], no. 25579/05, § 212, 16 December 2010). It is also clear from an examination of these cases that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a mother or a father in relation to one another or vis à vis the foetus (Vo v. France, cited above, § 82).

182. The Court concludes that Article 8 of the Convention is applicable to the circumstances of the case.

(b) General principles

183. The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. Any interference under the first paragraph of Article 8 must be justified in terms of the second paragraph, namely as being “in accordance with the law” and “necessary in a democratic society” for one or more of the legitimate aims listed therein. According to settled case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular that it is proportionate to one of the

legitimate aims pursued by the authorities (see, among other authorities, Olsson v. Sweden (No. 1), judgment of 24 March 1988, Series A no. 130, § 67).

184. In addition, there may also be positive obligations inherent in effective "respect" for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures (see, among other authorities, X and Y v. the Netherlands, judgment of 26 March 1985, Series A no. 91, p. 11, § 23).

185. The Court has previously found States to be under a positive obligation to secure to its citizens their right to effective respect for their physical and psychological integrity (Glass v. the United Kingdom, no. 61827/00, §§ 74-83, ECHR 2004 II; Sentges v. the Netherlands (dec.) no. 27677/02, 8 July 2003; Pentiacova and Others v. Moldova (dec.), no. 14462/03, ECHR 2005-...; Nitecki v. Poland (dec.), no. 65653/01, 21 March 2002; Odièvre v. France [GC], cited above, § 42). In addition, these obligations may involve the adoption of measures, including the provision of an effective and accessible means of protecting the right to respect for private life (Airey v. Ireland, 9 October 1979, § 33, Series A no. 32; McGinley and Egan v. the United Kingdom, 9 June 1998, § 101, Reports of Judgments and Decisions 1998 III; and Roche v. the United Kingdom [GC], no. 32555/96, § 162, ECHR 2005 X) including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures in the context of abortion (Tysiąc v. Poland , cited above, § 110; A, B and C v. Ireland [GC], cited above, § 245).

186. The Court has already held that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a "living instrument which must be interpreted in the light of present-day conditions" (see, among many other authorities, E.B. v. France [GC], no. 43546/02, § 92, ECHR 2008-...). The reasons for that conclusion are that the issue of such protection has not been resolved within the majority of the Contracting States themselves and that there is no European consensus on the scientific and legal definition of the beginning of life (Vo v. France, cited above, § 82). However, the Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion and that most

Contracting Parties have in their legislation resolved the conflicting rights of the foetus and the mother in favour of greater access to abortion (see (A, B and C v. Ireland [GC], cited above, 16 December 2010, §§ 235 and 237).

Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected, the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother. In the absence of such common approach regarding the beginning of life, the examination of national legal solutions as applied to the circumstances of individual cases is of particular importance also for the assessment of whether a fair balance between individual rights and the public interest has been maintained (see also, for such an approach, A, B, and C cited above, § 214).

187. Moreover, as in the negative obligation context, the State enjoys a certain margin of appreciation (see, among other authorities, Keegan v. Ireland, judgment of 26 May 1994, Series A no. 290, § 49). While a broad margin of appreciation is accorded to the State as regards the circumstances in which an abortion will be permitted in a State, once that decision is taken the legal framework devised for this purpose should be "shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention" (A, B and C v. Ireland [GC], cited above, § 249).

188. The Court notes the applicant's submission that the failure to allow her timely access to prenatal genetic tests had amounted to an interference with her rights guaranteed by Article 8. Furthermore, the Court has found that prohibition of the termination of pregnancies sought for reasons of health and /or well-being amounted to an interference with the applicants' right to respect for their private lives (see A., B., and C. v. Ireland, cited above, § 216).

However, in the present case the Court is confronted with a particular combination of a general right of access to information about one's health with the right to decide on the continuation of pregnancy. Compliance with the State's positive obligation to secure to their citizens their right to effective respect for their physical and psychological integrity may necessitate, in turn, the adoption of regulations concerning access to information about an individual's health (Guerra and Others v. Italy, 19 February 1998, § 60, Reports 1998 I; Roche v. the United Kingdom [GC], no. 32555/96, § 155, ECHR 2005 X; K.H. and Others v. Slovakia, no. 32881/04, §§ 50-56, ECHR 2009 ... (extracts)). Hence, and since the nature of the right to decide on the continuation of pregnancy is not absolute, the Court is of the view

that the circumstances of the present case are more appropriately examined from the standpoint of the respondent State's positive obligations arising under this provision of the Convention (see, mutatis mutandis, Tysiąc v. Poland, cited above, § 108).

189. The boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both the negative and positive contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, Keegan v. Ireland, judgment of 26 May 1994, Series A no. 290, p. 19, § 49; and Różański v. Poland, no. 55339/00, § 61, 18 May 2006). While the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must – in case of a therapeutic abortion – be also assessed against the positive obligations of the State to secure the physical integrity of mothers to be (see Tysiąc v. Poland, cited above, § 107).

190. The notion of "respect" is not clear cut, especially as far as those positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Nonetheless, in assessing the positive obligations of the State it must be borne in mind that the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see, e.g., Armonienė v. Lithuania, no. 36919/02, § 38, 25 November 2008; Zehnalová and Zehnal v. the Czech Republic (dec.), no. 38621/97, ECHR 2002-V). Compliance with requirements imposed by the rule of law presupposes that the rules of domestic law must provide a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention (see Malone v. the United Kingdom, judgment of 2 August 1984, Series A no. 82, p. 32, § 67; Segerstedt Wiberg and Others v. Sweden, no. 62332/00, § 76, ECHR 2006 VII).

191. Finally, the Court reiterates that in the assessment of the present case it should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see Airey v. Ireland, judgment of 9 October 1979, Series A no. 32, p. 12 13, § 24). Whilst Article 8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by this provision that the relevant decision making process is fair and such as to afford due respect for the interests safeguarded by it. What has to be determined is whether, having regard to the particular

circumstances of the case and notably the nature of the decisions to be taken, an individual has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests (see, mutatis mutandis, W. v. the United Kingdom, judgment of 8 July 1987, Series A no. 121, pp. 28 29, §§ 62 and 64). The Court has already held that in the context of access to abortion a relevant procedure should guarantee to a pregnant woman at least a possibility to be heard in person and to have her views considered. The competent body or person should also issue written grounds for its decision (see Tysiąc v. Poland, cited above, § 117).

(c) Compliance with Article 8 [21]of the Convention

192. When examining the circumstances of the present case, the Court cannot overlook its general national context. It notes that the 1993 Act specifies situations in which abortion is allowed. A doctor who terminates a pregnancy in breach of the conditions specified in that Act is guilty of a criminal offence punishable by up to three years' imprisonment (see paragraph 70 above).

193. The Court has already found that the legal restrictions on abortion in Poland, taken together with the risk of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case (see Tysiąc v. Poland, no. 5410/03, § 116, ECHR 2007 IV). It further notes that in the circumstances of the present case this was borne out also by the fact that the T. hospital's lawyer was asked to give an opinion on steps to be taken with a view to ensuring that the conditions of the 1993 Act as to the availability of abortion were respected. The Court is of the view that provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this chilling effect.

194. The Court further notes that in its fifth periodical report to the ICCPR Committee, relevant for the assessment of the circumstances obtaining at the relevant time, the Polish Government acknowledged, inter alia, that there had been deficiencies in the manner in which the 1993 Act had been applied in practice (see paragraph 84 above). It further notes the concern expressed by the Committee on the Elimination of Discrimination against Women as regards access by women in Poland to reproductive health services and to lawful abortion (see paragraph 86 above).

195. The Court notes that in its judgment in the case Tysiąc v. Poland, referred to above, it highlighted the importance of procedural safeguards in the context of the implementation of the 1993 Act in situations where a pregnant woman had objective grounds for fearing that pregnancy and delivery would have a serious negative impact on her health. In that case the Court held that Polish law did not contain any effective procedural mechanisms capable of determining whether the conditions existed for obtaining a lawful abortion on the grounds of danger to the mother's health which the pregnancy might present, or of addressing the mother's legitimate fears (see Tysiąc v. Poland, cited above, §§ 119 – 124, ECHR 2007 IV).

196. The Court discerns certain differences between the issues concerned in the Tysiąc v. Poland case and those to be examined in the context of the present case, where the applicant persistently but unsuccessfully sought access to prenatal genetic testing. It was not access to abortion as such which was primarily in issue, but essentially timely access to a medical diagnostic service that would, in turn, make it possible to determine whether the conditions for lawful abortion obtained in the applicant's situation or not. Hence, the starting point for the Court's analysis is the question of an individual's access to information about her or his health.

197. The right of access to such information falling within the ambit of the notion of private life can be said to comprise, in the Court's view, on the one hand, a right to obtain available information on one's condition. The Court further considers that during pregnancy the foetus' condition and health constitute an element of the pregnant woman's health (see Eur. Comm. HR, Bruggeman and Schouten v. Germany, cited above, § 59, mutatis mutandis). The effective exercise of this right is often decisive for the possibility of exercising personal autonomy, also covered by Article 8 of the Convention (Pretty v. the United Kingdom, cited above, § 61, ECHR 2002 III) by deciding, on the basis of such information, on the future course of events relevant for the individual's quality of life (e.g. by refusing consent to medical treatment or by requesting a given form of treatment).

The significance of timely access to information concerning one's condition applies with particular force to situations where rapid developments in the individual's condition occur and his or her capacity to take relevant decisions is thereby reduced. In the same vein, in the context of pregnancy, the effective access to relevant information on the mother's and foetus' health, where legislation allows for abortion in certain situations, is directly relevant for the exercise of personal autonomy.

198. In the present case the essential problem was precisely that of access to medical procedures, enabling the applicant to acquire full information about the foetus' health.

While the Convention does not guarantee as such a right to free medical care or to specific medical services, in a number of cases the Court has held that Article 8 is relevant to complaints about insufficient availability of health care services (Nitecki v. Poland (dec.), cited above; Pentiacova and Others v. Moldova (dec.), cited above). The present case differs from cases where the applicants complained about denial of or difficulties in obtaining access to certain health services for reasons of insufficient funding or availability. The Court has already found that it has not been argued, let alone shown, that there were any objective reasons why the genetic tests were not carried out immediately after the suspicions as to the foetus' condition had arisen but only after a lengthy delay (see paragraph 154 above). The difficulties the applicant experienced seem to have been caused, in part, by reticence on the part of certain doctors involved to issue a referral, and also by a certain organisational and administrative confusion in the health system at the material time as to the procedure applicable in cases of patients seeking services available outside their particular region of the then Medical Insurance Fund and the modalities of reimbursement between the regions of costs incurred in connection with such services.

199. The Court emphasises the relevance of the information which the applicant sought to obtain by way of genetic testing to the decision concerning continuation of her pregnancy. The 1993 Act allows for an abortion to be carried out before the foetus is capable of surviving outside the mother's body if prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffer from an incurable life threatening ailment. Hence, access to full and reliable information on the foetus' health is not only important for the comfort of the pregnant woman but also a necessary prerequisite for a legally permitted possibility to have an abortion to arise.

200. In this context, the Court reiterates its finding made in the case of Tysiąc v. Poland that once the State, acting within the limits of the margin of appreciation, referred to above, adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain it. In particular, the State is under a positive obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion (Tysiąc v. Poland, no. 5410/03, §§ 116 - 124, ECHR 2007 IV). In other words, if the domestic law allows for abortion in cases of foetal

malformation, there must be an adequate legal and procedural framework to guarantee that relevant, full and reliable information on the foetus' health is available to pregnant women.

201. In the present case, the Court reiterates that six weeks elapsed from the date when the first concerns arose regarding the foetus' health until their confirmation by way of genetic tests (see also paragraph 152 above).

202. The Court stresses that it is not its function to question doctors' clinical judgment (see Glass v. the United Kingdom, cited above). It is therefore not for the Court to embark on any attempt to determine the severity of the condition with which the doctors suspected that the foetus was affected, or whether that suspected condition could have been regarded as entitling the applicant to a legal abortion available under the provisions of section 4 (a) of that Act. In the Court's view this is wholly irrelevant for the assessment of the case at hand, given that the legal obligation to secure access to pre-natal genetic testing arose under the provisions of the 1993 Act regardless of the nature and severity of the suspected condition (see paragraph 66 above).

203. The Court observes that the nature of the issues involved in a woman's decision to terminate a pregnancy is such that the time factor is of critical importance. The procedures in place should therefore ensure that such decisions are taken in good time. The Court is of the view that there was ample time between week 18 of the pregnancy, when the suspicions first arose, and week 22, the stage of pregnancy at which it is generally accepted that the foetus is capable of surviving outside the mother's body and regarded as time-limit for legal abortion, to carry out genetic testing. The Court notes that the Supreme Court criticised the conduct of the medical professionals who had been involved in the applicant's case and the procrastination shown in deciding whether to give the applicant a referral for genetic tests. Such a critical assessment on the part of the highest domestic judicial authority is certainly, in the Court's view, of relevance for the overall assessment of the circumstances of the case.

204. As a result, the applicant was unable to obtain a diagnosis of the foetus' condition, established with the requisite certainty, by genetic tests within the time-limit for abortion to remain a lawful option for her.

205. In so far as the Government argued that in the present case access to genetic testing was closely linked, to the point of being identical, with access to abortion (see paragraph 112 above), the Court observes that prenatal genetic tests serve various purposes and they should not be identified with encouraging pregnant women to seek an abortion. Firstly, they can

simply dispel the suspicion that the foetus was affected with some malformation; secondly, a woman carrying the foetus concerned can well choose to carry the pregnancy to term and have the baby; thirdly, in some cases (although not in the present one), prenatal diagnosis of an ailment makes it possible to embark on prenatal treatment; fourthly, even in the event of a negative diagnosis, it gives the woman and her family time to prepare for the birth of a baby affected with an ailment, in terms of counselling and coping with the stress occasioned by such a diagnosis. Furthermore, the Court emphasises that the 1993 Act clearly provides for a possibility of abortion in cases of certain malformations. It is not in dispute that some of these malformations could only be detected by way of prenatal genetic tests. Therefore the Government's argument has failed to convince the Court.

206. In so far as the Government referred in their submissions to the right of physicians to refuse certain services on grounds of conscience and referred to Article 9 of the Convention, the Court reiterates that the word "practice" used in Article 9 § 1 does not denote each and every act or form of behaviour motivated or inspired by a religion or a belief (see Pichon and Sajous v. France (dec.), no. 49853/99, ECHR 2001-X). For the Court, States are obliged to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.

207. The Court further observes that the Government referred to the Ordinance of the Minister of Health of 22 January 1997 (see paragraph 68 above), arguing that it provided for a procedure governing decisions on access to abortion. However, the Court has already held that this Ordinance did not provide for any procedural framework to address and resolve controversies between the pregnant woman and her doctors or between the doctors themselves as to the availability of lawful abortion in an individual case (see Tysiąc v. Poland, cited above, § 121).

208. The Court concludes that it has not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms which would have enabled the applicant to seek access to a diagnostic service, decisive for the possibility of exercising her right to take an informed decision as to whether to seek an abortion or not.

209. In so far as the Government relied on the instruments of civil law as capable of addressing the applicant's situation, the Court has already held, in the context of the case of Tysiąc v. Poland, cited above, that the provisions of the civil law as applied by the Polish

courts did not afford the applicant a procedural instrument by which she could have fully vindicated her right to respect for her private life. The civil law remedy was solely of a retroactive and compensatory character. The Court was of the view that such retrospective measures alone were not sufficient to provide appropriate protection of personal rights of a pregnant woman in the context of a controversy concerning the determination of access to lawful abortion and emphasised the vulnerability of the woman's position in such circumstances (see Tysiąc v. Poland, no. 5410/03, § 125, ECHR 2007 IV). Given the retrospective nature of compensatory civil law, the Court fails to see any grounds on which to reach a different conclusion in the present case.

It therefore considers that it had not been demonstrated that Polish law contained any effective mechanisms which would have enabled the applicant to have access to the available diagnostic services and to take, in the light of their results, an informed decision as to whether to seek an abortion or not.

210. Consequently, the Court considers that neither the medical consultation nor litigation options relied on by the Government constituted effective and accessible procedures which would have allowed the applicant to establish her right to a lawful abortion in Poland. The uncertainty generated by the lack of legislative implementation of Article 4 (a) 1.2 of the 1993 Family Planning Act, and more particularly by the lack of effective and accessible procedures to establish a right to an abortion under that provision, has resulted in a striking discordance between the theoretical right to a lawful abortion in Poland on grounds referred to in this provision and the reality of its practical implementation (Christine Goodwin v. the United Kingdom [GC], cited above, at §§ 77-78; and S. H. and Others v. Austria, cited above, at § 74, mutatis mutandis; A, B and C v. Ireland [GC], no. 25579/05, §§ 263-264, 16 December 2010).

211. Having regard to the circumstances of the case as a whole, it cannot therefore be said that, by putting in place legal procedures which make it possible to vindicate her rights, the Polish State complied with its positive obligations to safeguard the applicant's right to respect for her private life in the context of controversy over whether she should have had access to, firstly, prenatal genetic tests and subsequently, an abortion, had the applicant chosen this option for her.

212. The Court therefore dismisses the Government's preliminary objection concerning civil litigation as an effective remedy. Furthermore, the Court, having regard to the circumstances of the case seen as a whole, has already found insufficient the award made by the domestic

courts in the civil proceedings for the violations alleged by the applicant (see paragraphs 103 108 above). Accordingly, it dismisses also the Government's preliminary objection that the applicant had lost her status of a victim of a breach of Article 8 of the Convention.

213. The Court reiterates that effective implementation of Article 4 (a) 1.2 of the 1993 Family Planning Act would necessitate ensuring to pregnant women access to diagnostic services which would make it possible for them to establish or dispel a suspicion that the foetus may be affected with ailments. The Court has already found that in the present case it has not been established that such services were unavailable. Moreover, an effective implementation of the provisions of the 1993 Act cannot, in the Court's view, be considered to impose a significant burden on the Polish State since it would amount to rendering operational a right to abortion already accorded in that Act in certain narrowly defined circumstances, including in certain cases of foetal malformation (A, B and C v. Ireland [GC], cited above, § 261, mutatis mutandis). While it is not for this Court to indicate the most appropriate means for the State to comply with its positive obligations (Airey v. Ireland judgment, § 26; cited above), the Court notes that the legislation in many Contracting States has specified the conditions governing effective access to a lawful abortion and put in place various implementing procedural and institutional procedures (Tysiąc v. Poland judgment, § 123).

214. The Court concludes that the authorities failed to comply with their positive obligations to secure to the applicant effective respect for her private life and that there has therefore been a breach of Article 8 of the Convention.

D. Alleged violation of Article 13[38] of the Convention

215. The applicant complained that the failure of the Polish authorities to create a legal mechanism that would have allowed her to challenge the doctors' decisions concerning the advisability of and access to prenatal examinations in a timely manner had amounted also to a breach of Article 13 of the Convention. Had such a framework existed, it would have made it possible for her to consider whether she wanted to have the pregnancy terminated in the conditions provided for in the 1993 Act.

Article 13 of the Convention reads as follows:

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

216. The Government submitted that Polish law provided for a procedure governing the taking of medical decisions concerning abortion on medical grounds. They referred to the 1993 Act and to the Ordinance of the Minister of Health of 22 January 1997. They further referred to section 37 of the Medical Profession Act 1996. They argued that it provided for the possibility of reviewing a therapeutic decision taken by a specialist.

217. The applicant submitted that the Polish legal framework governing the termination of pregnancy had proved to be inadequate. It had failed to provide her with reasonable procedural protection to safeguard her rights guaranteed by Article 8 of the Convention.

218. The Court observes that the applicant's complaint about the State's failure to put in place an adequate legal framework allowing for the determination of disputes arising in the context of a determination of access to diagnostic services relevant for the application of the 1993 Act, insofar as it allowed for legal abortion, essentially overlaps with the issues which have been examined under Article 8 of the Convention. The Court has found a violation of this provision on account of the State's failure to meet its positive obligations. It holds that no separate issue arises under Article 13 of the Convention (see Tysiąc v. Poland, cited above, § 135).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

219. 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

220. The applicant claimed compensation for pecuniary damage in the amount of EUR 9,000. This sum consisted of the estimated future medical expenses she would be obliged to bear in connection with her daughter's condition. She estimated her expenditure on adequate medical treatment which her daughter would have to seek in the future until her adulthood on the basis of information available on the website of the British Turner Association.

221. The applicant further requested the Court to award her just satisfaction in respect of non-pecuniary damage. She referred to the Court's judgment in the case of Draon v. France [GC], no. 1513/03, 6 October 2005. She further submitted that the intentional failure to provide the necessary medical services, the humiliating treatment of the applicant by doctors

and the lack of protection and effective redress from the State should be considered as an aggravating factor and influence the amount of non-pecuniary damages to be awarded in the case. She emphasised that she had suffered and still experiences pain, distress and suffering which were and remain causally connected to the events complained of before the Court. She claimed EUR 65,000 in this respect.

222. The Government were of the view that the applicant had not sustained pecuniary damage in the amount claimed, which was purely speculative and exorbitant.

223. As to the applicant's claim for non pecuniary damage, the Government submitted that it was excessive and should therefore be rejected.

224. The Court observes that the applicant's claim for pecuniary damage was based on the medical condition of her daughter.

The Court reiterates that it has found violations of the Convention on account of the manner in which the applicant's requests were handled by health professionals and because of the State's failure to create an effective procedural mechanism by which access to diagnostic services relevant for establishing the conditions of availability of legal abortion under Polish law could be secured. The Court does not discern any causal link between the violations found and the claim in respect of pecuniary damage. Accordingly, no award can be made under this head.

225. On the other hand, the Court has found that the applicant experienced considerable anguish and suffering, having regard to her fears about the situation of her family and her apprehension as to how she would be able to cope with the challenge of educating another child who was likely to be affected with a lifelong medical condition and to ensure its welfare and happiness. Moreover, the applicant had been humiliated by doctors' lack of sensibility to her plight. The Court has found a breach of both Articles 3 and 8 of the Convention. Having regard to the circumstances of the case seen as a whole and deciding on equitable basis, the Court awards the applicant EUR 45,000.

B. Costs and expenses

226. The applicant claimed reimbursement of the costs and expenses incurred in the domestic proceedings and in the proceedings before the Court. The applicant had instructed two Polish lawyers to represent her before the Court.

227. The applicant claimed, with reference to invoices they had submitted, EUR 11,529 (comprising EUR 9,450 in fees plus VAT of 22 per cent) in respect of legal fees for work carried out by Ms M. Gąsiorowska and Ms I. Kotiuk who represented the applicant in the domestic proceedings and before the Court. Legal fees corresponded to 189 hours spent in preparation of the applicant's case before the domestic courts and the case before the Court, at an hourly rate of EUR 50.

The applicant further claimed reimbursement of travel costs borne in connection with the civil case conducted before the courts in Cracow in the amount of PLN 1,400 and EUR 1,000 in respect of telephone bills for conversations with the applicant in the years 2005 2008.

228. The applicant further argued that the case had raised complicated issues of law which necessitated expert advice in reproductive rights law. She claimed, with reference to invoices, EUR 8,223,75 in respect of legal fees for work carried out by an expert of the Center for Reproductive Rights, based in New York. Legal fees corresponded to 85 hours spent in preparation of the applicant's case, at an hourly rate of USD 150, equivalent to EUR 96,75. She argued that it had been well established in the Court's case law that costs could reasonably be incurred by more than one lawyer and that an applicant's lawyers could be situated in different jurisdictions (Kurt v. Turkey, judgment of 25 May 1998, Reports of Judgments and Decisions 1998 III). This was justified by the novelty and complexity of the issues involved in the case which was comparable to the case of Tysiąc v. Poland, concerning access to legal abortion in Poland, but which related to different legal issues. She submitted that certain consequences followed from the involvement of foreign lawyers. In Tolstoy Miloslavsky v. the United Kingdom the Court stated that "given the great differences at present in rates of fees from one Contracting State to another, a uniform approach to the assessment of fees ... does not seem appropriate" (Tolstoy Miloslavsky v. the United Kingdom, judgment of 13 July 1995, § 77, Series A no. 316 B).

229. The Government requested the Court to decide on the reimbursement of legal costs and expenses only in so far as these costs and expenses were actually and necessarily incurred and were reasonable as to the quantum. They referred to the Court's judgment in the case of Eckle v. Germany (Eckle v. Germany, 15 July 1982, § 25, Series A no. 51).

230. The Government further submitted, in respect of the travel costs borne by the applicant's lawyers in 2005 and the amount claimed in respect of phone calls made from 2004 until 2008, that the applicant had failed to substantiate these costs by submitting relevant bills or documents.

231. They further submitted that the applicant had failed to provide the Court with information on lowest legal rates applicable in Poland. They were of the view that in cases of great importance to society, such as the present one, the lawyers should have followed good professional practices and, accordingly, either have acted pro bono or significantly reduced their fees. Generally, the Government were of the view that the amounts claimed by the applicant were exorbitant and could not be reimbursed.

232. The Government took the same position in respect of the claim concerning costs incurred by the Centre for Reproductive Rights.

233. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, Nikolova v. Bulgaria [GC], no. 31195/96, 25 March 1999, § 79, and Smith and Grady v. the United Kingdom (just satisfaction), nos. 33985/96 and 33986/96, § 28, ECHR 2000 IX). In the light of the documents submitted, the Court is satisfied that the legal costs concerned in the present case have actually been incurred.

234. As to the amounts concerned, the Court first points out that it has already held that the use of more than one lawyer may sometimes be justified by the importance of the issues raised in a case (see, among many other authorities, Sunday Times v. the United Kingdom (no. 1) (former Article 50), judgment of 6 November 1980, Series A no. 38, § 30). The Court notes, in this connection, that the issues involved in the present case have given rise to a heated and ongoing legal debate in Poland. It is also relevant to note in this connection the scarcity of relevant case-law of the Polish courts and lack of any established consensus in legal circles as to the degree and scope of protection which reproductive rights should enjoy under Polish law. The Court is further of the view that the Convention issues involved in the case were also of considerable complexity.

235. On the whole, having regard both to the national and the Convention law aspects of the case, the Court is of the opinion that they justified recourse to three lawyers, including an expert in reproductive rights issues. As to the hourly rates claimed, the Court is of the view that they are consistent with domestic practice in both jurisdictions where the lawyers representing the applicant practise and cannot be considered excessive.

236. On the other hand, as to the costs claimed by the applicant, the Court notes that no documents have been submitted to show that these costs have actually been incurred.

237. The Court, deciding on an equitable basis and having regard to the details of the claims submitted, awards the applicant a global sum of EUR 15,000 in respect of fees and expenses, plus any tax on that amount that may be chargeable to the applicant.

C. Default interest

238. 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.

6.6.4. The Court's decision

1. Joins unanimously to the merits the Government's preliminary objections concerning exhaustion of domestic remedies and lack of victim status as regards the Article 8[21] complaint and declares the application admissible;

2. Holds by six votes to one that there has been a violation of Article 3[39] of the Convention;

3. Holds by six votes to one that there has been a violation of Article 8 of the Convention and dismisses by six votes to one the Government's above-mentioned preliminary objections;

4. Holds unanimously that it is not necessary to examine separately whether there has been a violation of Article 13[38] of the Convention;

5. Holds unanimously

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Polish zloty at the rate applicable at the date of settlement:

(i) EUR 45,000 (forty-five thousand euros) plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

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

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

6.7. Case Of Dubetska And Others V. Ukraine[19]

6.7.1. The procedure

1. The case originated in an application (no. 30499/03) against Ukraine lodged with the Court on 4 September 2003 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eleven Ukrainian nationals: Ms Ganna Pavlivna Dubetska, born in 1927; Ms Olga Grygorivna Dubetska, born in 1958; Mr Yaroslav Vasylyovych Dubetskyy, born in 1957; Mr Igor Volodymyrovych Nayda, born in 1958; Ms Myroslava Vasylivna Nayda , born in 1960; Mr Arkadiy Vasylyovych Gavrylyuk, born in 1932; Ms Ganna Petrivna Gavrylyuk, born in 1939; Ms Alla Arkadiyivna Vakiv, born in 1957; Ms Mariya Yaroslavivna Vakiv, born in 1982; Mr Yaroslav Yosypovych Vakiv, born in 1955; and Mr Yuriy Yaroslavovych Vakiv, born in 1979.

2. The applicants were represented by Ms Y. Ostapyk, a lawyer practising in Lviv. The Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev.

3. The applicants alleged that the State authorities had failed to protect their home, private and family life from excessive pollution generated by two State-owned industrial facilities.

4. On 15 October 2008 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

[19] Fifth Section; Case Of Dubetska And Others V. Ukraine; (Application No. 30499/03); Strasbourg 10 February 2011; Final 10/05/2011

5. On an unspecified date after the case was communicated the applicant Mr Arkadiy Gavrylyuk died. On 18 September 2009 the applicants' representative requested that his claims be excluded from consideration.

6.7.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants are Ukrainian nationals residing in the hamlet of Vilshyna in the Lviv region.

A. Preliminary information

7. The first to fifth applicants are members of an extended family residing in a house owned by the first applicant (the Dubetska-Nayda family house). This house was built by the family in 1933.

8. The remaining applicants are members of an extended family residing in a house constructed by the sixth applicant (the Gavrylyuk-Vakiv family house). This house was built by him in 1959. It is unclear whether a permit for construction of this house was obtained in 1959. Subsequently the house was officially registered, to which a property certificate of 1988 is witness.

9. The applicants' houses are located in Vilshyna hamlet, administratively a part of Silets village, Sokalskyy district, Lviv Region. The village is located in the Chervonograd coal-mining basin.

10. In 1955 the State began building, and in 1960 put into operation, the Velykomostivska No. 8 coal mine, whose spoil heap is located 100 metres from the Dubetska-Vakiv family house. In 2001 this mine was renamed the Vizeyska mine of the Lvivvugillya State Holding Company (“the mine”; Шахта «Візейська» ДХК «Львіввугілля»). In July 2005 a decision was taken to close the mine as unprofitable. The closure project is currently under way.

11. In 1979 the State opened the Chervonogradska coal processing factory (“the factory”; Центрально-збагачувальна фабрика «Червоноградська») in the vicinity of the hamlet, initially managed by the Ukrzakhidvugillya State Company. In 2001 the factory was leased out to the Lvivsystemenergo Closed Joint Stock Company (ЗАТ «Львівсистеменерго»).

Subsequently the Lvivsystemenergo CJSC was succeeded by the Lviv Coal Company Open Joint Stock Company. In 2007 a decision was taken to allow the factory to be privatised. It is not clear whether the factory has already been privatised.

12. In the course of its operation the factory has piled up a 60-metre spoil heap 430 metres from the Dubetska-Nayda family house and 420 metres from the Gavrylyuk-Vakiv family house. This spoil heap was not subject to privatisation and remained State property.

B. The environmental situation in Vilshyna hamlet

1. General data concerning pollution emitted by the factory and the mine

13. According to a number of studies by governmental and non governmental entities, the operation of the factory and the mine has had adverse environmental effects.

14. In particular, in 1989 the Sokalskyy District Council Executive Committee ("the Sokalskyy Executive Committee"; Виконавчий комітет Сокальської районної ради) noted that the mine's and the factory's spoil heaps caused continuous infiltration of ground water, resulting in flooding of certain areas.

15. According to an assessment commissioned by the State Committee for Geology and Mineral Resource Utilisation, jointly with the Zakhidukrgeologiya State geological company (Державний комітет України по геології та використанню надр; Державне геологічне підприємство «Західукргеологія») in 1998, the factory was a major contributor to pollution of the ground water, in particular on account of infiltration of water from its spoil heap. The authors of the assessment contended, in particular, that:

"All the coal-mining industry operational in the region for over forty years has been negatively affecting the environment: spoil heaps from the mines and the coal-processing factory have been created, from which dust with a high concentration of toxic components spreads into the atmosphere and the soil ... systems of water drainage of the mines ... and cesspools... of the coal-processing factory are sources of pollution of surface and underground waters ...

Rocks from the spoil heaps contain a variety of toxic heavy metals, leaching of which results in pollution of soils, surface and underground waters ...

Very serious polluters ... are cesspools of mining waters and factory tailing ponds ..., which in the event of the slightest disturbance of the hydro-insulation cause pollution of surface and ground waters ...

The general area of soil subsidence is about 70 square kilometres ... the deepest subsidence (up to 3.5 metres) corresponds to areas with the most mining activity...

During construction of the water inlets ... deep wells were drilled which reached those [mineralised] waters. All this inevitably affected the health of people living in the area, first of all the children ...

Extremely high pollution levels ... were found in the hamlet of Vilshyna, not far from the coal-processing factory and mine no. 8 spoil heaps, in the wells of Mr T. and Mr Dubetskyy. We can testify that even the appearance of this water does not give grounds to consider it fit for any use. People from this community should be supplied with drinking-quality water or resettled ...”

16. In 2001 similar conclusions were proposed in a white paper published by Lviv State University.

17. On 20 April 2000 the Chervonograd Sanitary Epidemiological Service (“the Sanitary Service”; Червоноградська міська санітарно епідеміологічна служба) recorded a 5.2-fold excess of dust concentration and a 1.2-fold excess of soot concentration in ambient air samples taken 500 metres from the factory's chimney.

18. On 1 August 2000 the Sanitary Service sampled water in the Vilshyna hamlet wells and found it did not meet safety standards. In particular, the concentration of nitrates exceeded the safety limits by three- to five-fold, the concentration of iron by five- to ten-fold and that of manganese by nine- to eleven-fold.

19. On 16 August 2002 the Ministry of Ecology and Natural Resources (Міністерство екології та природних ресурсів) acknowledged in a letter to the applicants that mining activities were of major environmental concern for the entire Chervonograd region. They caused soil subsidence and flooding. Heavy metals from mining waste penetrated the soil and ground waters. The level of pollution of the soil by heavy metals was up to ten times the permissible concentration, in particular in Silets village, especially on account of the operation of the factory and the mine.

20. On 28 May 2003 factory officials and the Chervonograd Coal Industry Inspectorate (Червоноградська гірничо-технічна інспекція з нагляду у вугільній промисловості) recorded infiltration of water from the foot of the factory's spoil heap on the side facing Vilshyna hamlet. They noted that water flowing from the heap had accumulated into one hectare of brownish salty lake.

21. In 2004 the Zakhidukrgeologiya company published a study entitled "Hydrogeological Conclusion concerning the Condition of Underground Waters in the Area of Mezhyriccha Village and Vilshyna Hamlet", according to which in the geological composition of the area there were water-bearing layers of sand. The study also indicated that even before the beginning of the mining works the upper water-bearing layers were contaminated with sodium and compounds thereof as well as iron in the river valleys. However, exploitation of the mines added pollution to underground waters, especially their upper layers.

22. On 14 June 2004 the Lviv Chief Medical Officer for Health (Головний державний санітарний лікар Львівської області) noted that air samples had revealed dust and soot exceeding the maximum permissible concentrations 350 metres from the factory, and imposed administrative sanctions on the person in charge of the factory's boiler.

23. In September 2005 Dr Mark Chernaik of the Environmental Law Alliance Worldwide reported that the concentration of soot in ambient air samples taken in Vilshyna hamlet was 1.5 times higher than the maximum permissible concentration under domestic standards. The well water was contaminated with mercury and cadmium, exceeding domestic safety standards twenty-five-fold and fourfold respectively. According to the report, the hamlet inhabitants were exposed to higher risks of cancer and respiratory and kidney diseases.

2. The applicants' accounts of damage sustained by them on account of the mine and factory operation

24. The applicants first submitted that their houses had sustained damage as a result of soil subsidence caused by mining activities and presented an acknowledgement of this signed by the mine's director on 1 January 1999. According to the applicants, the mine promised to pay for the repair of their houses but never did so.

25. Secondly, the applicants alleged that they were continuing to suffer from a lack of drinkable water. They contended that until 2009 the hamlet had no access to a mains water supply. Using the local well and stream water for washing and cooking purposes caused itching and intestinal infections. The applicants presented three photographs reportedly of the

water available to them near their home. One photo entitled "water in a well in Vilshyna hamlet" pictured a bucket full of yellow-orange water near a well. The second photo entitled "a stream near the house" pictured a small stream of a bright orange colour. The third photo entitled "destruction of plant life by water from the coal-processing factory waste heap" depicted a brownish lake with many stumps and several dead bushes in the middle of it.

26. The applicants further contended that from 2003 the Lvivsystemenergo CJSC had been bringing, at its own expense, drinkable water into the hamlet by truck and tractor. However, this water was not provided in sufficient quantity. In evidence of this statement, the applicants presented a photograph picturing five large buckets of water and entitled "weekly water supply".

27. The applicants further alleged that the water supply was not always regular. In support of this argument they produced letters from the Sokalskyy District Administration dated 9 July 2002 and 7 March 2006, acknowledging recent irregularities in supply of drinking water.

28. Thirdly, some of the applicants were alleged to have developed chronic health conditions associated with the factory operation, especially with air pollution. They presented medical certificates which stated that Olga Dubetska and Alla Vakiv were suffering from chronic bronchitis and emphysema and that Ganna Gavrylyuk had been diagnosed with carcinoma.

29. Fourthly, the applicants contended that their frustration with environmental factors affected communication between family members. In particular, lack of clean water for washing reportedly caused difficulties in relations between spouses. Younger family members sought to break away from the older ones in search of better conditions for their growing children.

30. The applicants, however, did not relocate. They alleged that they would not be able to sell houses located in a contaminated area or to find other sources of funding for relocation to a safer community without State support. In evidence, the applicants presented a letter from a private real estate agency, S., dated September 2009, stating the following:

"since in Vilshyna hamlet ... there has been no demand for residential housing for the past ten years because of the situation of this hamlet in technogenically polluted territory and subsidence of soil on its territory ... it is not possible to determine the market value of the house."

C. Administrative decisions addressing the harmful effects of the factory and mine operation

1. Decisions aimed at improving the environmental situation in the region

31. In November 1995 the Sanitary Service ordered the factory to develop a plan for management of the buffer zone.

32. On 5 June 1996 the Sanitary Service found that the factory had failed to comply with its order and ordered suspension of its operation. In spite of this measure, the factory reportedly continued to operate, with no further sanctions being imposed on its management.

33. On 7 April 2000 and 12 June 2002 the State Commission for Technogenic and Ecological Safety and Emergencies ("The Ecological Safety Commission"; Державна комісія з питань техногенно екологічної безпеки та надзвичайних ситуацій) ordered a number of measures to improve water management and tackle soil pollution in the vicinity of the factory.

34. On 14 April 2003 the Lviv Regional Administration (Львівська обласна державна адміністрація) noted that the overall environmental situation had not improved since the Ecological Safety Commission's decision of 7 April 2000, as no funds had been allocated by the State Budget for implementation of the relevant measures.

35. On 27 January 2004 the Sanitary Service found that the mine had failed to comply with its instruction of 4 December 2003 as to the development of a plan for management of the buffer zone, and ordered suspension of its operation. However, the mine reportedly continued to operate.

36. On 13 July 2005 the Marzeyev State Institute for Hygiene and Medical Ecology (Інститут гігієни та медичної екології ім. О. М. Марзеєва АМН України) developed a management plan for the factory buffer zone. The authors of the report acknowledged that the factory was polluting the air with nitrogen dioxide, carbon oxide, sulphuric anhydride and dust. They noted, however, that according to their studies ambient air samples taken more than 300 metres from the factory did not contain excessive pollution. The plan provided for implementation of a number of measures aimed at improvement of the hydro-insulation of the spoil heap, as well as reduction of its height to 50 metres. The authors concluded that in view of such measures it was possible to establish a general buffer zone at 300 metres for the entire factory site.

37. Later in the year the Ministry of Health (Міністерство охорони здоров'я) approved the Marzeyev Institute's plan, on an assumption that the height of the spoil heap would be reduced by August 2008.

38. On 29 April 2009 the Sanitary Service fined the factory director for failing to implement the measures in the factory buffer zone management plan.

2. Decisions concerning the applicants' resettlement

39. On 20 December 1994 the Sokalskyy Executive Committee noted that eighteen houses, including those of the applicants, were located within the factory spoil heap 500-metre buffer zone, in violation of applicable sanitary norms. It further allowed the Ukrzakhidvugillya company to resettle the inhabitants and to have these houses demolished. The Committee further obliged the company director to provide the applicants with housing by December 1996. This decision was not enforced.

40. In 1995 the Sokalskyy Executive Committee amended its decision and allowed the residents to keep their former houses following resettlement for recreational and gardening use.

41. On 7 April 2000 the Ecological Safety Commission noted that eighteen families lived within the limits of the factory buffer zone and commissioned the Ministry of Fuel and Energy and local executive authorities to ensure their resettlement in 2000-2001. The names of the families appear not to have been listed.

42. In December 2000 and 2001 the applicants enquired of the Ministry of Fuel and Energy when they would be resettled and received no answer.

43. In 2001 the Lviv Regional Administration included resettlement of eighteen families (names not listed) from the factory sanitary security zone in their annual activity plan, indicating the State budget as the funding source and referring to the Ecological Safety Commission's decision of 7 April 2000.

44. On 12 June 2002 the Ecological Safety Commission noted that its decision of 7 April 2000 remained unenforced and ordered the Sokalskyy District Administration, the Silets Village Council and the factory to work together to ensure the resettlement of families from the factory spoil heap buffer zone by the end of 2003.

45. In June 2002 the applicants, along with other village residents, complained to the President of Ukraine about the non-enforcement of the decisions concerning their resettlement. The President's Administration redirected their complaint to the Lviv Regional Administration and the Ministry of Ecology and Natural Resources for consideration.

46. On 16 August 2002 the Ministry of Ecology and Natural Resources informed the Vilshyna inhabitants in response to their complaint that it had proposed that the Cabinet of Ministers ensure prompt resettlement of the inhabitants from the factory buffer zone in accordance with the decision of the Ecological Safety Commission of 7 April 2000.

47. On 14 April 2003 the Lviv Regional Administration informed the applicants that it had repeatedly requested the Prime Minister and the Ministry of Fuel and Energy to provide funding for the enforcement of the decision of 7 April 2000.

D. Civil actions concerning the applicants' resettlement

1. Proceeding brought by the Dubetska-Nayda family

48. On 23 July 2002 the Dubetska-Nayda family instituted civil proceedings in the Chervonograd Court (Місцевий суд м. Червонограда) seeking to oblige the factory to resettle them from its buffer zone. Subsequently the Lvivvugillya State Company was summoned as a co defendant.

49. The first hearing was scheduled for 28 October 2003. Subsequent hearings were scheduled for 12 November and 18 December 2003, 26 and 30 April, 18 May, 18 and 30 June, 19 July and 22 December 2004, and 25 November, 6, 20 and 26 December 2005. On some four occasions hearings were adjourned on account of a defendant's absence or following a defendant's request for an adjournment.

50. On 26 December 2005 the Chervonograd Court found that the plaintiffs resided in the mine's buffer zone and ordered the Lvivvugillya State Company holding it to resettle them. It further dismissed the applicants' claims against the factory, finding that their house was outside its 300-metre buffer zone.

51. This judgment was not appealed against and became final.

52. On 3 May 2006 the Chervonograd Bailiffs' Service initiated enforcement proceedings.

53. On 19 June 2006 the Bailiffs fined the mine's director for failing to ensure the enforcement of the judgment. The latter appealed against this decision.

54. On 26 June 2006 the director informed the Bailiffs that the mine could not comply with the judgment. It neither had available residential housing at its disposal nor was it engaged in constructing housing, as it had received no appropriate allocations from the State budget.

55. The judgment remains unenforced to the present date.

2. Proceedings brought by the Gavrylyuk -Vakiv family

56. On 23 July 2002 the Gavrylyuk-Vakiv family, similarly to the Dubetska-Nayda family, instituted civil proceedings at Chervonograd Court seeking to be resettled outside the factory buffer zone.

57. Subsequently the factory was replaced by the Lvivsystemenergo CJSC as a defendant in the proceedings.

58. The first hearing was scheduled for 29 September 2003. Subsequent hearings were scheduled for 6, 17 and 30 October 2003, and 15 and 30 April, 18 May, 18 and 21 June 2004.

59. On 21 June 2004 Chervonograd Court dismissed the applicants' claims. The court found, in particular that, although the plan for management of the factory buffer zone was still under way, there were sufficient studies to justify the 300-metre zone. As the plaintiffs' house was located outside it, the defendant could not be obliged to resettle them. Moreover, the defendant had no funds to provide the applicants with new housing. The court found the decision of 1994 concerning the applicants' resettlement irrelevant and did not comment on subsequent decisions concerning the matter.

60. On 20 July 2004 the applicants appealed. They maintained, in particular, that the law provided that the actual concentration of pollutants on the outside boundaries of the zone should meet applicable safety standards. In their case, the actual level of pollution outside the zone exceeded such standards, as evidenced by a number of studies, referring to the factory operation as the major source of pollution. Furthermore, the decision of the Sokalskyy Executive Committee of 1994 could not have been irrelevant, as it remained formally in force.

61. On 28 March 2005 the Lviv Regional Court of Appeal (Апеляційний суд Львівської області) upheld the previous judgment and agreed with the trial court's reasoning. In response to the applicants' arguments concerning the actual pollution level at their place of residence, the court noted that the hamlet was supplied with imported water and that in any event, while the applicable law included penalties against polluters, it did not impose a general obligation on them to resettle individuals.

62. On 23 April 2005 the applicants appealed on points of law, relying on essentially the same arguments as in their previous appeal.

63. On 17 September 2007 the Khmelnytskyy Regional Court of Appeal (Апеляційний суд Хмельницької області) dismissed the applicants' request for leave to appeal on points of law.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine

64. Relevant provisions of the Constitution read as follows:

Article 16

"To ensure ecological safety and to maintain the ecological balance on the territory of Ukraine, to overcome the consequences of the Chernobyl catastrophe — a catastrophe of global scale, and to preserve the gene pool of the Ukrainian people, is the duty of the State."

Article 50

"Everyone has the right to an environment that is safe for life and health, and to compensation for damages inflicted through the violation of this right ..."

B. Law of Ukraine "On Local Councils of People's Deputies and Local and Regional Self-Government" of 7 December 1990 (repealed with effect from 21 May 1997)

65. According to Article 57 of the Law, private and public entities and individuals could be held liable under the law for failure to comply with lawful decisions of bodies of regional self-government (which included executive committees of district councils).

66. Subsequent legislation concerning local self-government did not envisage the existence of such a body as an executive committee of a district council.

C. Law of Ukraine "On Waste" of 5 March 1998

67. Relevant provisions of the Law "On Waste" read as follows:

Section 9. Property rights to waste

"The State is the owner of waste produced on State property ... On behalf of the State the management of waste owned by the State shall be carried out by the Cabinet of Ministers."

D. Law of Ukraine "On Measures to Ensure the Stable Operation of Fuel and Energy Sector Enterprises" of 23 June 2005

68. The above Law introduced a new mechanism for payment and amortisation of companies' debts for energy resources. It also introduced a special register of companies involved in debt payment and amortisation under its provisions. A company's presence on that register suspends any enforcement proceedings against it; domestic courts shall also dismiss any request to initiate insolvency or liquidation proceedings against the company.

E. Order of the Ministry of Health No. 173 of 19 June 1996 "On Approval of the State Sanitary Rules concerning Planning and Construction of Populated Communities"

69. Relevant provisions of the Order of the Ministry of Health read as follows:

"5.4. Industrial, agricultural and other objects, which are sources of environmental pollution with chemical, physical and biological factors, in the event that it is impossible to create wasteless technologies, should be separated from residential areas by sanitary security zones.

...

On the exterior boundary of a sanitary security zone which faces a residential area, concentrations and levels of harmful substances should not be greater than those set down in the relevant hygiene standards (maximum permissible concentrations, maximum permissible levels) ...

5.5. ...

In the event the studies do not confirm the statutory sanitary security zone or its establishment is not possible under particular circumstances, it is necessary to take a decision concerning a change of production technology, which would provide for decrease in emission of harmful substances into the atmosphere, its re-profiling or closure.

Supplement No. 4, Sanitary classification of enterprises, production facilities and buildings and their required sanitary security zones:

.....

A sanitary security zone of 500 metres [shall surround the following facilities]:

....

5. Spoil heaps of mines which are being exploited, inactive spoil heaps exceeding 30 metres in height which are susceptible to combustion; inactive spoil heaps exceeding 50 metres in height which are not susceptible to combustion.

A sanitary security zone of 300 metres [shall surround the following facilities]:

...

5. ... coal-processing factories using wet treatment technology

6. ... inactive spoil heaps of mines, less than 50 metres in height and not susceptible to combustion."

6.7.3. The law

I. SCOPE OF THE CASE

70. On 18 September 2009 the applicants' representative informed the Court that applicant Mr Arkadiy Gavrylyuk had died. She further requested that his claims be excluded from consideration.

71. The Court considers that, in the absence of any heir expressing the wish to take over and continue the application on behalf of Mr Arkadiy Gavrylyuk, there are no special circumstances in the case affecting respect for human rights as defined in the Convention and requiring further examination of the application under Article 37 § 1 in fine of the Convention (see, for example, Pukhigova v. Russia, no. 15440/05, §§ 106 107, 2 July 2009 and Goranda v. Romania (dec.), no. 38090/03, 25 May 2010).

72. In view of the above, it is appropriate to strike the complaints lodged by Mr Arkadiy Gavrylyuk out of the list.

II. ALLEGED VIOLATION OF ARTICLE 8[21] OF THE CONVENTION

73. The applicants complained that the State authorities had failed to protect their home, private and family life from excessive pollution generated by two State-owned industrial facilities. They relied on Article 8 of the Convention, which reads as follows:

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Submissions by the parties

(a) The Government

74. The Government submitted that the application was inadmissible ratione temporis in so far as it related to the facts predating 11 September 1997, the date of entry of the Convention into force with respect to Ukraine.

75. They further submitted that the Gavrylyuk-Vakiv family could not claim to be victims of any violations of Article 8 as in 1959 they had unlawfully constructed their house on the land, which was formally allocated to them only a year later. Moreover, in breach of the law in force at the material time, this family had never requested authorisation of the mining authorities to construct their house on the land above the mine. As the Gavrylyuk-Vakiv family had deliberately constructed their house on land under industrial development and in so doing acted in violation of applicable law, they could not claim that the State had any obligations relating to respect for their Article 8 rights while they lived in this house. Their complaints were therefore inadmissible ratione personae.

76. The Government also submitted as an alternative that the Gavrylyuk Vakiv family's complaints were manifestly ill-founded, as their family lived outside the statutory buffer zones of both the mine and the factory, and their resettlement claim was rejected by a competent court at the close of adversary proceedings. These applicants had therefore not made out an arguable Convention claim.

77. Finally, the Government contended that none of the applicants had exhausted available domestic remedies. In particular, they had never claimed compensation from either the mine or the factory for any damage allegedly sustained on account of their industrial activity.

(b) The applicants

78. The applicants disagreed. They noted that while the situation complained about had started before the entry of the Convention into force with respect to Ukraine, it continued afterwards and up to the present day. In particular, the Sokalskyy Executive Committee's decision to resettle them had not been formally quashed and was in force by the date of the

Convention's entry into effect. So the competent authorities were responsible for its non-enforcement, as well as for the non-enforcement of the subsequent decision of the Ecological Safety Commission concerning the applicants' resettlement and the Chervonograd Court's judgment in the Dubetska-Nayda family's favour. Likewise, the State bore responsibility for failure to enforce the buffer zone management plans for the mine and the factory leading to environmental deterioration in the area, where the applicants lived.

79. The applicants further submitted that the Gavrylyuk-Vakiv family had constructed their house lawfully, on land duly allocated for this purpose, while in 1960 they had been given extra land for gardening. The Government's submission that they had to seek the mining authorities' permission to build a house was not based on law. Also, by the time the Convention entered into force in respect of Ukraine, their house had been properly registered with the authorities, as evidenced by the property certificate provided by them to the Court.

80. The applicants further contended that the fact that the Chervonograd Court had dismissed the Gavrylyuk-Vakiv family's resettlement claim did not render their application manifestly ill-founded, regard being had to the actual excessive levels of pollution in the vicinity of their home. In rejecting their claim for resettlement the courts had relied on the prospective improvements anticipated following implementation of the buffer zone management plan for the factory. As the plan remained unimplemented, this group of applicants continued to suffer from excessive pollution and their claim was therefore not manifestly ill-founded.

81. Finally, the applicants alleged that they had properly exhausted domestic remedies, as they aired their complaints through domestic courts and referred to environmental pollution as the reason to claim resettlement.

2. The Court's assessment

82. In so far as the Government alleged partial inadmissibility of the application as falling outside the scope of the Court's temporal jurisdiction, the Court considers itself not competent ratione temporis to examine the State actions or omissions in addressing the applicants' situation prior to the date of the entry of the Convention into force with respect to Ukraine (11 September 1997). It is however competent to examine the applicants' complaints, which relate to the period after this date (see, mutatis mutandis, Fadeyeva v. Russia, no. 55723/00, § 82, ECHR 2005 IV).

83. As regards the Government's allegation that the complaints lodged by the Gavrylyuk-Vakiv family are incompatible with the Convention ratione personae, the Court notes, firstly,

that Article 8 of the Convention applies regardless of whether an applicant's home has been built or occupied lawfully (see, among other authorities, Prokopovich v. Russia, no. 58255/00, § 36, ECHR 2004 XI (extracts)). Moreover, it notes that irrespective of whether the house at issue was lawfully constructed or regularised after the family had settled in it, by 11 September 1997, when the Convention entered into force with respect to Ukraine, the Gavrylyuk Vakiv family was occupying it lawfully. This fact is not disputed between the parties. In light of the above the Government's objection should be dismissed.

84. As regards the Government's allegation that the Gavrylyuk-Vakiv family's claims were manifestly ill-founded as their resettlement claim had been rejected in domestic proceedings, the Court agrees that it is not in a position to substitute its own judgment for that of the national courts and its power to review compliance with domestic law is limited (see, among other authorities, Slivenko v. Latvia [GC], no. 48321/99, § 105, ECHR 2003 X and Paulić v. Croatia, no. 3572/06, § 39, 22 October 2009). It is the Court's function, however, to review the reasoning adduced by domestic judicial authorities from the point of view of the Convention (see Slivenko, cited above, ibid.). Furthermore, the Court notes that the Gavrylyuk-Vakiv family's complaint is not limited to the alleged unfairness of the judgments dismissing their resettlement claim. It concerns a general failure of the State to remedy their suffering from adverse environmental effect of pollution in their area. The Government's objection must therefore be dismissed.

85. Finally, as regards the non-exhaustion objection, the Court notes that the Government have not presented any examples of domestic court practice whereby an individual's claim for compensation against an industrial pollutant would be allowed in a situation similar to that of the applicants. Furthermore, both applicant families in the present case chose to exhaust domestic remedies with respect to their claim to be resettled from the area, permanently affected by pollution. One family obtained a resettlement order, which however remains unenforced as the debtor mine lacks budgetary allocations for it, and the other's claim was dismissed on the grounds that it lived outside the pollutants' statutory buffer zone. In view of all the above the Court has doubts concerning the applicants' prospects of success in compensation proceedings.

86. Even assuming, however, that such compensation could be awarded to them for past pollution and paid in good time, the Court notes that the applicants complain about continuing pollution, curtailing which for the future appears to necessitate some structural solutions. It is

not obvious how the compensatory measure proposed by the Government would address this matter. In light of the above, the Court dismisses the non-exhaustion objection.

87. In conclusion, the Court notes that the application raises serious issues of fact and law under the Convention, the determination of which must be reserved to an examination of the merits. The application cannot therefore be declared manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established. The Court, therefore, declares the application admissible.

B. Merits

1. Applicability of Article 8 of the Convention

(a) Submissions by the parties

(i) The applicants

88. The applicants submitted that they were suffering from serious State interference with their rights guaranteed by Article 8 of the Convention, on account of environmental pollution emanating from the State-owned mine and factory (in particular their spoil heaps), as well as from the State's failure to cope with its positive obligation to regulate hazardous industrial activity.

89. The applicants further noted that they had set up their present homes lawfully, before they could possibly have known that the area would fall within the legislative industrial buffer zone and would be environmentally unsafe.

90. The applicants next alleged that the Government's plan approving the 300-metre buffer zone around the factory was controversial, as operation of the spoil heap required a 500-metre buffer zone. The plan at issue had not been approved by the State Medical Officer for Health until it had previewed the measures for decreasing the height of the waste heap to 50 metres and hydro-insulating it, which has not been done so far. They considered, therefore, that they continued to live within the scientifically justifiable buffer zone of the waste heap.

91. The applicants further contended that not only their houses were located within the zone formally designated by the law as inappropriate for habitation, but there was considerable evidence that the actual air, water and soil pollution levels in the vicinity of their homes were unsafe and were such as could increase the applicants' vulnerability to pollution-associated

diseases. In this regard they referred to various Governmental and non-governmental reports and surveys discussed in paragraphs 13-23 above.

92. The applicants additionally noted that other hazards included flooding of the nearby areas and soil subsidence caused by mining activities. They alleged that regard being had to the existence of numerous underground caverns dug out in the course of mining operations these hazards would exist even if no new mining activities took place.

93. In the meantime, the applicants were unable to relocate without the State's assistance, as on account of industrial pollution there was no demand for real estate in their hamlet and they were not capable of finding other sources of funding for relocation.

94. Finally, the applicants noted that the State being the owner of the factory for numerous years and remaining at present the owner of its spoil heap as well as the owner of the mine, was fully aware of and responsible for the damage caused by their everyday operations, which had been going on for a long time. It therefore had responsibility under Article 8 of the Convention to take appropriate measures to alleviate the applicants' burden.

(ii) The Government

95. The Government did not dispute that they had Convention responsibility for addressing environmental concerns associated with the mine and the factory operation.

96. On the other hand, they contested the applicants' submissions as regards the damage suffered by them on account of alleged pollution. In particular, the Government submitted that, as regards the pollution emitted by the factory, its levels were generally safe outside the 300-metre zone around it, as confirmed by numerous studies. It is in view of these studies that the 300-metre buffer zone around the factory was approved by the relevant authorities in 2005. The applicants' houses, located 430 and 420 metres from the factory, should accordingly have been safe, regardless of whether the buffer zone plans had formally been put in place. Although occasional incidents of increased emissions might have taken place, they were promptly monitored and appropriate measures to decrease them were applied in good time, as evidenced, for instance, by the sanctions imposed on the factory management (see paragraphs 32 and 35 above).

97. The Government further submitted that although the Dubetska Nayda family lived within the boundaries of the mine spoil heap's buffer zone, they, like the Gavrylyuk-Vakiv family, which lived outside the buffer zones of either the mine or the factory, had failed to

substantiate any actual damage sustained on account of their proximity to both industrial facilities.

98. As regards the applicants' reference to several chronic diseases suffered by some of them, these could well be associated with their occupational activities and other factors.

99. As regards soil subsidence and flooding, the Government referred to geological studies which determined that the mountainous area in which the applicants lived had layers of water-bearing sands underneath the surface, susceptible to flotation. Based on these studies, the Government alleged that it could not be proved beyond reasonable doubt that the soil had subsided as a result of mining activities, rather than of a natural geological process.

100. The Government next alleged that in so far as the applicants complained about the water quality, various studies, including the one done by the Zakhidukrgeologiya (see paragraph 15 above) scientifically proved that the chemical composition and purity of the underground water in the area was naturally unfavourable for household consumption, except when drilled for at a much deeper level than was done for the applicants' households. In addition, the applicants' wells were not equipped with the necessary filters and pipes. Moreover, the applicants were supplied with imported water. Finally, it was not in 2009, as suggested by the applicants (see paragraph 25 above), but in 2007 that a centralised aqueduct for the hamlet was put into operation.

101. As regards the authorities' decisions on the applicants' resettlement, they were based on preventive rather than remedial considerations. The decision taken by the Sokalskyy Executive Committee had expired by 1997 in view of the change in economic circumstances. The decision at issue had been taken when enlargement of the factory was being contemplated, which called for the establishment of a 500-metre buffer zone around it. If such a zone had been approved the applicants' houses would have been located within its boundaries, setting in motion the legal provisions calling for their resettlement regardless of the actual level of pollution. However, by 1997 it had become clear that the enlarged zone would not be necessary and the 1994 decision automatically became invalid.

102. Moreover, in 1995 the Sokalskyy Executive Committee had made amendments to its resettlement decision. Following requests from residents subject to resettlement, the Committee decided that there was no need to demolish their former houses, which could be used by them for recreational and gardening purposes. Several families who had been provided with alternative housing in 2000-03 as they lived within the 300-metre buffer zone,

did in fact continue to use their previous houses, including for long periods, and refused to give them up.

103. In the Government's view, this fact was evidence that the applicants' resettlement claims were in fact not based on the actual levels of pollution. The conclusion that the Gavrylyuk-Vakiv family's resettlement was not necessary was likewise reasonably made by the national judicial authorities. As regards the Dubetska-Nayda family, their resettlement was ordered on the basis of formal statutory provisions and did not involve any assessment of the actual or potential damage involved. In any event, both families were free to apply to the authorities for placement on a waiting list for social housing, which they had never done.

104. In sum, the applicants did not show that the operation of either the mine or the factory had infringed on their rights to an extent which would attract State responsibility under Article 8 of the Convention.

(b) The Court's assessment

(i) The Court's jurisprudence

105. The Court refers to its well-established case-law that neither Article 8 nor any other provision of the Convention guarantees the right to preservation of the natural environment as such (see Kyrtatos v. Greece, no. 41666/98, § 52, ECHR 2003-VI). Likewise, no issue will arise if the detriment complained of is negligible in comparison to the environmental hazards inherent in life in every modern city. However, an arguable claim under Article 8 may arise where an environmental hazard attains a level of severity resulting in significant impairment of the applicant's ability to enjoy his home, private or family life. The assessment of that minimum level is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life (see, among other authorities, Fadeyeva, cited above, §§ 68-69).

106. While there is no doubt that industrial pollution may negatively affect public health in general and worsen the quality of an individual's life, it is often impossible to quantify its effects in each individual case. As regards health impairment for instance, it is hard to distinguish the effect of environmental hazards from the influence of other relevant factors, such as age, profession or personal lifestyle. “Quality of life” in its turn is a subjective characteristic which hardly lends itself to a precise definition (see Ledyayeva and Others v. Russia, nos. 53157/99, 53247/99, 53695/00 and 56850/00, § 90, 26 October 2006).

107. Taking into consideration the evidentiary difficulties involved, the Court will primarily give regard to the findings of the domestic courts and other competent authorities in establishing the factual circumstances of the case (see Buckley v. the United Kingdom, judgment of 25 September 1996, Reports of Judgments and Decisions 1996-IV, pp. 1291-93, §§ 74-77). As a basis for the analysis it may use, for instance, domestic legal provisions determining unsafe levels of pollution (see Fadeyeva, cited above, § 87) and environmental studies commissioned by the authorities (see Taşkın and Others v. Turkey, no. 46117/99, §§113 and 120, ECHR 2004 X). Special attention will be paid by the Court to individual decisions taken by the authorities with respect to an applicant's particular situation, such as an undertaking to revoke a polluter's operating licence (see Taşkın and Others, cited above, § 112) or to resettle a resident away from a polluted area (see Fadeyeva, cited above, § 86). However, the Court cannot rely blindly on the decisions of the domestic authorities, especially when they are obviously inconsistent or contradict each other. In such a situation it has to assess the evidence in its entirety (see Ledyayeva and Others, cited above, § 90). Further sources of evidence for consideration in addition to the applicant's personal accounts of events, will include, for instance, his medical certificates (see Lars and Astrid Fägerskiöld v. Sweden (dec.), no. 37664/04, 26 February 2008) as well as relevant reports, statements or studies made by private entities (see Fadeyeva, cited above, § 85).

108. In addition, in order to determine whether or not the State could be held responsible under Article 8 of the Convention, the Court must examine whether a situation was a result of a sudden and unexpected turn of events or, on the contrary, was long-standing and well known to the State authorities (see Fadeyeva, cited above, §§ 90-91); whether the State was or should have been aware that the hazard or the nuisance was affecting the applicant's private life (see López Ostra v. Spain, 9 December 1994, §§ 52 53, Series A no. 303 C) and to what extent the applicant contributed to creating this situation for himself and was in a position to remedy it without a prohibitive outlay (see Ledyayeva, cited above, § 97).

(ii) Assessment of the facts in the present case

109. The Court reiterates that the present case concerns an allegation of adverse effects on the applicants' Article 8 rights on account of industrial pollution emanating from two State-owned facilities – the Vizeyska coal mine and the Chervonogradska coal-processing factory (in particular, its waste heap, which is 60 metres high).

110. The applicants' submissions relate firstly to deterioration of their health on account of water, air and soil pollution by toxic substances in excess of permissible concentrations. In

addition, these submissions likewise concern the worsening of the quality of life in view of the damage to the houses by soil subsidence and persistent difficulties in accessing non-contaminated water, which have adversely affected the applicants' daily routine and interactions between family members.

111. In assessing to what extent the applicants' health was affected by the pollution complained about, the Court agrees with the Government that there is no evidence making it possible to establish quantifiable harm in the present case. It considers, however, that living in the area marked by pollution in clear excess of applicable safety standards exposed the applicants to an elevated risk to health.

112. As regards the quality of the applicants' life, the Court notes the applicants' photographs of water and their accounts of their daily routine and communications (see paragraphs 24-30 above), which appear to be palpably affected by environmental considerations.

113. It notes that, as suggested by the Government, there may be different natural factors affecting the quality of water and causing soil subsidence in the applicants' case (see, for instance, paragraph 21 above). Moreover, at the present time the issue of accessing fresh water appears to have been resolved by the recent opening of a centralised aqueduct. At the same time, the case file contains sufficient evidence that the operation of the mine and the factory (in particular their spoil heaps) have contributed to the above problems for a number of years, at least to a certain extent.

114. This extent appears to be not at all negligible, in particular as according to domestic legislation residential houses may not be located within the buffer zones of the mines and the spoil heaps are designated as a priori environmentally hazardous. It appears that according to the State Sanitary Rules, a “safe distance” from a house to a spoil heap exceeding 50 metres in height is estimated at 500 metres (see paragraph 69 above). The Dubetska-Nayda family's house is situated 100 metres from the mine spoil heap and 430 metres from the factory one. The Gavrylyuk-Vakiv family's house in its turn is situated 420 metres from the factory spoil heap.

115. While agreeing with the Government that the statutory definitions do not necessarily reflect the actual levels of pollution to which the applicants were exposed, the Court notes that the applicants in the present case have presented a substantial amount of data in evidence that the actual excess of polluting substances within these distances from the facilities at issue has been recorded on a number of occasions (see paragraphs 17-18 and 22-23 above).

116. In deciding on whether the damage (or risk of damage) suffered by the applicants in the present case was such as to attract guarantees of Article 8, the Court also has regard to the fact that at various times the authorities considered resettling the applicants. The need to resettle the Dubetska-Nayda family was ultimately confirmed in a final judgment given by the Chervonograd Court on 26 December 2005.

117. As regards the Gavrylyuk-Vakiv family, on 21 June 2004 the same court found their resettlement unnecessary. However, in its findings the judicial authorities relied on anticipation that the factory would promptly enforce the measures envisioned in its prospective buffer zone management plan. These measures included hydro-insulation of the spoil heap and decreasing its height to 50 metres (in which case, as noted by the applicants, a 300-metre buffer zone around the spoil heap would become permissible under domestic law). According to the case file materials, these measures have not yet been carried out.

118. Consequently, it appears that for a period exceeding twelve years since the entry of the Convention into force in respect of Ukraine, the applicants were living permanently in an area which, according to both the legislative framework and empirical studies, was unsafe for residential use on account of air and water pollution and soil subsidence resulting from the operation of two State-owned industrial facilities.

119. In these circumstances the Court considers that the environmental nuisance complained about attained the level of severity necessary to bring the complaint within the ambit of Article 8 of the Convention.

120. In examining to what extent the State owed a duty to the applicants under this provision, the Court reiterates that the present case concerns pollution emanating from the daily operation of the State-owned Vizeyska coal mine and the Chervonogradska coal-processing factory, which was State-owned at least until 2007; its spoil heap has remained in State ownership to the present day. The State should have been, and in fact was, well aware of the environmental effects of the operation of these facilities, as these were the only large industries in the vicinity of the applicant families' households.

121. The Court further notes that the applicants set up their present homes before the facilities were in operation and long before the actual effect of their operation on the environment could be determined.

122. The Court also observes that, as the Government suggests, in principle the applicants remain free to move elsewhere. However, regard being had to the applicants' substantiated

arguments concerning lack of demand for their houses located in the close proximity to major industrial pollutants, the Court is prepared to conclude that remedying their situation without State support may be a difficult task. Moreover, the Court considers that the applicants were not unreasonable in relying on the State, which owned both the polluters, to support their resettlement, especially since a promise to that effect was given to them as early as in 1994. As regards the Government's argument that the applicants could have applied for social housing, in the Court's view they presented no valid evidence that a general request of this sort would have been more effective than other efforts made by the applicants to obtain State housing, especially in view of the fact that the only formal reason for them to seek relocation was environmental pollution.

123. In the Court's opinion the combination of all these factors shows a strong enough link between the pollutant emissions and the State to raise an issue of the State's responsibility under Article 8 of the Convention.

124. It remains to be determined whether the State, in securing the applicants' rights, has struck a fair balance between the competing interests of the applicants and the community as a whole, as required by paragraph 2 of Article 8[21].

2. Justification under Article 8 § 2 of the Convention

(a) Submissions by the parties

(i) The applicants

125. The applicants asserted that in addressing their environmental concerns the State had failed to strike a fair balance between their interests and those of the community.

126. In particular, for the period of more than twelve years since the entry of the Convention into force with respect to Ukraine, the State authorities have failed either to bring the pollution levels under control or to resettle the applicants into a safer area.

127. While some measures in respect of mitigating the applicants' hardship were taken at various times, they were inconsistent and insufficient to change the applicants' overall situation as well as marked by prohibitive delays.

128. In particular, it was only in 2009 that the hamlet was provided with a centralised aqueduct. Until then drinking water, which was not available at all before 2003, was brought in small quantities by trucks and tractors at irregular intervals, sometimes as long as several

months in winter. On several occasions the State authorities attempted to penalise the mine and the factory management for their failures to ensure safer pollution levels, but these punishments were negligible or remained unenforced (such as the decision to suspend operation of the mine) and did not bring about any subsequent improvements.

129. The applicants further submitted that, as regards their resettlement, the 1994 decision to this end was never officially revoked, remained in force and was confirmed in 2000 by the Ecological Safety Commission. The subsequent court decisions disregarding it were therefore unlawful. Moreover, in deciding that the applicants no longer lived in the factory buffer zone, the judicial authorities relied on its prospective plan for buffer zone management, envisioning a number of measures to ensure that living outside the 300-metre zone actually would become safe, including downsizing of the spoil heap to 50 metres and hydro-insulating it. However, as the zone management measures had remained unenforced, the applicants continued to live in an environmentally unsafe area.

130. Moreover, the Dubetska-Nayda family's house was also located within the mine's buffer zone, which was confirmed by the judicial authorities in a final and binding decision of 26 December 2005 ordering this family's resettlement.

131. Further, significant delays marked consideration of the applicants' claims by domestic judicial authorities. On many occasions the trial court failed to inform the applicants of hearing dates or unreasonably postponed hearings on account of defendants' absences.

132. Finally, even though the Dubetska-Nayda family succeeded in obtaining a resettlement judgment, its effect was set at naught, as for some five years now it has remained unenforced. The prospects for its enforcement within foreseeable future were unpromising, regard being had, in particular, to the entry into force of the Law of Ukraine “On Measures to Ensure the Stable Operation of Fuel and Energy Sector Enterprises”, which stalled the possibility of recovering debt from the Vizeyska mine.

133. In sum, the applicants submitted that the State authorities had failed to act diligently and in good time in addressing their problems caused by pollution from the mine and the factory.

(ii) The Government

134. The Government disagreed. They submitted that they had done everything in their power to ensure that people living near the mine and the factory, whose operation was admittedly connected with some environmental risks, were least affected by them.

135. In particular, the State put in place a legislative framework to regulate the operation of industrial polluters, including the establishment of safe emission levels and buffer zones. It has kept a constant watch on compliance with pollution safety standards by the mine and the factory and, in the event of occasional failures, the management was promptly penalised and the problems addressed. As a result, within 300 metres of the factory the levels of pollution were actually usually within the limits statutorily recognised as safe. This fact, confirmed by rigorous empirical monitoring, enabled scientific substantiation of the 300-metre buffer zone plan around the factory. A plan for the mine was likewise developed, however, in view of the mine's eventual closure there was no need to approve it or put it in place.

136. The Government further submitted that, as regards the applicants' resettlement claims, neither family had actually suffered damage or risk of damage from pollution such as to warrant their resettlement. As the 1994 decision, which had expired by 1997 in view of the economic challenges downsizing the factory's production levels instead of their anticipated increase, at no point in time from the entry of the Convention into force with respect to Ukraine to the present was the State responsible for the Gavrylyuk-Vakiv family's resettlement, as that family lived outside both buffer zones.

137. As regards the Dubetska-Nayda family, the State was obliged to resettle them on statutory grounds by the Chervonograd Court's decision of 26 December 2005. While the State's obligation to enforce this judgment was not in dispute, delays were caused by the severe financial problems of the debtor mine as well as the mining sector nationwide. The mine was unprofitable and owed substantial amounts to various creditors, including salary arrears to its employees. It was therefore unable to pay its debts and was subject to liquidation. Attempting to tackle the nationwide critical situation in the fuel and energy sector, the State was forced to enact the Law “On Measures to Ensure the Stable Operation of Fuel and Energy Sector Enterprises”, suspending or restructuring debts of the enterprises in the industry. Although it was not clear when the judgment would be enforced, funds were being sought and provision of the family with housing had been included in the list of measures previewed in the course of the liquidation.

138. In any event, both applicant families were given a judicial forum to handle their resettlement complaints. In so far as they complained that their court proceedings were lengthy, the delays were caused by the complexity of the subject and the search for the comprehensive evidence necessary to substantiate a reasoned and fair decision. In addition, some adjournments were on account of the applicants' failures to appear.

139. Overall, the State, which was facing a complex task of balancing between environmental and economic concerns relating to the mine and the factory operation, had duly considered the applicants' interests against those of the community in addressing them.

(b) The Court's assessment

(i) The Court's jurisprudence

140. The Court reiterates that the principles applicable to an assessment of the State's responsibility under Article 8 of the Convention in environmental cases are broadly similar regardless of whether the case is analysed in terms of a direct interference or a positive duty to regulate private activities (see Hatton and Others v. the United Kingdom [GC], no. 36022/97, § 98, ECHR 2003 VIII, and Fadeyeva, cited above, §§ 89 and 94).

141. In cases involving environmental issues, the State must be allowed a wide margin of appreciation and be left a choice between different ways and means of meeting its obligations. The ultimate question before the Court is, however, whether a State has succeeded in striking a fair balance between the competing interests of the individuals affected and the community as a whole (see Hatton and Others, cited above, §§ 100, 119 and 123). In making such an assessment all the factors, including domestic legality, must be analysed in the context of a particular case (see ibid., § 120, and Fadeyeva, cited above, §§ 96-97).

142. Where the complaints relate to State policy with respect to industrial polluters, as in the present case, it remains open to the Court to review the merits of the respective decisions and conclude that there has been a manifest error. However, the complexity of the issues involved with regard to environmental policymaking renders the Court's role primarily a subsidiary one. It must first examine whether the decision-making process was fair, and only in exceptional circumstances may it go beyond this line and revise the material conclusions of the domestic authorities (see Fadeyeva, cited above, § 105).

143. In scrutinising the procedures at issue, the Court will examine whether the authorities conducted sufficient studies to evaluate the risks of a potentially hazardous activity (see Hatton and Others, cited above, § 128, and Giacomelli v. Italy, no. 59909/00, § 86, ECHR 2006 XII), whether, on the basis of the information available, they have developed an adequate policy vis-à-vis polluters and whether all necessary measures have been taken to enforce this policy in good time (see Ledyayeva and Others, cited above, § 104, and Giacomelli, cited above, §§ 92-93, ECHR 2006 ...). The Court will likewise examine to what extent the individuals affected by the policy at issue were able to contribute to the decision-

making, including access to the relevant information and ability to challenge the authorities' decisions in an effective way (see, mutatis mutandis, Guerra and Others v. Italy, judgment of 19 February 1998, Reports 1998-I, p. 228, § 60; Hatton and Others, cited above, § 127; and Taşkın and Others, cited above, §119).

144. As the Convention is intended to protect effective rights, not illusory ones, a fair balance between the various interests at stake may be upset not only where the regulations to protect the guaranteed rights are lacking, but also where they are not duly complied with (see Moreno Gómez v. Spain, no. 4143/02, §§ 56 and 61, ECHR 2004 X). The procedural safeguards available to the applicant may be rendered inoperative and the State may be found liable under the Convention where a decision-making procedure is unjustifiably lengthy or where a decision taken as a result remains for an important period unenforced (see Taşkın and Others, cited above, §§ 124-25).

145. Overall, the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community (see Fadeyeva, cited above, § 128).

(ii) Assessment of the facts in the present case

146. The Court remarks that the authorities contemplated and conceived a number of measures aimed at minimising the harmful effects of the mine and the factory operation on the applicants' households. It should be noted, for instance, that the quality of the legislative framework concerning industrial pollution is not in dispute between the parties in the present case. Further, as suggested by the Government, the authorities regularly monitored the levels of actual pollution and designed various measures to minimise them, including imposing penalties on the mine and factory management for breaches and eventual development of a plan for maintenance of the factory buffer zone. In addition, the applicants were promised compensation for damage caused by soil subsidence and water was brought in at State expense. No later than 2009 a centralised aqueduct was built, which should relieve the applicants of the burdens associated with accessing drinking-quality water, a major issue raised in their application. Finally, as mentioned above, on numerous occasions the authorities considered resettling the applicants as a way of providing an effective solution to their environmental hardship.

147. Notwithstanding the effort, for more than twelve years the State authorities have not been able to put in place an effective solution for the applicants' personal situation, which throughout this period has remained virtually the same.

148. It is noted that on the date of the Convention's entry into force (11 September 1997) the applicants were living in close proximity to two major industrial polluters, which adversely and substantially affected their daily life. It appears that in order to fulfil their Convention obligations, the State authorities, who owned these polluters, contemplated two major policy choices vis-à-vis the applicants' situation – either to facilitate their relocation to a safer area or to mitigate the pollution effects in some way.

149. Yet in 1994, before the Convention's entry into force, the Sokalskyy Executive Committee made the choice in favour of relocation. In the following period, however, the Government did not act promptly and consistently and did not back up this decision with the necessary resources to have it enforced. While according to the Government's observations the 1994 decision automatically lost its legal power by 1997 in view of the factory downsizing, the applicants were never officially informed of this, much less given a reference to the legal provision on the basis of which the decision at issue could have automatically lost its effect, in particular, in the absence of a new factory buffer zone management plan. Moreover, it appears that in April 2000 the 1994 decision was backed up by that of the Ecological Safety Commission, resolving to solicit State funding for the resettlement of eighteen families from the factory buffer zone. While the names of the families apparently remained unlisted, their number – eighteen - was the same as that mentioned in the 1994 decision. The Court therefore finds that the applicants could have reasonably expected to be among them. It was not until 21 June 2004 for the Gavrylyuk-Vakiv family and 26 December 2005 for the Dubetska-Nayda family that the applicants were formally declared to be living outside the prospective factory buffer zone and not entitled to relocation at State expense. It was also only on 26 December 2005 that the State authorities acknowledged their obligation under domestic law to resettle the Dubetska-Nayda family from the mine spoil heap buffer zone. The judicial proceedings, which lasted some three and a half years at one level of jurisdiction for the Dubetska-Nayda family and a little over five years at three levels of jurisdiction for the Gavrylyuk-Vakiv family, were marked by certain delays, in particular, on account of some significant intervals between hearings. Next, the decision given in the Dubetska-Nayda family's favour did not change the family's situation, as throughout the next five years and until now it has not been funded. Consequently, the Court remarks that for

more than twelve years from the Convention's entry into force and up to now little or nothing has been done to help the applicants to move to a safer area.

150. The Court considers that when it comes to the wide margin of appreciation available to the States in context of their environmental obligations under Article 8 of the Convention, it would be going too far to establish an applicant's general right to free new housing at the State's expense (see Fadeyeva, cited above, § 133). The applicants' Article 8 complaints could also be remedied by duly addressing the environmental hazards.

151. In the meantime, the Government's approach to tackling pollution in the present case has also been marked by numerous delays and inconsistent enforcement. A major measure contemplated by the Government in this regard during the period in question concerned the development of scientifically justified buffer zone management plans for the mine and the factory. This measure appears to have been mandatory under the applicable law, as at various times the public health authorities imposed sanctions on the facilities' management for failures to implement it, going as far as the suspension of their operating licences (see paragraphs 32 and 35 above). However, these suspensions apparently remained unenforced and neither the mine nor the factory has put in place a valid functioning buffer zone management plan as yet.

152. Eight years since the entry of the Convention into force, in 2005, the factory had such plan developed. When dismissing the applicants' claims against the factory for resettlement, the judicial authorities pointed out that the applicants' rights should be duly protected by this plan, in particular, in view of the anticipated downsizing of the spoil heap and its hydro-insulation. However, these measures, envisioned by the plan as necessary in order to render the factory's operation harmless to the area outside the buffer zone, have still not been enforced more than five years later (see paragraph 38 above). There also appear to have been, at least until the launch of the aqueduct no later than in 2009, delays in supplying potable water to the hamlet, which resulted in considerable difficulties for the applicants. The applicants cannot therefore be said to have been duly protected from the environmental risks emanating from the factory operation.

153. As regards the mine, in 2005 it went into liquidation without the zone management plan ever being finalised. It is unclear whether the mine has in fact ceased to operate at the present time. It appears, however, that the applicants in any event continue to be affected by its presence, in particular as they have not been compensated for damage caused by soil subsidence. In addition, the Dubetska-Nayda family lives within 100 metres of the mine's spoil heap, which needs environmental management regardless of whether it is still in use.

154. In sum, it appears that during the entire period taken into consideration both the mine and the factory have functioned not in compliance with the applicable domestic environmental regulations and the Government have failed either to facilitate the applicants' relocation or to put in place a functioning policy to protect them from environmental risks associated with continuing to live within their immediate proximity.

155. The Court appreciates that tackling environmental concerns associated with the operation of two major industrial polluters, which had apparently been malfunctioning from the start and piling up waste for over fifty years, was a complex task which required time and considerable resources, the more so in the context of these facilities' low profitability and nationwide economic difficulties, to which the Government have referred. At the same time, the Court notes that these industrial facilities were located in a rural area and the applicants belonged to a very small group of people (apparently not more than two dozen families) who lived nearby and were most seriously affected by pollution. In these circumstances the Government has failed to adduce sufficient explanation for their failure to either resettle the applicants or find some other kind of effective solution for their individual burden for more than twelve years.

156. There has therefore been a breach of Article 8 of the Convention in the present case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

157. Article 41 of the Convention provides:

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

A. Damage

1. Pecuniary damage

158. The applicants claimed 28,000 euros (EUR) in respect of pecuniary damage. They alleged that this sum represented the purchase price of two comparable houses (one for each of the two applicant families) in the neighbouring area, not affected by pollution. They argued that they were entitled to this amount in damages, as their houses had lost market value and could not be sold on account of their unfavourable location.

159. The Government submitted that these claims were exorbitant and unsubstantiated.

160. In considering the applicants' claim for pecuniary damage, the Court would state that the violation complained of by the applicants is of a continuing nature. Throughout the period under consideration the applicants have been living in their houses and have never been deprived of them. Although during this time their private life was adversely affected by operation of two industrial facilities, nothing indicates that they incurred any expenses in this connection. Therefore, the applicants failed to substantiate any material loss.

161. In so far as they allege that their houses have lost market value, the Court reiterates that the present application was lodged and examined under Article 8 of the Convention and not under Article 1 of Protocol no. 1, which protects property rights. There is therefore no causal link between the violation found and the loss of market value alleged.

162. As regards future measures to be adopted by the Government in order to comply with the Court's finding of a violation of Article 8 of the Convention in the present case, the Court reiterates that the State obligation to enforce the final judgment in respect of the Dubetska-Nayda family is not in dispute. As regards the Gavrylyuk-Vakiv family, their resettlement to an ecologically safe area would be only one of many possible solutions. In any event, according to Article 41 of the Convention, by finding a violation of Article 8 in the present case the Court has established the Government's obligation to take appropriate measures to remedy the applicants' individual situation.

2. Non-pecuniary damage

163. In addition, the Dubetska-Nayda family claimed EUR 32,000 in non-pecuniary damage and the Gavrylyuk-Vakiv family claimed EUR 33,000 in this respect. The applicants alleged that these amounts represented compensation for their physical suffering in connection with living in an unsafe environment, as well as psychological distress on account of disruption of their daily routine, complications in interpersonal communication and frustration with making prolonged unsuccessful efforts to obtain redress from the public authorities.

164. The Government submitted that the applicants should not be awarded any compensation.

165. The Court is prepared to accept that the applicants' prolonged exposure to industrial pollution caused them much inconvenience, psychological distress and even a degree of physical suffering, and that they might well feel frustration on account of the authorities' response to their hardship – this is clear from the grounds on which the Court found a violation of Article 8. Taking into account various relevant factors, including the duration of

the situation complained of, and making an assessment on an equitable basis, the Court awards the applicants the amounts claimed in respect of non-pecuniary damage in full.

B. Costs and expenses

166. The applicants did not submit any claim under this head. The Court therefore makes no award.

C. Default interest

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

6.7.4. The Court's decision

1. Decides to strike the application out of its list of cases, in so far as Mr Arkadiy Gavrylyuk's complaint is concerned;

2. Declares the application admissible in respect of all other applicants;

3. Holds that there has been a violation of Article 8[21] of the Convention;

4. Holds

(a) that the respondent State is to pay, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention,

(i) the first, the second, the third, the fourth and the fifth applicant jointly EUR 32,000 (thirty-two thousand euros);

(ii) the seventh, the eighth, the ninth, the tenth and the eleventh applicant jointly EUR 33,000 (thirty-three thousand euros)

plus any tax that may be chargeable in respect of the above amounts, to be converted into the national currency of Ukraine at the rate applicable on the date of settlement;

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

5. Dismisses the remainder of the applicants' claim for just satisfaction.

6.8. Case of Glass V. The United Kingdom[20]

6.8.1. The procedure

1. The case originated in an application (no. 61827/00) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34[10] of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two United Kingdom nationals, David ("the first applicant") and Carol Glass ("the second applicant"), on 5 June 2000.

2. The applicants, who had been granted legal aid, were represented by Mr R. Stein, of Leigh, Day & Co., Solicitors, London. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, of the Foreign and Commonwealth Office.

3. The applicants alleged, among other matters, that certain decisions taken by a hospital authority and its doctors with respect to the treatment of the first applicant interfered with the latter's right to respect for personal integrity.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1[49] of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1[50] of the Convention) was constituted as provided in Rule 26 § 1[51].

5. By a decision of 18 March 2003, the Chamber declared the application partly admissible.

6. The applicants and the Government each filed observations on the merits (Rule 59 § 1[2]). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3[3] in fine), the parties replied in writing to each other's observations.

[20] Fourth Section; Case Of Glass V. The United Kingdom; (Application No. 61827/00); Strasbourg; 9 March 2004

6.8.2. The facts

7. The applicants, David (the first applicant) and Carol (the second applicant) Glass, are United Kingdom nationals. The first applicant, born in 1986, is a severely mentally and physically disabled child who requires twenty-four hour attention. The second applicant is his mother.

I. THE CIRCUMSTANCES OF THE CASE

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

9. The first applicant had been particularly unwell since July 1998 when he was admitted to St Mary's Hospital, one of two hospitals belonging to the Portsmouth Hospitals National Health Service (NHS) Trust ("the Trust"). He was operated on in order to alleviate an upper respiratory tract obstruction. The first applicant suffered post-operative complications, including infections, and had to be put on a ventilator since he had become critically ill.

10. During the period of the first applicant's treatment, discussions took place at the hospital between the second applicant and intensive-care staff and paediatricians. Among the views expressed was that, despite the best care, the first applicant was dying and that further intensive care would be inappropriate. The second applicant and other family members were not happy with this opinion, although a note drawn up on 30 July 1998 by Dr Smith mentioned that the family had appeared to accept the situation "without distress or significant surprise". However, on 31 July 1998, following an "unconstructive and confrontational" meeting with family members, the hospital offered to arrange for an outside opinion on David's condition and the suitability of further active intensive-care therapy. This offer was made twice and on both occasions was refused. The Trust consulted its solicitors and advised the applicants to consult their solicitors.

11. However, the first applicant's condition improved and on 31 July 1998 he was able to be returned from intensive care to the paediatric ward. The applicants draw attention to the fact that the first applicant's notes on being discharged from intensive care made reference to a "demanding family". They also observe that a note of Dr Wozniak drawn up on 3 August 1998 stated:

"I think [the first applicant] would not survive this illness despite our efforts, but our efforts continue and we will continue his antibiotics, physio' and attempt to find feeds that he will tolerate ... We may need to consider measures to relieve distress e.g. hyoscine for the

secretions, morphine and the risk of those measures and mum felt that this was not appropriate at present."

12. The first applicant was eventually able to return home on 2 September 1998. However, he had to be readmitted to the hospital on several occasions thereafter on account of respiratory tract infections.

On one such occasion, on 8 September 1998, the doctors discussed with the second applicant the use of morphine to alleviate distress. The second applicant expressed her opposition to the use of morphine or other drugs to relieve distress. She told the doctors that in the event that the first applicant's heart stopped she would expect resuscitation, including intubation. Dr Walker considered that this would not be in the first applicant's best interests, and stated that if death were inevitable all that was on offer was "morphine and TLC [tender loving care]". Dr Walker's case notes recorded that:

"These replies [of the second applicant] are contrary to decisions particularly previously made and I do not believe that further intensive care is in [the first applicant's] best interest. This needs to be resolved before it becomes necessary and I have therefore said that we need a second opinion – if necessary appointed by the courts to ensure an impartial decision by which we would all comply."

That same day the applicants' general practitioner informed the hospital that he had been contacted by the applicants' solicitor about the family's concern that the first applicant would be "helped on his way" with morphine.

13. Dr Walker reported as follows on a discussion which she had with the second applicant on 8 September 1998:

"If [the first applicant] deteriorates rapidly he should receive bag and mask positive pressure respiration, but no cardiac massage and no intravenous or other drugs to resuscitate him."

14. As to the use of morphine, Dr Walker stressed at the meeting that the doctors would never prescribe it or other sedatives without first discussing this with the second applicant. Dr Walker stated in her notes:

"I have told [the second applicant] that we can give morphine to alleviate distress even vs. their wishes (and we can – I am assured by the Official Solicitor that no judge has ever overturned a doctor's decision to withdraw treatment/alleviate symptoms) but we wouldn't without telling them."

15. According to the Government, the agreement as regards non-resuscitation was confirmed with the second applicant on 9 September 1998 by Dr Hallet. Dr Hallet's contemporaneous notes on the matter state:

"The position appears to me to be precarious. He may recover with the antibiotics but the inability to cough secretions makes it possible that he will deteriorate and die. I have discussed the latter scenario. Mother says that she would like bag and mask but understands that it would not be appropriate to go on to full intubation and ITU treatment. This is as discussed with Dr Walker."

16. Dr Hallet and the second applicant also discussed on that occasion the use of morphine in therapeutic doses. The applicants point out that Dr Hallet recognised that:

"In the event of total disagreement we should be obliged to go to the courts to provide support for decision. Mother says she does not understand this."

17. Dr Hallet's notes record the following:

"Mother said that she would not contemplate euthanasia and I said that we would not either. The question of morphine came up and she agrees with the use of morphine in therapeutic doses to overcome pain if necessary.

... in view of today's and yesterday's discussions with mother which appear to have achieved a common ground, involvement of the court may not be necessary."

18. The first applicant's condition deteriorated. He was admitted to St Mary's Hospital on 15 October 1998, and then again on 18 October 1998 following respiratory failure.

19. The first applicant was treated over the course of 19 October 1998. His condition was reviewed on separate occasions by two doctors, both of whom expressed serious concern about his prospects of surviving. Dr Walker observed that the first applicant looked "ghastly" and "exhausted".

20. At 1.30 p.m. on 20 October 1998, the medical opinion was that the first applicant "was going into the terminal phase of respiratory failure".

21. At 5.45 p.m. on 20 October 1998, Dr Hallet noted that the first applicant was "dying from his lung disease".

22. The doctors treating the first applicant advised that diamorphine should be administered to him, believing that he had entered a terminal phase and required pain relief. The second applicant and other members of the family did not agree with the doctors' view that her son was dying and were very concerned that the administration of diamorphine (previously morphine had been mentioned) would compromise his chances of recovery. The second applicant voiced her concerns at a meeting with Drs Walker and Hallet and the Chief Executive of the Trust. A woman police officer was also present. The hospital persisted in its wish to give the first applicant diamorphine, while the second applicant was given an assurance that he would only be given "the smallest possible dose". According to the applicants, the Chief Executive of the Trust had an influential role at the meeting and made it clear to the second applicant that diamorphine would be given to the first applicant. They refer in this connection to a letter written by the Chief Executive to the applicants' MP on 23 November 1998, in which he stated that he had instructed the doctors to administer diamorphine to the first applicant at the minimum dosage over a twenty-four hour period. The Government assert that the Chief Executive had no role to play whatsoever in the exercise of clinical judgment in the first applicant's case.

23. The notes of Drs Walker, Ashton and Hallet all stressed that the administration of morphine was not intended to kill the first applicant but to relieve his distress. Dr Hallet observed in his notes that the doctors who had met with the second applicant had stressed that the "use of morphine is NOT euthanasia – it is to relieve [the first applicant's] distress ...".

24. The second applicant subsequently expressed the wish to take the first applicant home if the doctors were correct in their view that he was dying. A police officer in attendance advised her that if she attempted to remove him, she would be arrested. The hospital also indicated that unless the family members present allowed the doctors to commence diamorphine the police would remove them also. The second applicant tried without success to contact her solicitor, including at the latter's home.

25. A diamorphine infusion was commenced at 7 p.m. on 20 October 1998. The applicants maintain that the dose administered, namely 1 mg per hour, was in reality an adult dose and excessive for a child of the first applicant's age. The Government deny this and point to the first applicant's weight and to the fact that previous treatment with opiates had rendered the first applicant more tolerant to them.

26. A dispute broke out in the hospital involving the family members (but not the second applicant) and the doctors. The family members believed that the first applicant was being

covertly euthanased and attempted to prevent the doctors from entering the first applicant's room. The hospital authorities called the security staff and threatened to remove the family from the hospital by force.

27. A do-not-resuscitate order (DNR) was put in the first applicant's medical notes without consulting the second applicant.

28. The dosage was reduced by half at 10 a.m. on 21 October 1998 in response to the family's continuing objections. The Government draw attention to the views of the doctors that the dose administered to the first applicant had improved his condition. Dr Walker found that it was:

"a real relief and pleasant to see [the first applicant] peaceful and settled ... and his overall condition including agitation and distress had markedly improved".

29. The following day the second applicant found that her son's condition had deteriorated alarmingly and was worried that this was due to the effect which the diamorphine was having on him. The family became extremely agitated and demanded that diamorphine be stopped. Dr Walker stated that this was only possible if the family agreed not to resuscitate or stimulate the first applicant. The Government contend that Dr Walker's objective was to prevent the family from disturbing the first applicant by creating undue noise and touching him, since at that time he was peaceful, breathing deeply and was not in distress.

30. The family tried to revive the first applicant and a fight broke out between certain members of the family and Drs Walker and Ashton.

31. The second applicant successfully resuscitated her son while the fight was going on. At some stage the police were summoned to the hospital in response to the assaults on Drs Walker and Ashton. Several police officers were injured and the mother of another patient on the ward was pushed against a wall. All but one of the children on the ward had to be evacuated. The injuries sustained by Drs Walker and Ashton were such that they were unable to perform their normal duties for a time.

32. The first applicant's condition improved and he was able to respond to stimuli from his relatives. He was able to be discharged on 21 October 1998.

33. The second applicant states that the Trust made no arrangements for any alternative care on discharge for the first applicant. They mention that the Trust did not arrange for him to be given an antidote for diamorphine and that the second applicant had to acquire equipment for

measuring his oxygen saturation. In this connection, the Government draw attention to a report by Dr Hallet, which states:

"It was felt that further care within the hospital setting was impossible and that he would be better managed at home, provided that we could obtain oxygen for the home. Arrangements were made to obtain oxygen and I discussed with his general practitioner to take on the responsibility of caring for his major chest problems at home. I then telephoned the Clinical Director at Southampton General Hospital to enquire whether they would accept him if he had to be readmitted in view of the severe disturbances to the hospital staff. I discussed going home with his mother who agreed to this and we then made telephone calls to community nurses and made arrangements for home oxygen. Following this transport was arranged to take the patient home."

34. On 23 June 2000 some of the family members involved in the fracas with the doctors were convicted of assault and ordered to be excluded from the hospital. On 28 July 2000 their sentences were reduced on appeal. On 26 October 1999 the Trust had dropped its civil action for trespass against the second applicant for want of a legal basis.

On 5 November 1998 the Medical Director of the Trust notified the second applicant in a letter that the paediatric staff at the hospital were anxious about a repetition of the problems which arose when her son was last admitted and were no longer confident of being able to give him the treatment he required. The letter continued:

"Unfortunately [Portsmouth Hospital] believe that all we could offer [the first applicant] would be to make his remaining life as comfortable as possible and take no active steps to prolong life. This obviously means withholding or giving treatment with which you may not agree. As there seems no easy way to resolve these differences it would be sensible, if [the first applicant] required further inpatient care, for this to be provided at another hospital."

35. The second applicant was informed that Southampton General Hospital, about twenty-five miles from her home, was willing to admit and treat her son should he suffer a further attack.

36. The family's general practitioner subsequently contacted Southampton General Hospital with a view to discussing arrangements for the first applicant's admission in the event of a future emergency.

37. The second applicant applied for judicial review of the decisions made by the Trust with regard to the medical treatment of her son. The matter came before Mr Justice Scott Baker.

38. On 21 April 1998 Mr Justice Scott Baker ruled that the Trust's decision was not susceptible to review because the situation had passed and would not arise again at the hospitals managed by it or, it was to be hoped, at any other hospital. He added:

"If there is serious disagreement, the best interests procedure can be involved at short notice and the court will resolve it on the basis of the facts as they are then. They will almost inevitably be different from the facts as they were in October 1998. ... In any event it is unclear precisely what the facts were in October 1998 on the evidence that is before this court. ... Furthermore, if there is a crisis in the future, I am confident that if the matter is brought before the court the Official Solicitor will again provide assistance."

39. In Mr Justice Scott Baker's view, judicial review was too blunt an instrument for the sensitive and on-going problems of the type raised by the case. In particular, he considered that it would be very difficult to frame any declaration in meaningful terms in a hypothetical situation so as not to restrict unnecessarily proper treatment by the doctors in an on-going and developing matter. He stressed in conclusion:

"Nothing, I would finally say, should be read into this judgment to infer that it is my view that [Portsmouth Hospital] in this case acted either lawfully or unlawfully."

40. The second applicant applied for permission to appeal to the Court of Appeal. The application was refused on 21 July 1999. Giving judgment, Lord Woolf, Master of the Rolls, was of the view that the considerations which might arise in relation to the first applicant and other children who suffered from similar disabilities were almost infinite and for the courts to try and produce clarity would be a task fraught with danger. He stated:

"There are questions of judgment involved. There can be no doubt that the best course is for a parent of a child to agree on the course which the doctors are proposing to take, having fully consulted the parent and for the parent to fully understand what is involved. That is the course which should always be adopted in a case of this nature. If that is not possible and there is a conflict, and if the conflict is of a grave nature, the matter must then be brought before the court so the court can decide what is in the best interests of the child concerned. Faced with a particular problem, the courts will answer that problem. ...

... The difficulty in this area is that there are conflicting principles involved. The principles of law are clearly established, but how you apply those principles to particular facts is often very difficult to anticipate. It is only when the court is faced with that task that it gives an answer which reflects the view of the court as to what is in the best interests of the child. In doing so it takes into account the natural concerns and the responsibilities of the parent. It also takes into account the views of the doctors, and considers what is the most desirable answer taking the best advice it can obtain from, among others, the Official Solicitor. That is the way, in my judgment, that the courts must react in this very sensitive and difficult area."

41. Lord Woolf disagreed with Mr Justice Scott Baker's view that the applicants had used the wrong legal procedure. In his opinion, "particularly in cases regarding children, the last thing the court should be concerned about is whether the right procedure has been used in the particular case".

42. The second applicant complained to the General Medical Council about the conduct of the doctors involved in her son's care, in particular that they had assaulted him by administering heroin to him against her wishes and without a court authorisation.

43. On 7 January 2000 the General Medical Council concluded that its investigation revealed that the doctors involved had not been guilty of serious professional misconduct or seriously deficient performance and that the treatment complained of had been justified in the light of the emergency situation which confronted the doctors at the material time. According to the General Medical Council, the test for bringing disciplinary proceedings against the doctors was not satisfied on the evidence. It had asked itself in this connection whether the doctors put themselves in a reasonable position from which to arrive at the decision they did and whether the decision reached was so "outrageous" that no reasonably competent doctor could have reached it.

44. The second applicant also complained to the Hampshire police about the conduct of the doctors who had treated her son. An investigation was opened. The doctors were interviewed and a report sent to the Crown Prosecution Service.

On 8 May 2000 the second applicant's solicitors informed her that the Crown Prosecution Service had decided not to bring charges against the doctors involved for lack of evidence. In a letter dated 16 June 2000 to her solicitors, the Crown Prosecution Service indicated the reasons which led to this finding as well as the various materials relied on in reaching its conclusion on the advisability of bringing charges against the doctors in relation to the

offences of attempted murder and conspiracy to murder and offences under the Offences against the Person Act 1861.

II. RELEVANT DOMESTIC LAW AND PRACTICE

45. Paragraph 24 of the General Medical Council's guidance "Seeking patients' consent: the ethical considerations" provides:

"Where a child under 16 years old is not competent to give or withhold the informed consent, a person with parental responsibility may authorise investigations or treatment which are in the child's best interests. This person may also refuse any intervention where they consider that refusal to be in the child's best interest, but you are not bound by such a refusal and may seek a ruling from the court. In an emergency, where you consider that it is in the child's best interest to proceed, you may treat the child, provided it is limited to that treatment which is reasonably required in an emergency."

In Re J. (A Minor) (Wardship: Medical Treatment) ([1990] 3 All England Law Reports), Lord Donaldson, Master of the Rolls, stated:

"The doctors owe the child a duty to care for it in accordance with good medical practice recognised as appropriate by a competent body of professional opinion ... This duty is however subject to the qualification that, if time permits, they must obtain the consent of the parents before undertaking serious invasive treatment.

The parents owe the child a duty to give or withhold consent in the best interests of the child and without regard to their own interests.

The court when exercising the parens patriae jurisdiction takes over the rights and duties of the parents, although this is not to say that the parents will be excluded from the decision-making process. Nevertheless in the end the responsibility for the decision whether to give or to withhold consent is that of the court alone.

...

No-one can dictate the treatment to be given to the child – neither court, parents nor doctors. There are checks and balances. The doctors can recommend treatment A in preference to treatment B. They can also refuse to adopt treatment C on the grounds that it is medically contra-indicated or for some other reason is a treatment which they could not conscientiously administer. The court or parents for their part can refuse to consent to treatment A or B or

both, but cannot insist on treatment C. The inevitable and desirable result is that choice of treatment is in some measure a joint decision of the doctors and the court or parents.

..."

In A National Health Service Trust v. D. ([2000] Family Court Reports 577), it was held:

"The court's clear respect for the sanctity of human life must impose a strong obligation in favour of taking all steps capable of preserving life, save in exceptional circumstances."

46. In that case, the court accepted the views of doctors treating a child that resuscitation of the child in the event of respiratory or cardiac arrest would be inappropriate.

47. According to the Government, English law recognises that it may be in the best interests of a child or of an adult to be treated with medication which relieves his symptoms but has the side-effect of hastening death.

According to Part 3B of the British Medical Association guidance "Withholding and withdrawing medical treatment: guidance for decision making":

"... where there is reasonable uncertainty about the benefit of life-prolonging treatment, there should be a presumption in favour of initiating it, although there are circumstances in which active intervention (other than basic care) would not be appropriate since best interests is not synonymous with prolongation of life ... If the child's condition is incompatible with survival or where there is broad consensus that the condition is so severe that treatment would not provide a benefit in terms of being able to restore or maintain the patient's health, intervention may be unjustified. Similarly, where treatments would involve suffering or distress to the child, these and other burdens must be weighed against the anticipated benefit, even if life cannot be prolonged without treatment."

Paragraph 15.1 of the 2001 British Medical Association guidance "Withholding and withdrawing life-prolonging medical treatment" states:

"Those with parental responsibility for a baby or young child are legally and morally entitled to give or withhold consent to treatment. Their decisions will usually be determinative unless they conflict seriously with the interpretation of those providing care about the child's best interests."

Paragraph 15.2 states:

"The law has confirmed that best interests and the balance of benefits and burdens are essential components of decision making and that the views of parents are a part of this. However, parents cannot necessarily insist on enforcing decisions based solely on their own preferences where these conflict with good medical evidence."

48. At the time of the facts giving rise to the instant application, guidance had been published by the Royal College of Paediatrics and Child Health indicating the procedures that should normally be followed in the event of a parent dissenting from the opinion of the health-care team that treatment should be withheld from a child. The guidance states that a second opinion should normally be offered and the parent should be allowed time to consult advisers of their choice. Paragraph 3.4.3 states:

"In most cases, with proper explanation and adequate time, parents can accept medical advice, but if the parents do not consent to withdrawal or withhold consent, a second opinion should be obtained and then the courts should be consulted. The Official Solicitor's Office can be telephoned for advice which will help clarify the need for court involvement."

Guidance published by the Department of Health in 2001, entitled "Consent: working with children", deals explicitly with the situation where clinicians believe that treatment which the parents want is not appropriate. It states:

"One example would be where a child is very seriously ill, and clinicians believe that the suffering involved in further treatment would outweigh the possible benefits. Parents cannot require you to provide a particular treatment if you do not believe that it is clinically appropriate, but again the courts can be asked to rule if agreement cannot be reached. While a court would not require you to provide treatment against your clinical judgment, it could require you to transfer responsibility for the child's care to another clinician who does believe that the proposed treatment is appropriate."

49. In Re A. (Conjoined Twins: Surgical Separation), Lord Justice Ward stated:

"Since the parents are empowered at law, it seems to be that their decision must be respected and in my judgment the hospital would be no more entitled to disregard their refusal than they are to disregard an adult person's refusal. I derive this from Re (A Minor) (Wardship: Consent to Treatment) [1992] Fam. 11, 22, where Lord Donaldson of Lymington, Master of the Rolls, said:

'It is trite law that in general a doctor is not entitled to treat a patient without the consent of someone who is authorised to give that consent. If he does so, he will be liable in damages for trespass to the person and may be guilty of a criminal assault'"

50. Under English law, there may be circumstances in which it is not practicable to seek a declaration from the courts, for example in an emergency situation where speedy decisions have to be taken concerning appropriate treatment. In Re C. (A Minor) ([1998] Lloyd's Reports: Medical 1), Sir Stephen Brown affirmed that the decision of a doctor whether to treat a child

"is dependent upon an exercise of his own professional judgment, subject only to the threshold requirement that save in exceptional cases usually of an emergency he has the consent of someone who has authority to give that consent".

51. This is reflected in paragraph 14 of the Reference guide to consent for examination or treatment, which states:

"In an emergency it is justifiable to treat a child who lacks capacity without the consent of a person with parental authority, if it is impossible to obtain consent in time and if the treatment is vital to the survival or health of the child."

52. In Re T (Adult: Refusal of Treatment) ([1994] 1 Weekly Law Reports Fam. 95), Lord Donaldson stated:

"If in a potentially life-threatening situation or one in which irreparable damage to the patient's health is to be anticipated, doctors or health authorities are faced with a refusal by an adult patient to accept essential treatment and they have real doubts as to the validity of that refusal, they should in the public interest, not to mention that of the patient, at once seek a declaration from the courts as to whether the proposed treatment would or would not be lawful. This step should not be left to the patient's family, who will probably not know of the facility and may be inhibited by questions of expense. Such cases will be rare, but when they do arise ... the courts can and will provide immediate assistance."

53. The Department of Health's aide-mémoire on consent provides:

"4. Giving and obtaining consent is usually a process, not a one-off event. Patients can change their minds and withdraw consent at any time. If there is any doubt, you should always check that the patient still consents to your caring for or treating them.

Can children consent for themselves?

5. Before examining, treating or caring for a child, you must also seek consent. Young people aged 16 and 17 are presumed to have the competence to give consent for themselves. Younger children who understand fully what is involved in the proposed procedure can also give consent (although their parents will ideally be involved). In other cases, someone with parental responsibility must give consent on the child's behalf, unless they cannot be reached in an emergency. ...

What information should be provided?

...

7. Parents need sufficient information before they can decide whether to give their consent: for example information about the benefits and risks of the proposed treatment, and alternative treatments. If the patient is not offered as much information as they reasonably need to make their decision, and in a form they can understand, their consent may not be valid."

Non-resuscitation

54. Guidelines published in March 1993 by the British Medical Association and the Royal College of Nursing in conjunction with the Resuscitation Council provide in paragraph 1:

"It is appropriate to consider a do-not-resuscitate order (DNR) in the following circumstances:

a. Where the patient's condition indicates that effective Cardiopulmonary Resuscitation (CPR) is unlikely to be successful.

b. Where CPR is not in accord with the recorded, sustained wishes of the patient who is mentally competent.

c. Where successful CPR is likely to be followed by a length and quality of life which would not be acceptable to the patient."

55. Paragraph 3 states:

"The overall responsibility for a DNR decision rests with the consultant in charge of the patient's care. This should be made after appropriate consultation and consideration of all aspects of the patient's condition. The perspectives of other members of the medical and

nursing team, the patient and with due regard to patient confidentiality, the patient's relatives or close friends, may all be valuable in forming the consultant's decision."

56. Paragraph 10 provides:

"Discussions of the advisability or otherwise of CPR will be highly sensitive and complex and should be undertaken by senior and experienced members of the medical team supported by senior nursing colleagues. A DNR order applies solely to CPR. It should be made clear that all other treatment and care which are appropriate for the patient are not precluded and should not be influenced by a DNR order."

57. Current departmental guidance is set out in "Resuscitation policy" (HSC Circular 2000/028). It states:

"Resuscitation decisions are amongst the most sensitive decisions that clinicians, patients and parents may have to make. Patients (and where appropriate their relatives and carers) have as much right to be involved in those decisions as they do in other decisions about their care and treatment. As with all decision making, doctors have a duty to act in accordance with an appropriate and responsible body of professional opinion."

III. RELEVANT INTERNATIONAL MATERIAL

58. The Council of Europe's Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (opened to signature at Oviedo on 4 April 1997), contains the following principles regarding consent:

"Chapter II – Consent

Article 5 – General rule

An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.

This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.

The person concerned may freely withdraw consent at any time.

Article 6 – Protection of persons not able to consent

1. Subject to Articles 17 and 20 below, an intervention may only be carried out on a person who does not have the capacity to consent, for his or her direct benefit.

2. Where, according to law, a minor does not have the capacity to consent to an intervention, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law.

The opinion of the minor shall be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity.

3. Where, according to law, an adult does not have the capacity to consent to an intervention because of a mental disability, a disease or for similar reasons, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law.

The individual concerned shall as far as possible take part in the authorisation procedure.

4. The representative, the authority, the person or the body mentioned in paragraphs 2 and 3 above shall be given, under the same conditions, the information referred to in Article 5.

5. The authorisation referred to in paragraphs 2 and 3 above may be withdrawn at any time in the best interests of the person concerned.

Article 7 – Protection of persons who have a mental disorder

Subject to protective conditions prescribed by law, including supervisory, control and appeal procedures, a person who has a mental disorder of a serious nature may be subjected, without his or her consent, to an intervention aimed at treating his or her mental disorder only where, without such treatment, serious harm is likely to result to his or her health.

Article 8 – Emergency situation

When because of an emergency situation the appropriate consent cannot be obtained, any medically necessary intervention may be carried out immediately for the benefit of the health of the individual concerned.

Article 9 – Previously expressed wishes

The previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account."

6.8.3. The law

1. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

59. The applicants stressed that it must be concluded that domestic law and practice failed in the circumstances of this case to ensure effective respect for the first applicant's right to physical and moral integrity within the meaning of "private life" as referred to and guaranteed by Article 8 of the Convention. That provision provides:

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

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

60. The Government disagreed.

A. The parties' submissions

1. The applicants

61. The applicants maintained that the decisions to administer diamorphine to the first applicant against the second applicant's wishes and to place a DNR notice in his notes without the second applicant's knowledge interfered with the first applicant's right to physical and moral integrity as well as with the second applicant's Article 8 rights. In their submission, the failure of the hospital authority to involve the domestic courts in the decision to intervene without the second applicant's consent resulted in a situation in which there was an interference with the first applicant's right which was not in accordance with the law.

62. As to the consent issue, the applicants stressed that any agreement which may at one stage have been given to the doctors by the second applicant should not be considered irrevocable. Consent to a particular course of treatment should be capable of being withdrawn in the light of changed circumstances. In her case, it would have been wrong of her to have issued blanket permission to medical professionals without any regard to what might happen to the first applicant subsequently. The applicants relied on the Department of Health's aide-mémoire on consent in this connection.

63. They further contended that in circumstances where there was a fundamental disagreement between a severely disabled child's legal proxy and doctors, it was inappropriate and unreasonable to leave the task of balancing fundamental rights to doctors. They had no training in such a task, which was pre-eminently a judicial function. In the applicants' submission, the decision-making procedures in the lead-up to the administration of diamorphine to the first applicant and the insertion of a DNR notice in his case notes failed to ensure effective respect for the interests of both applicants, in contravention of the respondent State's positive obligations under Article 8. They further pleaded that the impugned interferences were not "in accordance with the law" since the relevant domestic legal framework did not regulate what the medical authorities were required to do in circumstances where life-threatening treatment was proposed and a DNR notice included in the first applicant's medical notes without the second applicant's knowledge. Leaving the decision to involve the courts to the discretion of doctors was, in their view, a wholly inadequate basis on which to ensure effective respect for the rights of vulnerable patients such as the first applicant. They argued that the arbitrary nature of the current situation could be remedied by introducing greater clarity into, for example, the above-mentioned aide-mémoire on consent (see paragraph 53 above).

64. In the alternative, the applicants argued that the measures taken had to be seen as unnecessarily brusque and disproportionate in the circumstances.

2. The Government

65. For the Government, the actions taken by the hospital staff were fully in line with the requirements of Article 8. They drew attention to the nature of the emergency that confronted the hospital staff and contended that in exceptional circumstances, such as those in issue, the obligation to seek the consent of a parent before treating a child could not be considered an absolute requirement. In any event, the hospital reasonably took the view that it had earlier

reached agreement with the second applicant on the course of action to be followed in the event of a future emergency.

66. Developing this argument, the Government asserted that the applicants had not shown that the decisions were taken in the knowledge that they contravened the wishes of the second applicant. Significantly, the second applicant chose to admit the first applicant to St Mary's Hospital on 20 October 1998, in full knowledge of the tenor of the discussions which she had had with the doctors there in the preceding months. Had there been an irreconcilable difference of opinion between the second applicant and the doctors during the period between 9 September and 20 October 1998, it would have been open to the second applicant to seek another hospital or to bring an application before the High Court. Moreover, it was not practical for the Trust to seek the intervention of the courts with respect to the second applicant's opposition to the administration of diamorphine to her son, given that the latter's condition was clearly perceived to be critical on 20 October 1998. The doctors' duty to act in the first applicant's best interests required them to react swiftly to his serious condition. For the Government, had an urgent application been made to the High Court on 20 October 1998, whether by the Trust or by the second applicant, that court could have offered no remedy that could have benefited her in the circumstances of the case. In particular, the High Court would not have ordered the doctors to provide treatment that they did not consider clinically appropriate and would not have regarded the second applicant's views as determinative if they conflicted seriously with the doctors' views of the first applicant's best interests.

67. In their submissions on the merits of the applicants' complaint, the Government took issue with the applicants' assertion that the alleged interference was not “in accordance with the law.” In their view, this statement contradicted the applicants' principal contention that the hospital authority should have referred the consent issue to the domestic courts since the doctors treating the first applicant were not, in the applicants' opinion, faced with a genuine emergency. The Government pointed out that the applicants had hitherto consistently relied on the fact that, save in exceptional circumstances, domestic law required that doctors must have the consent of a person with parental responsibility before treating a child who lacks capacity and, in the event of a disagreement, recourse must be had to the courts. It was accordingly incorrect to argue at this stage that there is, and was, no legal framework regulating the involvement of a court or an authority's duty to involve a court.

3. The applicants' reply

68. The applicants retorted that it was their concern throughout the Convention proceedings that the Court should consider whether domestic law contained the minimum degree of protection against arbitrariness and whether the necessary safeguards were in place and observed in their case. They stated that, where disabled children were concerned, the domestic legal framework remained a loose patchwork of common law, local practices, ethical guidelines and various sets of official and professional guidelines.

69. The applicants reiterated that, contrary to the Government's view, the facts indicated that the doctors were not confronted with a situation in which immediate action had to be taken to save the first applicant's life. They noted in this connection that much time was spent by the medical professionals on 20 October 1998 on discussing whether diamorphine should be administered to the first applicant in order to make him more comfortable. During this time the Trust's solicitors should have been making an application, including by telephone, to a High Court judge. The applicants reaffirmed their view that court involvement was crucial in a case where physical integrity, human dignity and fundamental rights were involved.

B. The Court's assessment

1. As to the existence of an interference with Article 8[21]

70. The Court notes that the second applicant, as the mother of the first applicant – a severely handicapped child – acted as the latter's legal proxy. In that capacity, the second applicant had the authority to act on his behalf and to defend his interests, including in the area of medical treatment. The Government have observed that the second applicant had given doctors at St Mary's Hospital on the previous occasions on which he had been admitted authorisation to pursue particular courses of treatment (see paragraphs 15, 17 and 66 above). However, it is clear that, when confronted with the reality of the administration of diamorphine to the first applicant, the second applicant expressed her firm opposition to this form of treatment. These objections were overridden, including in the face of her continuing opposition. The Court considers that the decision to impose treatment on the first applicant in defiance of the second applicant's objections gave rise to an interference with the first applicant's right to respect for his private life, and in particular his right to physical integrity (on the latter point, see, mutatis mutandis, X and Y v. the Netherlands, judgment of 26 March 1985, Series A no. 91, p. 11, § 22; Pretty v. the United Kingdom, no. 2346/02, §§ 61 and 63, ECHR 2002-III; and Y.F. v. Turkey, no. 24209/94, § 33, 22 July 2003). It is to be noted that the Government have also laid emphasis on their view that the doctors were confronted with an emergency (which is disputed by the applicants) and had to act quickly in the best interests of the first applicant.

However, that argument does not detract from the fact of interference. It is, rather, an argument which goes to the necessity of the interference and has to be addressed in that context.

71. The Court would add that it has not been contested that the hospital was a public institution and that the acts and omissions of its medical staff were capable of engaging the responsibility of the respondent State under the Convention.

72. It would further observe that, although the applicants have alleged that the impugned treatment also gave rise to an interference with the second applicant's right to respect for her family life, it considers that it is only required to examine the issues raised from the standpoint of the first applicant's right to respect for his physical integrity, having regard, of course, to the second applicant's role as his mother and legal proxy.

2. Compliance with Article 8 § 2[21]

73. An interference with the exercise of an Article 8 right will not be compatible with Article 8 § 2 unless it is "in accordance with the law", has an aim or aims that is or are legitimate under that paragraph and is "necessary in a democratic society" for the aforesaid aim or aims (see Pretty, cited above, § 68).

74. The Court observes that the applicants have questioned the adequacy of the domestic legal framework for resolving conflicts arising out of parental objection to medical treatment proposed in respect of a child. It is their contention that the current situation confers too much discretion on doctors in deciding when to seek the intervention of the courts when faced with the objection of a parent to treatment which might, as a secondary effect, hasten the death of the child. However, it considers that, in the circumstances of this case, it is not required to address that issue from the standpoint of whether or not the qualitative criteria which have to be satisfied before an interference can be said to have been "in accordance with the law" have been complied with (as to those criteria, see, among many other authorities, Herczegfalvy v. Austria, judgment of 24 September 1992, Series A no. 244, pp. 27-28, §§ 88 91). Nor does it consider it necessary to pronounce on the applicants' contention that the authorities failed to comply with the positive obligations inherent in an effective respect for the first applicant's right to physical integrity by failing to adopt measures designed to secure respect for his physical integrity (see, for example, X and Y v. the Netherlands, cited above, p. 11, § 23, and, more recently, Odièvre v. France [GC], no. 42326/98, ECHR 2003-III).

75. The Court would, however, make two observations in this connection with reference to the facts of this case. Firstly, the regulatory framework in the respondent State is firmly predicated on the duty to preserve the life of a patient, save in exceptional circumstances. Secondly, that same framework prioritises the requirement of parental consent and, save in emergency situations, requires doctors to seek the intervention of the courts in the event of parental objection. It would add that it does not consider that the regulatory framework in place in the United Kingdom is in any way inconsistent with the standards laid down in the Council of Europe's Convention on Human Rights and Biomedicine in the area of consent (see paragraph 58 above); nor does it accept the view that the many sources from which the rules, regulations and standards are derived only contribute to unpredictability and an excess of discretion in this area at the level of application.

76. For the Court, the applicants' contention in reality amounts to an assertion that, in their case, the dispute between them and the hospital staff should have been referred to the courts and that the doctors treating the first applicant wrongly considered that they were faced with an emergency. However, the Government firmly maintain that the exigencies of the situation were such that diamorphine had to be administered to the first applicant as a matter of urgency in order to relieve his distress and that it would not have been practical in the circumstances to seek the approval of the court. However, for the Court, these are matters which fall to be dealt with under the "necessity" requirement of Article 8 § 2[21], and not from the standpoint of the "in accordance with the law" requirements.

77. As to the legitimacy of the aim pursued, the Court considers that the action taken by the hospital staff was intended, as a matter of clinical judgment, to serve the interests of the first applicant. It observes in this connection that it rejected in its partial decision on admissibility of 18 March 2003 any suggestion under Article 2[62] of the Convention that it was the doctors' intention unilaterally to hasten the first applicant's death, whether by administering diamorphine to him or by placing a DNR notice in his case notes.

78. Turning to the "necessity" of the interference in issue, the Court considers that the situation which arose at St Mary's Hospital between 19 and 21 October 1998 cannot be isolated from the earlier discussions in late July and early September 1998 between members of the hospital staff and the second applicant about the first applicant's condition and how it should be treated in the event of an emergency. The doctors at the hospital were obviously concerned about the second applicant's reluctance to follow their advice, in particular their view that morphine might have to be administered to her son in order to relieve any distress

which the first applicant might experience during a subsequent attack. It cannot be overlooked in this connection that Dr Walker recorded in his notes on 8 September 1998 that recourse to the courts might be needed in order to break the deadlock with the second applicant. Dr Hallet reached a similar conclusion following his meeting with the second applicant on 9 September (see paragraphs 12 and 17 above).

79. It has not been explained to the Court's satisfaction why the Trust did not at that stage seek the intervention of the High Court. The doctors during this phase all shared a gloomy prognosis of the first applicant's capacity to withstand further crises. They were left in no doubt that their proposed treatment would not meet with the agreement of the second applicant. Admittedly, the second applicant could have brought the matter before the High Court. However, in the circumstances it considers that the onus was on the Trust to take the initiative and to defuse the situation in anticipation of a further emergency.

80. The Court can accept that the doctors could not have predicted the level of confrontation and hostility which in fact arose following the first applicant's readmission to the hospital on 18 October 1998. However, in so far as the Government have maintained that the serious nature of the first applicant's condition involved the doctors in a race against time with the result that an application by the Trust to the High Court was an unrealistic option, it is nevertheless the case that the Trust's failure to make a High Court application at an earlier stage contributed to this situation.

81. That being said, the Court is not persuaded that an emergency High Court application could not have been made by the Trust when it became clear that the second applicant was firmly opposed to the administration of diamorphine to the first applicant. However, the doctors and officials used the limited time available to them in order to try to impose their views on the second applicant. It observes in this connection that the Trust was able to secure the presence of a police officer to oversee the negotiations with the second applicant but, surprisingly, did not give consideration to making a High Court application even though “the best interests procedure can be involved at short notice” (see the decision of Mr Justice Scott Baker in the High Court proceedings at paragraph 38 above).

82. The Court would further observe that the facts do not bear out the Government's contention that the second applicant had consented to the administration of diamorphine to the first applicant in the light of the previous discussions which she had had with the doctors. Quite apart from the fact that those talks had focused on the administration of morphine to the first applicant, it cannot be stated with certainty that any consent given was free, express and

informed. In any event, the second applicant clearly withdrew her consent, and the doctors and the Trust should have respected her change of mind and should not have engaged in rather insensitive attempts to overcome her opposition.

83. The Court considers that, having regard to the circumstances of the case, the decision of the authorities to override the second applicant's objection to the proposed treatment in the absence of authorisation by a court resulted in a breach of Article 8 of the Convention. In view of that conclusion, it does not consider it necessary to examine separately the applicants' complaint regarding the inclusion of the DNR notice in the first applicant's case notes without the consent and knowledge of the second applicant. It would however observe, in line with its admissibility decision, that the notice was only directed against the application of vigorous cardiac massage and intensive respiratory support, and did not exclude the use of other techniques, such as the provision of oxygen, to keep the first applicant alive.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

84. 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

85. The applicants submitted that they should each be awarded compensation for non-pecuniary damage in the light of the circumstances of the case. The manner in which the hospital authority chose to handle the differences of view which arose between the second applicant and the medical professionals unnecessarily complicated the first applicant's care. Furthermore, the position of vulnerability in which the first applicant was placed argued in favour of an award of compensation in his own right. The second applicant, for her part, suffered great anxiety and was subjected to unnecessary tension and stress as a result of the hospital authority's handling of the first applicant's treatment. Moreover, she had been left with feelings of injustice and apprehension as to what might happen to the first applicant in the future, given the lack of clarity and foreseeability in current domestic practice.

86. The Government considered that, in the circumstances, any finding by the Court that there had been a violation of Article 8 would in itself constitute just satisfaction.

87. The Court stresses that it is not its function to question the doctors' clinical judgment as regards the seriousness of the first applicant's condition or the appropriateness of the treatment they proposed. Moreover, the second applicant has been given clear guidance on how to assert her rights in the event of a future emergency. In addition, it cannot speculate as to what would have been the outcome of an application by the Trust to the High Court for authorisation to pursue the proposed. treatment On the other hand, the second applicant can be considered to have suffered stress and anxiety in her dealings with the doctors and officials representing the Trust as well as feelings of powerlessness and frustration in trying to defend her own perception of what was in the best interests of her child. Deciding on an equitable basis, it awards the applicants jointly 10,000 euros (EUR).

B. Costs and expenses

88. The applicants claimed the following amounts (inclusive of value-added tax): 10,184.31 pounds sterling (GBP), of which GBP 2,525 constituted future anticipated costs of an oral hearing in the case, for solicitors' fees; GBP 11,309.39 for fees charged by junior counsel; and GBP 587.50 for fees charged by senior counsel (at a reduced hourly rate of GBP 250). The applicants supplied itemised bills/fee notes in respect of the various amounts claimed.

89. The Government observed that the applicants' claim was partly based on costs which might be incurred if an oral hearing were to be held in the case. They further questioned the hourly rate claimed by senior counsel (GBP 250) and suggested that GBP 175 might be a more appropriate rate. Finally, the Government considered that the fifty-six hours' work claimed by junior counsel was excessive, given the time spent on the case by the applicants' solicitors. In their view, thirty-two hours' work should have been sufficient.

90. The Court reiterates that costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum (see The Sunday Times v. the United Kingdom (Article 50), judgment of 6 November 1980, Series A no. 38, p. 13, § 23). Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see Beyeler v. Italy, (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002).

91. The Court notes that it decided to dispense with an oral hearing in the case. Accordingly, any sums claimed in respect of an oral hearing should be rejected. It further notes that in their original application the applicants, in addition to Article 8, relied on Articles 2, 6, 13 and 14 of the

Convention. Their submissions on those latter Articles were however dismissed at the admissibility stage, and only the Article 8 complaint was retained for an examination on the merits.

92. Deciding on an equitable basis, and having regard to the amount granted to the applicants by way of legal aid, the Court awards the applicants EUR 15,000.

C. Default interest

93. 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.

6.8.4. The Court's decision

1. Holds that there has been a violation of Article 8[21] of the Convention;

2. Holds

(a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final according to Article 44 § 2[9] of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage;

(ii) EUR 15,000 (fifteen thousand euros) in respect of costs and expenses;

(iii) any tax that may be chargeable on the above amounts;

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

3. Dismisses the remainder of the applicants' claim for just satisfaction.

6.9. Case of A, B And C V. Ireland[21]

6.9.1. The procedure

1. The case originated in an application (no. 25579/05) against Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Irish nationals, Ms A and Ms B, and by a Lithuanian national, Ms C, ("the applicants"), on 15 July 2005. The President of the Chamber acceded to the applicants' request not to have their names disclosed (Rule 47 § 3[63] of the Rules of Court).

2. The applicants were represented by Ms J. Kay, a lawyer with the Irish Family Planning Association, a non-governmental organisation based in Dublin. The Irish Government ("the Government") were represented by their Agents, Ms P. O'Brien and, subsequently, Mr P. White, both of the Department of Foreign Affaires, Dublin.

3. The first two applicants principally complained under Article 8 about, inter alia, the prohibition of abortion for health and well-being reasons in Ireland and the third applicant's main complaint concerned the same Article and the alleged failure to implement the constitutional right to an abortion in Ireland in the case of a risk to the life of the woman.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1[48] of the Rules of Court). On 6 May 2008 a Chamber of that Section, composed of the following judges: Josep Casadevall, President, Elisabet Fura, Boštjan Zupančič, Alvina Gyulumyan, Egbert Myjer, Ineta Ziemele, Luis López Guerra, judges, and also of Santiago Quesada, Section Registrar, communicated the case to the respondent Government.

5. The applicants and the Government each filed written observations on the admissibility and merits. Third-party comments were also received from the Lithuanian Government which had exercised their right to intervene (Article 36 § 1[1] of the Convention and Rule 44 § 1 (b)[58]). Leave having been accorded by the President of the Section to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2[54]), numerous third party

[21] Grand Chamber; Case Of A, B And C V. Ireland; (Application No. 25579/05); Strasbourg 16 December 2010; This Judgment Is Final But It May Be Subject To Editorial Revision.

submissions were also received: joint observations from the European Centre for Law and Justice in association with Kathy Sinnott (Member of the European Parliament), the Family Research Council (Washington D.C.) and the Society for the Protection of Unborn Children (London); observations from the Pro-Life Campaign; joint observations from Doctors for Choice (Ireland) and the British Pregnancy Advisory Service; and joint observations from the Center for Reproductive Rights and the International Reproductive and Sexual Health Law Programme.

6. On 7 July 2009 the Chamber relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30[16] of the Convention and Rule 72[17]). The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3[18] of the Convention and Rule 24[20] of the Rules of Court.

7. Judge Ann Power, the judge elected in respect of Ireland, withdrew from sitting in the Grand Chamber (Rule 28). The Government appointed Mr Justice Nicolas Kearns and, following his withdrawal due to a judicial appointment in Ireland, Ms Justice Mary Finlay Geoghegan to sit as an ad hoc judge (former Article 27 § 2, now Article 26 § 4, of the Convention, and Rule 29 § 1 of the Rules of Court). At the first deliberations, Judge George Nicolaou replaced Judge Peer Lorenzen, who was unable to take part in the further consideration of the case (Rule 24 § 3).

8. The applicants and the Government each filed a memorial on the admissibility and on the merits with the Grand Chamber. The Lithuanian Government did not make further observations before the Grand Chamber and their, as well as the above-described other third party submissions to the Chamber, were included in the Grand Chamber's file.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 9 December 2009 (Rule 59 § 3[3]). There appeared before the Court:

(a) for the Government

10. The Court heard addresses by Messrs Gallagher S.C. and O'Donnell S.C. for the Government and by Ms Kay and Ms Stewart S.C for the applicants.

6.9.2. The facts

11. The applicants reside in Ireland and are women over 18 years of age.

12. The facts, as submitted by the applicants, are summarised immediately below. The Government's position was that these factual submissions were general, unsubstantiated and untested either by a domestic court, or through any other form of interaction with the Irish State, and they made further factual submissions as regards each applicant (summarised at paragraphs 115-118 and 122 below).

I THE CIRCUMSTANCES OF THE CASE

A. The first applicant (A)

13. On 28 February 2005 the first applicant travelled to England for an abortion as she believed that she was not entitled to an abortion in Ireland. She was 9½ weeks pregnant.

14. She had become pregnant unintentionally, believing her partner to be infertile. At the time she was unmarried, unemployed and living in poverty. She had four young children. The youngest was disabled and all children were in foster care as a result of problems she had experienced as an alcoholic. She had a history of depression during her first four pregnancies, and was battling depression at the time of her fifth pregnancy. During the year preceding her fifth pregnancy, she had remained sober and had been in constant contact with social workers with a view to regaining custody of her children. She considered that a further child at that moment of her life (with its attendant risk of post-natal depression and to her sobriety) would jeopardise her health and the successful reunification of her family. She decided to travel to England to have an abortion.

15. Delaying the abortion for three weeks, the first applicant borrowed the minimum amount of money for treatment in a private clinic and travel from a money lender (650 euros, "EUR") at a high interest rate. She felt she had to travel to England alone and in secrecy, without alerting the social workers and without missing a contact visit with her children.

16. She travelled back to Ireland by plane the day after the abortion for her contact visit with her youngest child. While she had initially submitted that she was afraid to seek medical advice on return to Ireland, she subsequently clarified that, on the train returning from Dublin she began to bleed profusely, and an ambulance met the train. At a nearby hospital she

underwent a dilation and curettage. She claims she experienced pain, nausea and bleeding for weeks thereafter but did not seek further medical advice.

17. Following the introduction of the present application, the first applicant became pregnant again and gave birth to her fifth child. She is struggling with depression, has custody of three of her children and two (including the disabled child) remain in care. She maintained that an abortion was the correct decision for her in 2005.

B. The second applicant (B)

18. On 17 January 2005 the second applicant travelled to England for an abortion believing that she was not entitled to an abortion in Ireland. She was 7 weeks pregnant.

19. The second applicant became pregnant unintentionally. She had taken the "morning-after pill" and was advised by two different doctors that there was a substantial risk of an ectopic pregnancy (a condition which cannot be diagnosed until 6-10 weeks of pregnancy). She was certain of her decision to travel to England for an abortion since she could not care for a child on her own at that time of her life. She waited several weeks until the counselling centre in Dublin opened after Christmas. She had difficulty meeting the costs of the travel and, not having a credit card, used a friend's credit card to book the flights. She accepted that, by the time she travelled to England, it had been confirmed that it was not an ectopic pregnancy.

20. Once in England she did not list anyone as her next of kin or give an Irish address so as to be sure her family would not learn of the abortion. She travelled alone and stayed in London the night before the procedure to avoid missing her appointment as well as the night of the procedure, as she would have arrived back in Dublin too late for public transport and the medication rendered her unfit to drive home from Dublin airport. The clinic advised her to inform Irish doctors that she had had a miscarriage.

21. On her return to Ireland she started passing blood clots and two weeks later, being unsure of the legality of having travelled for an abortion, sought follow-up care in a clinic in Dublin affiliated to the English clinic.

C. The third applicant (C)

22. On 3 March 2005 the third applicant had an abortion in England believing that she could not establish her right to an abortion in Ireland. She was in her first trimester of pregnancy at the time.

23. Prior to that, she had been treated for 3 years with chemotherapy for a rare form of cancer. She had asked her doctor before the treatment about the implications of her illness as regards her desire to have children and was advised that it was not possible to predict the effect of pregnancy on her cancer and that, if she did become pregnant, it would be dangerous for the foetus if she were to have chemotherapy during the first trimester.

24. The cancer went into remission and the applicant unintentionally became pregnant. She was unaware of this fact when she underwent a series of tests for cancer, contraindicated during pregnancy. When she discovered she was pregnant, the first applicant consulted her General Practitioner ("GP") as well as several medical consultants. She alleged that, as a result of the chilling effect of the Irish legal framework, she received insufficient information as to the impact of the pregnancy on her health and life and of her prior tests for cancer on the foetus.

25. She therefore researched the risks on the internet. Given the uncertainty about the risks involved, the third applicant travelled to England for an abortion. She maintained that she wanted a medical abortion (drugs to induce a miscarriage) as her pregnancy was at an early stage but that she could not find a clinic which would provide this treatment as she was a non-resident and because of the need for follow-up. She therefore alleged she had to wait a further 8 weeks until a surgical abortion was possible.

26. On returning to Ireland after the abortion, the third applicant suffered complications of an incomplete abortion, including prolonged bleeding and infection. She alleges that doctors provided inadequate medical care. She consulted her own GP several months after the abortion and her GP made no reference to the fact that she was visibly no longer pregnant.

II. RELEVANT LAW AND PRACTICE

A. Article 40.3.3 of the Irish Constitution

27. The courts are the custodians of the rights set out in the Constitution and their powers are as ample as the defence of the Constitution requires (The State (Quinn) v. Ryan [1965] IR 70). In his judgment in The People v. Shaw ([1982] IR 1), Mr Justice Kenny also observed:

"The obligation to implement [the guarantee of Article 40.3] is imposed not on the Oireachtas [Parliament] only, but on each branch of the State which exercises the powers of legislating, executing and giving judgment on those laws: Article 6. The word 'laws' in Article [40.3] is not confined to laws which have been enacted by the Oireachtas, but comprehends the laws

made by judges and by ministers of State when they make statutory instruments or regulations."

1. The legal position prior to the Eighth Amendment of the Constitution

28. Prior to the adoption of the Eighth Amendment to the Constitution in 1983, Article 40.3 of the Constitution read as follows:

"1 The State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2 The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."

29. Certain judgments relied upon Article 40.3 and other Articles of the Constitution to recognise the right to life of the unborn and to suggest that the Constitution implicitly prohibited abortion (McGee v. Attorney General [1974] IR 284; G v. An Bord Uchtála [1980] IR 32; and Finn v. Attorney General [1983] IR 154).

30. Abortion is also prohibited under the criminal law by section 58 (as amended) of the Offences Against the Person Act 1861 ("the 1861 Act"):

"Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or not be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of a felony, and being convicted thereof shall be liable to be kept in penal servitude for life."

Section 59 of the 1861 Act states that:

"Whoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour ..."

31. Section 58 of the Civil Liability Act 1961 ("the 1961 Act") provides that "the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided the child is subsequently born alive".

32. Section 10 of the Health (Family Planning) Act 1979 re-affirms the statutory prohibition of abortion and stated as follows:

"Nothing in this Act shall be construed as authorising -

(a) the procuring of abortion,

(b) the doing of any other thing the doing of which is prohibited by section 58 or 59 of the Offences Against the Person Act, 1861 (which sections prohibit the administering of drugs or the use of any instruments to procure abortion)

or,

(c) the sale, importation into the State, manufacture, advertising or display of abortifacients."

33. Article 50.1 of the Irish Constitution makes provision for the continuation of laws, such as the 1861 Act, which were in force on the adoption of the Constitution in 1937 as follows:

"Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in [Ireland] immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of [Parliament]."

34. The meaning of section 58 of the 1861 Act was considered in England and Wales in R. v. Bourne ([1939] 1 KB 687), where the defendant had carried out an abortion on a minor, pregnant as a result of multiple rape. Macnaghten J. accepted that abortion to preserve the life of a pregnant woman was not unlawful and, further, where a doctor was of the opinion that the woman's physical or mental health would be seriously harmed by continuing with the pregnancy, he could properly be said to be operating for the purpose of preserving the life of the mother. This principle was not, however, applied by the Irish courts. In the case of Society for the Protection of the Unborn Child (Ireland) Ltd (S.P.U.C.) v. Grogan and Others ([1989] I.R. 753), Keane J. maintained that "the preponderance of judicial opinion in this country would suggest that the Bourne approach could not have been adopted ... consistently with the Constitution prior to the Eighth Amendment".

2. The Eighth Amendment to the Constitution (1983)

35. From the early 1980s there was some concern about the adequacy of existing provisions concerning abortion and the possibility of abortion being deemed lawful by judicial interpretation. There was some debate as to whether the Supreme Court would follow the course adopted in England and Wales in Bourne (cited above) or in the United States of America in Roe v. Wade (410 US 113 (1973)).

36. A referendum was held in 1983, resulting in the adoption of a provision which became Article 40.3.3 of the Irish Constitution, the Eighth Amendment (53.67% of the electorate voted with 841,233 votes in favour and 416,136 against). Article 40.3.3 reads as follows:

"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

3. Attorney General v. X and Others [1992] 1 IR 1 ("the X case")

(a) Prior to the X case

37. A number of cases then came before the courts concerning the interpretation of the Eighth Amendment and the provision of information on or referral to abortion services available in other countries.

38. In 1986 the S.P.U.C. obtained an injunction restraining two organisations (Open Door Counselling and the Dublin Well Woman Centre) from furnishing women with information which encouraged or facilitated an abortion. The Supreme Court held (Attorney General (S.P.U.C.) v. Open Door Counselling [1988] I.R. 593]) that it was unlawful to disseminate information, including contact information, about foreign abortion services, which had the effect of facilitating the commission of an abortion (see also, S.P.U.C. (Ireland) v. Grogan and Others, cited above). These two organisations then complained about restraints on their freedom to impart and receive information and a violation of Article 10 of the Convention was established by this Court (Open Door and Dublin Well Woman v. Ireland, judgment of 29 October 1992, Series A no. 246-A, cited below as the "Open Door" case).

(b) Judgment of the Supreme Court in the X case

39. The interpretation of the Eighth Amendment was considered in the seminal judgment in the X case. X was fourteen years of age when she became pregnant as a result of rape. Her parents arranged for her to have an abortion in the United Kingdom and asked the Irish police whether it would be possible to have scientific tests carried out on retrieved foetal tissue with

a view to determining the identity of the rapist. The Director of Public Prosecutions was consulted who, in turn, informed the Attorney General. On 7 February 1992 an interim injunction was granted ex parte on the application of the Attorney General restraining X from leaving the jurisdiction or from arranging or carrying out a termination of the pregnancy. X and her parents returned from the United Kingdom to contest the injunction.

40. On 26 February 1992, on appeal, a majority (Finlay C.J., McCarthy J., Egan J. and O'Flaherty J., with Hederman J. dissenting) of the Supreme Court discharged the injunction.

41. The Chief Justice noted that no interpretation of the Constitution was intended to be final for all time (citing McGee v. the Attorney General [1974] IR 284), which statement was "peculiarly appropriate and illuminating in the interpretation of [the Eighth Amendment] which deals with the intimate human problem of the right of the unborn to life and its relationship to the right of the mother of an unborn child to her life." He went on:

"36. Such a harmonious interpretation of the Constitution carried out in accordance with concepts of prudence, justice and charity, ... leads me to the conclusion that in vindicating and defending as far as practicable the right of the unborn to life but at the same time giving due regard to the right of the mother to life, the Court must, amongst the matters to be so regarded, concern itself with the position of the mother within a family group, with persons on whom she is dependent, with, in other instances, persons who are dependent upon her and her interaction with other citizens and members of society in the areas in which her activities occur. Having regard to that conclusion, I am satisfied that the test proposed on behalf of the Attorney General that the life of the unborn could only be terminated if it were established that an inevitable or immediate risk to the life of the mother existed, for the avoidance of which a termination of the pregnancy was necessary, insufficiently vindicates the mother's right to life.

37. I, therefore, conclude that the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article [40.3.3] of the Constitution.

42. Considering that a suicide risk had to be taken into account in reconciling the right to life of the mother and the unborn, the Chief Justice continued:

"44. I am, therefore, satisfied that on the evidence before the learned trial judge, which was in no way contested, and on the findings which he has made, that the defendants have satisfied

the test which I have laid down as being appropriate and have established, as a matter of probability, that there is a real and substantial risk to the life of the mother by self-destruction which can only be avoided by termination of her pregnancy."

43. Similar judgments on the substantive issue were delivered by three other judges. McCarthy J. noted that "the right of the girl here is a right to a life in being; the right of the unborn is to a life contingent; contingent on survival in the womb until successful delivery". He went on:

141. ... In my view, the true construction of the [Eighth] Amendment ... is that, paying due regard to the equal right to life of the mother, when there is a real and substantial risk attached to her survival not merely at the time of application but in contemplation at least throughout the pregnancy, then it may not be practicable to vindicate the right to life of the unborn. It is not a question of a risk of a different order of magnitude; it can never be otherwise than a risk of a different order of magnitude.

142. On the facts of the case, which are not in contest, I am wholly satisfied that a real and substantial risk that the girl might take her own life was established; it follows that she should not be prevented from having a medical termination of pregnancy."

44. McCarthy J. commented in some detail on the lack of legislation implementing Article 40.3.3. He noted in the above-cited Grogan case, that he had already pointed out that no relevant legislation had been enacted since the Eighth Amendment came into force, the direct criminal law ban on abortion still deriving from the 1861 Act. He also noted that the Chief Justice had pointed out in the above-cited Open Door case that it was "unfortunate that the [Parliament] has not enacted any legislation at all in respect of this constitutionally guaranteed right."

Having noted that Article 40.3.3 envisaged a lawful abortion in the State and thereby qualified section 58 of the 1861 Act (which had made abortion for any purpose unlawful), he continued:

"... I agree with the Chief Justice that the want of legislation pursuant to the amendment does not in any way inhibit the courts from exercising a function to vindicate and defend the right to life of the unborn. I think it reasonable, however, to hold that the People when enacting the Amendment were entitled to believe that legislation would be introduced so as to regulate the manner in which the right to life of the unborn and the right to life of the mother could be reconciled.

147. In the context of the eight years that have passed since the Amendment was adopted and the two years since Grogan's case the failure by the legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable. What are pregnant women to do? What are the parents of a pregnant girl under age to do? What are the medical profession to do? They have no guidelines save what may be gleaned from the judgments in this case. What additional considerations are there? Is the victim of rape, statutory or otherwise, or the victim of incest, finding herself pregnant, to be assessed in a manner different from others? The Amendment, born of public disquiet, historically divisive of our people, guaranteeing in its laws to respect and by its laws to defend the right to life of the unborn, remains bare of legislative direction...

148. ... The State may fulfil its role by providing necessary agencies to help, to counsel, to encourage, to comfort, to plan for the pregnant woman, the pregnant girl or her family. It is not for the courts to programme society; that is partly, at least, the role of the legislature. The courts are not equipped to regulate these procedures."

4. The Thirteenth and Fourteenth Amendments (1992)

45. The judgment of the Supreme Court gave rise to a number of questions. Certain obiter dicta of the majority in the Supreme Court implied that the constitutional right to travel could be limited so as to prevent an abortion taking place where there was no threat to the life of the mother.

46. A further referendum, in which three separate proposals were put forward, was held in November 1992. 68.18% of the electorate voted.

47. The first was a proposal to amend the Constitution to provide for lawful abortion where there would otherwise be a real and substantial risk to the mother's life, except a risk of suicide. Its acceptance would therefore have limited the impact of the X case: it was rejected (65.35% to 34.65%).

48. The second proposal was accepted and became the Thirteenth Amendment to the Constitution (added to Article 40.3.3). It was designed to ensure that a woman could not be prevented from leaving the jurisdiction for an abortion abroad and it reads as follows:

"This subsection shall not limit freedom to travel between the State and another state."

49. The third proposal was also accepted and became the Fourteenth Amendment (also added to Article 40.3.3). It allows for the provision in Ireland of information on abortion services abroad and provides as follows:

"This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another State."

5. The proposed Twenty-fifth Amendment to the Constitution (2002)

50. Further to certain public reflection process (see paragraphs 62-76 below), in March 2002 a third referendum on abortion was held to resolve the legal uncertainty since the X case by putting draft legislation (Protection of Human Life in Pregnancy Act, 2002) to the electorate. The intention was threefold.

51. The referendum was to ensure that the draft 2002 Act, once adopted by referendum, could only be changed by another referendum.

52. The proposed 2002 Act defined the crime of abortion (to replace sections 58 and 59 of the 1861 Act and to reduce the maximum penalty). It also removed the threat of suicide as a ground for a lawful abortion and thereby restricted the grounds recognised in the X case. The definition of abortion excluded "the carrying out of a medical procedure by a medical practitioner at an approved place in the course of which or as a result of which unborn human life is ended where that procedure is, in the reasonable opinion of the practitioner, necessary to prevent a real and substantial risk of loss of the woman's life other than by self-destruction".

53. The proposed 2002 Act also provided safeguards to medical procedures to protect the life of the mother by setting out the conditions which such procedures were to meet in order to be lawful: the procedures had, inter alia, to be carried out by a medical practitioner at an approved place; the practitioner had to form a reasonable opinion that the procedure was necessary to save the life of the mother; the practitioner had also to make and sign a written record of the basis for the opinion; and there would be no obligation on anyone to carry out or assist in carrying out a procedure.

54. The referendum resulted in the lowest turnout in all three abortion referenda (42.89% of the electorate) and the proposal was defeated (50.42% against and 49.58% in favour). The Referendum Commission had earlier explained that a negative vote would mean that Article

40.3.3 would remain in place as it was. Any legislation introduced thereafter would have to accord with the present interpretation of the Constitution which would mean a threat of suicide would continue to be a ground for a legal abortion.

6. Current text of Article 40.3 of the Constitution

55. Following the above-described amendments, Article 40.3 of the Constitution reads as follows:

"1o The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2o The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

3o The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

This subsection shall not limit freedom to travel between the State and another state.

This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."

B. Information in Ireland as regards abortion services abroad

1. The Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995 ("the 1995 Act")

56. The 1995 Act was the legislation envisaged by the Fourteenth Amendment and constituted a response to the above-cited judgment of this Court in the Open Door case. That Act defines the conditions under which information relating to abortion services lawfully available in another State might be made available in Ireland.

57. Section 2 defines "Act information" as information that (a) is likely to be required by a woman for the purpose of availing herself of services provided outside the State for the termination of pregnancies; and (b) relates to such services or to persons who provide them.

58. Section 1 confirms that a "person to whom section 5 applies" means a person who engages in, or holds himself, herself or itself out as engaging in, the activity of giving information, advice or counselling to individual members of the public in relation to pregnancy. Section 5 of the Act provides as follows:

"Where a person to whom section 5 applies is requested, by or on behalf of an individual woman who indicates or on whose behalf it is indicated that she is or may be pregnant, to give information, advice or counselling in relation to her particular circumstances having regard to the fact that it is indicated by her or on her behalf that she is or may be pregnant-

(a) it shall not be lawful for the person or the employer or principal of the person to advocate or promote the termination of pregnancy to the woman or to any person on her behalf,

(b) it shall not be lawful for the person or the employer or principal of the person to give Act information to the woman or to any person on her behalf unless—

(i) the information and the method and manner of its publication are in compliance with subparagraphs (I) and (II) of section 3 (1) (a) and the information is given in a form and manner which do not advocate or promote the termination of pregnancy,

(ii) at the same time, information (other than Act information), counselling and advice are given directly to the woman in relation to all the courses of action that are open to her in relation to her particular circumstances aforesaid, and

(iii) the information, counselling and advice referred to in subparagraph (ii) are truthful and objective, fully inform the woman of all the courses of action that are open to her in relation to her particular circumstances aforesaid and do not advocate or promote, and are not accompanied by any advocacy or promotion of, the termination of pregnancy."

59. Section 8 of the 1995 Act reads as follows:

"(1) It shall not be lawful for a person to whom section 5 applies or the employer or principal of the person to make an appointment or any other arrangement for or on behalf of a woman with a person who provides services outside the State for the termination of pregnancies.

(2) Nothing in subsection (1) shall be construed as prohibiting the giving to a woman by a person to whom section 5 applies ... of any medical, surgical, clinical, social or other like records or notes relating to the woman ... ."

2. Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995, In Re [1995] IESC 9

60. Before its enactment, the 1995 Act was referred by the President to the Supreme Court for a review of its constitutionality. The Supreme Court found it to be constitutional so that the 1995 Act thereby became immune from future constitutional challenge (Article 34.3.3 of the Constitution). In so concluding, the Supreme Court examined, inter alia, whether the provisions of Articles 5 and 8 were repugnant to the Constitution namely, whether, from an objective point of view, those provisions represented "a fair and reasonable balancing by [Parliament] of the various conflicting rights and was not so contrary to reason and fairness as to constitute an unjust attack on the constitutional rights of the unborn or on the constitutional rights of the mother or any other person or persons." In this respect, the Supreme Court noted that:

"The [1995 Act] merely deals with information relating to services lawfully available outside the State for the termination of pregnancies and the persons who provide such services.

The condition subject to which such information may be provided to a woman who indicates or on whose behalf it is indicated that she is or may be pregnant is that the person giving such information is

(i) not permitted to advocate or promote the termination of pregnancy to the woman or any person on her behalf;

(ii) not permitted to give the information unless it is given in a form and manner which do not advocate or promote the termination of pregnancy

and is only permitted to give information relating to services which are lawfully available in the other State and to persons, who in providing them are acting lawfully in that place if

(a) the information and the method and manner of its publication are in compliance with the law of that place, and

(b) the information is truthful and objective and does not advocate or promote, and is not accompanied by any advocacy or promotion of the termination of pregnancy.

At the same time information, counselling and advice must be given directly to the woman in relation to all the courses of action that are open to her in relation to her particular

circumstances and such information, counselling and advice must not advocate or promote and must not be accompanied by any advocacy or promotion of, the termination of pregnancy.

Subject to such restrictions, all information relating to services lawfully available outside the State and the persons who provide them is available to her."

61. The Supreme Court considered that the submission, that a woman's life and/or health might be placed at serious risk in the event that a doctor was unable to send a letter referring her to another doctor for the purposes of having her pregnancy terminated, was based on a misinterpretation of the provisions of section 8 of the 1995 Act:

"This section prohibits a doctor or any person to whom Section 5 of the [1995 Act] relates from making an appointment or any other arrangement for or on behalf of a woman with a person who provides services outside the State for the termination of pregnancies.

It does not preclude him, once such appointment is made, from communicating in the normal way with such other doctor with regard to the condition of his patient provided that such communication does not in any way advocate or promote and is not accompanied by any advocacy of the termination of pregnancy.

While a doctor is precluded by the terms of the [1995 Act] from advocating or promoting the termination of pregnancy, he is not in any way precluded from giving full information to a woman with regard to her state of health, the effect of the pregnancy thereon and the consequences to her health and life if the pregnancy continues and leaving to the mother the decision whether in all the circumstances the pregnancy should be terminated. The doctor is not in any way prohibited from giving to his pregnant patient all the information necessary to enable her to make an informed decision provided that he does not advocate or promote the termination of pregnancy.

In addition, Section 8(2) does not prohibit or in any way prevent the giving to a woman of any medical, surgical, clinical, social or other like records relating to her. ...

Having regard to the obligation on [Parliament] to respect, and so far as practicable, to defend and vindicate the right to life of the unborn having regard to the equal right to life of the mother, the prohibition against the advocacy or promotion of the termination of pregnancy and the prohibition against any person to whom Section 5 of the Bill applies making an appointment or any other arrangement for and on behalf of a woman with a person who provides services outside the State for the termination of pregnancies does not constitute an

unjust attack on the rights of the pregnant woman. These conditions represent a fair and reasonable balancing of the rights involved and consequently Sections 5 and 8 of the Bill are not repugnant to the Constitution on these grounds."

C. Public Reflection Processes

1. The Constitution Review Group Report 1996 ("the Review Group Report 1996")

62. Established in April 1995, the Review Group's terms of reference were to review the Constitution and to establish those areas where constitutional change might be necessary with a view to assisting the governmental committees in their constitutional review work.

63. In its 1996 report, the Review Group considered the substantive law on abortion in Ireland following the X case and the rejection of the Twelfth Amendment to be unclear (for example, the definition of the unborn, the scope of the admissibility of the suicidal disposition as a ground for abortion and the absence of any statutory time-limit on lawful abortion following the X case criteria). The Review Group considered the option of amending Article 40.3.3 to legalise abortion in constitutionally defined circumstances:

"Although thousands of women go abroad annually for abortions without breach of domestic law, there appears to be strong opposition to any extensive legalisation of abortion in the State. There might be some disposition to concede limited permissibility in extreme cases, such, perhaps, as those of rape, incest or other grave circumstances. On the other hand, particularly difficult problems would be posed for those committed in principle to the preservation of life from its earliest stage."

64. The Review Group concluded that, while in principle the major issues should ideally be tackled by constitutional amendment, there was no consensus as to what that amendment should be and no certainty of success for any referendum proposal for substantive constitutional change in relation to Article 40.3.3. The Review Group therefore considered that the only practical possibility at that time was the introduction of legislation to regulate the application of Article 40.3.3. Such legislation could, inter alia, include definitions (for example of the "unborn"); afford express protection for appropriate medical intervention necessary to protect the life of the mother, require written certification by appropriate medical specialists of "real and substantial risk to the life of the mother" and impose a time-limit on lawful abortion namely, in circumstances permitted by the X case.

2. The Interdepartmental Working Group Green Paper on Abortion, 1999 ("the Green Paper 1999")

65. A cabinet committee was established to supervise the drafting of a Green Paper on abortion and the preparatory work was carried out by an Interdepartmental Working Group of officials. In drawing up the Green Paper, submissions were invited from the public, from professional and voluntary organisations and any other parties who wished to contribute. Over 10,000 such submissions were received, as well as petitions containing 36,500 signatures. The introduction to the Green Paper 1999 noted that:

"The current situation ... is that, constitutionally, termination of pregnancy is not legal in this country unless it meets the conditions laid down by the Supreme Court in the X case; information on abortion services abroad can be provided within the terms of the [1995 Act]; and, in general, women can travel abroad for an abortion.

There are strong bodies of opinion which express dissatisfaction with the current situation, whether in relation to the permissibility of abortion in the State or to the numbers of women travelling abroad for abortion.

Various options have been proposed to resolve what is termed the "substantive issue" of abortion but there is a wide diversity of views on how to proceed. The Taoiseach indicated shortly after the Government took office in 1997 that it was intended to issue a Green Paper on the subject. The implications of the X case were again brought sharply into focus in November 1997 as a result of the C Case, and a Cabinet Committee was established to oversee the drafting of this Green Paper, the preparatory work on which was carried out by an interdepartmental group of officials. (for a description of the C case, see paragraphs 95-96 below)

While the issues surrounding abortion are extremely complex, the objective of this Green Paper is to set out the issues, to provide a brief analysis of them and to consider possible options for the resolution of the problem. The Paper does not attempt to address every single issue in relation to abortion, nor to give an exhaustive analysis of each. Every effort has been made to concentrate on the main issues and to discuss them in a clear, concise and objective way.

Submissions were invited from interested members of the public, professional and voluntary organisations and any other parties who wished to contribute. ..."

66. Paragraph 1.09 noted that there was no medical evidence to suggest that doctors in Ireland did not treat women with cancer or other illnesses on the grounds that the treatment would damage the unborn.

67. Chapter 7 of the paper comprised a discussion of seven possible constitutional and legislative solutions:

- an absolute constitutional ban on abortion;
- an amendment of the Constitution so as to restrict the application of the X case;
- the retention of the current position;
- the retention of the constitutional status quo with a legislative restatement of the prohibition of abortion;
- legislation to regulate abortion as defined in the X case;
- a reversion to the pre-1983 position; and
- permitting abortion beyond the grounds specified in the X case.

68. As to the fifth option (legislation to regulate abortion as defined in the X case), the Green Paper 1999 noted as follows:

"7.48 The objective of this approach would be to implement the X case decision by means of legislation ... This approach assumes that there would be no change in the existing wording of Article 40.3.3.

7.49 In formulating such legislation a possible approach may be not to restate the prohibition on abortion, which is already contained in section 58 of the Offences Against the Person Act, 1861, but instead to provide that a termination carried out in accordance with the legislation would not be an offence.

7.50 The detail of such legislation would require careful consideration but it could be along the lines of that discussed under the previous option (retention of the constitutional status quo with legislative restatement of the prohibition on abortion).

Discussion

7.51 Since this option does not provide for a regime more liberal than the X case formulation, no constitutional amendment would be required. This option would, however, provide for

abortion in defined circumstances and as such, would be certain to encounter criticism from those who are opposed to abortion on any grounds and who disagreed with the decision in the X case. Central to the criticism would be the inclusion of the threat of suicide as a ground and the difficulties inherent in assessing same.

7.52 The main advantage of this approach is that it would provide a framework within which the need for an abortion could be assessed, rather than resolving the question on a case-by-case basis before the courts, with all the attendant publicity and debate. It would allow pregnant women who establish that there is a real and substantial risk to the their life to have an abortion in Ireland rather than travelling out of the jurisdiction and would provide legal protection for medical and other personnel, such as nurses, involved in the procedure to terminate the pregnancy. The current medical ethical guidelines would not be consistent with such legislation.

7.53 It must be pointed out however that the problems of definition in the text of Article 40.3.3 would remain. A decision would be necessary on whether the proposed legislation would provide the definitions necessary to remove the current ambiguity surrounding the text of that Article. There is however a limit to what legislation can achieve by way of definitions as ultimately the interpretation of Article 40.3.3 is a matter for the Courts."

69. As to the Seventh option (permitting abortion beyond the grounds specified in the X case), the Green Paper 1999 noted as follows:

"7.65 In Chapter 4, other possible grounds for abortion are examined and set where possible in an international context. As indicated earlier, a number of submissions also sought the introduction of abortion on some or all of these grounds. Each of the possible types of provision identified has been considered separately. This does not rule out consideration of a combination of some or all of these options if this approach were to be pursued. Were this to be done, some of the difficulties identified when options are considered separately might not arise.

7.66 In all of the cases discussed in this section, abortion would be permissible only if Article 40.3.3 of the Constitution were amended. Sections 58 and 59 of the Offences Against the Person Act, 1861 may also need to be reviewed and new legislation to regulate any new arrangement would be necessary. The type of legislative model referred to in the discussion on the option of retention of the constitutional status quo with legislative restatement of the prohibition on abortion (see paragraphs 7.42 - 7.47) might, with appropriate adaptations, serve

as a basis for regulation in other circumstances also. Issues such as criteria under which an abortion would be permissible, gestational limits, certification and counselling requirements, and possibly a waiting period after counselling, would be among the matters which legislation might address. The provisions in force in some other countries are also discussed in Chapter 4.

Discussion

(a) Risk to Physical/mental health of mother

7.67 This option would provide for abortion on grounds of risk to a woman's physical and/or mental health.

7.68 In 1992 the proposed Twelfth Amendment to the Constitution was the subject of some criticism on the grounds that it specifically excluded risk to health as grounds for termination of a pregnancy. The English Bourne case of 1938 involved interpretation of the Offences Against the Person Act, 1861 to permit termination of a pregnancy where a doctor thought that the probable consequence of continuing a pregnancy would be to make the woman a physical or mental wreck.

7.69 As stated earlier, this case has not been specifically followed in any decision of the Irish courts. Article 40.3.3 of the Constitution would rule out an interpretation of the Offences Against the Person Act, 1861 in the manner of the Bourne judgement. Therefore any proposal to permit abortion on the grounds of danger to a woman's health would require amendment of this Article and possibly a review of the Sections 58 and 59 of the Offences Against the Person Act, 1861. A legislative framework to regulate the operation of such arrangements would also be required.

7.70 As discussed in Chapter 4, 'Other Grounds for Abortion, set in an International Context', the concept of physical health used in other countries for the purposes of abortion law tends not to be very specific. If it were intended to permit abortion on grounds of risk to a woman's health, but to confine the operation of such a provision to cases where there was a grave risk of serious and permanent damage, it would be necessary to circumscribe the provisions in an appropriate manner. The usual practice in other countries is for the issue to be treated as a medical matter. It could be anticipated that it might be difficult to arrive at provisions which would allow clinical independence and at the same time be guaranteed to operate in a very strict manner so as not to permit abortion other than on a very limited basis."

3. The Oireachtas Committee on the Constitution Fifth Progress Report 2000 ("the Fifth Progress Report on Abortion 2000")

70. The Green Paper 1999 was then referred to this Committee. The Committee consulted widely, initially seeking submissions on the options discussed in the Green Paper 1999. Over 100,000 submissions were received from individuals and organisations. Approximately 92% of these communications took the form of signatures to petitions (over 80,000 signatures were contained in one petition alone). The vast majority of communications were in favour of the first option in the Green Paper 1999 (an absolute constitutional ban on abortion).

71. Since very few medical organisations had made submissions during the preparation of the Green Paper 1999, the Committee was concerned to establish authoritatively the current medical practice in Irish hospitals as regards medical intervention during pregnancies. The Committee therefore heard the views and opinions of experts in the fields of obstetrics, gynaecology and psychiatry through public (and recorded) hearings.

72. The Chairman of the Institute of Obstetricians and Gynaecologists, which represents 90%-95% of the obstetricians and gynaecologists in Ireland, gave written evidence, inter alia, that:

"In current obstetrical practice rare complications can arise where therapeutic intervention is required at a stage in pregnancy when there will be little or no prospect for the survival of the baby, due to extreme immaturity. In these exceptional situations failure to intervene may result in the death of both the mother and baby. We consider that there is a fundamental difference between abortion carried out with the intention of taking the life of the baby, for example for social reasons, and the unavoidable death of the baby resulting from essential treatment to protect the life of the mother.

We recognise our responsibility to provide after care for women who decide to leave the State for a termination of pregnancy. We recommend that full support and follow-up services be made available for all women whose pregnancies have been terminated, whatever the circumstances".

73. In oral evidence, the Chairman also noted that:

"We have never regarded these interventions as abortion. It would never cross an obstetrician's mind that intervening in a case of pre-eclampsia, cancer of the cervix or ectopic pregnancy is abortion. They are not abortion as far as the professional is concerned, these are

medical treatments that are essential to protect the life of the mother. So when we interfere in the best interests of protecting a mother, and not allowing her to succumb, and we are faced with a foetus that dies, we don't regard that as something that we have, as it were, achieved by an abortion. Abortion in the professional view to my mind is something entirely different. It is actually intervening, usually in a normal pregnancy, to get rid of the pregnancy, to get rid of the foetus. That is what we would consider the direct procurement of an abortion. In other words, it's an unwanted baby and, therefore, you intervene to end its life. That has never been a part of the practice of Irish obstetrics and I hope it never will be. ...

In dealing with complex rare situations, where there is a direct physical threat to the life of the pregnant mother, we will intervene always."

74. In 2000 the Committee issued its Fifth Progress Report on Abortion. The Report explained that was not a comprehensive analysis of the matters discussed in the Green Paper 1999 but rather a political assessment of questions which arose from it in the context of the submissions received and the hearings conducted.

75. The Committee on the Constitution agreed that a specific agency should be put in place to implement a strategy to reduce the number of crisis pregnancies by the provision of preventative services, to reduce the number of women with crisis pregnancies who opt for abortion by offering services which make other options more attractive and to provide post-abortion services consisting of counselling and medical check-ups. There was agreement on other matters including on the need for the Government to prepare a public memorandum outlining the State's precise responsibilities under all relevant international and European Union ("EU") instruments.

76. The Committee agreed that clarity in legal provisions was essential for the guidance of the medical profession so that any legal framework should ensure that doctors could carry out best medical practice necessary to save the life of the mother. However, the Committee found that none of the seven options canvassed in the Green Paper 1999 commanded unanimous support of the Committee. Three approaches commanded substantial but not majority support: the first was to concentrate on the plan to reduce the number of crisis pregnancies and the rate of abortion and to leave the legal position unchanged; the second approach would add legislation which would protect medical intervention to safeguard the life of the mother within the existing constitutional framework; and the third approach was in addition to accommodate such legislation with a Constitutional amendment. The Committee did not therefore reach agreement on a single course of reform action.

D. Crisis Pregnancy Agency ("the CPA")

1. The objectives of the CPA

77. Further to the Fifth Progress Report on Abortion 2000, the CPA was established by the Crisis Pregnancy Agency (Establishment) Order 2001 (S.I. No. 446 of 2001). Section 4 of that Order described the functions of the Agency, in so far as relevant, as follows (prior to its amendment in 2007):

"(i) ... to prepare a strategy to address the issue of crisis pregnancy, this strategy to provide, inter alia, for:

(a) a reduction in the number of crisis pregnancies by the provision of education, advice and contraceptive services;

(b) a reduction in the number of women with crisis pregnancies who opt for abortion by offering services and supports which make other options more attractive;

(c) the provision of counselling and medical services after crisis pregnancy ..."

78. The CPA implemented its first Strategy (2004-2006) and is in the process of implementing its second one (2007-2011). It achieves its objectives mainly through its communications programme (including media campaigns and resource materials), its research programme (promoting evidence-based practice and policy development) and its funding programme which funds projects ranging from personal development to counselling, parent supports and medical and health services.

79. Further to the Health (Miscellaneous Provisions) Act 2009, the CPA was integrated into the Health Service Executive (HSE) from 1 January 2010. Funding of the crisis pregnancy function was also transferred to the HSE.

2. Primary Care Guidelines for the Prevention and Management of Crisis Pregnancy ("CPA Guidelines")

80. The CPA Guidelines, developed in association with the Irish College of General Practitioners, outline the role of GPs in the management of crisis pregnancy. The Guidelines detail the role of GPs in the prevention of crisis pregnancies, in assisting the woman in making decisions about the outcome of her crisis pregnancy (by, inter alia, counselling on all options available to her including pregnancy, adoption and abortion) and assisting her in safely carrying out her decision (by, inter alia, advising on the importance of follow-up care,

including medical care, after any abortion). GPs are advised on the importance of providing sensitive counselling to assist the decision-making process ("to minimize the risk of emotional disturbance, whatever decision is reached") and of pre- and post-abortion counselling and medical care. GPs are reminded of their duty of care to the patient, that they should never refuse treatment on the basis of moral disapproval of the patient's behaviour and that, where they have a conscientious objection to providing care, they should make the names of other GPs available to the patient.

The Guidelines went on to note that "Irrespective of what decision a woman makes in the crisis pregnancy situation, follow-up care will be important. This may include antenatal care, counselling, future contraception or medical care after abortion. The GP's response to the initial consultation will have a profound influence on her willingness to attend for further care". If a woman decides to proceed with an abortion, it is the GP's main concern to ensure that she does so safely, receives proper medical care, and returns for appropriate follow-up. GPs are advised to supplement verbal advice with a written handout.

81. A Patient Information Leaflet is attached to the Guidelines. It informs women that, should they choose an abortion, they should plan to visit their GP at least three weeks after the termination to allow the GP to carry out a full check-up and allow the woman to express any questions or concerns she may have.

3. "Understanding how sexually active women think about fertility, sex, and motherhood", CPA Report No. 6 (2004)

82. The subject of this report was the perceptions of Irish women in the general age range of 20-30 about fertility, sex, and motherhood. The report captured the meanings young women attributed to their fertility and fertility-related decisions in relation to life objectives and women's changing roles in education, careers, relationships, and motherhood. The report uses data drawn from qualitative interviews (twenty individual case studies and twelve focus groups; the total sample was 66 women with an age range of 19-34). The research reflected the views of a diverse group of women by socio-economic status, geographic location, and relationship history. The data demonstrated a need for greater support for young Irish women in the range and variety of their decision-making about fertility, sex and motherhood.

83. The significant findings included that the X case and the declining role of the Catholic Church were major events in the lives of young women and shaped their attitudes and experiences. Young women had moved into adulthood more firmly convinced that sexual and

reproductive decisions should be part of a person's private actions, with the freedom to decide as they think best.

4. "Irish Contraception and Crisis Pregnancy Study: A Survey of the General Population", CPA Report No. 7 (2004)

84. The aim of the study was to establish nationally representative data on current attitudes, knowledge and experience of contraception, crisis pregnancy and related services in Ireland. It carried out a cross-sectional national survey of the young adult population using a telephone interview (in 2003) of 3000 members of the public to include equal numbers of women and men and people aged 18-45 in order to focus on those for whom contraceptive practices, service perceptions and service usage were considered most relevant. It was also considered that the age profile of the sample meant that the results would be particularly relevant to contemporary evaluation of services and in planning for the future.

85. Public attitudes to aspects of crisis-pregnancy outcomes were assessed to evaluate the acceptability of alternative outcomes (lone parenting, adoption and abortion). The questions were adapted from a prior survey in 1986 and the replication of these questions in the CPA study provided an opportunity to measure any changes in attitudes to abortion. In the 1986 survey, over 38% of participants indicated that they believed abortion should not be permissible under any circumstances while 58% felt that it should be allowed in certain circumstances. 4% did not express a view.

86. In the CPA study, the question was extended to include the option that a woman 'should always have a choice to have an abortion, regardless of the circumstances': 8% of participants felt that abortion should not be permissible under any circumstances, 39% felt that it should be allowed under certain circumstances, 51% felt women should always have a choice to have an abortion and 2% were unsure.

"Thus, a notable change in attitudes towards abortion was observed over the seventeen-year period (1986-2003), with a substantially higher proportion of the population supporting a choice of abortion in some or all circumstances in the more recent [CPA] survey".

87. Since many participants, who thought that a woman should have a choice in certain circumstances or who did not know, were considered to hold qualified views concerning the acceptability of abortion, those participants were asked whether they agreed or disagreed that a woman should have a choice to have an abortion in specific circumstances (based on the 1986 survey). The Report described the results as follows:

"The level of agreement reported across possible circumstances under which an abortion may be acceptable varied greatly across circumstance. The majority of these participants agreed that a woman should have a choice to have an abortion if the pregnancy seriously endangered her life (96%) or her health (87%). Additionally, most agreed that a woman should have a choice to have an abortion if the pregnancy was a result of rape (87%) or incest (85%). Less than half (46%) of participant's felt that a woman should have a choice if there was evidence that the child would be seriously deformed. Furthermore, the majority of participants disagreed that a woman should have a choice if she was not married (79%) or if the couple cannot afford another child (80%). There were no significant variations in attitude across gender or educational level for any of the statements. There were small but significant age differences across two items. Firstly, younger participants were more likely to favour abortion as a choice for rape victims (92% of 18-25 year olds vs. 87% of 26-35 year olds and 83% of 36-45 year olds) ... The reverse pattern was evident in the case of pregnancy where there is evidence that the baby will be seriously deformed. Here older participants were more likely to favour having the choice to have an abortion (fewer (42%) of 18-25 year olds agreed vs. 49% of 26-35 year olds and 48% of 36-45 year olds) ... ."

88. The findings as to the circumstances in which abortion was acceptable were compared with those reported from the 1986 survey. The percentages of those who agreed that abortion was acceptable in various circumstances were reported as a proportion of all those interviewed for the relevant study. This showed that the acceptability of abortion in various circumstances "had increased substantially in the population over time":

- if the pregnancy seriously endangered the woman's life (57% agreement in 1986; 90% agreement in 2003);

- if the pregnancy seriously endangered the woman's health (46% in 1986; 86% in 2003);

- if the pregnancy is the result of rape (51% in 1986; 86% in 2003) or incest (52% in 1986; 86% in 2003); and

- where there is evidence that the child will be deformed (31% in 1986 and 70% in 2003).

E. Medical Council Guidelines 2004

89. The Medical Practitioners Act 1978 gives the Medical Council of Ireland responsibility for providing guidance to the medical profession on all matters relating to ethical conduct and behaviour.

90. Its Guide to Ethical Conduct and Behaviour (6th Edition 2004) provides (paragraph 2.5) that "treatment must never be refused on grounds of moral disapproval of the patient's behaviour". The Guide recognises that an abortion may be lawfully carried out in Ireland in accordance with the criteria in X case, and provides as follows:

"The Council recognises that termination of pregnancy can occur where there is real and substantial risk to the life of the mother and subscribes to the view expressed in Part 2 of the written submission of the Institute of Obstetricians and Gynaecologists to the All-Party Oireachtas Committee on the Constitution as contained in its Fifth Progress Report .."

91. This latter written submission is Appendix C to the Guide and contains three paragraphs. In the first paragraph, the Institute of Obstetricians and Gynaecologists welcomes the Green Paper 1999 and notes that its comments were confined to the medical aspects of the question. The submission continued as cited at paragraph 72 above.

F. European Convention on Human Rights Act 2003 ("the 2003 Act")

92. The 2003 Act came into force on 31 December 2003. Its long title described it as an Act to enable further effect to be given "subject to the constitution" to certain provisions of the Convention.

93. Section 5 of the 2003 Act reads, in so far as relevant, as follows:

"(1) In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as "a declaration of incompatibility") that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.

(2) A declaration of incompatibility—

(a) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made, and

(b) shall not prevent a party to the proceedings concerned from making submissions or representations in relation to matters to which the declaration relates in any proceedings before the European Court of Human Rights.

(3) The Taoiseach shall cause a copy of any order containing a declaration of incompatibility to be laid before each House of the Oireachtas within the next 21 days on which that House has sat after the making of the order.

(4) Where—

(a) a declaration of incompatibility is made,

(b) a party to the proceedings concerned makes an application in writing to the Attorney General for compensation in respect of an injury or loss or damage suffered by him or her as a result of the incompatibility concerned, and

(c) the Government, in their discretion, consider that it may be appropriate to make an ex gratia payment of compensation to that party ("a payment"),

the Government may request an adviser appointed by them to advise them as to the amount of such compensation (if any) and may, in their discretion, make a payment of the amount aforesaid or of such other amount as they consider appropriate in the circumstances.

(5) In advising the Government on the amount of compensation for the purposes of subsection (4), an adviser shall take appropriate account of the principles and practice applied by the European Court of Human Rights in relation to affording just satisfaction to an injured party under Article 41 of the Convention."

94. The Supreme Court (Carmody -v- Minister for Justice Equality and Law Reform and others 2009 IESC 71) made the following comments on an application for a declaration under section 5 of the 2003 Act:

"As can be seen from the foregoing the nature of the remedy, such as it is, provided by s. 5 of the Act of 2003 is both limited and sui generis. It does not accord to a plaintiff any direct or enforceable judicial remedy. There are extra-judicial consequences whereby the [Prime Minister] is obliged to lay a copy of the order containing a declaration before each House of the Oireachtas within 21 days. That is the only step which is required to be taken under national law in relation to the provisions concerned. Otherwise it rests with the plaintiff who obtained the declaration to initiate an application for compensation in writing to the Attorney General for any alleged injury or loss or damage suffered by him or her as a result of the incompatibility and then it is a matter for the discretion of the Government as to whether or not they should pay any such compensation on an ex gratia basis. ...

.. the Court is satisfied that when a party makes a claim that an Act or any of its provisions is invalid for being repugnant to the Constitution and at the same time makes an application for a declaration of incompatibility of such Act or some of its provisions with the State's obligations under the Convention, the issue of constitutionality must first be decided."

G. Other domestic jurisprudence concerning abortion

1. A and B v. Eastern Health Board, Judge Mary Fahy and C, and the Attorney General (notice party), [1998] 1 IR 464 ("the C case")

95. This case concerned a thirteen-year-old girl ("C") who became pregnant following a rape. The Health Board, which had taken the girl into its care, became aware that she was pregnant and, in accordance with her wishes, obtained a interim care order (under the Child Care Act 1991) from the District Court allowing the Health Board to facilitate a termination of her pregnancy. C's parents sought to challenge that order by judicial review. On appeal C, her parents and the Health Board were each represented by a Senior and Junior Counsel, and the Attorney General was represented by two Senior and two Junior Counsel.

96. On 28 November 1997 the High Court accepted that, where evidence had been given to the effect that the pregnant young woman might commit suicide unless allowed to terminate her pregnancy, there was a real and substantial risk to her life and such termination was therefore a permissible medical treatment of her condition where abortion was the only means of avoiding such a risk. An abortion was therefore lawful in Ireland in C's case and the travel issue became unnecessary to resolve. It rejected the appeal on this basis. In rejecting the parents' argument that the District Court was not competent given, inter alia, the reconciliation of constitutional rights required, the High Court found:

"Furthermore, I think it highly undesirable for the courts to develop a jurisprudence under which questions of disputed rights to have a termination of pregnancy can only be determined by plenary action in the High Court. The High Court undoubtedly has a function in granting injunctions to prevent unlawful terminations taking place and it may in certain circumstances properly entertain an action brought for declarations and consequential orders if somebody is being physically prevented without just cause from having a termination. But it would be wrong to turn the High Court into some kind of licensing authority for abortions and indeed it was for this reason that I have rejected a suggestion made by counsel for C. in this case that I should effectively convert the judicial review proceedings into an independent application invoking the inherent jurisdiction of the High Court and grant leave for such a termination to

take place. I took the view that the case should continue in the form of a judicial review and nothing more. The Child Care Act, 1991 is a perfectly appropriate umbrella under which these questions can be determined."

2. MR v. TR and Others

97. The parties disputed the 'ownership' of embryos fertilised in vitro. The High Court ([2006] IEHC 359) analysed at some length the decision of the Supreme Court in X which it found equated "unborn" with an embryo which was implanted in the womb or a foetus. The High Court concluded that there was no evidence that it was ever in the mind of the people voting on the Eighth Amendment to the Constitution that "unborn meant anything other than a foetus or child within the womb". Accordingly, it could not be concluded that embryos outside the womb or in-vitro fell within the scope of Article 40.3.3. As regards the Medical Council Guidelines 2004, the High Court noted as follows:

"These ethical guidelines do not have the force of law and offer only such limited protection as derives from the fear on the part of a doctor that he might be found guilty of professional misconduct with all the professional consequences that might follow".

98. The appeal to the Supreme Court ([2009] IESC 82) was unanimously dismissed, the five judges each finding that frozen embryos did not enjoy the protection of the unborn in Article 40.3.3 of the Constitution. Hardiman and Fennelly J.J. also expressed concern about the absence of any form of statutory regulation of in vitro fertilisation in Ireland.

3. D (A Minor) v. District Judge Brennan, the Health Services Executive, Ireland and the Attorney General, unreported judgment of the High Court , 9 May 2007

99. D was a minor in care who had been prevented by the local authority from going abroad for an abortion. Her foetus had been diagnosed with anencephaly, which diagnosis was accepted as being incompatible with life outside the uterus. According to a transcript of its ex tempore oral judgment, the High Court clarified that the case was "not about abortion or termination of pregnancy. It is about the right to travel, admittedly for the purposes of a pregnancy termination, but that does not convert it into an abortion case." Accordingly, the legal circumstances in which a termination of pregnancy was available in Ireland were not in issue, and this "judgment expressly disavows any intention to interfere, whether by enlargement or curtailment, with such circumstances". The High Court held that the right to travel guaranteed by the Thirteenth Amendment took precedence over the right of the unborn

guaranteed by Article 40.3.3. There was no statutory or constitutional impediment preventing Ms D from travelling to the United Kingdom for an abortion.

H. Relevant European and international material

1. The Maastricht and Lisbon Treaties

100. Efforts to preserve, inter alia, the existing Irish prohibition on abortion gave rise to Protocol No. 17 to the Maastricht Treaty on European Union which was signed in February 1992. It reads as follows:

"Nothing in the Treaty on European Union, or in the treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland"

101. On 12 June 2008 the proposed constitutional amendment for the ratification of the Lisbon Treaty was rejected by referendum. The Government commissioned University College Dublin to conduct independent research into the behaviour and attitudes of the electorate and, notably, to analyse why the people voted for, against or abstained in the referendum. The Report (entitled "Attitudes and Behaviour in the Referendum on the Treaty of Lisbon" prepared by professionals with expertise in political science, quantitative research methods, economics and social science data) is dated March 2009. Fieldwork was completed in July 2008 and the sample size was 2,101. The Executive Summary concluded:

"The defeat by referendum of the proposal to ratify the Treaty of Lisbon ... was the product of a complex combination of factors. These included attitudes to Ireland's membership of the EU, to Irish-only versus Irish-and-European identity and to neutrality. The defeat was heavily influenced by low levels of knowledge and by specific misperceptions in the areas of abortion, corporate taxation and conscription. Concerns about policy issues (the scope of EU decision-making and a belief in the importance of the country having a permanent commissioner) also contributed significantly and substantially to the treaty's downfall, as did the perception that the EU means low wage rates. Social class and more specific socio-economic interests also played a role ...."

102. The Government sought and obtained a legally binding Decision of the Heads of State or Governments of the 27 Member States of the EU reflecting the Irish people's concerns that Article 40.3.3 would be unaffected by the Lisbon Treaty (The Presidency Conclusions of the European Council of 11/12 December 2008 and of 18/19 July 2009 (172171/1/08 and

11225/2/08). The relevant part of the Decision, which came into effect on the same date as the Lisbon Treaty, reads as follows:

"Nothing in the Treaty of Lisbon attributing legal status to the charter of fundamental rights of the European Union, or in the provisions of that Treaty and the area freedom, security and justice, affects in any way the scope and applicability of the protection of the right to life in Article 40.3.1, 40.3.4 and 40.3.3... provided by the Constitution of Ireland".

103. On 2 October 2009 a referendum approved a constitutional amendment allowing for the ratification of the Treaty of Lisbon.

2. The International Conference on Population and Development ("the Cairo ICPD, 1994")

(a) The Programme of Action of the Cairo ICPD, 1994

104. At this conference 179 countries adopted a twenty-year Programme of Action which focused on individuals' needs and rights rather than on achieving demographic targets. Article 8.25 of the programme provided, in so far as relevant, as follows:

"... All Governments ... are urged to strengthen their commitment to women's health, to deal with the health impact of unsafe abortion as a major public health concern and to reduce the recourse to abortion through expanded and improved family-planning services. ... Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process."

(b) The Fourth World Conference on Women, Beijing 1995

105. The Platform for Action adopted at this conference recalled the above-noted paragraph 8.25 of the Programme of Action of the Cairo ICPD 1994 and the Governments resolved to consider reviewing laws containing punitive measures against women who have undergone illegal abortions.

(c) Parliamentary Assembly of the Council of Europe ("PACE") Recommendation 1903(2010) entitled: Fifteen years since the International Conference on Population and Development Programme of Action

106. The PACE noted some progress has been made since the Cairo ICPD 1994. However, "achievements on education enrolment, gender equity and equality, infant child and maternal mortality and morbidity and the provision of universal access to sexual and reproductive health services, including family planning and safe abortion services, remain mixed". The

PACE called on European governments to "review, update and compare Council of Europe members states' national and international population and sexual and reproductive health and rights policies and strategies", as well as to review and compare funding to ensure the full implementation of the Programme of Action of the Cairo ICPD 1994 by 2015.

3. PACE Resolution 1607 (2008) entitled "Access to safe and legal abortion in Europe"

107. This resolution was adopted by 102 votes to 69. The 4 Irish representatives to the PACE voted against it, two of the members urging the PACE to apply the Programme of Action of the Cairo ICPD 1994.

108. The Resolution reads, in so far as relevant, as follows:

"2. In most of the Council of Europe member states the law permits abortion in order to save the expectant mother's life. Abortion is permitted in the majority of European countries for a number of reasons, mainly to preserve the mother's physical and mental health, but also in cases of rape or incest, of foetal impairment or for economic and social reasons and, in some countries, on request. The Assembly is nonetheless concerned that, in many of these states, numerous conditions are imposed and restrict the effective access to safe, affordable, acceptable and appropriate abortion services. These restrictions have discriminatory effects, since women who are well informed and possess adequate financial means can often obtain legal and safe abortions more easily.

3. The Assembly also notes that, in member states where abortion is permitted for a number of reasons, conditions are not always such as to guarantee women effective access to this right: the lack of local health care facilities, the lack of doctors willing to carry out abortions, the repeated medical consultations required, the time allowed for changing one's mind and the waiting time for the abortion all have the potential to make access to safe, affordable, acceptable and appropriate abortion services more difficult, or even impossible in practice.

4. The Assembly takes the view that abortion should not be banned within reasonable gestational limits. A ban on abortions does not result in fewer abortions but mainly leads to clandestine abortions, which are more traumatic and increase maternal mortality and/or lead to abortion "tourism" which is costly, and delays the timing of an abortion and results in social inequities. The lawfulness of abortion does not have an effect on a woman's need for an abortion, but only on her access to a safe abortion.

5. At the same time, evidence shows that appropriate sexual and reproductive health and rights strategies and policies, including compulsory age-appropriate, gender-sensitive sex and relationships education for young people, result in less recourse to abortion. This type of education should include teaching on self-esteem, healthy relationships, the freedom to delay sexual activity, avoiding peer pressure, contraceptive advice, and considering consequences and responsibilities.

6. The Assembly affirms the right of all human beings, in particular women, to respect for their physical integrity and to freedom to control their own bodies. In this context, the ultimate decision on whether or not to have an abortion should be a matter for the woman concerned, who should have the means of exercising this right in an effective way.

7. The Assembly invites the member states of the Council of Europe to:

7.1. decriminalise abortion within reasonable gestational limits, if they have not already done so;

7.2. guarantee women's effective exercise of their right of access to a safe and legal abortion;

7.3. allow women freedom of choice and offer the conditions for a free and enlightened choice without specifically promoting abortion;

7.4. lift restrictions which hinder, de jure or de facto, access to safe abortion, and, in particular, take the necessary steps to create the appropriate conditions for health, medical and psychological care and offer suitable financial cover ..."

4. Report of the Commissioner for Human Rights on his visit to Ireland, 26-30 November 2007, adopted on 30 April 2008, CommDH(2008)9

109. The Commissioner noted that there was still no legislation in place implementing the X judgment and, consequently, no legal certainty when a doctor might legally perform a life-saving abortion. He opined that, in practice, abortion was largely unavailable in Ireland in almost all circumstances. He recalled the Tysiąc v. Poland judgment (no. 5410/03, ECHR 2007 IV) and urged the Irish authorities to ensure that legislation was enacted to resolve this problem.

5. Office of the High Commissioner for Human Rights, Committee on the Elimination of Discrimination Against Women ("CEDAW")

110. The Report of the CEDAW of July 2005 (A/60/38(SUPP) recorded Ireland's introduction of its periodic report to the Committee as follows:

"365. Steps had been taken to integrate a gender dimension into the health service and to make it responsive to the particular needs of women. Additional funding had been provided for family planning and pregnancy counselling services. The [CPA] had been set up in 2001. Extensive national dialogue had occurred on the issue of abortion, with five separate referendums held on three separate occasions. The representative noted that the Government had no plans to put forward further proposals at the present time."

In the Committee's concluding comments, it responded as follows:

"396. While acknowledging positive developments ... the Committee reiterates its concern about the consequences of the very restrictive abortion laws, under which abortion is prohibited except where it is established as a matter of probability that there is a real and substantial risk to the life of the mother that can be averted only by the termination of her pregnancy.

397. The Committee urges the State party to continue to facilitate a national dialogue on women's right to reproductive health, including on the very restrictive abortion laws ..."

6. The Human Rights Committee

111. In the Committee's Concluding Comments on the third periodic Report of Ireland on observance of the UN Covenant on Civil and Political Rights (CCPR/C/IRL/CO/3 dated 30 July 2008), it noted:

"13. The Committee reiterates its concern regarding the highly restrictive circumstances under which women can lawfully have an abortion in the State party. While noting the establishment of the [CPA], the Committee regrets that the progress in this regard is slow. ...

The State party should bring its abortion laws into line with the Covenant. It should take measures to help women avoid unwanted pregnancies so that they do not have to resort to illegal or unsafe abortions that could put their lives at risk ... or to abortions abroad (articles 26 and 6)."

7. Laws on abortion in Contracting States

112. Abortion is available on request (according to certain criteria including gestational limits) in some 30 Contracting States. An abortion justified on health grounds is available in

some 40 Contracting States and justified on well-being grounds in some 35 such States. Three Contracting States prohibit abortion in all circumstances (Andorra, Malta and San Marino). In recent years, certain States have extended the grounds on which abortion can be obtained (Monaco, Montenegro, Portugal and Spain).

6.9.3. The law

113. The first two applicants complained under Articles 3, 8, 13 and 14 of the Convention about the prohibition of abortion in Ireland on health and well-being grounds.

The third applicant complained under Articles 2, 3, 8, 13 and 14 of the Convention about the absence of legislative implementation of Article 40.3.3 of the Constitution which she argued meant that she had no appropriate means of establishing her right to a lawful abortion in Ireland on the grounds of a risk to her life.

I. ADMISSIBILITY

A. The relevant facts and scope of the case

114. The parties disputed the factual basis of the applications. Having regard to the Court's conclusions as regards the applicants' exhaustion of domestic remedies (paragraph 156), the Court has examined immediately below the relevant facts and, consequently, the scope of the case before it.

1. The submissions of the parties

115. The Government considered that the profoundly important issues in this case were based on subjective and general factual assertions which were unproven, disputed and not tested either by review by a domestic tribunal or through any other form of interaction with the State. No documentation was submitted, in contrast to the above-cited case of Tysiąc v. Poland. Many of the alleged perceptions and assumptions (notably as regards information available and medical treatment) were countered by authoritative documents. It was a serious and unsubstantiated allegation to suggest that doctors and social workers would not carry out the duties imposed on them by law.

116. As to the first applicant, the Government did not accept that her health was adversely affected by travelling for an abortion (her alleged side effects were known complications of

abortion) or that the stress which she allegedly suffered resulted from the Irish legal regime. If she received inadequate medical treatment on her return, this was due to her reluctance to see a doctor. Her suggestions that a social worker would have denied or reduced her access to her children and that she did not consult her doctor as he or she might disapprove, were unsubstantiated and, indeed, such alleged acts would have been unlawful.

117. As to the second applicant, the Government maintained that nothing demonstrated that her health and well-being were affected by having to travel for an abortion. Part of the distress she claimed to have suffered stemmed from her family's opinions and, if she were advised by the English clinic to lie to Irish doctors, that clinic misunderstood Irish law. The alleged "chilling effect" of Irish criminal law did not affect her factual situation. If she had an ectopic pregnancy, she would have been able to seek an abortion as well as the necessary follow-up care in Ireland.

118. As to the third applicant, the Government submitted that the asserted facts (her rare form of cancer) did not allow a determination of whether her pregnancy was life threatening or whether she was unable to obtain relevant advice to that effect. She had not demonstrated that her health and well-being were affected by a delay caused by travelling for a surgical abortion: she herself submitted that she chose an abortion provider who did not offer a medical abortion. It was equally unclear whether she suggested that she was not afforded the proper treatment due to some form of moral disapproval.

119. The applicants considered their factual submissions to be clear. The first two applicants travelled to England for abortions for reasons of health and/or well-being and the third applicant given her fear that her pregnancy posed a risk to her life. The third applicant also referred to a fear for the health of the foetus given the prior tests for cancer she had undertaken. They took issue with the Government's description of their seeking abortion for "social reasons", a vague term with no legal or human rights meaning. The Court should take note of the first applicant's concern about her mental health, alcoholism and custody of her children and it was understandable that the first applicant would prefer not to inform her social worker, given the possibility that the latter would disapprove and prejudice her chances of regaining custody of her children. The Court should also take note of the second applicant's concern about her well-being and of the third applicant's concern for her own life and for the health of her foetus. All felt stigmatised as they were going abroad to do something that was a criminal offence in their own country. The constitutional and criminal

restrictions added to the difficulties and delays in accessing abortions and all applicants faced significant hardship as a result of having to travel abroad for an abortion.

2. Relevant submissions of the third parties

120. Joint observations were submitted by 'Doctors for Choice' (an Irish non-governmental organisation of approximately 200 doctors) and by the British Pregnancy Advisory Service ("BPAS", a British non-governmental organisation set up following the Abortion Act 1967 to provide non-profit services, to train doctors and to ensure premises for safe abortions).

They made detailed submissions as to the physiological and physical consequences for women of the restrictions on abortion in Ireland. Women had to bear the weight of abortions abroad. They had recourse to less safe abortions, inevitable delays in abortions abroad, de facto exclusion from early non-invasive medical abortion, "backstreet" illegal abortions in the country or abortions abroad in unsafe conditions. Continuing pregnancy was riskier than a termination. Studies were not definitive about the negative psychological impact of an abortion, especially measured against the burden of an unwanted pregnancy. Nor was there evidence that abortion affected fertility.

121. The third parties also made the following additional submissions. They suggested that vital post-abortion medical care and counselling in Ireland were randomly available and of poor quality due to a lack of training and the reluctance of women to seek care. Women in Ireland were also being denied other medical care: life saving treatment was denied to pregnant women and women with a diagnosis of severe foetal abnormality were denied an abortion and necessary genetic analysis post-abortion in Ireland. Concealment of pregnancy and the abandonment of newborns were not unusual in Ireland. The restrictions on abortion also impacted on women's autonomy and rights: families suffered as a result of the unintended addition; women of already reduced resources found their lives disproportionately disadvantaged by abortion restrictions; women were entitled to confidentiality as regards their reproductive choices but feared that admitting an abortion would mean that their privacy would not be respected and, sometimes, it inevitably was not as, for example, in the case of female immigrants who had to apply for travel documents to travel for an abortion; and comforted, by the restrictions, treating health professionals pressured women against abortion.

122. The Government disputed these third party submissions. In particular, they considered unsubstantiated the suggestion that pre- and post-abortion care and counselling in Ireland was "randomly available or of poor quality". The CPA funded 14 service providers to offer non-

judgmental crisis pregnancy and post-abortion counselling free of charge in 27 cities and towns in Ireland; some of the larger cities and towns had more than one service; the CPA funded 7 service providers to offer free post-termination medical checks, provided by the relevant service in family planning clinics or through a network of GPs in a number of locations around the country; GPs and family planning clinics which did not receive funding from the CPA also provided such services, which were either paid for, or subsidised through, the health service; the CPA had developed information resources on post-abortion care including an information leaflet published in 2006 and widely distributed throughout Ireland and in abortion clinics in the United Kingdom, a new website and a service providing messages to mobile telephones to raise awareness and provide clarity about the availability of free post-abortion medical care as well as counselling. The Irish College of GPs had reported that 95% of doctors provided medical care after abortion.

3. The Court's assessment

123. The Court would underline at the outset that it is not its role to examine submissions which do not concern the factual matrix of the case before it: rather it must examine the impugned legal position on abortion in Ireland in so far as it directly affected the applicants, in so far as they belonged to a class of persons who risked being directly affected by it or in so far as they were required to either modify their conduct or risk prosecution (Burden v. the United Kingdom [GC], no. 13378/05, §§ 33-34, 29 April 2008; and Sejdić and Finci v. Bosnia and Herzegovina [GC], nos. 27996/06 and 34836/06, § 28, 22 December 2009). In this respect, the present case is to be contrasted with the above-cited Open Door case where the interference in question was an injunction against the provision by the applicant non-governmental organisations of, inter alia, information to women about abortion services abroad so that the Court's response in that case necessarily involved consideration of the general impact on women of the injunction.

124. Turning therefore to the circumstances of the present applicants' cases, the Court notes that, although arguing that the facts were unsubstantiated and disputed, the Government did not seriously dispute (Open Door, § 76, cited above) the core factual submission that the applicants had travelled to England for abortions. Having regard also to the nature of the subject matter as well as the undoubted personal reticence associated with its disclosure in proceedings such as the present, the Court considers it reasonable to accept that each of the applicants travelled to England for an abortion in 2005.

125. As to their reasons for doing so, the Court notes the claimed involvement of a social worker and the fact that the first applicant's children had been in care, facts which were not specifically disputed by the State. It considers that it can reasonably rely on the related personal circumstances outlined by her (her history of alcoholism, post-natal depression and her difficult family circumstances) as her reasons for seeking an abortion abroad. The second applicant acknowledged that she knew her pregnancy was not ectopic before her abortion and the Court has accepted her core factual submission that she travelled for an abortion as she was not ready to have a child. Equally, it is reasonable to consider that the third applicant previously had cancer, this not being specifically disputed by the Government, so that she travelled abroad for an abortion because of a fear (whether founded or not) that her pregnancy constituted a risk to her life (that her cancer would return because of her pregnancy and that she would not be able to obtain treatment for cancer in Ireland if she was pregnant) and because she would be unable to establish her right to an abortion in Ireland. She also suggested that her foetus might have been harmed by tests undergone for cancer but she did not indicate that she had undertaken the relevant clinical tests or established that this was an overriding reason for obtaining an abortion abroad.

Accordingly, the Court finds that the first applicant travelled for an abortion for reasons of health and well-being, the second applicant for well-being reasons and the third applicant as she mainly feared her pregnancy constituted a risk to her life. While the Government's use of the term "social reasons" is noted, the Court has considered it useful to distinguish between health (physical and mental) and other well-being reasons to describe why the applicants choose to obtain abortions.

126. As to the psychological impact on the applicants of their travelling abroad for an abortion, the Court considers that this is by its nature subjective, personal and not susceptible to clear documentary or objective proof. The Court considers it reasonable to find that each applicant felt the weight of a considerable stigma prior to, during and after their abortions: they travelled abroad to do something which, on the Government's own submissions, went against the profound moral values of the majority of the Irish people (see also paragraphs 222-227 below) and which was, or (in the case of the third applicant) could have been, a serious criminal offence in their own country punishable by penal servitude for life (paragraph 30 above). Moreover, obtaining an abortion abroad, rather than in the security of their own country and medical system, undoubtedly constituted a significant source of added anxiety. The Court considers it evident that travelling abroad for an abortion constituted a significant psychological burden on each applicant.

127. As to the physical impact of travelling for an abortion abroad, it is evident that an abortion would have been physically a less arduous process without the need to travel, notably after the procedure. However, the Court does not find it established that the present applicants lacked access to necessary medical treatment in Ireland before or after their abortions. The Court notes the professional requirements on doctors to provide medical treatment to women post-abortion (the CPA Guidelines and Medical Council Guidelines (paragraphs 80-81 and 89-91 above). Against this, the first and second applicants accepted that they obtained medical treatment post-abortion when required. The third applicant's suggestions as to the inadequacy of medical treatment available to her for a relatively well-known condition (incomplete abortion) are too general and improbable to be considered substantiated.

128. As to the financial burden of travelling for an abortion abroad, it would be reasonable to consider that the costs of doing so constituted a significant financial burden on the first applicant (given her personal and family circumstances as accepted at paragraph 125 above) and constituted a considerable expense for the second and third applicants.

129. As to any delay (and the consequent physical and psychological impact on the applicants), the financial demands on the first applicant must be accepted as having delayed somewhat her abortion. The second applicant herself chose to delay her travel to consult further in Ireland. While the third applicant alleged she had to await 8 weeks for a surgical abortion (in addition to the time taken in making her earlier enquiries about her medical situation), she again remained vague on essential matters notably as to the precise stage of her pregnancy when she obtained her abortion: the Court considers she has not either demonstrated that she was excluded from an early medical abortion or established a specific period of delay in travelling for an abortion.

130. As to the first and second applicants' submissions that there was a lack of information on the options available to them and that this added to the burden of the impugned restrictions on abortion in Ireland, the Court finds these submissions to be general and unsubstantiated. While Doctors for Choice/BPAS maintained that information services in Ireland were inadequate, the Court has had regard to the developments in Ireland since the above-cited Open Door judgment including: the adoption of the 1995 Act (the breadth of which was explained by the Supreme Court during its review of its constitutionality) to ensure a right to provide and receive information about, inter alia, abortion services abroad (paragraphs 56-61 above); the establishment of the CPA in 2001, with the aims outlined in section 4 of the

relevant establishing order, its first Strategy (2004-2006) and the Government's clarifications as regards care and counselling provided or facilitated by the CPA (paragraphs 77-79 and 122 above); and the adoption of the CPA Guidelines and Medical Council Guidelines (paragraphs 80-81 and 89-91 above). Against this, the first two applicants' core submission was that they understood that their only option for an abortion on health and/or well-being grounds was to travel abroad and, in that respect, neither indicated precisely what information they sought but could not obtain.

The third applicant's submission about a lack of information is different. She complained that she required a regulatory framework by which any risk to her life and her entitlement to a lawful abortion in Ireland could be established, so that any information provided outside such a framework was insufficient. This submission will be examined as relevant on the merits of her complaints.

131. Finally, and as to the risk of criminal sanctions, the first and second applicants did not submit that they had considered an abortion in Ireland and Irish law clearly allowed them to travel for an abortion abroad (the Thirteenth Amendment to the Constitution and D(A Minor), paragraphs 48 and 99 above): apart from the psychological impact of the criminal regime in Ireland referred to above, the criminal sanctions had no direct relevance to their complaints. The risk of such sanctions will be examined on the merits of the third applicant's complaints in so far as she maintained that those sanctions had a chilling effect on the establishment of her qualification for a lawful abortion in Ireland.

B. Exhaustion of domestic remedies

1. The Government's submissions

132. The Government had two general observations. They noted the applicants' distinction between the relevant legal provisions, on the one hand, and the State's restrictive interpretation of those provisions, on the other. Since the applicants took issue with the latter, this underlined the need for them to have exhausted domestic remedies. The Government emphasised the consequences for the Convention system of this Court deciding on such vitally important issues when the underlying facts, as well as the application of the relevant domestic laws to each applicant's case, had not been determined by a domestic court.

133. The Government argued that there were effective remedies at the applicants' disposal. Supported by a Senior Counsel's Opinion, they relied on the principles outlined in the decision in D v. Ireland ((dec.), no. 26499/02, 6 September 2005) and, notably, underlined the

need to test domestically, in a common law constitutional system, the meaning and potential of any alleged lack of clarity in domestic law so as to afford the State the opportunity to address breaches domestically. The Constitution provided remedies where there were constitutional rights and the domestic courts would make all rulings required to protect those rights.

134. The main remedies on which the Government relied, supported by the Opinion, were a challenge to the constitutionality or compatibility of the 1861 Act or, since the 1995 Act had been found to be constitutional, by taking an action for mandatory relief requiring the provision of information in compliance with that Act.

As to the merits of a constitutional action, they underlined the interpretative potential of Article 40.3.3 of the Constitution as confirmed by the admission of a risk of self-harm itself as a ground for lawful abortion in the X case and by two later domestic cases: the MR v. TR case raised the question of the point at which Article 40.3.3 would apply in the process of fertilisation and conception and demonstrated that it was possible to "raise arguments" in the Irish courts as to the breadth of Article 40.3.3; and in the case of D(A Minor), the High Court noted that the question of the minor's right to an abortion in Ireland (given her foetus' diagnosis) gave rise to "very important and very difficult and very significant issues". This potential was such that it was difficult "to exclude on an a priori case basis many arguments in this area, particularly where the facts are compelling" and the domestic courts would be unlikely to interpret Article 40.3.3 with "remorseless logic". However, the Government confirmed in their observations that on no analysis did Article 40.3.3 permit abortion in Ireland for social reasons.

As to seeking a post-abortion declaration of incompatibility under the 2003 Act and an ex gratia payment of damages from the Attorney General, the Government argued that it was incorrect to suggest that the 2003 Act afforded minimal weight to Convention rights. The courts were required to interpret statutes in a Convention compliant manner and, if that was not possible, to make a declaration of incompatibility (the above-cited Carmody case). While a declaration of incompatibility was not obligatory on the State, it would be formally put to the houses of the Oireachtas (parliament) and Ireland's record of solemn compliance with its international obligations entitled it to a presumption that it would comply with those obligations and give effect to declarations of incompatibility.

135. As regards the first applicant specifically, the Government accepted that an abortion in Ireland in the circumstances outlined by her would have contravened domestic law and that

"it was hard to see that she had any real prospects of succeeding on the merits of her claim to an entitlement to a termination". Nevertheless, the domestic courts were deprived of the possibility of fact-finding and of determining the scope and application of the relevant legislative and constitutional provisions. Had the second applicant been diagnosed as suffering from an ectopic pregnancy, she would have been entitled to a therapeutic abortion in Ireland. In so far as the third applicant maintained that she was refused an abortion when her life was at risk, she could have sought mandatory orders from the courts requiring doctors to terminate her pregnancy in accordance with the X case criteria. In so far as she suggested that the 1861 Act produced a chilling effect precluding her from a lawful abortion in Ireland, she could have brought proceedings to establish that the Act interfered with her constitutional rights and to have its offending provisions set aside. The suggestion that legislation, and not litigation, was required was inconsistent with the Commission's position in Whiteside v. the United Kingdom (no. 20357/92, (dec.) 7 March 1994).

136. The Government noted that the applicants had submitted no legal opinion or evidence that they had taken legal advice at the relevant time. The Government also responded in some detail to other effectiveness issues relied on by the applicants as regards the constitutional actions, notably the timing, speed, costs and confidentiality of those actions.

2. The applicants' submissions

137. The applicants maintained that the State had not demonstrated that an effective domestic remedy was available to any of them and they were not required to initiate ineffective actions simply to clarify facts. They underlined that it was not the law, but the State's interpretation of the law, which was overly restrictive. In addition, only remedies which could intervene prior to any necessary abortion could be considered effective.

138. Different submissions were made as regards the first and second applicants, on the one hand, and the third applicant, on the other.

139. The first and second applicants submitted that domestic entitlements to abortion remained general (Article 40.3.3 as clarified in the X case). While there had been numerous consultations and reports, the law had not changed since 1992 and certainly not towards allowing abortion in Ireland on the grounds of health or well-being. Moreover, even if the domestic courts could find in favour of these applicants, they would be unlikely to order the Government and/or a doctor to facilitate access by these applicants to abortion services in Ireland in a timely manner. Indeed, it would also be difficult to find a doctor to perform the

procedure given the potential stigma and intimidation of a high profile case. This Court's decision in D v. Ireland was distinguishable from the present case since the conflicting interests in that case were entirely different from the present cases.

In addition, the 2003 Act did not require a balancing of the rights of the unborn and the mother or of the Convention and Constitutional rights and a constitutional prohibition would always trump Convention rights. A declaration of incompatibility created no legal obligation on the State and a successful applicant could only apply for an ex gratia award of damages. There had been only three declarations of incompatibility to date (concerning the Irish Civil Registration Act 2004 and the Housing Act 1966) and these statutes remained in force pending ongoing current appeals.

140. As to the third applicant, there were no procedures at all to be followed by a woman and her advising doctor to determine her qualification for a life-saving abortion. Accordingly, the lack of such procedures constituted "special circumstances" absolving the third applicant from any obligation to exhaust domestic remedies (Opuz v. Turkey, no. 33401/02, § 201, ECHR 2009 ...). Even if she could have raised different arguments in a constitutional action about a risk to her life, it would have had little chance of success. In any event, legislation was required to clarify constitutional provisions not litigation.

141. The applicants also made detailed submissions on other effectiveness issues as regards the proposed constitutional actions and, notably, as regards the timing, speed, costs and confidentiality of such actions.

3. The Court's assessment

142. The Court reiterates that under Article 35 § 1[47] it may only deal with a matter after all domestic remedies have been exhausted. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness: it falls to the respondent State to establish that these conditions are satisfied (see, amongst many other authorities, McFarlane v. Ireland [GC], § 107, 10 September 2010). The Court also recalls the relevant principles set out at paragraphs 83-85 of its decision in the above-cited D v. Ireland case and, notably, the established principle that 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, in a common law system, to allow the domestic courts to develop those rights by way of interpretation. In this respect, it is recalled that a declaratory action before the High Court, with a possibility of

an appeal to the Supreme Court, constitutes the most appropriate method under Irish law of seeking to assert and vindicate constitutional rights (D v. Ireland, at § 85).

143. It is further recalled that the question of the applicants' exhaustion of domestic remedies must be approached by considering the high threshold of protection of the unborn provided under Irish law by Article 40.3.3 as interpreted by the Supreme Court in the X case (Open Door, cited above, § 59). It is further recalled that the constitutional obligation that the State defend and vindicate personal rights "by its laws" (Article 40.3.1 of the Constitution) has been interpreted by the courts as imposing an obligation on the Irish courts to defend and vindicate constitutionally protected personal rights.

144. While the Court has noted the applicants' distinction between domestic law on abortion and what they described as the State's interpretation of that law, the meaning of this submission is not entirely clear. The Court has had regard to the relevant Irish abortion laws namely, the constitutional and legislative provisions as interpreted by the Irish courts. It has examined whether the applicants had available to them any effective domestic remedies as regards their complaints about the prohibition in Ireland of abortion on health and well-being grounds (the first two applicants) and as regards a lack of legislative implementation of the right to abortion in Ireland in the case of a risk to the woman's life (the third applicant).

(a) The first and second applicants

145. The Court notes that the prohibition of which the first two applicants complained comprised sections 58 and 59 of the 1861 Act (it being an offence to procure or attempt to procure an abortion, to administer an abortion or to assist in an abortion by supplying any noxious thing or instrument, punishable by penal servitude for life) as qualified by Article 40.3.3 of the Constitution as interpreted by the Supreme Court in the X case (see also Articles 40.3.1 and 50 of the Constitution).

146. The Court considers that the first remedy proposed by the Government (a constitutional action by these applicants seeking a declaration of unconstitutionality of sections 58 and 59 of the 1861 Act, with mandatory or other ancillary relief) would require demonstrating that those sections, in so far as they prohibit abortion on grounds of health and well-being of the woman, are inconsistent with the rights of the mother as guaranteed by Article 40.3 of the Constitution.

147. However, the Court does not consider that it has been demonstrated that such an action would have had any prospect of success, going against, as it would, the history, text and judicial interpretation of Article 40.3.3 of the Constitution. Prior to 1983, the 1861 Act constituted the only law prohibiting abortion in Ireland. Following the development of abortion rights in the England through, inter alia, judicial interpretation of the same 1861 Act, Article 40.3.3 was adopted by referendum in 1983. By that constitutional provision, the State acknowledged the right to life of the unborn and, with due regard to the equal right to life of the mother, guaranteed in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the right to life of the unborn. The Supreme Court then clarified, in the seminal X case, that the proper test for a lawful abortion in Ireland was as follows: if it was established as a matter of probability that there was "a real and substantial risk to the life, as distinct from the health, of the mother" (emphasis added) which could only be avoided by the termination of the pregnancy, a termination of a pregnancy was permissible in Ireland. The Supreme Court went on to accept that an established threat of suicide constituted a qualifying "real and substantial risk" to the life of the woman. Subsequent amendments to the Constitution did not extend the grounds for a lawful abortion in Ireland. None of the domestic case law subsequent to the X case, opened by the parties to this Court, concerned the right to an abortion in Ireland for reasons of health and well-being nor could they be considered to indicate any potential in this argument: the cases of "C" and of D(A Minor) concerned a suicide risk and a minor's right to travel abroad for an abortion, respectively; and the case of MR v. TR concerned the question of whether the constitutional notion of "unborn" included an embryo fertilised extra-uterine.

148. In addition, it is evident from the public reflection processes (notably the Constitutional Review Group Report and the Green Paper 1999) that a termination of pregnancy was not considered legal in Ireland unless it met the conditions laid down in Article 40.3.3 as clarified by the X case and that to extend those conditions would require a constitutional amendment. Moreover, the Government acknowledged to the Grand Chamber that on no analysis did Article 40.3.3 permit abortion in Ireland for "social reasons" and that it was difficult to see how the first applicant would have had any real prospects of succeeding in such a constitutional claim. This latter submission would apply equally to the second applicant who obtained an abortion for reasons of well-being. Finally, the Court would agree that the balance of rights at issue in the D v. Ireland case were relevantly different from those at issue in the first and second applicants' cases: in D v. Ireland the Court found that Ms D could have argued in the domestic courts, with some prospect of success, that the relevant balance of

competing interests was in her favour since one of the twin foetuses she was carrying was already dead and the other had an accepted fatal foetal abnormality.

149. Accordingly, the Court concludes that it has not been demonstrated that an action by the first and second applicants seeking a declaration of a constitutional entitlement to an abortion in Ireland on health and/or well-being grounds and, consequently, of the unconstitutionality of sections 58 and 59 of the 1961 Act, would have had any prospect of success. It is not therefore an effective remedy available both in theory and in practice which the first and second applicants were required to exhaust (see paragraph 142 above).

150. Moreover, and contrary to the Government's submissions at paragraph 134 above, the Court does not consider that an application under the 2003 Act for a declaration of incompatibility of the relevant provisions of the 1861 Act, and for an associated ex gratia award of damages, could be considered an effective remedy which had to be exhausted. The rights guaranteed by the 2003 Act would not prevail over the provisions of the Constitution (paragraphs 92-94 above). In any event, a declaration of incompatibility would place no legal obligation on the State to amend domestic law and, since it would not be binding on the parties to the relevant proceedings, it could not form the basis of an obligatory award of monetary compensation. In such circumstances, and given the relatively small number of declarations to date (paragraph 139 above) only one of which has recently become final, a request for such a declaration and for an ex gratia award of damages would not have provided an effective remedy to the first and second applicants (Hobbs v. the United Kingdom (dec.), no. 63684/00, 18 June 2002; and Burden v. the United Kingdom [GC], cited above, §§ 40-44).

151. Since these applicants' core complaints, on the facts accepted by the Court, did not concern or reveal a lack of information about the abortion options open to them (paragraph 130 above), it is not necessary to examine whether they had any remedies to exhaust in this regard and, notably, as regards the 1995 Act.

152. For these reasons, the Court considers that it has not been demonstrated that the first and second applicants had an effective domestic remedy available to them as regards their complaint about a lack of abortion in Ireland for reasons of health and/or well-being. The Court is not, therefore, required to address the parties' additional submissions concerning the timing, speed, costs and confidentiality of such domestic proceedings.

153. Moreover, when the proposed remedies have not been demonstrated to be effective, these applicants could not be required, nevertheless, to exhaust them solely with a view to establishing facts relevant to their applications to this Court.

(b) The third applicant

154. The third applicant feared her pregnancy constituted a risk to her life and complained under Article 8 about the lack of legislation implementing the constitutional right to an abortion in the case of such a risk. She argued that she therefore had no effective procedure by which to establish her qualification for a lawful abortion in Ireland and that she should not be required to litigate to do so.

155. In those circumstances, the Court considers that the question of the need for the third applicant to exhaust judicial remedies is inextricably linked, and therefore should be joined, to the merits of her complaint under Article 8 of the Convention (Tysiąc v. Poland, no. 5410/03 (dec.) 7 February 2006).

4. The Court's conclusion

156. Accordingly, the Court dismisses the Government's objection on grounds of a failure to exhaust domestic remedies as regards the first and second applicants and joins this objection to the merits of the third applicant's complaint under Article 8 of the Convention.

C. Article 2 of the Convention

157. The third applicant complained under Article 2 that abortion was not available in Ireland even in a life threatening situation because of the failure to implement Article 40.3.3 of the Constitution. The Government argued that no issue arose under Article 2 of the Convention.

158. The Court recalls that, just as for the first and second applicants, there was no legal impediment to the third applicant travelling for an abortion abroad (paragraph 131 above). The third applicant did not refer to any other impediment to her travelling to England for an abortion and none of her submissions about post-abortion complications concerned a risk to her life. In such circumstances, there is no evidence of any relevant risk to the third applicant's life (L.C.B. v. the United Kingdom, 9 June 1998, § 36, Reports of Judgments and Decisions 1998 III; and Osman v. the United Kingdom, 28 October 1998, § 116, Reports

1998 VIII). Her complaint that she was required to travel abroad for an abortion given her fear for her life falls to be examined under Article 8[21] of the Convention.

159. Accordingly, the third applicant's complaint under Article 2[62] of the Convention must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4[47] of the Convention.

Since this complaint does not therefore give rise to an "arguable claim" of a breach of the Convention (Boyle and Rice v. the United Kingdom, judgment of 27 April 1988, Series A no. 131, § 52), her associated complaint under Article 13[38] of the Convention must also be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

D. Article 3 of the Convention

160. All three applicants complained that the restrictions on abortion in Ireland constituted treatment which breached Article 3 of the Convention.

161. The Government reiterated that relevant medical care and counselling were available to the applicants and, largely because of their failure to exhaust domestic remedies, they had not demonstrated any good reason for not availing themselves of these services. No act of the State prevented consultation and any perceived taboo or stigma causing the applicants' hesitation to consult did not flow from the impugned legal provisions. Even accepting a perceived stigma or taboo, the applicants had not demonstrated "beyond all reasonable doubt" treatment falling within the scope of Article 3 of the Convention.

162. The applicants complained of a violation of the positive and negative obligations in Article 3 of the Convention given the impact on them of the restrictions on abortion and of travelling for an abortion abroad. They maintained that the criminalisation of abortion was discriminatory (crude stereotyping and prejudice against women), caused an affront to women's dignity and stigmatised women, increasing feelings of anxiety. The applicants argued that the two options open to women - overcoming taboos to seek an abortion abroad and aftercare at home or maintaining the pregnancy in their situations - were degrading and a deliberate affront to their dignity. While the stigma and taboo effect of the criminalisation of abortion was denied by the Government, they submitted that there was much evidence confirming this effect on women. Indeed, the applicants contended that the State was under a positive obligation to protect the applicants from such hardship and degrading treatment.

163. The Court considers it evident, for the reasons set out at paragraphs 124-127 above, that travelling abroad for an abortion was both psychologically and physically arduous for each of

the applicants. It was also financially burdensome for the first applicant (paragraph 128 above).

164. However, the Court reiterates its case-law to the effect that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (Ireland v. the United Kingdom, 18 January 1978, § 162, Series A no. 25; and, more recently, Lotarev v. Ukraine, no. 29447/04, § 79, 8 April 2010). In the above-described factual circumstances (paragraphs 124-129 above) and whether or not such treatment would be entirely attributable to the State, the Court considers that the facts alleged do not disclose a level of severity falling within the scope of Article 3[39] of the Convention.

165. In such circumstances, the Court rejects the applicants' complaints under Article 3 of the Convention as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

Since this complaint does not therefore give rise to an "arguable claim" of a breach of the Convention (Boyle and Rice v. the United Kingdom, cited above), their associated complaint under Article 13 of the Convention must also be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

E. The Court's conclusion on the admissibility of the applications

166. Accordingly, no ground having been established for declaring inadmissible the applicants' complaints under Article 8 or the associated complaints under Articles 13[38] and 14 [45]of the Convention, the Court declares these complaints admissible and the remainder of the application inadmissible.

II. ALLEGED VIOLATION OF ARTICLE 8[21] OF THE CONVENTION

167. The first and second applicants complained under Article 8 about the restrictions on lawful abortion in Ireland which meant that they could not obtain an abortion for health and/or well-being reasons in Ireland and the third applicant complained under the same Article about the absence of any legislative implementation of Article 40.3.3 of the Constitution.

A. The observations of the applicants

168. The applicants maintained that Article 8 clearly applied to their complaints since the relevant restrictions on abortion interfered with the most intimate part of their family and private lives including their physical integrity.

169. They accepted that the restrictions were "in accordance with the law" but again referred to the Government's "interpretation" of the law (see paragraph 137 above).

170. While they accepted that the abortion restrictions pursued the aim of protecting foetal life, they took issue with a number of related matters.

They considered that it had not been shown that the restrictions were effective in achieving that aim: the abortion rate for women in Ireland was similar to States where abortion was legal since, inter alia, Irish women chose to travel abroad for abortions in any event.

Even if they were effective, the applicants questioned how the State could maintain the legitimacy of that aim given the opposite moral viewpoint espoused by human rights bodies worldwide.

The applicants also suggested that the current prohibition on abortion in Ireland (protecting foetal life unless the life of the woman was at risk) no longer reflected the position of the Irish people, arguing that there was evidence of greater support for broader access to legal abortion. Since 1983, each referendum proposed narrower access to abortion, each was rejected and no referendum had been proposed since 1983 to expand access to abortion. Research by the CPA showed that public support for legal access to abortion in Ireland had increased in the past two decades (CPA Report Nos. 6 and 7, paragraphs 82-88 above) and an opinion poll, conducted for "Safe and Legal (in Ireland) Abortion Rights Campaign" and reported in the Irish Examiner on 22 June 2007, found that 51% of respondents did not agree that a woman should have the right to abortion if she considered it 'in her best interests', while 43% agreed with abortion on these grounds. That the Government sought exceptions from the Maastricht and Lisbon Treaties was not relevant. In any event, popular opinion could not be used by a State to justify a failure to protect human rights, the European and international consensus outlined below being far more significant.

171. The applicants also maintained that the means chosen to achieve that aim was disproportionate.

172. While the State was entitled to a margin of appreciation to protect pre-natal life, it was not an absolute one. The Court could not give unqualified deference to the State's interest in protecting pre-natal life as that would allow a State to employ any means necessary to restrict abortion without any regard to the mother's life (Open Door, cited above, at §§ 68-69 and 73). The ruling requested of this Court was not, as the Government suggested, to mandate a particular abortion law for all Contracting States: the proportionality exercise did not preclude variation between States and it did not require deciding when life began (States, courts, scientists, philosophers and religions had and would always disagree). However, this lack of agreement should not, of itself, deny women their Convention rights so that there was a need to express the minimum requirements to protect a woman's health and well-being under the Convention. Preserving pre-natal life was an acceptable goal only when the health and well-being of the mother were given proportionate value (Vo v. France [GC], no. 53924/00, § 80, ECHR 2004 VIII and Tysiąc v. Poland judgment, § 113).

173. The restrictive nature of the legal regime in Ireland disproportionately harmed women. There was a medical risk due to a late, and therefore often surgical, abortion and an inevitable reduction in pre- and post-abortion medical support. The financial burden impacted more on poor women and, indirectly, on their families. Women experienced the stigma and psychological burden of doing something abroad which was a serious criminal offence in their own country.

The core Convention values necessitated that the State adopt alternative methods of protecting pre-natal life without criminalising necessary health care. Such methods existed and this was the approach favoured by human rights bodies (the Office of the Commissioner for Human Rights and the CEDAW). Instead of punitive criminal measures, State resources should be directed towards reproductive health and support. The establishment of the CPA was a positive but inadequate development in this direction.

174. Moreover, the extent of the prohibition on abortion in Ireland stood in stark contrast to more flexible regimes for which there was a clear European and international consensus. This Court's case law had previously found reliance on consensus instructive in considering the scope of Convention rights, including the consensus amongst Contracting States and the provisions in specialised international instruments and evolving norms and principles of international law (Opuz v. Turkey, no. 33401/02, §§ 164 and 184, ECHR 2009 ...; and Christine Goodwin v. the United Kingdom [GC], no. 28957/95, § 85, ECHR 2002 VI).

175. The current European consensus was clearly in favour of extending the right to abortion in Ireland and distinguished the earlier Commission case law on which the Government relied: the applicants relied in this respect on a report of the International Planned Parenthood Federation (Abortion Legislation in Europe 2009) and on certain third party submissions (at paragraphs 206-211 below). While there might be no European consensus on the scientific and legal definition of the beginning of life (Vo v. France, cited above, at § 82), there was a clear consensus on the minimum standards for abortion services necessary to preserve a woman's health and well-being.

The PACE resolution (paragraphs 107-108 above) was indicative of this. In addition, the laws of the vast majority of the Contracting States also constituted strong evidence: 31 out of 47 States allowed abortion on request during the first trimester, 42 out of 47 States allowed abortion when the woman's health was at risk; and 32 out of 47 States expressly allowed the termination of pregnancy where there was a foetal abnormality. Ireland was in a small minority of 4 States that still enforced highly restrictive criminal abortion laws (with Malta, San Marino and Andorra). They further argued that the recent trend was towards further easing of restrictions on access to abortions including decriminalisation. The international human rights standards' consensus also tended to permitting legal abortion to protect the health and well-being of a woman (CEDAW and the Human Rights Committee, paragraphs 110-111 above) and to the decriminalising of abortion. The Cairo ICPD 1994 noted that an unsafe abortion could be a major public health concern.

176. While the above submissions were made by all applicants, the following were raised specifically as regards the third applicant.

177. The third applicant impugned the lack of a legal framework through which the relevant risk to her life and her entitlement to an abortion in Ireland could have been established which, she maintained, left her with no choice but to travel to England.

178. She underlined that Article 40.3.3, as interpreted by the X case, was a general provision. That provision did not define "unborn" and the X case did not define a real and substantial risk to life. A legal distinction, without more, between a woman's life and her health was also an unworkable distinction in practice. There were no legally binding and/or relevant professional guidelines and none of the professional bodies provided any clear guidance as to the precise steps to be taken or the criteria to be considered. Accordingly, none of her doctors could inform the third applicant of any official procedures to assist her. The doctors, who had treated her for cancer, were unable to offer her basic assistance as to the impact her pregnancy

could have on her health. She stated that her own GP failed to advise her about abortion options and did not refer to the fact that she had been pregnant when she visited him several months later. This hesitancy on the part of doctors was explained by the chilling effect of a lack of clear legal procedures combined with the risk of serious criminal and professional sanctions. It was not a problem that could be reduced, as the Government suggested, to the dereliction by doctors of their duties. Accordingly, the normal medical consultation process relied on by the Government to establish an entitlement to a lawful abortion was simply insufficient given the lack of clarity as to what constitutes a "real and substantial risk" to life combined with the chilling effect of severe criminal sanctions for doctors whose assessment could be considered ex post facto to fall outside that qualifying risk.

179. The third applicant also noted that domestic courts and many studies in Ireland clearly stated that Article 40.3.3 required implementation through legislation introducing a non-judicial certification procedure to establish a woman's qualification for lawful abortion. Contracting States permitting abortion had such legal procedures in place enabling doctors to swiftly and confidentially make the relevant determinations. Ireland did not intend to introduce any such procedures. The Court required this in Tysiąc v. Poland (indeed, in Poland there was already some legislative framework), a judgment recalled by the Commissioner for Human Rights during his visit to Ireland in 2007. International bodies had frequently criticised precisely this absence of legislation and the consequent negative impact on women.

B. The observations of the Irish Government

180. The Government argued that the Convention organs had never held that Article 8 was engaged where States failed to provide for certain types of abortion and any conclusion in that direction would raise serious issues for all Contracting States and, particularly for Ireland, where the prohibition was constitutionally enshrined. The Convention (see the travaux préparatoires) did not intend to make this Court the arbiter of the substantive law of abortion. The issue attracted strong opinions in Contracting States and was resolved by domestic decision-making often following extensive political debate. The protection accorded under Irish law to the right to life of the unborn was based on profound moral values deeply embedded in the fabric of society in Ireland and the legal position was defined through equally intense debate. The Government accepted that no legislative proposal concerning abortion was currently under discussion in Ireland. The applicants were asking the Court to align varied abortion laws and thereby go against the recognised importance and fundamental

role of the democratic process in each State and acceptance of a diversity of traditions and values in Contracting States (Article 53 of the Convention).

181. Even if Article 8 applied, the impugned restrictions satisfied the requirements of its second paragraph. In particular, Article 40.3.3, as interpreted in the X case, was a fundamental law of the State, was clear and foreseeable and pursued the legitimate aims of the protection of morals and the rights and freedoms of others including the protection of pre-natal life.

182. The Government underlined that the State was entitled to adopt the view, endorsed by the people, that the protection of pre-natal life, combined with the prohibition of direct destruction, was a legitimate goal and the Court should not scrutinise or measure the moral validity, legitimacy or success of this aim.

183. In any event, the Government disputed the applicants' suggestion that the current will of the Irish people was not reflected in the restrictions on abortion in Ireland: the opinion of the Irish people had been measured in referenda in 1983, 1992 and 2002. Its public representatives had actively sought, with detailed public reflection processes including extensive consultation, to consider the possible evolution of the laws and the recent public debates as to the possible impact of the Maastricht and Lisbon Treaties resulted in special Protocols to those Treaties.

The Government also underlined that the impugned restrictions had led to a significant reduction in Irish women travelling to the United Kingdom for an abortion (6673 women in 2001 travelled and 4686 women did so in 2007) and to one of the lowest levels of maternal deaths in the European Union and they disputed the assertion of Doctors for Choice/BPAS that the reduction in recent years in Irish women going to the United Kingdom for an abortion was explained by travel to other countries for an abortion. The Government maintained that CPA data from 2006 demonstrated relatively small numbers travelling to the 3 other countries most frequently cited (less than 10 women went to Spain and Belgium from 2005-2007 but significant numbers were going to the Netherlands namely, 42 in 2005, 461 in 2006 and 445 in 2007). Even taking account of these latter figures, there had been a clear reduction in the number of Irish women travelling abroad for an abortion.

184. Moreover, the impugned restrictions were proportionate.

185. The protection accorded under Irish domestic law to the right to life of the unborn and the restrictions on lawful abortion in Ireland were based on profound moral and ethical values

to which the Convention afforded a significant margin of appreciation. A broad margin was specifically accorded to determining what persons were protected by Article 2 of the Convention: the Court had conclusively answered in its judgments in Vo v. France and in Evans v. the United Kingdom ([GC], no. 6339/05, ECHR 2007 IV) that there was no European scientific or legal definition of the beginning of life so that the question of the legal protection of the right to life fell within the States' margin of appreciation. If States could have a different position on this point, they could have a different position as to limits on lawful abortion and the applicants were effectively asking the Court to leave out of the equation this fundamental legal foundation of the domestic position. The Court had not addressed the substantive issue of the regulation of abortion in the Open Door case on which the applicants relied.

In so far as the applicants' suggested that their situations must outweigh religious notions of morality, it was not clear whether the will of the Irish people was necessarily predicated on a particular religious view and, in any event, it was inappropriate to draw distinctions depending on whether a society's choices were based on religious or secular notions of morality.

186. As to the role of any consensus, the Government noted that it was not only the State's concern to protect pre-natal life that must to be factored into the balance but also the legitimate choice made, in the absence of any European consensus on when life begins, that the unborn was deserving of protection. The Government did not accept the contention that there was a European and/or international consensus in favour of greater access to abortion, including for social reasons: while in some countries, access to abortion was indeed broader, the conditions of access greatly varied; the consensus upon which the applicants relied was irrelevant since it was based on legislation and not on the decisions of any constitutional court on the provisions of a constitution or the Convention; the applicants' reliance on random material, observations and recommendations was selective and futile; there was no discernible argument that the legislation in some or even most Contracting States was at some tipping point to be enforced on remaining States.

187. Indeed, even if there was such a consensus, determining the scope of fundamental rights based on such consensus was fraught with difficulty. The rights guaranteed by the Convention were not dependent upon the assessment of the popular will at any given time and, indeed, sometimes rights might have to be protected against the popular will. There were serious objections to attempting to deduce from the current position in Contracting States the

existence of a controversial Convention right which was not included in the Convention in the first place. Underlining the principle of subsidiarity and the respective roles of the State and the Court in such a particular context, the Government further maintained that the international consensus, if at all relevant, in fact pointed the other way namely, towards supporting a State's autonomy in determining its own abortion laws rather than leaving this to a supranational judicial-making body (the Cairo ICPD 1994, the Fourth World Conference on Women in Beijing in 1995 and the PACE Recommendation 1903(2010) as well as the Protocols to the Maastricht and Lisbon Treaties). The PACE Resolution 607(2008), relied on by the applicants, demonstrated the divergence of views in Contracting States as it was a resolution and not a recommendation and it was adopted by a split vote, the Irish MEPs voting against.

188. The ethical and moral issues to which abortion gave rise were to be distinguished from the scientific issues central to the Christine Goodwin v. the United Kingdom judgment (cited above). The violation of Article 8 in that case was based on a continuing international trend in favour of the legal recognition of the new sexual identity of post-operative transsexuals, even in the absence of European consensus, and on the fact that that no concrete or substantial hardship or detriment to the public would be likely to flow from a change in the status of transsexuals. A finding that a failure to provide abortion for social reasons breached Article 8 would bring a significant detriment to the Irish public which had sought to protect pre-natal life.

189. As regards the third applicant specifically, the Government made the following submissions.

In the first place, they maintained in response to a question from the Court, that the procedure for obtaining a lawful abortion in Ireland was clear. The decision was made, like any other major medical matter, by a patient in consultation with her doctor. On the rare occasion there was a possibility of a risk to the life of a woman, there was "a very clear and bright line rule provided by Irish law which is neither difficult to understand or to apply because it is the same law that has been applied under Section 58 of the 1861 Act, under Article 40.3.3 of the Irish Constitution and under the legislative provisions of every country which permits a pregnancy to be terminated on that ground". As to the precise procedures to be followed by a pregnant woman and her doctor where an issue arose as to such a possible risk, it was the responsibility of the doctor and a termination could occur when the risk was real and substantial. If the patient did not agree with that advice, she was free to seek another medical

opinion and, in the last resort, she could make an emergency application to the High Court (as outlined above). The grounds for lawful abortion in Ireland were well known and applied. Referring to the Medical Council Guidelines, the CPA Guidelines and the evidence of practitioners to the Committee on the Constitution, the Government considered it clear that, while there were issues regarding the characterisation of medical treatment essential to protect the life of the mother, medical intervention occurred when a mother's life was threatened, the refusal of treatment on grounds of moral disapproval was prohibited and a patient was entitled to a second opinion. While the Irish Institute of Obstetricians and Gynaecologists had no published guidelines concerning a pregnant woman presenting with life threatening conditions, that Institute would be in agreement with the Guidelines of the United Kingdom Royal College of Obstetricians and Gynaecologists concerning the management of ectopic pregnancies and it was probable that Irish gynaecologists would "by and large" follow the latter Guidelines with or without minor amendments or additions. This clear process of how a decision to terminate a pregnancy was taken in Ireland by the patient in consultation with the doctor was regularly followed in the case of ectopic pregnancies.

In response to a further question from the Court as to how many lawful abortions were carried out annually in Ireland, the Government referred to a database of the Economic and Social Research Institute on discharges and deaths from all public acute hospitals. The Department of Health and Children had analysed that database based on the conditions that might require termination of pregnancy referred to in the Fifth Progress Report on Abortion. The results presented by the Government concerned ectopic pregnancies only.

Secondly, the Government did not accept the conclusions drawn by the third applicant from the comment of McCarthy J. in the X case (paragraph 44 above) combined with the above-cited Tysiąc v. Poland judgment. McCarthy J. did not assert that legislation was required to operate Article 40.3.3 but rather that the courts had a duty to interpret and to apply Article 40.3.3.

Thirdly, since this Court in the Open Door case found that Article 40.3.3 was sufficiently clear and precise to be considered to be prescribed by law, it could not now find that it was not sufficiently clear and precise as regards the authorisation of an abortion which was the very focus of that constitutional provision.

Fourthly, the Government distinguished the Tysiąc v. Poland judgment. There was an undercurrent in that case that doctors were not operating procedures and this simply could not be sustained in the present case. In addition, there was a stark contrast between the wealth of

medical evidence before the Court in the Tysiąc v. Poland case (notably, as regards the risk the pregnancy constituted for her health) and that in the case of the third applicant who presented no evidence of the life threatening nature of her condition. Moreover, the Government disputed whether the situation of patients and doctors would be improved by a certification process which applied in Poland. Furthermore, while in Tysiąc v. Poland the Court found that a State must not structure its legal framework so as to limit real possibilities to obtain a lawful abortion and should include a possibility of having a woman's views considered pre-partum, the third applicant had not demonstrated that she had considered legal action. Finally, the Government did not accept that the alleged chilling effect of the criminal sanctions in Irish law militated against obtaining an abortion in Ireland: there had been no criminal prosecution of a doctor in living memory, in the "C" case the High Court referred to doctors' support of C and to the fact that doctors would carry out the duties imposed on them by law and to suggest otherwise was serious and unsubstantiated.

190. Finally, the Government considered that the striking polarity of the third parties' submissions demonstrated the diversity of opinions and approaches on the subject of abortion throughout the Contracting States.

191. The Government concluded that, in the circumstances there was no basis for the applicants' claim that Article 40.3.3 was disproportionate. It would be inappropriate for this Court to attempt to balance the competing interests where striking that balance domestically has been a long, complex and delicate process, to which a broad margin of appreciation applied and in respect of which there was plainly no consensus in Member States of the Council of Europe.

C. The observations of the intervening Government to the Chamber

192. Since the third applicant is Lithuanian, that Government submitted observations to the Chamber (summarised below), although they did not make written or oral submissions to the Grand Chamber.

193. The Lithuanian Government reviewed the jurisprudence of the Convention organs: concerning the applicability of Article 2 to the foetus; concerning the compatibility of restrictions on abortion with Article 8 and concerning the compatibility of restrictions on receiving and imparting information on abortion with Article 10. They pointed out that the Convention institutions had not, until the present case, had the opportunity to develop certain general Convention principles on the minimum degree of protection to which a woman

seeking an abortion would be entitled, having regard to the right to protection of a foetus. They maintained that such clarification by this Court would be of great importance to all Contracting States.

194. Since the early Commission case law, the situation had evolved considerably and they referred, in particular to the PACE Resolution 1607, which Resolution responded to a perceived need to lay down standards in Europe as regards the rights of women seeking abortion. The explanatory memorandum to that Resolution noted that an abortion on request was at least in theory available in all Council of Europe Member States apart from Andorra, Ireland, Malta, Monaco and Poland and noted other commonalities and differences on the abortion issue in those States. They considered the situation in Council of Europe Member States to be diverse and that this sensitive question was still the subject of many debates in those States, often exposing conflicting moral positions: it was still not possible to find a uniform European conception of morals.

195. Accordingly, the Lithuanian Government considered that it would be of great importance for this Court to provide guidance on the question of the minimum degree of protection to which a woman requesting an abortion was to be accorded vis-à-vis her unborn child.

D. The observations of the third parties

1. Joint Observations of the European Centre for Law and Justice in association with Kathy Sinnott (Member of the European Parliament); of The Family Research Council, Washington D.C.; and of the Society for the Protection of Unborn Children, London.

196. These third parties described themselves as persons and bodies dedicated to the defence of the sanctity of human life.

197. As regards Article 2 of the Convention, Ireland had a sovereign right to determine when life began and the appropriate protections based on the paramount right to life, which right outweighed other rights. Ireland's abortion regime was based on full and equal rights to life of the mother and of the unborn. It was against the paramount right to life of the unborn that the lesser rights to privacy and bodily integrity of the mother had to be measured. The primacy of the right to life came from the fact that the basic building block of the State was the individual and personal rights existed only because a human being existed from the moment of conception. This primacy was recognised by many international instruments. The principle of respect for national sovereignty formed the very basis for the Convention rights because those

rights stemmed from treaty obligations. Recognising a right to abortion would create a new Convention right to which Ireland had never acceded. Ireland's position deserved special deference because of its longevity and consistency despite numerous domestic challenges and given its inscription in the Constitution ratified by the overwhelming majority of the Irish people. The Irish Government have always taken the firm position that their participation in the European political union would not impact on Article 40.3.3 of the Constitution.

198. The Convention organs recognised that Article 2 gave States the option of protecting the unborn (H v. Norway, cited above). The above-cited judgment of Vo v. France confirmed that the unborn belonged to the human race and that the highest deference had to be shown to States in determining the extent of that protection which amounted, indeed, to a higher measure of protection, inclusive of life, envisaged by Article 53 of the Convention. Since abortion in Ireland was lawful in case of a risk to life, it met any positive obligations under Article 2 of the Convention. Neither was there any negative aspect of Article 2 requiring States to deny life to the unborn to protect the life of women. Interpreting Article 2 in that manner would be tantamount to limiting the right to life by prohibiting States from recognising that right in the unborn and, indeed, creating a right to kill: the scope of Article 2 did not reach that far (Pretty v. the United Kingdom, no. 2346/02, § 39, ECHR 2002 III).

199. Just as Article 2 did not provide a right to abortion, Ireland's restrictions on abortion could not be said to unduly interfere with the Article 8 rights of women. A woman's right to privacy and bodily integrity in the context of pregnancy was not absolute, nor was pregnancy a purely private matter as it was to be analysed against the rights of the unborn and the State's right to choose when life began. In any event, the impugned restrictions were "prescribed by law". They were precise in their formulation, clearly defined in the case law (see the X case), codified by the Medical Council Guidelines and uniform in their application. In this latter respect, it was legitimate to rely on clinical judgments. The restrictions were also "proportionate" given the paramount right to life of the unborn. Deference to the fact that Ireland was inclusive in recognising the right to life of the mother and the unborn outweighed any alleged conflict with the interests of the woman to health, privacy and bodily integrity. In fact, the restrictions also protected women: they avoided the selection of female children for abortion; Ireland's maternal mortality rate was the lowest in Europe; and abortion had negative effects on women's health, lives (the rate of death after abortion being higher than after childbirth) and on future pregnancies. The right to life of the unborn took precedence over any financial concerns of the mother.

200. That Irish women could travel for an abortion did not defeat the legitimacy of Ireland's abortion laws: that exception was imposed by the right to travel under the EC law and could not be used to justify an even wider exception to the restrictions.

201. There was no universal consensus towards recognising a right to abortion in international law: on the contrary, certain international instruments and 68 countries prohibited abortion entirely or allowed it to save the mother's life only.

2. The Pro-Life Campaign ("PLC")

202. The PLC described itself as an Irish non-governmental organisation which promoted pro-life education and defends human life from conception.

203. The PLC pointed out that the protection of the life of the unborn was fundamental to the Constitutional scheme of fundamental rights. That tradition of human rights protection via constitutional jurisprudence was a long, proud and praiseworthy one which had given Ireland an exemplary record before this Court as compared to other Contracting States.

204. The constitutional protection of the unborn was only capable of being curtailed in the limited circumstances outlined in the X case, in which circumstances abortion would be lawful in Ireland. Information on services abroad was available (the 1995 Act) and, in general, no one's travel was restricted. The Medical Council Guidelines made it clear that doctors should not refuse to treat any patient on grounds of moral disapproval.

205. The Irish courts had due regard to any decision or judgment of the Court but, despite the incorporation of the Convention into Irish law by the 2003 Act, the Constitution remained the paramount source of law in Ireland so that Convention argument could not be used to overthrow laws that were otherwise constitutional. The Contracting States had a margin of appreciation in relation to the implementation of the Convention since the national authorities were, in principle, better placed than an international court to evaluate local needs and conditions. Any examination of the extent to which the Convention complimented, supplemented or deepened existing rights, should be addressed in the domestic courts prior to this Court.

3. Joint observations of Doctors for Choice, Ireland and BPAS

206. As well as the submissions outlined at paragraphs 120-121 above, they submitted figures as to the annual rates of abortion by Irish women in England and Wales published by the United Kingdom Department of Health (from the CPA Report no. 19) as follows: 1975

(1573); 1980 (3320); 1985 (3888); 1990 (4064); 1995 (4532); 2000 (6391); 2001 (6673); 2002 (6522); 2003 (6320); 2004 (6217); 2005 (5585); 2006 (5042); and 2007 (4686). However, they explained that Irish women give addresses in the United Kingdom to maintain confidentiality and/or to obtain British health cover. They argued that the reduction in the numbers of Irish women obtaining abortions in England and Wales in recent years could be explained by the availability of other more accessible options (abortions in other euro zone countries or greater use of abortion medication, "the abortion pill"). They also suggested that Irish women were statistically more likely to consult later for an abortion abroad and that there was no evidence that banning abortion in a country actually reduced the rate of abortion when other means were available.

207. Irish medical professionals were in an unclear position and unable to provide adequate medical services. Doctors advising a patient on the subject faced criminal charges, on the one hand, and an absence of clear legal, ethical or medical guidelines, on the other. The Medical Council Guidelines were of no assistance. They had never heard of any case where life-saving abortions had been performed in Ireland. Irish doctors did not receive any training on abortion techniques and were not therefore equipped to carry out an abortion or to provide adequate post-abortion care.

4. Joint Observations of the Centre for Reproductive Rights ("the Centre") and International Reproductive and Sexual Health Law Programme ("the Programme")

208. These third parties mainly argued that international human rights' laws and comparative standards should inform the Court's consideration and that the impugned Irish restrictions on abortion were inconsistent with such laws and standards for two reasons.

209. In the first place, they maintained that denying a lawful abortion to protect a woman's physical and mental health was inconsistent with international law and comparative standards. As to that international law, the UN human rights monitoring organs (inter alia, the Human Rights Committee and CEDAW) interpreted the human rights to life, health and non-discrimination, as well as the right to freedom from cruel, inhuman and degrading treatment or punishment, as requiring States to lawfully permit abortion where necessary to protect a woman's health. These bodies had consistently advised States to amend national abortion laws which prohibited abortion without exception or permitted abortion only where necessary to protect the woman's life. Laws permitted abortion to protect the health of the mother in all but 4 of the 47 Contracting States and 40 out of 47 allowed abortion for broader socio-economic reasons or on request within certain gestational limits. Constitutional courts in

Europe, relying on women's rights to physical and mental health and personal autonomy, reflected these health-based exceptions to abortion restrictions.

Neither international law nor comparative standards supported a distinction between the right to life and health in abortion regulation. It was a basic principle of international human rights' law that no formal hierarchy could be drawn between life and health as interests equally deserving of State protection, so that a law which permitted abortion to protect life but not health would not be acceptable. International human rights' law also reflected an understanding in an abortion context that the protection of life was practically indistinguishable from the protection of health. A comparative review revealed that all Contracting States which permitted abortion to preserve life also admitted abortion to protect health: all except Ireland. This recognised that distinctions between life and health protection could not be meaningfully drawn in a clinical context.

210. Secondly, they submitted that international law and comparative standards recognised that the State should seek to protect pre-natal interests through proportionate means that give due consideration to the rights of pregnant women so that restrictive criminal abortion laws and harsh penalties were excessively burdensome on women and abortion providers. UN human rights monitoring bodies consistently called on States to amend and/or repeal legislation criminalising abortion to ensure access to lawful abortion. Criminal laws were considered not to restrict access to abortion but rather access to safe abortion. Certain of those UN human rights' monitoring bodies considered criminal restrictions on abortion discriminatory. While most Contracting States controlled abortion via criminal law, the majority did not have criminal punishment for women, the penalties were moderate and they permitted lawful abortion in a broad set of circumstances. Ireland's criminal law was the harshest criminal penalty in abortion regulations across Europe. Equally, international and comparative standards supported the adoption by States of less restrictive measures that protected the State's interest in pre-natal life and guaranteed women's rights. International standards supported pre-natal life by ensuring safe pregnancies, welfare provisions and supporting family planning. Most Council of Europe Member States had procedural frameworks regulating access to abortion which balanced the State interest in protecting pre-natal life with a mother's rights.

211. In conclusion, the degree of conformity of the above-described international laws and comparative standards was such that it did not admit of a margin of appreciation being accorded to Ireland in this matter.

E. The Court's assessment

1. Whether Article 8 applied to the applicants' complaints

212. The Court recalls that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, inter alia, the right to personal autonomy and personal development (see Pretty v. the United Kingdom, cited above, § 61). It concerns subjects such as gender identification, sexual orientation and sexual life (for example, Dudgeon v. the United Kingdom, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41; and Laskey, Jaggard and Brown v. the United Kingdom, judgment of 19 February 1997, Reports of Judgments and Decisions 1997-I, p. 131, § 36), a person's physical and psychological integrity (Tysiąc v. Poland judgment, cited above, § 107) as well as decisions both to have and not to have a child or to become genetic parents (Evans v. the United Kingdom [GC], cited above, § 71).

213. The Court has also previously found, citing with approval the case-law of the former Commission, that legislation regulating the interruption of pregnancy touches upon the sphere of the private life of the woman, the Court emphasising that Article 8 cannot be interpreted as meaning that pregnancy and its termination pertain uniquely to the woman's private life as, whenever a woman is pregnant, her private life becomes closely connected with the developing foetus. The woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child (Tysiąc v. Poland judgment, cited above, § 106; and Vo v. France [GC], cited above, §§ 76, 80 and 82).

214. While Article 8 cannot, accordingly, be interpreted as conferring a right to abortion, the Court finds that the prohibition in Ireland of abortion where sought for reasons of health and/or well-being about which the first and second applicants complained, and the third applicant's alleged inability to establish her qualification for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly Article 8. The difference in the substantive complaints of the first and second applicants, on the one hand, and that of the third applicant on the other, requires separate determination of the question whether there has been a breach of Article 8 of the Convention.

215. It is not, in these circumstances, necessary also to examine whether Article 8 applied as regards its family life component.

2. The first and second applicants

(a) Positive or negative obligations under Article 8 of the Convention?

216. While there are positive obligations inherent in effective respect for private life (see paragraphs 244-246 below), the Court considers it appropriate to analyse the first and second applicants' complaints as concerning negative obligations, their core argument being that the prohibition in Ireland of abortion where sought for health and/or well-being reasons disproportionately restricted their right to respect for their private lives. The Court has previously noted, citing with approval the case-law of the former Commission in Bruggemann and Scheuten v. Germany, that not every regulation of the termination of pregnancy constitutes an interference with the right to respect for the private life of the mother (Vo v. France [GC], cited above, § 76). Nevertheless, having regard to the broad concept of private life within the meaning of Article 8 including the right to personal autonomy and to physical and psychological integrity (see paragraphs 212-214 above), the Court finds that the prohibition of the termination of the first and second applicants' pregnancies sought for reasons of health and/or well being amounted to an interference with their right to respect for their private lives. The essential question which must be determined is whether the prohibition is an unjustified interference with their rights under Article 8 of the Convention.

217. As noted at paragraph 145 above, the impugned interference stemmed from sections 58 and 59 of the 1861 Act, as qualified by Article 40.3.3 of the Constitution as interpreted by the Supreme Court in the X case.

218. To determine whether this interference entailed a violation of Article 8, the Court must examine whether or not it was justified under the second paragraph of that Article namely, whether the interference was "in accordance with the law" and "necessary in a democratic society" for one of the "legitimate aims" specified in Article 8 of the Convention.

(b) Was the interference "in accordance with the law"?

219. The applicants accepted that the restriction was in accordance with the law and the Government recalled that the Court had found Article 40.3.3 to be "prescribed by law" in the above-cited Open Door case.

220. The Court recalls that an impugned interference must have some basis in domestic law, which law must be adequately accessible and be formulated with sufficient precision to enable the citizen to regulate his conduct, he or she being able - if need be with appropriate

advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (for example, Silver and Others v. the United Kingdom, 25 March 1983, §§ 86-88, Series A no. 61).

221. The Court considers that the domestic legal provisions constituting the interference were clearly accessible. Having regard to paragraphs 147-149 above, the Court also considers that it was clearly foreseeable that the first and second applicants were not entitled to an abortion in Ireland for health and/or well-being reasons.

(c) Did the interference pursue a legitimate aim?

222. The Court recalls that, in the Open Door case, it found that the protection afforded under Irish law to the right to life of the unborn was based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum. The impugned restriction in that case was found to pursue the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect. This was confirmed by the Court's finding in the above-cited Vo v. France case that it was neither desirable nor possible to answer the question of whether the unborn was a person for the purposes of Article 2 of the Convention, so that it would be equally legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life.

223. However, the first and second applicants maintained that the will of the Irish people had changed since the 1983 referendum so that the legitimate aim accepted by the Court in its Open Door judgment was no longer a valid one. The Court recalls that it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals including on the question of when life begins. By reason of their "direct and continuous contact with the vital forces of their countries", State authorities are in principle in a better position than the international judge to give an opinion on the "exact content of the requirements of morals" in their country, as well as on the necessity of a restriction intended to meet them (Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, § 48; Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133, § 35; Open Door, § 68; and Vo v. France [GC], § 82).

224. The constitutional framework for the interference, Article 40.3.3, was adopted in referendum by a substantial majority in 1983. It is true that, since then, the population of Ireland has not been requested to vote in a referendum proposing any broader abortion rights

in Ireland. In fact, in 1992 and 2002 the Irish people refused in referenda to restrict the existing grounds for lawful abortion in Ireland, on the one hand, and accorded in those referenda the right to travel abroad for an abortion and to have information about that option, on the other (paragraphs 45-54 above).

225. However, the Court recalls the public reflection processes prior to the adoption of the Constitution Review Group Report, the Green Paper and the Fifth Progress Report on Abortion (paragraphs 62-76 above). These processes, which involved significant consultation and considered numerous constitutional and/or legislative options, reflected profoundly differing opinions and demonstrated the sensitivity and complexity of the question of extending the grounds for lawful abortion in Ireland. The rejection by a further referendum of the Lisbon Treaty in 2008 is also important in this context. While it could not be said that this rejection was entirely due to concerns about maintaining Irish abortion laws, the Report commissioned by the Government found that the rejection was "heavily influenced by low levels of knowledge and specific misperceptions" as to the impact of the Treaty on Irish abortion laws. As with the Maastricht Treaty in 1992, a special Protocol to the Lisbon Treaty was granted confirming that nothing in the Treaty would affect, inter alia, the constitutional protection of the right to life of the unborn and a further referendum in 2009 allowed the ratification of the Lisbon Treaty (paragraphs 100-103).

226. In light of the above, the Court does not consider that the limited opinion polls on which the first and second applicants relied (paragraphs 82-88 and 170 above) are sufficiently indicative of a change in the views of the Irish people, concerning the grounds for lawful abortion in Ireland, as to displace the State's opinion to the Court on the exact content of the requirements of morals in Ireland (Handyside v. the United Kingdom judgment and further references cited at 221 above). Accordingly, the Court finds that the impugned restrictions in the present case, albeit different from those at issue in the Open Door case, were based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum and which have not been demonstrated to have relevantly changed since then.

227. The Court concludes that the impugned restriction therefore pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect.

228. The Court does not therefore consider it necessary to determine whether these are moral views stemming from religious or other beliefs or whether the term "others" in Article 8 § 2

extends to the unborn (Open Door, cited above, § 63; and Vo v. France [GC], cited above, § 85). The first and second applicants' submissions to the effect that the abortion restrictions in pursuance of that aim are ineffective and their reliance on the moral viewpoint of international bodies fall to be examined below under the necessity of the interference (Open Door, § 76).

(e) Was the interference "necessary in a democratic society"?

229. In this respect, the Court must examine whether there existed a pressing social need for the measure in question and, in particular, whether the interference was proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests in respect of which the State enjoys a margin of appreciation (Open Door, § 70; Odièvre v. France [GC], no. 42326/98, § 40, ECHR 2003 III; and Evans v. the United Kingdom [GC], § 75).

230. Accordingly, and as underlined at paragraph 213 above, in the present cases the Court must examine whether the prohibition of abortion in Ireland for health and/or well-being reasons struck a fair balance between, on the one hand, the first and second applicants' right to respect for their private lives under Article 8 and, on the other, profound moral values of the Irish people as to the nature of life and consequently as to the need to protect the life of the unborn.

231. The Court considers that the breadth of the margin of appreciation to be accorded to the State is crucial to its conclusion as to whether the impugned prohibition struck that fair balance. The Government maintained that, in the context of abortion laws, the State's margin was significant and unaffected by any European or international consensus. The first and second applicants argued that, while a margin was to be accorded, the right to life of the unborn could not be accorded primacy to the exclusion of the proportionate protection of the rights of women and, further, that it was crucial to take account of the consensus outside of Ireland towards broader access to abortion.

232. The Court recalls that a number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State when determining any case under Article 8 of the Convention. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted (see Evans v. the United Kingdom [GC], cited above, § 77). Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative

importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (Evans v. the United Kingdom [GC], cited above, § 77; X., Y. and Z. v. the United Kingdom, judgment of 22 April 1997, Reports of Judgments and Decisions 1997-II, § 44; Frette v. France, no. 36515/97, § 41, ECHR 2002-I; Christine Goodwin, cited above, § 85). As noted above, by reason of their direct and continuous contact with the vital forces of their countries, the State authorities are, in principle, in a better position than the international judge to give an opinion, not only on the "exact content of the requirements of morals" in their country, but also on the necessity of a restriction intended to meet them (Handyside v. the United Kingdom judgment and the other references cited at paragraph 223 above).

233. There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake. A broad margin of appreciation is, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under Article 8 of the Convention.

234. However, the question remains whether this wide margin of appreciation is narrowed by the existence of a relevant consensus.

The existence of a consensus has long played a role in the development and evolution of Convention protections beginning with Tyrer v. the United Kingdom (25 April 1978, § 31, Series A no. 26), the Convention being considered a "living instrument" to be interpreted in the light of present-day conditions. Consensus has therefore been invoked to justify a dynamic interpretation of the Convention (Marckx v. Belgium, judgment of 13 June 1979, Series A no. 31, § 41; Dudgeon v. the United Kingdom, judgment of 22 October 1981, Series A no. 45, § 60; Soering v. the United Kingdom, judgment of 7 July 1989, Series A no. 161, § 102; L. and V. v. Austria, nos. 39392/98 and 39829/98, § 50, ECHR 2003-I and Christine Goodwin v. the United Kingdom [GC], cited above, § 85).

235. In the present case, and contrary to the Government's submission, the Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law. In particular, the Court notes that the first and second applicants could have obtained an abortion on request (according to certain criteria including gestational limits) in

some 30 such States. The first applicant could have obtained an abortion justified on health and well-being grounds in approximately 40 Contracting States and the second applicant could have obtained an abortion justified on well-being grounds in some 35 Contracting States. Only 3 States have more restrictive access to abortion services than in Ireland namely, a prohibition on abortion regardless of the risk to the woman's life. Certain States have in recent years extended the grounds on which abortion can be obtained (see paragraph 112 above). Ireland is the only State which allows abortion solely where there is a risk to the life (including self-destruction) of the expectant mother. Given this consensus amongst a substantial majority of the Contracting States, it is not necessary to look further to international trends and views which the first two applicants and certain of the third parties argued also leant in favour of broader access to abortion.

236. However, the Court does not consider that this consensus decisively narrows the broad margin of appreciation of the State.

237. Of central importance is the finding in the above-cited Vo case, referred to above, that the question of when the right to life begins came within the States' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2. Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected (see the review of the Convention case law at paragraphs 75-80 in the above-cited Vo v. France [GC] judgment), the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother. It follows that, even if it appears from the national laws referred to that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention (Tyrer v. the United Kingdom, § 31; and Vo v. France [GC], § 82, both cited above).

238. It is indeed the case that this margin of appreciation is not unlimited. The prohibition impugned by the first and second applicants must be compatible with a State's Convention obligations and, given the Court's responsibility under Article 19 of the Convention, the Court must supervise whether the interference constitutes a proportionate balancing of the

competing interests involved (Open Door, § 68). A prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature. Nor is the regulation of abortion rights solely a matter for the Contracting States, as the Government maintained relying on certain international declarations (paragraph 187 above). However, and as explained above, the Court must decide on the compatibility with Article 8 of the Convention of the Irish State's prohibition of abortion on health and well-being grounds on the basis of the above-described fair balance test to which a broad margin of appreciation is applicable.

239. From the lengthy, complex and sensitive debate in Ireland (summarised at 28-76 above) as regards the content of its abortion laws, a choice has emerged. Irish law prohibits abortion in Ireland for health and well-being reasons but allows women, in the first and second applicants' position who wish to have an abortion for those reasons (see paragraphs 123-130 above), the option of lawfully travelling to another State to do so.

On the one hand, the Thirteenth and Fourteenth Amendments to the Constitution removed any legal impediment to adult women travelling abroad for an abortion and to obtaining information in Ireland in that respect. Legislative measures were then adopted to ensure the provision of information and counselling about, inter alia, the options available including abortions services abroad, and to ensure any necessary medical treatment before, and more particularly after, an abortion. The importance of the role of doctors in providing information on all options available, including abortion abroad, and their obligation to provide all appropriate medical care, notably post-abortion, is emphasised in CPA work and documents and in professional medical guidelines (see generally paragraph 130 above). The Court has found that the first two applicants did not demonstrate that they lacked relevant information or necessary medical care as regards their abortions (paragraphs 127 and 130 above).

On the other hand, it is true that the process of travelling abroad for an abortion was psychologically and physically arduous for the first and second applicants, additionally so for the first applicant given her impoverished circumstances (paragraph 163 above). While this may not have amounted to treatment falling within the scope of Article 3 of the Convention (paragraph 164 above), the Court does not underestimate the serious impact of the impugned restriction on the first and second applicants. It may even be the case, as the first two applicants argued, that the impugned prohibition on abortion is to a large extent ineffective in protecting the unborn in the sense that a substantial number of women take the option open to

them in law of travelling abroad for an abortion not available in Ireland: it is not possible to be more conclusive, given the disputed nature of the relevant statistics provided to the Court (paragraphs 170, 183 and 206 above).

240. It is with this choice that the first and second applicants take issue. However, it is equally to this choice that the broad margin of appreciation centrally applies. The Court would distinguish the prohibition on the provision of information about abortion services abroad at issue in the Open Door case and the finding in that case that the prohibition on information was ineffective to protect the right to life because women travelled abroad anyhow (§ 76 of that judgment). There is, in the Court's view, a clear distinction to be drawn between that prohibition and the more fundamental choice at issue in the present case as to the permitted grounds for lawful abortion in Ireland to which the above-described margin of appreciation is accorded.

241. Accordingly, having regard to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life (paragraphs 222-227 above) and as to the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation accorded in that respect to the Irish State. In such circumstances, the Court finds that the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn.

(f) The Court's conclusion as regards the first and second applicants

242. It concludes that there has been no violation of Article 8 of the Convention as regards the first and second applicants.

3. The third applicant

243. The third applicant's complaint concerns the failure by the Irish State to implement Article 40.3.3 of the Constitution by legislation and, notably, to introduce a procedure by which she could have established whether she qualified for a lawful abortion in Ireland on grounds of the risk to her life of her pregnancy.

(a) Does her complaint fall to be examined under the positive or negative obligations of Article 8 of the Convention?

244. While the essential object of Article 8 is, as noted above, to protect individuals against arbitrary interference by public authorities, it may also impose on a State certain positive obligations to ensure effective respect for the rights protected by Article 8 (see, among other authorities, X and Y v. the Netherlands, judgment of 26 March 1985, Series A no. 91, § 23).

245. The Court has previously found States to be under a positive obligation to secure to its citizens their right to effective respect for their physical and psychological integrity (Glass v. the United Kingdom, no. 61827/00, §§ 74-83, ECHR 2004 II; Sentges v. the Netherlands (dec.) no. 27677/02, 8 July 2003; Pentiacova and Others v. Moldova (dec.), no. 14462/03, ECHR 2005-...; Nitecki v. Poland (dec.), no. 65653/01, 21 March 2002; Odièvre v. France [GC], cited above, § 42). In addition, these obligations may involve the adoption of measures, including the provision of an effective and accessible means of protecting the right to respect for private life (Airey v. Ireland, 9 October 1979, § 33, Series A no. 32; McGinley and Egan v. the United Kingdom, 9 June 1998, § 101, Reports of Judgments and Decisions 1998 III; and Roche v. the United Kingdom [GC], no. 32555/96, § 162, ECHR 2005 X) including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures in an abortion context (Tysiąc v. Poland judgment, cited above, § 110).

246. Accordingly, the Court considers that the third applicant's complaint falls to be analysed under the positive aspect of Article 8. In particular, the question to the determined by the Court is whether there is a positive obligation on the State to provide an effective and accessible procedure allowing the third applicant to establish her entitlement to a lawful abortion in Ireland and thereby affording due respect to her interests safeguarded by Article 8 of the Convention.

(b) General principles applicable to assessing a State's positive obligations

247. The principles applicable to assessing a State's positive and negative obligations under the Convention are similar. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance (Gaskin v. the United Kingdom, 7 July 1989, § 42, Series A no. 160; and Roche v. the United Kingdom [GC], cited above, § 157).

248. The notion of "respect" is not clear cut especially as far as positive obligations are concerned: having regard to the diversity of the practices followed and the situations

obtaining in the Contracting States, the notion's requirements will vary considerably from case to case (Christine Goodwin v. the United Kingdom [GC], cited above, § 72).

Nonetheless, certain factors have been considered relevant for the assessment of the content of those positive obligations on States. Some factors concern the applicant: the importance of the interest at stake and whether "fundamental values" or "essential aspects" of private life are in issue (X and Y v. the Netherlands, 26 March 1985, § 27, Series A no. 91; and Gaskin v. the United Kingdom, 7 July 1989, § 49, Series A no. 160); and the impact on an applicant of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment carried out under Article 8 (B. v. France, 25 March 1992, § 63, Series A no. 232 C; and Christine Goodwin v. the United Kingdom [GC], cited above, §§ 77-78). Some factors concern the position of the State: whether the alleged obligation is narrow and defined or broad and indeterminate (Botta v. Italy, 24 February 1998, § 35, Reports of Judgments and Decisions 1998 I); and the extent of any burden the obligation would impose on the State (Rees v. the United Kingdom, 17 October 1986, §§ 43-44, Series A no. 106; Christine Goodwin v. the United Kingdom [GC], cited above, §§ 86-88).

249. As in the negative obligation context, the State enjoys a certain margin of appreciation (see, among other authorities, Keegan v. Ireland, judgment of 26 May 1994, Series A no. 290, § 49). While a broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted in a State (paragraphs 231-238 above), once that decision is taken the legal framework devised for this purpose should be "shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention" (S.H. and Others v. Austria, no. 57813/00, § 74, 1 April 2010).

(c) Application of the general principles to the third applicant's case

250. The third applicant had a rare form of cancer. When she discovered she was pregnant she feared for her life as she believed that her pregnancy increased the risk of her cancer returning and that she would not obtain treatment for that cancer in Ireland while pregnant (see paragraph 125 above). The Court considers that the establishment of any such relevant risk to her life caused by her pregnancy clearly concerned fundamental values and essential aspects of her right to respect for her private life (X and Y v. the Netherlands, 26 March 1985, cited above, § 27 and paragraph 248 above). Contrary to the Government's submissions, it is not

necessary for the applicant to further substantiate the alleged medical risk, her complaint concerning as it did the absence of any effective domestic procedure for establishing that risk.

251. The Government maintained that effective and accessible procedures existed whereby a woman could establish her entitlement to a lawful abortion in Ireland.

252. In the first place, the Court has examined the only non-judicial means on which the Government relied namely, the ordinary medical consultation process between a woman and her doctor.

253. However, the Court has a number of concerns as to the effectiveness of this consultation procedure as a means of establishing the third applicant's qualification for a lawful abortion in Ireland.

It is first noted that the ground upon which a woman can seek a lawful abortion in Ireland is expressed in broad terms: Article 40.3.3, as interpreted by the Supreme Court in the X case, provides that an abortion is available in Ireland if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, including a risk of self harm, which can only be avoided by a termination of the pregnancy (the X case, cited at paragraphs 39-44 above). While a constitutional provision of this scope is not unusual, no criteria or procedures have been subsequently laid down in Irish law, whether in legislation, case law or otherwise, by which that risk is to be measured or determined, leading to uncertainty as to its precise application. Indeed, while this constitutional provision (as interpreted by the Supreme Court in the X case) qualified sections 58 and 59 of the earlier 1861 Act (see paragraph 145 above), those sections have never been amended so that, on their face, they remain in force with their absolute prohibition on abortion and associated serious criminal offences thereby contributing to the lack of certainty for a woman seeking a lawful abortion in Ireland.

Moreover, whether or not the broad right to a lawful abortion in Ireland for which Article 40.3.3 provides could be clarified by Irish professional medical guidelines as suggested by the Government (and see the High Court judgment in MR v. TR and Others, at paragraph 97 above), the guidelines do not in any event provide any relevant precision as to the criteria by which a doctor is to assess that risk. The Court cannot accept the Government's argument that the oral submissions to the Committee on the Constitution, and still less obstetric guidelines on ectopic pregnancies from another State, could constitute relevant clarification of Irish law. In any event, the three conditions noted in those oral submissions as accepted conditions

requiring medical intervention to save a woman's life (pre-eclampsia, cancer of the cervix and ectopic pregnancies) were not pertinent to the third applicant's case.

Furthermore, there is no framework whereby any difference of opinion between the woman and her doctor or between different doctors consulted, or whereby an understandable hesitancy on the part of a woman or doctor, could be examined and resolved through a decision which would establish as a matter of law whether a particular case presented a qualifying risk to a woman's life such that a lawful abortion might be performed.

254. Against this background of substantial uncertainty, the Court considers it evident that the criminal provisions of the 1861 Act would constitute a significant chilling factor for both women and doctors in the medical consultation process, regardless of whether or not prosecutions have in fact been pursued under that Act. Both the third applicant and any doctor ran a risk of a serious criminal conviction and imprisonment in the event that a decision taken in medical consultation, that the woman was entitled to an abortion in Ireland given the risk to her life, was later found not to accord with Article 40.3.3 of the Constitution. Doctors also risked professional disciplinary proceedings and serious sanctions. The Government have not indicated whether disciplinary action has ever been taken against a doctor in this regard. The Review Group Report 1996, the Green Paper 1999 and the Fifth Progress Report on Abortion 2000 each expressed concerns about the lack of legal protection for medical personnel. As to the Government's reliance on the C case, doctors consulted by women such as the third applicant were not in the same legal situation as those in the C case who were providing opinions as regards a rape victim who was a suicide risk, a situation falling clearly within the ambit of the X case.

255. Accordingly, and referring also to McCarthy J.'s judgment in the X case (paragraph 44 above), the Court does not consider that the normal process of medical consultation could be considered an effective means of determining whether an abortion may be lawfully performed in Ireland on the ground of a risk to life.

256. Secondly, the Government argued that her interests would be protected by the availability of judicial proceedings, submitting also that the third applicant had failed to exhaust domestic remedies, an argument which was joined to the merits of the present complaint (paragraph 155 above). They maintained that she could have initiated a constitutional action to determine her qualification for a lawful abortion in Ireland, in which action she could have obtained mandatory orders requiring doctors to terminate her pregnancy. In so far as she argued that the 1861 Act deterred doctors, she could also have

established in such an action whether the 1861 Act interfered with her constitutional right in which case she could have obtained an order setting aside the offending provisions of the 1861 Act.

257. However, the Court does not consider that this action would be an effective means of protecting the third applicant's right to respect for her private life for the following reasons.

258. The Court does not consider that the constitutional courts are the appropriate fora for the primary determination as to whether a woman qualifies for an abortion which is lawfully available in a State. In particular, this process would amount to requiring the constitutional courts to set down on a case by case basis the legal criteria by which the relevant risk to a woman's life would be measured and, further, to resolve through evidence, largely of a medical nature, whether a woman had established that qualifying risk. However, the constitutional courts themselves have underlined that this should not be their role. Contrary to the Government's submission, McCarthy J. in the X case clearly referred to prior judicial expressions of regret that Article 40.3.3 had not been implemented by legislation and went on to state that, while the want of that legislation would not inhibit the courts from exercising their functions, it was reasonable to find that, when enacting that Amendment, the people were entitled to believe that legislation would be introduced so as to regulate the manner in which the right to life of the unborn and the right to life of the mother could be reconciled. In the view of McCarthy J., the failure to legislate was no longer just unfortunate, but it was "inexcusable" (paragraph 44 above). The High Court in the "C" case (paragraphs 95-96 above) referred to the same issue more succinctly, finding that it would be wrong to turn the High Court into a "licensing authority" for abortions.

259. In addition, it would be equally inappropriate to require women to take on such complex constitutional proceedings when their underlying constitutional right to an abortion in the case of a qualifying risk to life was not disputable (the Green Paper 1999, paragraph 68 above). The D v. Ireland decision is distinguishable for the reasons set out at paragraph 148 above and, notably, because D's constitutional right to an abortion in Ireland in the case of a fatal foetal abnormality was an open question.

260. Furthermore, it is not clear how the courts would enforce a mandatory order requiring doctors to carry out an abortion. The Government's statistical material provided in response to the Court's question (paragraph 189 above) concerned public acute hospitals and ectopic pregnancies only and thereby revealed a lack of knowledge on the part of the State as to, inter alia, who carries out lawful abortions in Ireland and where. It is also not clear on what basis a

declaration of unconstitutionality of the provisions of the 1861 Act could have been made since those provisions have been already qualified by Article 40.3.3 and since the third applicant did not seek a right to abortion extending beyond the parameters of that Article.

261. Thirdly, the Court's findings as regards the 2003 Act outlined at paragraph 150 above are equally applicable to the third applicant. In addition, since her complaint does not concern a lack of information but rather the lack of a decision-making process, it is not necessary to examine whether she had any remedy to exhaust in this regard, in particular, in respect of the 1995 Act.

262. The above-noted factors distinguish the Whiteside decision on which the Government relied to suggest that the positive obligation could be fulfilled by litigation as opposed to legislation.

263. Consequently, the Court considers that neither the medical consultation nor litigation options relied on by the Government constituted effective and accessible procedures which allowed the third applicant to establish her right to a lawful abortion in Ireland. The Court is not, therefore, required to address the parties' additional submissions concerning the timing, speed, costs and confidentiality of such domestic proceedings.

264. The Court considers that the uncertainty generated by the lack of legislative implementation of Article 40.3.3, and more particularly by the lack of effective and accessible procedures to establish a right to an abortion under that provision, has resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on grounds of a relevant risk to a woman's life and the reality of its practical implementation (Christine Goodwin v. the United Kingdom [GC], cited above, at §§ 77-78; and S. H. and Others v. Austria, cited above, at § 74. See also the Commissioner for Human Rights, paragraph 110 above).

265. Moreover, the Government have not explained the failure to implement Article 40.3.3 and no convincing explanations can be discerned from the reports following the recent public reflection processes. The Review Group Report 1996 found the substantive law on abortion in Ireland to be unclear and recommended the adoption of legislation regulating the application of Article 40.3.3, by including a certification process by medical specialists and a time-limit for any certified termination in the case of an abortion considered lawful under Article 40.3.3. In discussing the option of such implementing legislation, the Green Paper 1999 noted that this would have several advantages: it would provide a "framework within which the need for

an abortion could be assessed, rather than resolving the question on a case-by-case basis before the courts, with all the attendant publicity and debate"; it would allow "pregnant women who establish that there is a real and substantial risk to the their life to have an abortion in Ireland rather than travelling out of the jurisdiction"; and it would provide legal protection for medical and other personnel involved in a procedure to terminate the pregnancy in Ireland. The political assessment of that Paper by the Committee on the Constitution led to the Fifth Progress Report which found that clarity in legal provisions was essential for the guidance of the medical profession so that any legal framework should ensure that doctors could carry out best medical practice in saving the life of the mother.

Despite therefore the recognition by those bodies that further legal clarity was required as regards lawful abortions in Ireland, no agreement was reached on any reform proposals, no legislation and/or constitutional referenda were proposed and the Government confirmed to the Court that no legislative reform was envisaged.

266. As to the burden which implementation of Article 40.3.3 would impose on the State, the Court accepts that this would be a sensitive and complex task. However, while it is not for this Court to indicate the most appropriate means for the State to comply with its positive obligations (Marckx v. Belgium judgment, § 58; Airey v. Ireland judgment, § 26; and B. v. France, § 63, all cited above), the Court notes that legislation in many Contracting States has specified the conditions governing access to a lawful abortion and put in place various implementing procedural and institutional procedures (Tysiąc v. Poland judgment, § 123). Equally, implementation could not be considered to involve significant detriment to the Irish public since it would amount to rendering effective a right already accorded, after referendum, by Article 40.3.3 of the Constitution.

(d) The Court's conclusion as regards the third applicant

267. In such circumstances, the Court rejects the Government's argument that the third applicant failed to exhaust domestic remedies. It also concludes that the authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3 of the Constitution.

268. Accordingly, the Court finds that there has been a violation of Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

269. The applicants also complained that the above-described restrictions and limitations on lawful abortion in Ireland were discriminatory and in breach of Article 14 in conjunction with Article 8 in that they placed an excessive burden on them as women and, in particular, on the first applicant as an impoverished woman. The Government argued that there was no basis for considering that the impugned legal framework discriminated against women on grounds of sex. Even if it did constitute a difference of treatment on that ground, it was justifiable and proportionate for the reasons referred to under Article 8 of the Convention. That the first applicant would have been adversely affected by virtue of her financial status was insufficient to ground a complaint under Article 14 of the Convention.

270. Having regard to the parties' submissions under Article 8 and to the reasons for its conclusions thereunder, the Court does not consider it necessary to examine the applicants' complaints separately under Article 14 of the Convention (Open Door, at § 83; and Tysiąc v. Poland judgment, at § 144, both cited above).

IV. ALLEGED VIOLATION OF ARTICLE 13, IN CONJUNCTION WITH ARTICLES 8 AND 14 OF THE CONVENTION

271. The applicants also complained under Article 13, arguing that they had no effective domestic remedy as regards their complaints under Articles 8 and 14 of the Convention. The Government maintained that they had effective remedies available to them.

272. The Court recalls that Article 13 applies where an individual has an "arguable claim" that he or she has been the victim of a violation of a Convention right (Boyle and Rice v. the United Kingdom, cited above) and that complaints declared admissible, in the present case Articles 8 and 14, are considered "arguable".

273. The first and second applicants challenged the restrictions on abortion in Ireland, contained in the relevant provisions of the 1861 Act as qualified by Article 40.3.3. However, the Court recalls that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's primary legislation, let alone provisions of its Constitution, to be challenged before a national authority on grounds that it is contrary to the Convention (James

and Others v. the United Kingdom, 21 February 1986, § 85, Series A no. 98; and A. v. the United Kingdom, no. 35373/97, § 112, ECHR 2002 X).

274. The third applicant's fundamental concern was the lack of implementation of Article 40.3.3 of the Constitution and therefore the lack of accessible and effective procedures in Ireland to allow her to establish her qualification for a lawful abortion in Ireland. Having regard to the overlap of this complaint and matters examined and found to violate Article 8 of the Convention, the Court finds that no separate issue arises under Article 13 of the Convention as regards the third applicant (Tysiąc v. Poland judgment, § 135).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

275. 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

276. The third applicant claimed pecuniary damages as regards the costs of her abortion in England in the sum of EUR 1500, as she would not be eligible for reimbursement from the Irish State. She also claimed EUR 40,000 in non-pecuniary damages as regards the threat to her life, health and well-being and for the stigma, humiliation, harm and distress caused to her, which is continuing.

277. The Court has found that the failure by the State to implement Article 40.3.3 constituted a failure to respect the third applicant's right to respect for her private life in violation of Article 8 of the Convention.

However, the Court does not consider that there is an established causal link between the violation found and the third applicant's claim for pecuniary and non-pecuniary damage regarding her travel for an abortion to England. While it may be that the third applicant preferred the certainty of abortion services abroad to the uncertainty of a theoretical right to abortion in Ireland (paragraph 125 above), the Court cannot speculate on whether she would have qualified or not for an abortion in Ireland had she had access to the relevant regulatory procedures. It notes, in particular, the lack of any medical documentation submitted to the Court as regards her condition or its consequences, a point emphasised by the Government. Nor is it possible to speculate as to what the third applicant would have done had she not so

qualified. It notes in this respect her submissions, albeit not developed, as to her concern about the impact on the foetus of prior tests for cancer undertaken by her (Tysiąc v. Poland judgment, § 151)).

278. Consequently, the Court rejects the third applicant's claim for just satisfaction in so far as it is linked to her travelling abroad for an abortion.

279. However, the Court considers it evident that the lack of an effective procedure, which meant that she could not effectively determine her right to a lawful abortion in Ireland, caused considerable anxiety and suffering to the applicant, confronted as she was with a fear that her life was threatened by her pregnancy and an uncertain legal position, set against the highly sensitive backdrop of the abortion issue in Ireland. The Court considers that the damage suffered by the third applicant could not be satisfied by a mere finding of a violation of the Convention. Having regard to the circumstances of the case seen as a whole and deciding on equitable basis, the Court awards the third applicant EUR 15,000 in respect of non pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

280. A global figure of EUR 50,000 was claimed as regards the costs and expenses of representation of all three applicants.

281. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, Nikolova v. Bulgaria [GC], no. 31195/96, 25 March 1999, § 79, and Smith and Grady v. the United Kingdom (just satisfaction), nos. 33985/96 and 33986/96, § 28, ECHR 2000 IX). In accordance with Rule 60 § 2 of the Rules of Court, itemised particulars of all claims must be submitted, failing which the Court may reject the claim in whole or in part (Carabulea v. Romania, no. 45661/99, § 179, 13 July 2010).

282. The Court notes that the fees are claimed in a global sum for all three applicants. In addition, no breakdown, of the costs referable to each applicant or of the tasks carried out for each, was submitted and no bills or vouchers were provided to support the amount claimed.

283. In such circumstances, the Court dismisses the applicant's claim under this head (see, for example, Cudak v. Lithuania [GC], no. 15869/02, § 82, ECHR 2010 ...).

C. Default interest

284. 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.

6.9.4. The Court's decision

1. Dismisses unanimously the Government's objection as to a failure to exhaust domestic remedies as regards the first and second applicants and joins this objection to the merits of the third applicant's complaint under Article 8[21] of the Convention;

2. Declares unanimously the applicants' complaints concerning abortion laws in Ireland under Articles 8, 13[38] and 14[45] admissible;

3. Declares by a majority the remainder of the application inadmissible;

4. Holds by eleven votes to six that there has been no violation of Article 8 of the Convention, or of Article 13 taken in conjunction with Article 8, as regards the first and second applicants;

5. Holds unanimously that there has been a violation of Article 8 of the Convention, and that no separate issue arises under Article 13 taken in conjunction with Article 8, as regards the third applicant;

6. Holds unanimously that no separate issue arises under Article 14 of the Convention in conjunction with Article 8 as regards all applicants;

7. Holds unanimously

(a) that the respondent State is to pay the third applicant, within three months, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage, 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. Dismisses unanimously the remainder of the claims for just satisfaction.

6.10. Case of Dolenec V. Croatia[22]

6.10.1. The procedure

1. The case originated in an application (no. 25282/06) against the Republic of Croatia lodged with the Court under Article 34[10] of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Branko Dolenec ("the applicant"), on 19 May 2006.

2. The applicant, who had been granted legal aid, was represented by Mr M. Ramušćak, a lawyer practising in Varaždin. The Croatian Government ("the Government") were represented by their Agent, Mrs Š. Stažnik.

3. On 11 December 2007 and 17 December 2008 the President of the First Section decided to communicate the complaints under Article 3[39] of the Convention concerning the general conditions of the applicant's detention, the alleged lack of adequate medical care and the alleged attacks on the applicant by prison personnel; the complaints under Article 5 §§ 1[6] and 3 of the Convention concerning the applicant's deprivation of liberty between 2 and 30 March 2005; the complaint under Article 8 of the Convention concerning the applicant's allegations that he was placed in a cell with smokers; the complaints under Article 6 § 3 (b) and (c)[64] concerning his inability to engage the services of a defence counsel at the hearing held on 1 April 2005 and afterwards and the alleged lack of possibility to consult the case file to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3[26]).

[22] First Section; Case Of Dolenec V. Croatia; (Application No. 25282/06); Strasbourg 26 November 2009; Final 26/02/2010

6.10.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1967 and is at present serving a prison term in Gospić Prison.

1. Criminal proceedings against the applicant

5. On an unspecified date an investigation was opened in respect of the applicant, who was suspected of having committed a number of thefts and aggravated thefts.

6. On 20 February 2004 a Varaždin County Court investigating judge (istražni sudac Županijskog suda u Varaždinu) issued a warrant for the search of the applicant's flat. The search was carried out by the police on 23 February 2004 and a number of items were seized.

7. The applicant was arrested on 23 February 2004 at 10 p.m. but was released on 24 February 2004 at 6.00 p.m.

8. On 1 March 2004 the applicant was indicted in the Prelog Municipal Court (Općinski sud u Prelogu) on numerous counts of theft and aggravated theft. He was represented in these proceedings by an officially appointed defence counsel.

9. He was arrested again on 2 March 2004 and placed in pre-trial detention in Varaždin Prison (Zatvor Varaždin) and later on in other prison facilities (see below).

10. During the criminal proceedings against him, the applicant was examined by a psychiatrist and, in a psychiatric report of 16 May 2004, it was established that the applicant suffered from post-traumatic stress disorder (PTSD).

11. In a judgment of the Prelog Municipal Court of 26 August 2004 the applicant was found guilty of twenty counts of theft and aggravated theft and sentenced to six years and six months' imprisonment. The applicant appealed against the judgment to the Čakovec County Court (Županijski sud u Čakovcu) complaining about the outcome of the proceedings and also that his defence rights had been violated in that he had not been informed of the hearings in time to prepare his defence and that he had not had sufficient contact with the officially appointed defence counsel.

12. On 1 October 2004 the applicant was taken to the Prelog Municipal Court, where he examined the case file. His request that certain documents be copied for him was complied with.

13. The first-instance judgment of 26 August 2004 was quashed on 14 January 2005 by the Čakovec County Court which extended the applicant's detention at the same time. The first-instance judgment was quashed, inter alia, on the grounds that the applicant had not been informed of the hearings in time to prepare his defence and that he had not had sufficient contact with the officially appointed defence counsel.

14. On 30 January 2005 the applicant lodged a request with the Prelog Municipal Court seeking permission to contact his officially appointed defence counsel and some other persons. On 2 February the Municipal Court allowed the applicant unrestricted telephone communication with his defence counsel.

15. At a hearing held on 3 February 2005 the applicant challenged the presiding judge for bias. The defence counsel opposed the challenge. The hearing was adjourned pending the decision on the applicant's objection. In his submission of the same date the defence counsel requested to be relieved of his duties.

16. On 4 February 2005 the President of the Prelog Municipal Court dismissed the applicant's challenge to the presiding judge as unfounded. On the same day the presiding judge relieved the officially appointed defence counsel of his duties and the president of the court appointed a new defence counsel. The applicant was allowed unrestricted telephone communication with his new counsel.

17. On 14 February 2005 the applicant informed the presiding judge that his attempts to contact his newly appointed defence counsel had remained unsuccessful, since there had been no answer to his calls, and requested a visit from his defence counsel in prison since the next hearing had been scheduled for 17 February 2005. On the same day the presiding judge allowed an unlimited number of visits to the applicant's sister and mother but made no decision about the request concerning the defence counsel. However, the hearing scheduled for 17 February 2005 was adjourned on the oral request of the defence counsel, in order to prepare the defence. The next hearing was scheduled for 10 March 2005.

18. In the meantime, on 11 February 2005, the Prelog Municipal Court further extended the applicant's detention. A subsequent request by the applicant that his detention be lifted was dismissed on 23 March 2005 by the Prelog Municipal Court. The applicant appealed against this decision.

19. On 7 March 2005 the applicant lodged a request with the presiding judge for leave to consult the case file. He alleged that on 1 October 2004, when he had been brought to the

Prelog Municipal Court, he had not had sufficient time to consult the entire file and that not all copies he had requested had been given to him and that at that time the case file had not yet been completed. This request remained unanswered.

20. At the beginning of the hearing of 10 March 2005 the applicant insulted the presiding judge and was removed from the courtroom, followed by his defence counsel. Soon afterwards counsel returned and challenged the presiding judge, and the hearing was adjourned. On 14 March 2005 the President of the Prelog Municipal Court dismissed the challenge as unfounded.

21. Upon the appeal by the applicant against the decision of 23 March 2005, on 30 March 2005 the Čakovec County Court quashed the first-instance decision and ordered the applicant's immediate release. It found that, pursuant to the relevant provisions of the Criminal Procedure Act, the statutory time-limit for the applicant's detention had expired on 2 March 2005 and that therefore there had been no grounds for keeping him in detention after that date.

22. The applicant was released on 30 March 2005. On 31 March 2005 the presiding judge relieved the applicant's officially appointed defence counsel of his duties.

23. The next hearing before the Prelog Municipal Court was held on 1 April 2005. The applicant was present in person, but legally unrepresented. The transcript of the hearing shows that the applicant expressly stated that he did not want a defence counsel and decided to remain silent. The applicant did not sign the transcript of the hearing. In a judgment adopted on the same day, the first-instance court again found the applicant guilty of twenty counts of theft and aggravated theft and sentenced him to six years and six months' imprisonment. Immediately after the hearing the applicant was detained and placed in Varaždin Prison. On the same day the same defence counsel was officially assigned to the applicant.

24. The applicant appealed against the first-instance judgment on 4 and 22 April 2005, alleging that his defence rights had been violated in that he had not been given an opportunity to consult the case file. He alleged that on 1 October 2004 he had been brought to the Prelog Municipal Court in order to consult the case file. However, owing to the large volume of documents in the case file, the time allowed for that purpose had not permitted him to consult all the documents he had wished to. It had therefore been agreed that the requested documents would be copied and sent to him in prison. However, this request had only partially been

complied with and he had never had an opportunity to read the whole case file. He further alleged that he had complained about this at the hearing held on 1 April 2005 but that his allegations had been ignored. He further complained that the search of his premises had been carried out in contravention of the relevant provisions of the Code of Criminal Procedure because the requirement that two witnesses be constantly present had not been complied with. He also complained about the qualification of some of the offences as aggravated theft instead of theft and about the severity of the sentence.

25. On 18 April 2005 the officially appointed defence counsel also lodged an appeal, referring to the factual findings of the first-instance court.

26. On an unspecified date the applicant asked the Prelog Municipal Court if he could consult the case file. In its letter of 28 April 2005 addressed to the Head of Prison Administration at the Ministry of Justice, a copy of which was also forwarded to the applicant, the president of that court allowed the applicant's request. The applicant then requested that a date be fixed for consulting the case file. The President of the Prelog Municipal Court replied that the consultation was not possible because the case had been forwarded to the Čakovec County Court upon an appeal against the first-instance judgment. In a letter of 13 May 2005 a judge of the same court informed the applicant that his request had been granted and that the case file had been forwarded to the Čakovec County Court.

27. On 17 May 2005 the Čakovec County Court allowed the applicant's appeal in the part concerning the qualification of certain offences and reduced the sentence to six years and four months' imprisonment while dismissing the remainder of his complaints. The relevant parts of the appeal judgment read as follows:

"In his personal appeal the defendant complains of serious breaches of the provisions regulating criminal proceedings, [these being] his inability to consult the case file; reliance of the impugned judgment on evidence under Article 9, paragraph 2, of the Code of Criminal Procedure, namely, the written record of the search of his flat and other premises, and the allegation that the identification of items (as potential evidence) by the injured parties had not been carried out in accordance with Article 243 (a) of the Code of Criminal Procedure.

The officially appointed defence counsel also alleges in his appeal that there was a serious breach of the provisions regulating criminal proceedings in the reliance of the first-instance judgment on illegally obtained evidence, because the search of the defendant's premises had been carried out without the simultaneous presence of two witnesses.

The search of the defendant's flat and other premises at the address Donji Kraljevec, Gornji kraj no. 13, was carried out by the police pursuant to search warrant no. Kir-75/04-02, issued by a Varaždin County Court investigating judge on 20 February 2004 and served on the defendant beforehand, as can be seen from a receipt on page 18 of the first-instance [court] case file. The report of the search of the [defendant's] flat and other premises of 23 February 2004 shows that the search was carried out in the presence of the defendant and two witnesses. On that occasion objects, which were enumerated in the certificates on temporarily seized items, were found and temporarily seized from the defendant. The defendant's assertion that the witnesses were not simultaneously and continually present during the search is unfounded and uncorroborated, since neither the defendant nor the present witnesses put forward any objections. As the search was carried out in compliance with Articles 211 and 214 of the Code of Criminal Procedure, the report in question and the certificates regarding the items temporarily seized from the defendant constitute fully valid and legal evidence.

The defendant's assertion that the first-instance court breached the provisions of the Code of Criminal Procedure [regulating] identification of certain objects in that the injured parties were shown the objects for identification without previously being asked to describe those objects is unfounded. Article 243(a) of the Code of Criminal Procedure requires that a defendant or a witness be asked beforehand to describe a person or an object [to be identified] and describe their distinguishing marks only when necessary; following which the person or the object [to be identified] are to be shown to the defendant or a witness, together with other persons unknown to them, or with similar objects. It follows that this provision does not oblige the court or the police authorities to present the persons identifying [objects as potential evidence] with similar objects at each instance but [this requirement applies] only where possible. In the present case, where a large number of different objects were [to be identified], the police officers were not obliged to act in the manner the defendant argued they were in his appeal and therefore, in the view of this court, the identification of objects [as potential evidence] was carried out in accordance with the law. Therefore, the reports on identification in the present case constitute valid evidence, especially since some of the injured parties emphatically stated at the main hearing that the objects they had been presented with were theirs, which in any event – save for a few of [these objects] – the defendant did not deny in his initial defence.

As regards the [alleged] inability of the defendant to consult the case file, it is to be noted that the [documents] from the case file show that the first-instance court allowed the defendant to

consult the case file on 1 October 2004 (page 520) and that the requested copies of material evidence were served on the defendant in detention on 14 October 2005 (page 572).

The defendant complains that his written request of 7 March 2005 to consult the case file while he was in detention was not granted.

On the basis of the above [considerations], this court considers that in the present case there was no breach of Article 367, paragraph 3, of the Code of Criminal Procedure, since the defendant regularly attended the hearings, where he was able to consult the case file, copy the documents thereof and [examine] the objects aimed at establishing the facts of the case. Furthermore, during practically the entire first-instance proceedings the defendant had an officially appointed defence counsel. Thus, this court finds that there was no breach of his defence rights within the meaning of Article 367, paragraph 3, of the Code of Criminal Procedure.

...

As regards the [allegations] that the facts of the case were wrongly established and incomplete, both appeals allege the same fact: that the first-instance court's refusal to hear evidence from the witnesses to the search resulted in a failure to establish whether the search of the applicant's house and adjoining courtyard had been carried out in accordance with the law.

This court considers that the first-instance court correctly and completely established all the relevant facts, including those concerning the question whether the carrying out of the search on the applicant's flat and other premises was in accordance with the law. In this connection the first-instance court gave valid reasons for its decision not to accept the above-mentioned defendant's request [that two witnesses be heard], which reasons this court entirely endorses ...”

28. The applicant then lodged a request for extraordinary review of a final judgment.

29. In response to repeated requests by the applicant to consult the case file, the President of the Municipal Court informed him in a letter of 7 November 2005 that his request could not be granted because the case file had been forwarded to the Supreme Court.

30. On 22 November 2005 the Supreme Court (Vrhovni sud Republike Hrvatske) dismissed the applicant's request for extraordinary review of a final judgment. The relevant parts of the judgment read as follows:

".. the defendant ... alleges that the impugned judgment rests on unlawfully obtained evidence, namely the report on the search of his flat, and that his defence rights were violated because he was not allowed to consult the case file before presenting his defence.

...

The report on the search of the [defendant's] flat and other premises shows that the search was carried out pursuant to Varaždin County Court search warrant no. Kir 75/04-2 of 20 February 2004; and that two witnesses were present who were instructed at the outset to observe the procedure for carrying out [the search] and informed of their right to make objections before signing the report if they considered its contents to be inaccurate. The defendant was also present. All of these persons signed the report after it had been read to them, without making any objections, thus expressing their agreement with the content of the report.

Such a report is lawful evidence because it shows that the search was carried out in accordance with Articles 213 and 214 of the Code of Criminal Procedure.

The defendant's assertion that the witnesses were not constantly present during the search is an objection to the established facts and cannot be accepted as a valid ground for lodging this extraordinary remedy.

This court may consider the veracity of decisive facts only if a suspicion in that regard arises when it examines a request lodged under Article 427 of the Code of Criminal Procedure. In the present case, bearing in mind the content of the report on the search of the [defendant's] flat and other premises, this panel does not find any reasons to suspect that the search was not carried out in accordance with Articles 213 and 214 of the Code of Criminal Procedure.

Under Article 427(3) a request for extraordinary review of a final judgment may also be lodged [on the allegation that] the defendant's rights were violated at a main hearing.

At the main hearing held on 1 April 2005, when the first-instance judgment was adopted and pronounced, the defendant's rights were not violated. The transcript of the hearing shows that the hearing started anew with a deputy State Attorney reading out the indictment. The defendant was informed of his right to a defence counsel under Article 320, paragraphs 2 and 4, of the Code of Criminal Procedure, but he decided neither to exercise that right nor to present his defence, and remained silent.

The defendant did not object to the procedure followed by the court or ask for the hearing to be adjourned in order to prepare his defence.

The defendant's allegation that the court denied him the right to consult the case file while in detention is irrelevant for the examination of this request because he was informed of his rights at the main hearing, after which he chose not to submit his defence.

..."

31. In reply to a further request to consult the case file, lodged by the applicant on 23 January 2006, the President of the Prelog Municipal Court informed the applicant that his request could not be granted because the case file had been forwarded to the Varaždin Municipal Court (Općinski sud u Varaždinu).

32. A constitutional complaint subsequently lodged by the applicant was declared inadmissible on 23 February 2006 by the Constitutional Court (Ustavni sud Republike Hrvatske) on the grounds that the impugned decision, namely the Supreme Court's judgment of 22 November 2005, had not concerned the merits of the case. The relevant part of the decision reads:

"In accordance with [section 62 of the Constitutional Court Act], only a decision in which a competent court has decided on the merits of a case, namely, on the suspicion or indictment in respect of a criminal offence committed by the applicant, is an individual act within the meaning of section 62(1) of the Constitutional Court Act in respect of which the Constitutional Court, in proceedings instituted upon a constitutional complaint, is competent to protect human rights and fundamental freedoms of the applicant guaranteed by the Constitution of the Republic of Croatia.

In the proceedings before the Constitutional Court it has been established that the impugned judgment of the Supreme Court of the Republic of Croatia no. Kr-83/05 of 22 November 2005 is not an individual act within the meaning of section 62(1) of the Constitutional Court Act in respect of which the Constitutional Court is competent to give constitutional protection to the applicant."

2. Conditions of the applicant's detention

33. The medical documentation submitted by the parties shows that the applicant has been diagnosed as suffering from PTSD and a personality disorder.

The applicant's stay in Varaždin Prison

34. The applicant was arrested on 23 February 2004 at 10 p.m. and released on 24 February 2004 at 6.00 p.m. He was arrested again on 2 March 2004 and placed in pre-trial detention in Varaždin Prison. As to the latter, the applicant alleges that the cells were overcrowded, that he was placed in a smoking cell and that he was only allowed to spend fifteen to twenty minutes a day in the fresh air. On 11 June 2004 the applicant was transferred to Zagreb Prison Hospital further to his complaint that he suffered from being placed in a cell with smokers. The discharge letter of 15 June 2004 shows that no lung disease had been established. The applicant was returned to Varaždin Prison.

35. In a complaint of 7 July 2004 addressed to the Prison Administration of the Ministry of Justice (Uprava za zatvorski sustav Ministartsva pravosuđa), the applicant complained about his placement in a cell with smokers. In a letter of 12 July 2007 of the Varaždin Prison authorities, addressed to the above Administration, it was explained that, owing to overcrowded conditions in that prison, it was not possible to place the applicant in a cell with non-smokers only. This information was forwarded to the applicant in a letter of the Prison Administration of the Ministry of Justice of 16 July 2004.

36. In his complaint of 12 October 2004 addressed to the Varaždin County Court, the applicant complained, inter alia, about the conditions in detention and, in particular, that he was placed in a cell with smokers and was allowed only fifteen to twenty minutes daily outdoor exercise. The applicant's complaints remained unanswered.

37. In October 2004 the applicant was released.

38. The applicant was again detained in January 2005 and placed in Varaždin Prison until 30 March 2005, when he was released.

39. On 1 April 2005, after his conviction by the Prelog Municipal Court, the applicant was arrested and again placed in Varaždin Prison. He was placed in cell no. 15, measuring 10.26 square metres, together with one other inmate, a non-smoker.

40. On 1 May 2005 the applicant made a commotion in his cell by banging chairs and his bed and verbally insulting the prison personnel. He was taken out of his cell and strapped down in a special cell. There is no written record of this measure or its exact duration.

41. During an outdoor walk on 13 May 2005 an attempt by the applicant to hit another inmate was prevented by a prison guard. The applicant was strapped down in a special cell and returned to his regular cell the same day. There is no written record of this measure or its

exact duration. The same day the applicant attempted to attack a prison guard. As a consequence, he was strapped to his bed. There is no written record of this measure or its exact duration. Furthermore, the same day the applicant was transferred to Zagreb Prison Hospital. The relevant part of the discharge letter of 25 May 2005 reads:

"The patient was brought from Varaždin Prison in reactive exacerbation of his mental condition. He was agitated on arrival, with no manifest psychotic or suicidal symptoms. He said that he had been refusing food since 12 May.

... He has continued to refuse food until 23 May, but has been taking liquids and vitamin pills. He has not received any other treatment. He is in a good general condition ... Elements of PTSD. Depressive-paranoid syndrome. Histrionic personality. ...

Recommended treatment: Apaurin ..., psychiatric supervision and more intensive engagement on the part of the treatment services."

42. He was returned to Varaždin Prison to the same cell. The medical record shows that he refused food from 12 to 23 May 2005, but did take liquids and vitamin pills.

43. On 8 June 2005, following an incident in which the applicant started breaking furniture in his cell, he was sent to the prison doctor. However, he verbally insulted the doctor and other medical personnel and was strapped down in cell no. 16. There is no written record of this measure or its exact duration.

The applicant's stay in Zagreb Prison from 13 June to 6 July 2005

44. On 13 June 2005 the applicant was transferred to Zagreb Prison, where he was placed in the Department for Diagnostics and Programming (Odjel za dijagnostiku i programiranje). A report on the general examination of the applicant, in so far as relevant, reads as follows:

"...

DIAGNOSTIC INFORMATION

In the intellectual capacity tests his results are above average. He adequately cooperates during the interview, apologising for having to go on a hunger strike in order to safeguard his rights. Actually, he is highly anxious and over-sensitive, everything bothers him. In terms of his personality, he is impulsive and emotionally unstable. He easily loses control of his behaviour and acts in an emotionally impulsive and inadequate manner. The low tolerance of frustrations is evident, which leads to irritability and accentuated touchiness. His tendency to

react aggressively is marked and he has a significantly lowered capacity to maintain self-control and self-protection, which makes him prone to undertake activities involving a high level of risk. He has no insight into his motives and feelings and is uncritical. The likelihood that he will reoffend is high.

...

WORKING CAPACITY

He is capable for all types of work without restrictions.

PROPOSAL AS TO THE INDIVIDUAL PROGRAMME FOR THE ENFORCEMNT OF THE PRISON TERM

The prison term is to be continued in closed conditions. It is to be expected that his behaviour will be excessive (conflicts, disobedience, refusal of food ...). He may be assigned to a work place according to the needs of the institution. Psychiatric supervision as needed."

RECOMMENDATION OF THE INSTITUTION WHERE THE PRISON TERM IS TO BE CONTINUED

Lepoglava State Prison"

45. The relevant part of the applicant's medical record during his stay in Zagreb Prison reads:

"13 June 2005 ...

In May 2005 [he was] treated at the psychiatric ward of Zagreb Prison Hospital. Pharmacotherapy: Apaurin... At present [he is] agitated, complaining of chest pain ...

Treatment: Apaurin ..., Fluzepan ...

..."

46. On 6 July 2005 the applicant was transferred to Lepoglava State Prison.

The applicant's stay in Lepoglava State Prison from 6 July 2005 to 14 October 2006

47. From July to September 2005 the applicant was placed in cell no. 5, measuring 9.12 square metres, together with three other inmates. Adjacent to the cell and for the exclusive use of the inmates occupying the cell was a tiled area measuring 2.15 square metres. From September to December 2005 the applicant was placed in cell no. 9, measuring 9.82 square

metres, together with three other inmates. He was able to use a bathroom and toilet area measuring 20.9 square metres.

48. On 1 September 2005 the applicant petitioned the Varaždin County Court judge responsible for the execution of sentences (sudac izvršenja Županijskog suda u Varaždinu), complaining about conditions in Lepoglava State Prison. He explained that he had been continually placed in a cell with smokers and that he was detained in overcrowded conditions. He further complained that he had not been receiving any treatment for his psychiatric ailments, in particular the PTSD, and that he was being given no psychiatric treatment at all. He also complained that the examination by a doctor, who had seen him on 8 July 2005 in order to establish his fitness to work in prison, had lasted two minutes. In a letter of 11 October 2005 the judge found that the applicant was allowed to use some of his personal items, that he had complained about his placement in a smoking cell, that he had adequate medical care, and that he had been on hunger strike between 2 and 14 September 2005.

49. Although upon his arrival the applicant was assigned to a non-working group, there were subsequently several attempts to include him in working activities. For a month, starting on 28 October 2005, the applicant worked in a storehouse. Since his work there was found to be unsatisfactory, on 30 November 2005 he was offered work in a therapeutic workshop and placement in a non-smoking cell. However, the applicant refused this offer.

50. On 2 December 2005 the applicant was placed in the Department with increased supervision for a period of three months.

51. From 7 to 20 December 2005 the applicant was on hunger strike. He was subsequently returned to work in a storehouse.

52. On 7 December 2005 the applicant again complained to the Varaždin County Court judge responsible for the execution of sentences about the conditions in prison. The report of the Lepoglava State Prison authorities of 13 December 2005 state, inter alia, that the applicant had been included in the programme for persons suffering from PTSD, without any further details. The applicant's complaints remained unanswered by the competent judge.

53. On an unspecified date the applicant complained about the prison conditions and in particular the lack of adequate medical treatment to the Ministry of Justice. On 2 February 2006 the Ministry asked the Lepoglava Prison authorities to submit their report on the matter. The report of 24 February 2006, in so far as relevant, reads as follows:

“Upon his arrival at the prison the inmate was assigned to a non-working group, and involved in leisure activities and the programme for persons suffering from PTSD as well as to the programme for a computer operator...

The prison doctor saw him on twenty-three occasions and he was twice examined by a psychiatrist. His diagnosis includes depression, paranoia, elements of PTSD and low tolerance towards frustrations. He has regularly been receiving sleeping pills and tranquilisers (Apaurin and Cerson)....”

It was also stated that the applicant had worked for a certain period but had stopped, owing to some conflicts. The applicant sent his reply to the report, in which he stated that he had actually seen a psychiatrist on three or even four occasions, but each time at his insistence although a discharge letter from Zagreb Prison Hospital of 25 May 2005 requested that he receive regular psychiatric supervision. He further asserted that he had not been able to attend group therapy sessions for persons suffering from PTSD because he had had no access to information about the time of these sessions. No decision was taken upon the applicant's complaint.

54. In April and May 2006 the applicant had a number of arguments with other inmates, which culminated on 10 May 2006 in a fight with another inmate. The applicant was transferred to the Department with increased supervision, owing to which he refused to take food. He also refused a psychiatric examination scheduled for 11 May 2006.

55. In his appeal of 16 May 2006 against a decision of the Lepoglava State Prison authorities to place him in a Strict Supervision Department, addressed to the Varaždin County Court judge responsible for the execution of sentences, the applicant complained, inter alia, that he had not been regularly receiving the prescribed pharmacotherapy. He also alleged that on 8 May 2006 he had been attacked by his cellmate, who had allegedly attempted to strangle him. The applicant further complained that he had been forced to share the cell with that inmate although he had complained to the prison authorities that later on that inmate had threatened him and had been allowed to keep a knife in the cell. The applicant also alleged that on 9 May 2006 he had been denied the prescribed pharmacotherapy and had therefore asked one of the guards to take him to the medical ward. The guard, however, had refused and threatened to crush the applicant, following which the applicant had inflicted self-injuries by cutting his veins, whereupon he had been taken to the medical ward within the prison. The applicant also alleged that on 10 May 2006, during breakfast, he had been attacked by another inmate who bit his finger. In the report of 26 May 2006, addressed to the judge responsible for the

execution of sentences, the Lepoglava State Prison authorities stated that the applicant had not complied with the House Rules for a longer period. A report of the incident of 10 May 2006 was enclosed. This report stated that on 10 May 2006 during breakfast the applicant had thrown a plate at inmate M.B., who had been washing the dishes, whereupon M.B. had jumped on the applicant and bit his finger. The applicant had been taken to the medical ward, while M.B. had no injuries. The report did not address any of the incidents described by the applicant. The competent judge did not answer the applicant's complaint.

56. On 30 May 2006 the applicant wrote to the Ombudsman's Office (Pučki pravobranitelj). In a letter of 6 June 2006 addressed to the Head of the Prison Administration, the Deputy Ombudsman reiterated the applicant's allegations that he had been attacked by other inmates on two occasions at the beginning of May and that no steps had been taken against the perpetrators, as well as further allegations that the applicant, although suffering from PTSD, had not received any treatment for over a month and had been placed in a smoking cell.

57. From 30 May to 21 June 2006 the applicant was transferred to Zagreb Prison Hospital. The relevant part of the discharge letter of 21 June 2006 reads:

"The patient was admitted due to the hunger strike he had started on 10 May 2006 because he had been dissatisfied with his treatment in prison.

...

During the first days of his hospitalisation the patient refused food, and [he was] hostile and manipulative; on several occasions during the interviews with a psychiatrist he requested a solution to his problems in connection with the conditions in the prison, being unwilling to correct his behaviour.

...

While in hospital the patient started to take food. He is discharged in a partially better condition ..."

58. During the period the applicant spent in Lepoglava State Prison in May and June 2006 he was placed in cell no. 4, measuring 10.13 square metres, together with one other inmate, and sharing an adjacent toilet area of 1.79 square metres. From June to September 2006 the applicant was placed in cell no. 1, measuring 13.72 square metres, together with three other inmates, also sharing an adjacent toilet area of 2.3 square metres. During this period the

applicant spent two non-consecutive days in solitary confinement in a cell (no. 13) measuring 8.97 square metres.

59. On 1 August 2006 the applicant again petitioned the Varaždin County Court judge responsible for the execution of sentences, complaining about being placed in a smoking cell. The judge replied in a letter of 11 September 2006 that the applicant's transfer to another prison would be considered.

60. On 18 September 2006 an incident involving the use of force against the applicant occurred. The two guards involved in the incident gave oral statements on the same day to the Head of Security Division within the prison. These statements and several written reports of 18 and 19 September 2006 by the Lepoglava State Prison personnel, submitted to the prison governor, all concur that on 18 September 2006 at 12.50 p.m. the applicant had started to shout at some of them and requested to be immediately taken to the prison doctor. One of the prison guards had asked him to wait since the doctor had been with another inmate, but he had continued to shout and hit the walls and metal bars. After he had ignored warnings to calm down, he had lifted a chair and thrown it at the prison guards and continued throwing objects. Another guard had arrived, whereupon one of the guards had taken the applicant by the left hand and the other by the right hand, twisted them behind the applicant's back and handcuffed him. The applicant had continued to utter shouts and threats and had therefore been taken to a special cell where he had been strapped down. He had also refused the prison doctor's attempt to examine him.

61. Further to these reports the Government submitted that the applicant had refused to be examined by the prison doctor or to give a statement about the incident. The Head of Security Division heard the two guards involved in the incident separately. In the next two days the applicant again refused to see the prison doctor. One of the guards made a report on the applicant's refusal to see the prison doctor on 19 and 20 September 2006.

62. From 20 to 29 September 2006 the applicant was placed in Zagreb Prison Hospital. The relevant part of the discharge letter of 27 September 2006 reads:

“The patient was admitted because of suicide threats.

... He expressed dissatisfaction with his treatment in the prison.

During hospitalisation he has been calm, neither suicidal nor productive. He has refused food in order to have his paramedical problems resolved. He does not consider himself as ill. He insists on being discharged.

...

Since the patient is not in vital danger, [and he is] productive, against suicide, he is to be discharged and it is recommended that he be placed in a day-care department."

63. Meanwhile, on 25 September 2006 the applicant again petitioned the Varaždin County Court judge responsible for the execution of sentences, complaining about his placement in a smoking cell. He also referred to the incident of 18 September 2006, alleging that he had been beaten up while in solitary confinement and that his request to see the prison doctor had been ignored. On 6 October 2006 the judge asked the Lepoglava State Prison authorities whether it was possible to place the applicant in another penal institution. The applicant's allegations about the attack of 18 September 2006 were ignored.

64. During the periods when the applicant did not work his daily regime was as follows:

7 a.m. – 7.30 a.m. – wake up, personal hygiene, cleaning of cells

7.30 a.m. – 7.45. a.m. – distribution of medicines

7.45 a.m. – 8.15 a.m. – breakfast

8.15 a.m. – 9.45 a.m. – outdoor exercise, stay in cells or TV-room, making telephone calls

11.30 a.m. – 11.45 a.m. – medical treatment

11.45 a.m. – 12. 15. p.m. – lunch

12.15 p.m. – 2.00 p.m. – outdoor exercise, sport activities

2.00 p.m. – 3.00 p.m. – return to cells, washing and personal hygiene

3.00 p.m. – 5.00 p.m. – stay in cell or in TV-room or making telephone calls

5.00 p.m. – 5.15 p.m. – distribution of medicines

5.15 p.m. – 5.45 p.m. – dinner

5.45 p.m. – 7.00 p.m. – stay in cell or TV-room

7.00 p.m. – line-up

7.00 p.m. – 7.30 p.m. – cleaning of corridors, stairs, sanitary facilities and disposal of garbage

8.00 p.m. – optional stay in cells

9.00 p.m. – lights out

10.45 p.m. – television sets switched off

65. During the period the applicant worked his daily regime was as follows:

6.00 a.m. – 6.30 a.m. – wake up, personal hygiene, cleaning of cells, distribution of medicines

6.30 a.m. – 6.50 – a.m. – breakfast

6.50 a.m. – 7.00 a.m. – departure for work

7.00 a.m. – 3.00 p.m. – work (with a meal break from 10.00 a.m. to 10.30 a.m.)

3.p.m. – 5.15. p.m. – lunch, outdoor exercise, optional stay in cell or TV-room, washing, making telephone calls

5.30 p.m. – 6.00 p.m. – distribution of medicines, personal hygiene

7.00 p.m. – line-up

7.00 p.m. – optional stay in TV-room

8.00 p.m. – optional stay in cell

9.00 p.m. – lights out

10.45 p.m. - television sets switched off

66. During his stay at the Department with increased supervision the applicant's daily regime was as follows:

6.00 a.m. – 8.00 a.m. – wake up, personal hygiene, cleaning of cells

8.00 a.m. – 8.15. a.m. – distribution of medicines

8.15 a.m. – 8.45 a.m. – breakfast

8.45 a.m. – 9.a.m. – personal hygiene

9.00 a.m. – 11.00 a.m. – outdoor exercise for one group while the other group stays in TV-room

11.00 a.m. – 11.45. a.m. – personal hygiene of the group that went outdoors

11.45 a.m. – noon – distribution of medicines

Noon – 12.30 p.m. – lunch

1.00 p.m. – 2.00 p.m. – personal hygiene

1.00 p.m. – 2.00 p.m. – stay in cells

2.00 p.m. – 4.00 p.m. – outdoor exercise for one group while the other group stays in TV-room

4.00 p.m. – 5.00 p.m. – personal hygiene of the group which went outdoors

5.00 p.m. – 5.45 p.m. – stay in cells

6.00 p.m. – 6.30 p.m. – dinner

6.30 p.m. – 7.00 p.m. – personal hygiene

7.00 p.m. – line up

7.00 p.m. – 7.30 p.m. – cleaning of corridors, stairs, sanitary facilities and disposal of garbage

8.00 p.m. – optional stay in cells

9.00 p.m. –lights out

10.45 p.m. – television sets switched off

67. The Government submitted that at his arrival at Lepoglava State Prison the applicant had been included in the programme for prisoners suffering from PTSD and that in addition he had been continuously monitored by a psychiatrist. Later on, owing to the applicant's ill-adapted behaviour and conflicts with other prisoners he had been offered the possibility of joining a different therapy workshop, which he had refused. The Government did not specify, however, the dates of the applicant's group or individual therapy sessions.

68. The Government submitted the Lepoglava State Prison programme of therapy for inmates suffering from PTSD. The programme included one-hour weekly meetings of three small

groups (five to twelve persons) who met on their own in order to discuss their problems. Each group was led by a member of the prison personnel. The qualifications or occupation of these persons was not specified; nor was it specified whether they attended the group meetings or not. The therapists met once a month with two psychiatrists in and outside the prison clinic and once a month in the prison. Participation in therapy groups was voluntary.

69. The relevant part of the applicant's medical record during his stay in Lepoglava State Prison reads:

"1 September 2005

Psychiatric examination at the medical ward of Lepoglava State Prison. During the current examination he is neither psychotic nor suicidal. He says that he has not been taking food for a week. He asks to be placed in a non-smoking cell and to be given treatment for headaches and sleep deprivation.

Treatment: Fortevit ..., Apaurin ..., Fluzepan

...

7 December 2005

Psychiatric examination: conscious, well-orientated, no signs of psychosis, [he] is not suicidal, [he is] very tense, has very low level of tolerance towards frustrations

...

20 April 2006

He saw a psychiatrist at the medical ward of the Lepoglava State Prison.

Treatment: Apaurin ..., Sanval ...

He is currently on hunger strike.

...

10 May 2006

Alleges fight with another inmate, who allegedly bit his finger.

D[ia]g[nosis]: Vulnus morsum? [a wound by biting]? Indicis m.l.sin. [marks on middle left finger], Regio ph. Medialis [middle zone].

Alleges that he will go on hunger strike.

...

20 July 2006

Psychiatric examination: [he is] neither psychotic nor suicidal, [he is] anxious, tense with low level of tolerance, allegedly worried, asks for hospitalisation which is unfounded.

...

20 July 2006

Hospitalisation was ordered, but he refused to go to Zagreb Prison Hospital.

...

He returned to the medical ward at 5.40 p.m., revolted, wanting to go to the hospital today although at 2 p.m. he had refused it. He took out a razor blade and made a few cuts on the surface of his left forearm. ...

[He] made threats of inflicting further self-injuries if not taken to the hospital today. Hospitalisation was ordered, but there was no capacity in the hospital to admit him. ...

21 July 2006

Sent to Zagreb Prison Hospital.

24 July 2006

The admission report from Zagreb Prison Hospital of 21 July 2007: '... [the patient] is shouting, threatening to beat other patients, asking to be placed in a non-smoking room, making threats against the hospital personnel because there is only one bed available and there is no separate room for non-smokers. He does not want to stay in the hospital because he cannot get desired accommodation. He refuses to take Apaurin in his veins. He is very unpleasant, uttering threats and blackmail. Since his condition is not life-threatening and given that the patient is refusing the treatment offered, he shall be returned to prison.

Started eating so as not to be removed form Division 8 of the Prison.

...

18 September 2006

... he has been placed in solitary confinement, handcuffed to a bed. He is anxious, verbally aggressive, dissatisfied with being handcuffed, bangs on the bed with his handcuffs and asks to be released. [He] is not psychotic or suicidal ... It has not been possible to examine him because he is very restless and is banging on the bed with his handcuffs, so that it has not been possible to approach the inmate in bed.

5 October 2006

[He] refused to see a psychiatrist.

..."

70. On 14 October 2006 the applicant was transferred to Gospić Prison.

The applicant's stay in Gospić Prison from 14 October 2006 to 6 January 2007

71. The applicant was placed, together with one other inmate, in a cell measuring 13.13 square metres with an adjacent toilet area measuring 3.2 square metres. The cell was furnished with two beds, two cupboards, a table and two chairs. A bathroom was available to the applicant the whole day. He did not work.

72. During his stay in this prison the applicant did not work and did not receive any treatment for his PTSD. His daily regime was as follows:

6.30 a.m. – wake up

6.30 – 7.00 a.m. – personal hygiene

7.00 – 7.30 p.m. – breakfast

7.30 – 8.30 – possibility to see prison doctor

One hour between 8.30 a.m. and 1.00 p.m. – outdoor exercise

1.00 p.m. – 1.30 p.m. – lunch

One hour between 1.30 p.m. – 5.00 p.m. – exercise in the sports hall

3.00 p.m. – 6.00 p.m. – leisure time, one-hour outdoor exercise

6.00 p.m. – 6.30 p.m. – dinner

6.30 p.m. – 8.00 p.m. – leisure time

8.00 p.m. – 10.00 p.m. – stay in TV-room or reading

10.00 p.m. – bed-time

73. On 6 November 2006 the applicant complained to the Head of the Prison Administration about the conditions in prison. He was answered in a letter of 30 November 2006 stating that his treatment had been humane, professional and in accordance with the legislative standards.

74. On 6 January 2007 the applicant was transferred to Pula Prison

The applicant's stay in Pula Prison from 6 January to 5 November 2007

75. Initially, he was placed, together with another inmate, a non-smoker, in a cell measuring 10.2 square metres, furnished with two beds, two cupboards, a table and two chairs, with an adjacent toilet area measuring 3.98 square metres. The cell was heated by a radiator. The applicant did not work, had the possibility of spending time outdoors every day between noon and 2 p.m. and again between 6.30 p.m. and 8.30 p.m. During his leisure time the applicant was involved in the computer group.

76. On 21 January 2007 an incident occurred involving the use of force against the applicant. According to the Government, at 8 p.m. that day two prison guards, E.L. and I.O., were distributing pharmacotherapy to the inmates in their cells. The applicant had refused to take the prescribed medication. At 10 p.m. he had taken the prescribed medication but also asked for the medicine he had refused to take at 8 p.m.. His request had been refused. After the guards in charge had left his cell the applicant had started shouting and banging. The guards had returned and the applicant had made an attempt to kick one of them. The guards had taken the applicant, pushed him to the floor and handcuffed his hands behind his back. The applicant had continued resisting, hitting and shouting. Two other guards had arrived and the applicant was tied down in a separate cell. One of the guards had noticed a laceration next to the applicant's right eye and asked if he wished to see the prison doctor, which the applicant had refused, demanding to see a psychiatrist. He also refused to sign the report on the incident and the statement that he had not wished to see the prison doctor.

77. On the same day the guard on duty, N.B., made a report on the incident, which was submitted to the Head of Security. The guards E.I. and I.O. also made their reports on the incident. On 24 January E.I. and I.O. gave their oral statements to the officer in charge.

78. On an unspecified date the applicant wrote to the Ministry of Family, War Veterans and Inter-Generational Solidarity, which forwarded his complaint about the conditions in Pula

Prison to the Head of the Prison Administration on 26 January 2007. The complaint remained unanswered.

79. On 8 February 2007 the applicant was transferred to a single occupancy cell measuring 8.73 square metres, with an adjacent toilet area. According to the Government, the cell had a window measuring 0.9 square metres and was heated by a radiator. The applicant was provided with a television set. He was able to use a common bathroom on request.

80. On 17 February 2007 another incident occurred. According to the applicant, he had been placed in solitary confinement and one of the guards thumped him several times on the left side of his chest.

81. On 21 and 22 February the applicant was examined by a doctor. The relevant part of the medical report reads:

"21 February 2007

[The inmate is] complaining about pain in the left hemithorax, trauma not excluded. I have not found visible signs of trauma or haematoma. While breathing he spares left side, pain on palpation of left upper ribs. Sent for an X-ray.

22 February 2007

Pain in the left-rib area. The X-ray examination shows that there are no signs of rib-related trauma or lung alteration. He does not present allergy to medication."

82. On 26 February 2007 the applicant was heard by a judge responsible for the execution of sentences of the Pula County Court. He stated that on 21 January 2007 at around 8 p.m. two prison guards, I.O. and E.L., had been administering pharmacotherapy to the inmates in Pula Prison. The applicant had complained that he had to take his therapy at 10 p.m. The guards had replied that they would make a note that the applicant had refused therapy. The applicant had then opened a cupboard in his cell in order to show them his medical documentation confirming his allegations. Since the guards had left, the applicant had stamped in order to make them return since there was no other way of drawing their attention. The guards had returned and opened the applicant's cell. One of them had stamped on the applicant's foot and the other had hit him in the head, while shouting at him. He further stated that, on 17 February 2007, while he had been placed in solitary confinement, four guards had arrived and strapped him to the bed, which he had not resisted. One of the guards had hit him several times on the

left side of his body. The applicant had begged him to stop since he had heart problems. The same guard had also threatened to leave the applicant strapped down for twenty-four hours.

83. The Pula Prison authorities filed a report with the Pula County Court on 9 March 2007. The relevant part of the report reads:

"...

We have already examined the allegations of the said inmate about the acts of the prison guards of 21 January 2007. The guards involved made their reports and also gave their oral statements. The inmate Branko Dolenec was also interviewed.

It has been established that the guards acted in accordance with the law and that the inmate Branko Dolenec had attempted to diminish his responsibility by saying that he had not been given the prescribed treatment at the right time. He did not wish to give a written statement of the incident. Disciplinary proceedings have been instituted against the inmate Branko Dolenec for disciplinary offences under section 145(2)(8) and 145(3)(8) of the Enforcement of Prison Sentences Act in respect of which there is a reasonable suspicion that he committed them on 21 January 2007 to the detriment of the guards about whose acts he was complaining.

It is true that on 17 February 2007 a special measure of keeping order and security under section 135(6) was applied because there was a danger that he would inflict self-injuries. Beforehand, on the same day he had threatened to inflict self-injuries and repeated warnings had produced no results. In accordance with section 138(2), the applied measure lasted from 8.25 a.m. to 6 p.m. We have no information that on that occasion any of the guards used force against the inmate, or that anyone threatened to keep him tied down for twenty-four hours.

..."

84. In a letter of 23 March 2007 the judge responsible for the execution of sentences of the Pula County Court replied to the applicant that the report submitted by the prison authorities showed that on 21 January 2007 the prison guards had acted in accordance with the law and that on 17 February 2007 he had been placed in solitary confinement because he had threatened to inflict self-injuries and that neither coercive measures had been applied not any threats made against him. The relevant part of the letter reads:

"As regards the event of 21 January 2007, according to the report of the Pula Prison Administration, the guards acted in accordance with the law while you, in order to diminish

your personal responsibility, asserted that you had not received the prescribed medication at the right time.

...

Furthermore, the information submitted by Pula Prison does not show any indication that on 17 February 2007 any force was used against you or that any of the prison personnel threatened to tie you down for twenty-four hours."

85. On 27 March 2007 the applicant objected to the findings of the judge responsible for the execution of sentences and reiterated that on 17 February 2007 he had been strapped down for twelve hours in solitary confinement and beaten up by a prison guard. He further complained of lack of treatment for PTSD. On 16 May 2007 the judge replied to the applicant by letter, stating that his objections were unfounded.

86. On 24 May 2007 the applicant was assigned to work in the prison shop. According to the Government, until 6 August 2007 his comportment was fully satisfactory, when he suddenly started to verbally insult the prison personnel and other inmates. Owing to such frequent incidents and his exacerbated psychiatric condition, on 24 August 2007 he had again been assigned to a non-working group.

87. From 24 September to 3 October 2007 the applicant worked in the prison library. On the latter date he again started verbally insulting and attempting to physically attack the prison personnel because he was dissatisfied with the prospect of being placed in a cell with another inmate.

88. On 4 October 2007, owing to his worsening psychiatric condition and the self-infliction of injuries, the applicant was transferred to Zagreb Prison Hospital. The relevant part of the discharge letter of 18 October 2007 reads as follows:

"Diagnosis: Personality disorder

PTSD

The patient was admitted ... because of self-inflicted injuries. On arrival he was upset and in corresponding mood, with accelerated and widened thought processes, querulous and with a number of projections but without clear psychotic indications. He did not show aggressive or further auto-aggressive drives. His complaints about his treatment in Pula Prison included allegations that he had been placed in the pre-trial detention ward in a cell with smokers. He

also asserted that he had been beaten up a few days prior to his arrival at the hospital. Lacerations and older haematomas on his back and a haematoma in regression on his thigh were visible on arrival. There were no visible injuries to his head.

During his stay in the hospital he was demanding, querulous, upset, constantly insisting on the alleged injustice done to him. There were no psychotic signs or aggressive or auto-aggressive drives. Only after his treatment had been altered did he become somewhat calmer and more willing to co-operate, although still persisting in his demand for "the just".

...

There are no indications for hospital treatment. Placement in a calmer and non-smoking cell is recommended together with stricter supervision and stronger efforts on the part of the treatment services as well as regular pharmacotherapy: Haldol ..., Akineton ..., Fluzepan ... and Brufen ... with regular psychiatric supervision, starting in two weeks."

89. On 19 October 2007 the applicant was returned to Pula Prison and placed in a single-occupancy cell identical to the one in which he had stayed prior to his transfer to the hospital. The Government submitted that although there had been group therapy for inmates suffering from PTSD in Pula Prison since 5 October 2007, the applicant, owing to his mental condition which included impulsive behaviour, emotional instability and tendency towards aggressive behaviour, had not been included in that therapy. However, they submitted that psychiatric supervision had been carried out as needed, without any further details.

90. The relevant part of the applicant's medical record during his stay in Pula Prison reads:

"24 April 2007

An interview. [He] announces a hunger strike as of today and [expresses an intention to inflict] self-injuries. [He is] upset, communication is not possible ...

Stricter supervision measures for seven days [are recommended]. Therapy: none.

...

24 August 2007

At 4 a.m. today he was taken to a psychiatrist at Pula General Hospital ... Hospitalisation in the Psychiatric Ward of Zagreb Prison Hospital was recommended. Treatment: Apaurin ..., Fluzepan ...

He could not be admitted to Zagreb Prison Hospital owing to the lack of space. He was calm during the second interview [with a psychiatrist], there was no further indication for hospitalisation in Zagreb Prison Hospital. Placement in a separate non-smoking cell was recommended.

...

4 October 2007

Yesterday [he inflicted] self-injuries ... [there is] redness on his neck and back and several lacerations measuring approximately 2 cm, haematoma measuring 2 to 8 cm. [He is] upset, tense, anxious, expresses suicidal thoughts and intentions. Given Prazine ... and it was recommended [to take him to] the Psychiatric Ward of Zagreb Prison Hospital.

25 October 2007

[He] is not taking the treatment prescribed.

...”

91. On 5 November 2007 the applicant was transferred back to Lepoglava State Prison.

The applicant's stay in Lepoglava State Prison from 5 November 2007 to an unspecified date in 2008

92. The relevant part of the applicant's medical record during his second stay in Lepoglava State Prison reads:

“16 November 2007

Psychiatric examination in Lepoglava State Prison: [he is] conscious, well orientated, [he is] not suicidal, [there are] no signs of psychosis, [there is] low frustration tolerance, [he is] dissatisfied with his placement, treatment and other. Placement in a smaller, non-smoking cell is recommended. [He] refuses the treatment offered (Haldol). Treatment: Apaurin ..., Fluzepan ..., stronger involvement on the part of the treatment services. D[ia]g[nosis]: Personality disorder, PTSD. [Next] check in a month.

...

28 November 2007

Psychiatric examination in Lepoglava State Prison by a psychiatrist from Zagreb Prison Hospital.... Placement in a smaller non-smoking cell is recommended.... Patient [is] motivated to work. It is recommended that he works if possible, which would also be curative. Psychiatric supervision as needed. D[i]g[anosis]: the same. Treatment: the same. ...

...

4 December 2007

Psychiatric examination in Lepoglava State Prison ... Allegedly the patient is not eating because the recommendations by psychiatrists have not been followed. We request that these recommendations be followed. On examination he is neither psychotic nor suicidal. Psychiatric supervision as needed.

...

18 December 2007

Psychiatric examination in Lepoglava State Prison ... tolerance towards frustrations still low, [he is] dissatisfied with treatment, [but is] motivated to work. Placement in a smaller, non-smoking cell is recommended as well as including him in the PTSD group.

Treatment: Apaurin ..., Sanval ...

Psychiatric supervision as needed.

...

15 January 2008

Psychiatric examination in Lepoglava State Prison ... somewhat better in view of his new job and a smaller cell, which had so far been the biggest problem. Ventilation interview. Treatment: Apaurin ..., Sanval."

The applicant's further transfers

93. On an unspecified date in 2008 the applicant was transferred to Varaždin Prison where he stayed until 27 April 2009 when he was transferred to Zadar Prison. On 8 June 2009 he was transferred to Pula Prison and on 28 July 2009 to Zagreb Prison.

3. Civil proceedings instituted by the applicant against the State

94. As to the twenty-eight days of his unlawful detention between 2 and 30 March 2005, on 28 October 2005 the applicant applied to the Ministry of Justice (Ministarstvo Pravosuđa) for compensation in the sum of 500 Croatian kunas (HRK) per day and HRK 5,500 for lost earnings. Since he received no reply, the applicant brought a civil action against the State in the Prelog Municipal Court, seeking the above amounts in connection with his unlawful detention. He also complained that since 2 March 2004 he had been detained in inadequate, small and overcrowded cells and only allowed to spend fifteen to twenty minutes a day in the fresh air, and also that he had been detained with smokers, minors and convicts between 14 July and 26 September 2004. He further complained of inadequate conditions in the prison hospital and Lepoglava State Prison, as well as inadequate medical care. In this connection he alleged that he had not been provided with eye glasses and that an examination of his head had been carried out late, while an examination of his spine had not been carried out at all, and that he had not been provided with the requisite psychiatric treatment although he suffered from PTSD. He also alleged that he had been strapped to his bed and forced to spend long periods confined in the same room with smokers, all of which resulted in immense physical and mental suffering. The applicant complained in addition that he had had no opportunity to consult the case file during the criminal proceedings against him. He sought HRK 469,500 under all the above heads.

95. On 24 April 2006 the Prelog Municipal Court declared the applicant's action inadmissible on the grounds that he had failed to firstly seek compensation with the competent State Attorney's Office. The first-instance decision was quashed by the Čakovec County Court and the case was remitted to the Municipal Court for fresh examination. On 7 November 2008 the Municipal Court again declared the applicant's claim inadmissible on the same grounds. The applicant lodged an appeal and the appeal proceedings are still pending.

II. RELEVANT DOMESTIC LAW

96. Article 23 of the Croatian Constitution (Ustav Republike Hrvatske) provides:

“No one shall be subjected to any form of ill-treatment ...”

97. The relevant part of section 62 of the Constitutional Court Act (Official Gazette no. 49/2002, of 3 May 2002, Ustavni zakon o Ustavnom sudu Republike Hrvatske) reads as follows:

Section 62

“1. Anyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which has determined his or her rights and obligations, or a suspicion or accusation of a criminal act, has violated his or her human rights or fundamental freedoms or his or her right to local and regional self-government guaranteed by the Constitution (hereinafter: constitutional right) ...

2. If there is provision for another legal remedy in respect of a violation of the constitutional rights [complained of], a constitutional complaint may be lodged only after this remedy has been exhausted.

...”

98. The relevant part of the Code of Criminal Procedure (Official Gazette nos. 62/2003 – Zakon o kaznenom postupku) provides as follows:

Article 4

“(1) The defendant shall be informed of any charge against him and the grounds thereof from the time of the first interview.

(2) The defendant shall have the opportunity to give his or her statement on all incriminating facts and evidence, as well as facts and evidence favourable to him.

(3) The defendant is obliged neither to present his or her defence nor to answer any question. It is forbidden and punishable to extort a confession or any other statement from the defendant or any other person participating in the proceedings.”

Article 5

“(1) The defendant has the right to defend himself or herself in person or through legal counsel of his or her own choosing from among the members of the Bar. Where prescribed by this Code, defence counsel shall be officially appointed in order to ensure [the right to] defence of a defendant who has declined to appoint a defence counsel.

(2) Under the conditions set out in this Code, a defendant who, owing to the lack of means to pay for legal assistance, has not chosen a defence counsel shall be provided, at his or her request, with a defence counsel at the expense of the court [conducting the proceedings].

(3) The court or another authority participating in the proceedings shall inform the defendant of his or her right to a defence counsel from the time of the first interview.

(4) The defendant shall have adequate time and facilities for the preparation of his or her defence."

Article 13

"The court [conducting the criminal proceedings] shall inform a defendant ... of his or her rights guaranteed under this Code and the consequences of failure to undertake a step required therein."

Article 65

"A defendant in pre-trial detention shall have access to a defence counsel as soon as a decision [to place him or her in] detention has been adopted and as long as the detention lasts."

Article 104

"(1) Detention may be imposed only if the same purpose cannot be achieved by another [preventive] measure.

(2) Detention shall be lifted and the detainee released as soon as the grounds for detention cease to exist.

(3) When deciding on detention, in particular its duration, the court shall take into consideration the proportionality between the gravity of the offence, the sentence which ... may be expected to be imposed, and the need to order and determine the duration of detention.

(4) The judicial authorities conducting the criminal proceedings shall proceed with particular urgency when the defendant is in detention and shall review of their own motion whether the grounds and legal conditions for detention have ceased to exist, in which case the detention measure shall immediately be lifted."

Article 105

"(1) Where a reasonable suspicion exists that a person has committed an offence, that person may be placed in detention:

...”

The relevant provisions regulating the duration of detention read as follows:

Article 110 provides, inter alia, that detention ordered by an investigating judge may last one month and may be extended, for justified reasons, by a three-member judicial panel for two more months and after that for another three months. However, the maximum duration of detention during investigation shall not exceed six months.

Article 111 provides, inter alia, that following indictment detention may last until the judgment becomes final and after that until the decision imposing a prison sentence becomes final. In that period a judicial panel of three members shall assess every two months whether the conditions for detention still exist.

Article 114

“(1) Prior to adoption of the first-instance judgment pre-trial detention may last for a maximum of:

...

2. one year for offences carrying a sentence of a statutory maximum of five years' imprisonment;

...

(2) In cases where a judgment has been adopted but has not yet become operative, the maximum term of pre-trial detention may be extended for one sixth of the term referred to in subparagraphs 1 to 3 of paragraph 1 of this provision until the judgment becomes final, and for one fourth of the term referred to in subparagraphs 4 and 5 of paragraph 1 of this provision.

(3) Where the first-instance judgment has been quashed on appeal, following an application by the State Attorney and where important reasons exist, the Supreme Court may extend the term of detention referred to in subparagraphs 1 to 3 of paragraph 1 of this provision for another six months and the term referred to in subparagraphs 4 and 5 of paragraph 1 of this provision for another year.

(4) Following the adoption of the second-instance judgment against which an appeal is allowed, detention may last until the judgment becomes final, for a maximum period of three months.

(5) A defendant placed in detention and sentenced to a prison term by a final judgment shall stay in detention until he is sent to prison, but for no longer than the duration of his prison term."

Article 164

"...

(5) The defendant has the right to consult and copy the case file and items intended for the assessment of facts in the proceedings.

..."

Article 425

"(1) A defendant finally sentenced to a prison term ... may lodge a request for extraordinary review of a final judgment on account of infringements of laws in circumstances prescribed by this Act.

..."

Article 427

A request for extraordinary review of a final judgment may be lodged on account of:

...

3. infringement of the defence rights at the main hearing ...

Article 498

"Compensation may be awarded to a person who

...

3. owing to an error or unlawful action by a State authority ... has been kept in detention after the statutory time-limit had expired ..."

99. Article 217 of the Criminal Code (Osnovni krivični zakon, Official Gazette nos. 110/1997, 28/1998, 50/2000, 129/2000, 51/2001 and 111/2003), imposes, inter alia, a sentence of up to five years' imprisonment for aggravated theft.

100. The relevant part of section 186(a) of the Civil Procedure Act (Zakon o parničnom postupku, Official Gazette nos. 53/91, 91/92, 58/93, 112/99, 88/01 and 117/03 reads as follows:

"A person intending to bring a civil suit against the Republic of Croatia shall first submit a request for a settlement to the competent State Attorney's Office.

...

Where the request has been refused or no decision has been taken within three months of its submission, the person concerned may file an action with the competent court.

..."

101. The relevant provisions of the Enforcement of Prison Sentences Act (Zakon o izvršavanju kazne zatvora, Official Gazette nos. 128/1999 and 190/2003) read as follows:

PURPOSE OF A PRISON TERM

Section 2

"The main purpose of a prison term, apart from humane treatment and respect for personal integrity of a person serving a prison term ... is development of his or her capacity for life after release in accordance with the laws and general customs of society."

PREPARATION FOR RELEASE AND ASSISTANCE AFTER RELEASE

Section 13

"During the enforcement of a prison sentence a penitentiary or prison shall, together with the institutions and other legal entities in charge of assistance after release, ensure that a prisoner is prepared for his or her release [from prison]."

COMPLAINTS

Section 15

"(1) Inmates shall have the right to complain about an act or decision of a prison employee.

(2) Complaints shall be lodged orally or in writing with a prison governor, a judge responsible for the execution of sentences or the Head Office of the Prison Administration. Written complaints addressed to a judge responsible for the execution of sentences or the Head Office of the Prison Administration shall be submitted in an envelope which the prison authorities may not open ...”

JUDICIAL PROTECTION AGAINST ACTS AND DECISIONS OF THE PRISON ADMINISTRATION

Section 17

“(1) An inmate may lodge a request for judicial protection against any acts or decisions unlawfully denying him, or limiting him in, any of the rights guaranteed by this Act.

(2) Requests for judicial protection shall be decided by the judge responsible for the execution of sentences.”

INDIVIDUAL PROGRAMME FOR THE ENFORCEMENT OF A PRISON TERM

Section 69

(1) The individual programme for the enforcement of a prison term (hereinafter “the enforcement programme”) consists of a combination of pedagogical, working, leisure, health, psychological and safety acts and measures aimed at organising the time spent during the prison term according to the character traits and needs of a prisoner and the type and facilities of a particular penitentiary or prison. The enforcement programme shall be designed with a view to fulfilling the purposes of a prison term under section 7 of this Act.

(2) The enforcement programme shall be devised by a prison governor on the proposal of a penitentiary or a prison's expert team ...

(3) The enforcement programme shall contain information on ... special procedures (... psychological and psychiatric assistance ... special security measures ...)

...”

HEALTH PROTECTION

Section 103

“(1) Inmates shall be provided with medical treatment and regular care for their physical and mental health...”

OBLIGATORY MEDICAL EXAMINATION

Section 104

“...

(2) A doctor shall examine a sick or injured inmate ... and undertake all measures necessary to prevent or cure the illness and to prevent deterioration of the inmate's health.”

SPECIALIST EXAMINATION

Section 107

“(1) An inmate has the right to seek a specialist examination if such an examination has not been ordered by a prison doctor.

...”

III. RELEVANT COUNCIL OF EUROPE DOCUMENTS

102. The relevant part of the Report to the Croatian Government on the visit to Croatia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 4 to 14 May 2007 reads:

“84. The provision of adequate psychiatric care was problematic at Lepoglava Prison. Efforts to employ a full-time psychiatrist had not been successful, due to the fact that remuneration and other working conditions fell short of those offered in health establishments; instead, two psychiatrists attended the establishment for a total of six hours a week, and a third from Zagreb Prison Hospital was involved in various programmes for different categories of patients (e.g. drug-addicts, inmates with post-traumatic-stress-disorder (PTSD), sexual offenders).

The CPT recommends that steps be taken to:

- significantly increase the hours of attendance of psychiatrists at Lepoglava Prison;

- ensure that prisoners at Lepoglava, Osijek and Rijeka Prisons benefit from the services of a psychologist.”

6.10.3. The law

I. ALLEGED VIOLATIONS OF ARTICLE 3[39] and 8[21] OF THE CONVENTION

103. The applicant complained about the general conditions of his detention in various prisons and alleged that the prison authorities had failed to secure him adequate medical care for his psychiatric condition, in particular PTSD. He further complained that on several occasions he had been attacked by prison personnel and other inmates and that no steps had been taken in this respect. The applicant also complained of the fact that he had been placed in a cell with smokers. He relied on Articles 3 and 8 of the Convention, which reads as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8

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

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

104. The Government contested these arguments.

A. Admissibility

1. The applicant's stay in Varaždin Prison from March 2004 to 30 March 2005 and in Zagreb Prison from 13 June to 6 July 2005

105. The Government firstly argued that in respect of the period the applicant had spent in Varaždin Prison from March 2004 until 30 March 2005 the application had been lodged with the Court outside the six-month time-limit.

106. The applicant made no comments.

107. The Court notes that the applicant's first pre-trial detention in Varaždin Prison ended on 30 March 2005, when he was released. Thus, the six-month period in respect of the conditions of the applicant's detention in that period started to run on 31 March 2005. As regards the applicant's stay in Zagreb Prison, the Court notes that it ended on 6 July 2005.

108. However, the applicant lodged his application with the Court on 19 May 2006, more than six months later.

109. It follows that the part of the application concerning the applicant's complaints about this stay in Varaždin Prison from March 2004 to 30 March 2005 and in Zagreb Prison from 13 June to 6 July 2005 has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

2. The applicant's detention from 6 July 2005 to 5 November 2007

110. The Government requested the Court to declare the complaints under Article 3 of the Convention inadmissible for failure to exhaust domestic remedies. They submitted that the 1999 Enforcement of Prison Sentences Act envisaged a number of remedies for the protection of the rights of persons deprived of liberty, including judicial protection against proceedings and decisions of the prison administration. The applicant should have firstly addressed his complaints to the prison administration. The applicant had, however, addressed only some of his complaints directly to a judge responsible for the execution of sentences.

111. The applicant argued that he had exhausted all available remedies.

112. According to the Court's established case-law, where an applicant has a choice of domestic remedies, it is sufficient for the purposes of the rule of exhaustion of domestic remedies that that applicant make use of the remedy which is not unreasonable and which is capable of providing redress for the substance of his or her Convention complaints (see, inter alia, Hilal v. the United Kingdom (dec.), no. 45276/99, 8 February 2000, and Krumpel and Krumpelová v. Slovakia, no. 56195/00, § 43, 5 July 2005). Indeed, where an applicant has a choice of remedies and their comparative effectiveness is not obvious, the Court interprets the requirement of exhaustion of domestic remedies in the applicant's favour (see Budayeva and Others v. Russia, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, § 110, ECHR 2008-... (extracts), and the cases cited therein). Once the applicant has used such a remedy, he or she cannot also be required to have tried others that were also available but probably no more likely to be successful (see Ivan Vasilev v. Bulgaria, no. 48130/99, § 56, 12 April 2007 and the cases cited therein).

113. As to the remedies available to the applicant under the Enforcement of Prison Sentences Act, the Court notes that section 5(2) of that Act clearly provides that complaints shall be lodged orally or in writing with a prison governor, a judge responsible for the execution of sentences or the Head Office of the Prison Administration of the Ministry of Justice. It follows that the applicant could have addressed his complaints to any of these authorities (see Štitić.v. Croatia, no. 29660/03, § 27, 8 November 2007).

114. In this connection the Court notes that on 1 September and 7 December 2005 the applicant made complaints to the Varaždin County Court judge responsible for the execution of sentences about the conditions in Lepoglava State Prison and the lack of adequate psychiatric treatment. The latter complaint he repeated to the Ministry of Justice. Again, in his appeal of 16 May 2006 against the decision of the Lepoglava State Prison authorities to place him in a Strict Supervision Department, addressed to the Varaždin County Court judge responsible for the execution of sentences, the applicant complained of the lack of adequate medical treatment and his conflicts with other inmates. The applicant's complaint of 30 May 2006, addressed to the Ombudsman's Office, was forwarded to the Head of Prison Administration. In his further complaint to the Varaždin County Court judge responsible for the execution of sentences, of 25 September 2006, the applicant complained of the use of force against him on 18 September 2006.

115. During his stay in Gospić Prison, on 6 November 2006 the applicant complained to the Head of the Prison Administration.

116. A complaint about conditions in Pula Prison was sent to the Ministry of Family, War Veterans and Inter-Generational Solidarity, which forwarded it to the Head of the Prison Administration on 26 January 2007. The applicant also complained about the incidents in Pula Prison of 21 January and 17 February 2007 in his oral statement given before the Pula County Court judge responsible for the execution of sentences.

117. It follows that the applicant did complain both to the competent judges responsible for the execution of sentences and to the Prison Administration. In the Court's view this choice was in conformity with the domestic legislation. However, the judges did not institute any proceedings upon the applicant's complaints; nor did they issue a decision on them. Instead, they replied to the applicant by letters.

118. The Court finds that the applicant, by complaining to the competent judges responsible for the execution of sentences and the Prison Administration, made adequate use of the

remedies provided for in the domestic law that were at his disposal in respect of his complaints concerning the inadequate prison conditions and the lack of adequate medical assistance as well as the alleged attacks on him by the prison guards on three separate occasions. Accordingly, the complaints concerning the applicant's stay in Lepoglava State Prison from 6 July 2005 to 14 October 2006, in Gospić Prison from 14 October 2006 to 6 January 2007 and in Pula Prison from 6 January to 5 November 2007, cannot be dismissed for failure to exhaust domestic remedies (see Štitić.v. Croatia, cited above, § 30).

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

3. The applicant's further detention from 5 November 2007 on

120. As regards the applicant's stay in various detention facilities after 5 November 2007, the Court notes that the applicant has not shown that he has exhausted available domestic remedies. It follows that this part of the application must be rejected under Article 35 §§ 1 and 4[47] of the Convention for non-exhaustion of domestic remedies.

B. Merits

1. The parties' submissions

121. The applicant made global complaints about his overall detention. He maintained that he had been placed in overcrowded cells, mostly with smokers, although he did not smoke. He further argued that although he had been suffering from post-traumatic stress disorder, he had not received any treatment in this connection. The applicant also alleged that on three separate occasions, namely, on 18 September 2006 and 21 January and 17 February 2007, he had been beaten up by prison personnel and that no adequate steps had been taken by the relevant domestic authorities to investigate these allegations.

122. The Government also submitted global arguments as regards the overall period of the applicant's detention. They argued that the conditions of the applicant's detention had not amounted to inhuman treatment within the meaning of Article 3[39] of the Convention. They maintained that he had had adequate cell space and that he had been able to have at least two hours' fresh air daily. As regards the working opportunities and leisure activities, the Government submitted that during his detention after conviction the applicant had had a

possibility to work and it had depended on him to benefit from it. He had also been able to undergo computer training, watch television or read.

123. As regards the psychiatric treatment, the Government argued that none of the experts had established that the applicant's mental condition had been incompatible with serving a prison term in a regular prison. The applicant had been under constant psychiatric and medical supervision. Whenever his condition had worsened, he had been placed in a hospital or his treatment had been adjusted. He had been administered the prescribed pharmacotherapy. He had been involved in PTSD group-therapy sessions while in Lepoglava State Prison. While in Pula Prison such group sessions had also been provided and the applicant had initially been included. However, owing to his frequent conflicts with other inmates and his general disruptive behaviour his further participation was terminated. There was no indication that his medical condition had worsened during his stay in prison.

124. As regards the alleged assaults on the applicant by the prison personnel, the Government argued that none of them reached the required level of severity under Article 3 of the Convention. On each occasion the use of force against the applicant had been necessary and undertaken solely with the aim of preventing the applicant from attacking others or inflicting self-injuries. On 18 September 2006 the force was used by the prison personnel in order to protect the prison guards from the chair thrown by the applicant at prison guards; that use of force against the applicant had been justified. Although the prison doctor had been immediately summoned, the applicant had refused to be examined. He had made no complaints about the incident. Likewise, as regards the incidents of 21 January and 17 February 2007, the applicant had refused to be examined by a doctor immediately after the incidents and subsequent medical reports showed no injuries on the applicant's body. On each occasion the guards in question were heard by the prison authorities and had made reports on the incidents. As regards the incidents of 21 January and 17 February 2007, the competent judge responsible for the execution of sentences had heard the applicant and obtained the reports from the Pula Prison authorities and concluded that the applicant's allegations were unfounded.

2. The Court's assessment

(a) Scope of the issues for consideration

125. The Court notes that the applicant's complaints under Article 3 and 8 of the Convention mainly concern three issues:

- first, whether the general conditions of the applicant's detention in various prison facilities were compatible with that provision;

- second, whether adequate steps were taken in connection with the applicant's allegations of attacks on him by the prison personnel and other inmates; and

- third, whether the applicant received adequate medical care for his psychiatric condition.

126. As regards the first and the third issue, the Court notes that the period to be examined starts with the applicant's first placement in Lepoglava State Prison on 6 July 2005 and ends on 5 November 2007 when he was again transferred from Pula Prison to Lepoglava State Prison. As regards the period of the applicant's detention prior to 6 July 2005, it is to be noted, as concluded above (see paragraph 110) that that part of the application was lodged with the Court out of the six-month time-limit. As regards the period after the applicant was transferred from Pula Prison back to Lepoglava State Prison on 5 November 2007, it is to be noted that the applicant has not exhausted domestic remedies as regards any complaints concerning his detention following that transfer (see paragraph 121 above).

127. Before addressing further issues as to the applicant's above complaints, the Court notes that it is the master of the characterisation to be given in law to the facts of the case; it does not consider itself bound by the characterisation given by an applicant or a government. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see Powell and Rayner v. the United Kingdom, 21 February 1990, § 29, Series A no. 172, and Guerra and Others v. Italy, 19 February 1998, § 44, Reports 1998 I).

128. In this connection the Court stresses that its case-law does not exclude that treatment which does not reach the severity of Article 3 may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity (see Costello-Roberts v. the United Kingdom, judgment of 25 March 1993, Series A no. 247-C, § 36). In the present case the Court will consider the applicant's complaints concerning the general conditions of his detention and the alleged attacks on him under Article 3 of the Convention, while the remaining complaints, concerning the alleged lack of adequate psychiatric treatment, will be examined under Article 8 of the Convention.

A. COMPLAINTS TO BE EXAMINED UNDER ARTICLE 3 OF THE CONVENTION

1. General principles enshrined in the case-law

129. As the Court has held on many occasions, Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see Labita v. Italy [GC], no. 26772/95, § 119, ECHR 2000-IV).

130. The Court reiterates that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see Kudła v. Poland [GC], no. 30210/96, § 91, ECHR 2000-XI, and Peers v. Greece, no. 28524/95, § 67, ECHR 2001-III). Although the purpose of such treatment is a factor to be taken into account, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3 (ibid., § 74).

2. Application in the present case

a. General conditions of the applicant's detention

131. One of the characteristics of the applicant's detention that requires examination is his allegation that the cells were overpopulated. In this connection the Court observes that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has set 4 sq. m per prisoner as an appropriate, desirable guideline for a detention cell (see, for example, the CPT Report on its visit to Latvia in 2002 – CPT/Inf (2005) 8, § 65). This approach has been confirmed by the Court's case-law. The Court notes that in the Peers case a cell of 7 sq. m for two inmates was noted as a relevant aspect in finding a violation of Article 3, albeit that in that case the space factor was coupled with an established lack of ventilation and lighting (see Peers v. Greece, no. 28524/95, §§ 70–72, ECHR 2001-III). In the Kalashnikov case the applicant had been confined to a space measuring less than 2 sq. m. In that case the Court held that such a degree of overcrowding raised in itself an issue under Article 3 of the Convention (see Kalashnikov v. Russia, no. 47095/99, §§ 96–97, ECHR 2002-VI). The Court reached a similar conclusion in the Labzov case, where the applicant was afforded less than 1 sq. m of personal space during his 35-day period of detention (see Labzov v. Russia, no. 62208/00, §§ 41-49, 16 June 2005), and in the Mayzit case, where the applicant was afforded less than 2 sq. m during nine months of his detention (see Mayzit v. Russia, no. 63378/00, § 40, 20 January 2005).

132. By contrast, in some other cases no violation of Article 3 was found, as the restricted space in the sleeping facilities was compensated for by the freedom of movement enjoyed by the detainees during the daytime (see Valašinas, cited above, §§ 103-107, and Nurmagomedov v. Russia (dec.), no. 30138/02, 16 September 2004).

(i) Lepoglava State Prison from 6 July 2005 to October 2006

133. According to the Government from July to September 2005 the applicant shared a cell measuring 9.12 square metres with three other inmates; from September to December 2005 he shared a cell measuring 9.82 square metres with three other inmates; in May and June 2006 he shared a cell measuring 10.13 square metres with one inmate; from July to September 2006 he shared a cell measuring 13.72 square metres with three other inmates. In all cells there was a separate toiled area. No information was submitted either by the Government or the applicant for the period between December 2005 and May 2006. It follows that the applicant was confined in a space below the standards set by the CPT in the following periods: from July to September 2005 the applicant was confined to a space measuring 2.28 square metres; from September to December 2005 to 2.45 square metres; and from July to September 2006 to 3.43 square metres.

134. The applicant's daily regime during the periods when he did not work allowed for his movement out of cell during the entire day save for the period from 10.45 p.m. to 7.00 a.m. During the daytime he was allowed to either stay in the cell or in a TV-room or to make telephone calls. He was also allowed optional outdoor exercise of an hour and a half twice a day. In the periods when he worked, the applicant was allowed out of the cell from 6 a.m. to 10.45 p.m. After his work ended at 3 p.m., the applicant was allowed optional activities until 5.15 p.m., including an outdoor exercise. In the Court's view, the scarce space of the applicant's cells was compensated for by the freedom of movement allowed. The Court finds no other aggravating circumstances of the applicant's detention in Lepoglava State Prison.

135. The fact that, during his incarceration, the applicant was at times placed in cells with smokers cannot in itself amount to treatment contrary to Article 3 of the Convention because no specific consequences have been cited, such as an established serious effect on the applicant's health.

136. The foregoing considerations are sufficient for the Court to conclude that there has been no violation of Article 3 of the Convention on account of the general conditions of the

applicant's detention in Lepoglava State Prison in the period from 6 July 2005 to 14 October 2006.

(ii) Gospić Prison from 14 October 2006 to 6 January 2007

137. From 14 October 2006 to 6 January 2007 the applicant shared a cell measuring 12.12 square metres with one other inmate. Thus, he was confined to personal space measuring 6.06 square metres, which is in conformity with the standards set by the CPT. The Court finds no other aggravating circumstances of the applicant's detention in Gospić Prison.

138. The Court concludes that the information submitted by the applicant does not suffice for it to find a violation of Article 3 of the Convention on account of the general conditions of the applicant's detention in Gospić Prison in the period from 14 October 2006 to 6 January 2007.

(iii) Pula Prison from 6 January to 5 November 2007

139. From 6 January 2007 to 8 February 2007 he shared a cell measuring 10.02 square metres with one other inmate; and from 8 February 2007 to 5 November 2007 he shared one measuring 8.73 square metres with another inmate, save for the period from 4 to 19 October 2007 when he was in Zagreb Prison Hospital. Thus he was confined to personal space between 5.01 and 4.36 square metres, which is in conformity with the standards set by the CPT.

140. The Court finds no other aggravating circumstances of the applicant's detention in Pula Prison and concludes that the information submitted by the applicant does not suffice for it to find a violation of Article 3 of the Convention on account of the general conditions of the applicant's detention in Pula Prison in the period from 6 January to 5 November 2007.

(iv) Conclusion

141. In conclusion the Court finds that there has been no violation of Article 3 of the Convention as regards the general conditions of the applicant's detention from 6 July 2005 to 5 November 2007.

b. Alleged assaults on the applicant in prison

142. The Court reiterates that where an individual is taken into police custody in good health but is found to be injured at the time of his release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises

under Article 3 (see Selmouni v. France [GC], no. 25803/94, § 87, ECHR 1999 V, and Satık and Others v. Turkey, no. 31866/96, § 54, 10 October 2000).

143. In the Court's opinion, the same principle extends to detainees in a prison having regard to the fact that they are deprived of their liberty and remain subject to the control and responsibility of the prison administration. In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see Tekin v. Turkey, 9 June 1998, Reports 1998-IV, §§ 52 and 53).

144. Where an individual raises an arguable claim that he or she has been seriously ill-treated by the state authorities in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see Assenov and Others, cited above, § 102; Labita v. Italy [GC], no. 26772/95, § 131, ECHR 2000-IV; and Muradova v. Azerbaijan, no. 22684/05, § 100, 2 April 2009). The minimum standards as to effectiveness defined by the Court's case-law also include the requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness (see, for example, Menesheva v. Russia, no. 59261/00, § 67, ECHR 2006 III).

145. The investigation into serious allegations of ill-treatment must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions (see Assenov and Others, cited above, § 103 et seq.). They must take all reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony and forensic evidence (see Tanrıkulu v. Turkey [GC], no. 23763/94, ECHR 1999-IV, § 104 et seq., and Gül v. Turkey, no. 22676/93, § 89, 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard.

(i) Incident of 18 September 2006

146. The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence. In assessing evidence, the Court has generally applied the standard of proof beyond reasonable doubt. However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see Salman v. Turkey [GC], no. 21986/93, § 100, ECHR 2000 VII, and Dedovskiy and Others v. Russia, no. 7178/03, § 74, 15 May 2008).

147. It is not disputed between the parties that on 18 September 2006 force was used against the applicant by prison guards. However, the course of the incident is differently described by the applicant and by the Government. While the applicant asserted that the prison guards had beaten him, the Government, relying on several written reports by the Lepoglava State Prison personnel submitted to the prison governor, alleged that force was used against the applicant strictly for the purposes of responding to his violent behaviour and handcuffing him and strapping him to the bed.

148. The Court notes that the prison doctor arrived immediately afterwards to examine the applicant. In the applicant's medical record the doctor described the applicant as being anxious, verbally aggressive, dissatisfied with being handcuffed and banging against the bed with the handcuffs. The doctor recorded no wounds or any other traces of physical injuries.

149. In view of the above, the Court considers that these indications are insufficient to substantiate the ill-treatment described by the applicant. Thus the Court finds that there is insufficient evidence to support the applicant's allegation that on 18 September 2007 he was beaten by prison guards. Therefore, there has been no substantive violation of Article 3 of the Convention as regards the said incident.

150. The Court reiterates that Article 3 of the Convention also requires the authorities to investigate allegations of ill-treatment when they are “arguable” and “raise a reasonable suspicion” (see Gök and Güler v. Turkey, no. 74307/01, § 38, 28 July 2009). In the present case the Court has not found it proved, on account of lack of evidence, that the applicant was ill-treated. Nevertheless, as it has held in previous case, that does not preclude his complaint in relation to Article 3 form being “arguable” for the purposes of the positive obligation to investigate (see Böke and Kandemir v. Turkey, nos. 71912/01, 26968/02 and 36397/03, § 54, 10 March 2009).

151. The Court notes that it is undisputed that on 18 September 2006 an incident took place in Lepoglava State Prison where physical force was used against the applicant by the prison

guards. Furthermore, in his complaint of 25 September 2006 addressed to the Varaždin County Court judge responsible for the execution of sentences, the applicant alleged, inter alia, that on 18 September 2006 he had been beaten up in Lepoglava State Prison by prison guards. In view of particularly vulnerable position of detained persons and the requirement that any use of physical force by the state officials must be confined to the level of strictly necessary, the Court considers that the above facts called for an investigation into the applicant's allegations of ill-treatment in order to establish all relevant circumstances of the use of physical force against the applicant. However, the applicant's allegations were ignored.

152. As to the Government's argument that the prison personnel involved in the incident made written reports to the prison governor, the Court reiterates that it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see, mutatis mutandis, Güleç v. Turkey, 27 July 1998, Reports 1998-IV, §§ 81-82; Öğur v. Turkey, [GC] no. 21954/93, ECHR 1999-III, §§ 91-92; and McShane v. the United Kingdom, no. 43290/98, § 95, 28 May 2002). This means not only a lack of hierarchical or institutional connection, but also a practical independence (see, mutatis mutandis, Ergi v. Turkey, 28 July 1998, Reports 1998-IV, §§ 83-84).

153. In the present case the written reports and oral statements of the guards involved were made within the prison and were subject to scrutiny by the prison governor, who was the hierarchical superior of the persons implicated in the incident. Furthermore, neither the prison governor nor any other official has issued any decision as to the applicant's allegations. This cannot be seen as a thorough and effective investigation into the applicant's allegations of ill-treatment by the prison personnel carried out by independent and impartial bodies. In the Court's view, the onus was primarily on the Varaždin County Court judge responsible for the execution of sentences, to whom the applicant submitted his complaint of ill-treatment, or other independent prosecuting or judicial authority, to examine the available evidence, such as taking statements from the applicant, the officers involved and the prison doctor, and carrying out an independent assessment of the facts. However, the judge ignored the applicant's allegations.

154. Having regard to the above findings, the Court finds that the inquiry carried out into the applicant's allegations of ill-treatment was not independent, thorough, adequate or efficient. There has accordingly been a violation of Article 3 of the Convention under its procedural limb.

(ii) Incident of 21 January 2007

155. Again, it is not disputed between the parties that on 21 January 2007 force was used against the applicant by prison guards. However, the course of the incident is differently described by the applicant and by the Government. While the applicant asserted that one of the prison guards had stamped on his foot and the other had hit him on the head, the Government, relying on several written reports by the Pula Prison personnel, alleged that the force was used against the applicant strictly for the purpose of responding to his violent behaviour and handcuffing him and strapping him to the bed.

156. The Court notes that there is no medical documentation or any other evidence supporting the applicant's allegations of ill-treatment. Therefore, the Court considers that there is insufficient evidence to support the applicant's allegation that on 21 January 2007 he was ill-treated by prison guards. Therefore, there has been no substantive violation of Article 3 of the Convention as regards the said incident.

157. As to the procedural aspect of Article 3 of the Convention, and especially in the context of detained persons, the Court refers to the principles stated above in paragraphs 150 and 151. In his statement given before the Pula County Court judge responsible for the execution of sentences on 26 February 2007, the applicant alleged, inter alia, that on 21 January 2007 one of the prison guards had stamped on his foot while the other had thumped him on the head. The judge requested the report from the Pula Prison authorities, which report was filed on 9 March 2007, briefly describing the event in question. In a letter of 23 March 2007 the judge dismissed the applicant's allegations. The Court notes that the judge did not hear any of the guards involved in person. As to the report submitted by the Pula Prison authorities, the Court notes that it did not describe the details of the incident, but only briefly stated that a special measure of maintaining order and security had been applied to the applicant because he had previously threatened to inflict self-injuries.

158. As to the Government's argument that the prison personnel involved in the incident submitted written reports to the prison governor, the Court refers to the findings as regards the incident of 18 September 2006 (see paragraphs 152 and 153 above).

159. In sum, the Court considers that there was no thorough, effective and independent investigation into the applicant's allegations of ill-treatment by the prison personnel. There has accordingly been a violation of Article 3 of the Convention under its procedural limb.

(iii) Incident of 17 February 2007

160. As regards the incident of 17 February 2007, the applicant alleged that while being strapped to the bed in solitary confinement one guard had thumped him on the left side of his chest. The Government denied that any force had been used against the applicant that day.

161. The Court notes that four days after the alleged incident, on 21 February 2007, the applicant was examined by the Pula Prison doctor who drew up a report stating that the applicant complained of pain in the left hemithorax and that trauma was not excluded, though the doctor found no visible signs of trauma or haematoma. While breathing, the applicant spared the left side and expressed pain at palpation of the left upper ribs. He was sent for an x-ray examination, which was done on 22 February 2007 and did not reveal any signs of rib-related trauma or lung alteration.

162. In the Court's view, the above medical report does not suffice to conclude beyond reasonable doubt that the applicant had been hit on the left side of his chest. While it is true that he expressed pain on being touched in that area, neither the examination by the prison doctor, nor the x-ray examination revealed any sign of injury. Therefore, the Court considers that there is insufficient evidence to support the applicant's allegation that on 17 February 2007 he was ill-treated by prison guards. Therefore, there has been no substantive violation of Article 3 of the Convention as regards the said incident.

163. As to the procedural aspect of Article 3 of the Convention, the Court first notes that in his statement given before the Pula County Court judge responsible for the execution of sentences on 26 February 2007, the applicant alleged, inter alia, that on 17 January 2007 one of the prison guards had thumped him on the left side of his chest while the applicant had been strapped to a bed in solitary confinement. It follows that the applicant duly informed the relevant national authorities of the substance of his complaints under Article 3 of the Convention. A question now arises as to whether in the specific circumstances of the incident at issue an obligation arose for the relevant State authorities to investigate the applicant's allegations of ill-treatment. In this connection the Court observes that the judge requested the report from the Pula Prison authorities, which report was filed on 9 March 2007 stating that no force had been used against the applicant.

164. The Court finds that because of the lack of clear medical findings that the applicant had any injuries coupled with the lack of any conducive evidence that physical force was used against the applicant, his assertion of ill-treatment against him by the prison guards allegedly occurred on 17 February 2007 lacked credibility and therefore did not entail a procedural obligation under Article 3 of the Convention to investigate the applicant's allegations.

There has accordingly been no violation of Article 3 of the Convention under its procedural limb.

B. COMPLAINTS TO BE EXAMINED UNDER ARTICLE 8 OF THE CONVENTION

165. Private life" is a broad term not susceptible to exhaustive definition. The Court has already held that mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life (see Bensaid v. the United Kingdom, no. 44599/98, § 47, ECHR 2001 I).

166. The Court further reiterates that, while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private (see Van Kück v. Germany, no. 35968/97, § 70, ECHR 2003 VII). However, the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In determining whether or not such an obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual; and in both contexts the State enjoys a certain margin of appreciation (see, for instance, Keegan v. Ireland, 26 May 1994, Series A no. 290, § 49; Sheffield and Horsham v. the United Kingdom, 30 July 1998, § 52, Reports of Judgments and Decisions 1998 V and Mikulić v. Croatia, no. 53176/99, § 57, ECHR 2002 I).

167. The Court firstly notes that it has been established by appropriate experts that the applicant suffers from a personality disorder, PTSD and various other mental ailments. On 13 June 2005 the applicant was placed in the Department for Diagnostics and Programming of Zagreb Prison with a view to assessing his condition in order to decide on which prison he should be placed in and his individual programme. A report drawn up for that purpose indicated that he was impulsive and emotionally unstable, easily lost control of his behaviour, with evident low tolerance towards frustrations, a high tendency to react aggressively, a significantly reduced capacity to maintain self-control and a high likelihood that he would reoffend. Psychiatric supervision, as needed, was recommended (see § 44 above).

168. This indication was reinforced several times. Thus, the discharge letter of Zagreb Prison Hospital drawn up on 25 May 2005 recommended psychiatric supervision of the applicant as needed and more intensive engagement on the part of the treatment services (see paragraph 41

above). The report of 24 February 2006 drawn up by the Lepoglava State Prison authorities indicated that the applicant's diagnosis included depression, paranoia, elements of PTSD and low tolerance on frustrations (see paragraph 53 above). A further discharge letter of the Zagreb Prison Hospital drawn up on 18 October 2007 indicated PTSD as the applicant's diagnosis and recommended his regular psychiatric supervision (see paragraph 88 above).

169. The facts of the case also show that the applicant was prone to conflicts with other inmates and the prison personnel, that he was of aggressive behaviour and that he often went on hunger strike. On several occasions he also inflicted self-injuries. In the Court's view, the above circumstances show that the applicant was indeed in need of a psychiatric supervision.

170. The case therefore raises the question whether the State authorities have taken necessary measures to secure adequate psychiatric supervision of the applicant. In this connection the fact that the applicant is a detainee is of paramount importance since as such he is under the control of the State authorities and is not able of securing the psychiatric supervision on his own but is in that respect dependable on the actions of the relevant prison authorities. Undeniably, detained persons who suffer from a mental disorder are more susceptible to the feeling of inferiority and powerlessness. Because of that an increased vigilance is called for in reviewing whether the Convention has been complied with. While it is for the authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used to preserve the physical and mental health of patients who are incapable of deciding for themselves, and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 8 (see, mutatis mutandis, Sławomir Musiał v. Poland, no. 28300/06, § 96, 20 January 2009).

171. As to the case at issue, the Court agrees with the Government that there was no indication in the applicant's medical record at any stage that called into question his placement in a regular penal institution. It is not for the Court to challenge this record. The Court further notes that none of the psychiatrists who examined the applicant recommended any specific treatment, save for pharmacotherapy, for the applicant's mental condition.

172. It is undisputed that the applicant was prescribed and given pharmacotherapy for his mental condition during his stay in prisons. Furthermore, there is no indication in the documents submitted by the applicant that the conditions of his detention led to a deterioration of his mental health.

173. As regards some other, optional, treatment, the Government submitted that inmates suffering from PTSD were involved in group therapy specifically tailored to their needs. As regards the three penal institutions at issue, such groups were founded in Lepoglava State Prison and Pula Prison.

174. As regards the applicant's stay in Lepoglava State prison, the Government maintained that during his stay there the applicant had initially, from the day of his arrival, been involved in a therapeutic programme for inmates suffering from PTSD. The applicant alleged that he had not been informed of the group sessions and had not attended them. The Court notes that the Government failed to provide any further information on the exact duration and frequency of any therapeutic treatment of the applicant. For that reason the Court is not able to assess whether the applicant did or did not attend any such sessions.

175. While in Pula Prison, from 6 January to 5 November 2007, the applicant initially had been included in group therapy for inmates suffering from PTSD, but was soon excluded. According to the Government, this was because of the applicant's frequent conflicts with other inmates and his disruptive behaviour at the sessions.

176. The Court does accept that, as stated in the medical documents in the file, the applicant is a person prone to conflict and aggressive behaviour (as indeed indicated in his medical record and the opinions of the psychiatrists) and that accordingly his involvement in therapeutic groups might be difficult if at all possible. The Court also observes that the psychiatrists have never specifically recommended that the applicant undergo group therapy.

177. As regards the applicant's psychiatric treatment during his stay in Lepoglava State Prison, the Court notes that during the period of one year and three months that the applicant spent there, he was seen by a psychiatrist on six occasions and once refused to see the prison psychiatrist. He was also hospitalised twice in Zagreb Prison Hospital in connection with his mental condition, first for a period of twenty days from 30 May to 21 June 2006 and then for a period of nine days from 20 to 29 September 2006. During his entire stay in Lepoglava State Prison the applicant received prescription drugs for his mental condition.

178. It transpires from the file that during his stay in Gospić Prison from 14 October 2006 to 6 January 2007 the applicant did not receive any treatment for his psychiatric condition.

179. During the applicant's stay in Pula Prison from 6 January to 5 November 2007 he received prescription drugs. He was twice seen by a psychiatrist and sent to Zagreb Prison Hospital for fourteen days from 4 to 18 October 2007.

180. The Court observes that the applicant received pharmacotherapy as prescribed and was regularly seen by a psychiatrist. He was hospitalised on three occasions, owing to the worsening of his mental condition. In the Court's view, the applicant received the treatment prescribed by the psychiatrist and was under regular and adequate psychiatric supervision. His psychiatric condition was thus adequately addressed by the relevant prison authorities.

There has accordingly been no violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 §§ 1[41] AND 5 OF THE CONVENTION

181. The applicant complained that his detention between 2 and 30 March 2005 was unlawful and that he had not obtained redress in that respect. He relied on Article 5 §§ 1 and 5 of the Convention, which, in so far as relevant, read:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

182. The Government argued that the applicant did not have victim status because, in a decision of 30 March 2005, the Pula County Court found that the applicant's detention from 2 to 30 March 2005 had been unlawful and because the applicant had the possibility of bringing a civil action against the State in order to obtain compensation for his unlawful detention. In the alternative, they argued that this part of the application had been lodged outside the six-month time-period because the applicant's detention had ended on 30 March 2005, whereas the application had been lodged with the Court on 19 May 2006. Furthermore, the applicant had failed to exhaust domestic remedies because his civil action against the State had been pending.

183. As to the applicant's victim status, the Court reiterates that an applicant may lose his victim status if two conditions are met: first, the authorities should acknowledge the alleged violations either expressly or in substance and, second, afford redress (see, for example, Eckle v. Germany, 15 July 1982, Series A no. 51, §§ 69; Dalban v. Romania [GC], no. 28114/95, § 44, ECHR 1999-VI; Guisset v. France, no. 33933/96, §§ 66-67, ECHR 2000-IX; and Stephens v. Malta (no. 1), no. 11956/07, § 58, 21 April 2009). A decision or measure favourable to the applicant is in principle not sufficient to deprive him of his status as a "victim" in the absence of such acknowledgement and redress (see Constantinescu v. Romania, no. 28871/95, § 40, ECHR 2000-VIII).

184. As to the question of exhaustion of domestic remedies, the Court has already held that where the applicant's complaint of a violation of Article 5 § 1 of the Convention is mainly based on the alleged unlawfulness of his or her detention under domestic law, and where this detention has come to an end, an action capable of leading to a declaration that it was unlawful and to a consequent award of compensation is an effective remedy which needs to be exhausted if its practicability has been convincingly established. To hold otherwise would mean to duplicate the domestic process with proceedings before the Court, which would be hardly compatible with its subsidiary character (see Gavril Yosifov v. Bulgaria, no. 74012/01, § 42, 6 November 2008).

185. Turning to the present case, the Court notes that the Čakovec County Court, in a decision of 30 March 2005, expressly acknowledged that, pursuant to the relevant provisions of the Criminal Procedure Act, the statutory time-limit of the applicant's detention had expired on 2 March 2005 and that there had therefore been no ground for keeping him in detention after that date and that consequently the applicant's detention from 2 to 30 March 2005 had been contrary to the relevant law (see paragraph 20 above). Furthermore, under Article 498 of the Code of Criminal Procedure, the applicant has the right to compensation for the period he was kept in detention after the statutory time-limit had expired. The applicant is entitled to bring a civil action against the State in that respect. Under section 186(a) of the Civil Procedure Act, he is firstly required to submit a request for a settlement with the competent State Attorney's Office. In the Court's view, a civil action against the State provided for under domestic law is a remedy to be exhausted since is specifically designed to allow persons who have been unlawfully detained to obtain redress from the State. The Court notes that the applicant did lodge a civil action for damages and that these proceedings are at present pending before the appellate court.

186. It follows that this part of the application is premature and therefore must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies. In view of this conclusion, the Court considers that at this stage it absorbs any further issue as to the applicant's victim status.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1[8] OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 6 § 3[64]

187. The applicant complained of a violation of his right to a fair trial in the criminal proceedings against him on account of his inability to engage the services of a defence counsel at the hearing held on 1 April 2005 and afterwards and the alleged inability to consult the case file. He also alleged that the identification of objects to be used as evidence was not carried out in compliance with the relevant procedural rules because two witnesses were not continually and simultaneously present. He relied on Article 6 §§ 1 and 3 of the Convention, the relevant parts of which read as follows:

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

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

..."

188. The Government contested that argument.

A. Admissibility

The parties' arguments

189. The Government argued that the applicant had not properly exhausted domestic remedies in that, instead of lodging a request for extraordinary review with the Supreme

Court, he should have lodged a constitutional complaint against the judgment of the Čakovec County Court of 17 May 2005. Therefore, his application had also been lodged outside the six-month time-limit since the final decision in the criminal proceedings against the applicant was the above-mentioned judgment of the Čakovec County Court.

190. The applicant argued that he had properly exhausted all available remedies and that the request for extraordinary review of a final judgment was the remedy which would address the violation of which he had complained in respect of the criminal proceedings.

The Court's assessment

191. The Court observes that the requirements contained in Article 35 § 1[47] concerning the exhaustion of domestic remedies and the six-month period are closely interrelated, since not only are they combined in the same Article, but they are also expressed in a single sentence whose grammatical construction implies such correlation (see Hatjianastasiou v. Greece, no. 12945/87, Commission decision of 4 April 1990, and Berdzenishvili v. Russia (dec.), no. 31697/03, ECHR 2004 II (extracts).

192. The Court observes further that the purpose of the six-month rule is to promote security of the law and to ensure that cases raising issues under the Convention are dealt with within a reasonable time. Furthermore, it ought also to protect the authorities and other persons concerned from being under any uncertainty for a prolonged period of time. Finally, it should ensure the possibility of ascertaining the facts of the case before that possibility fades away, making a fair examination of the question at issue next to impossible (see Kelly v. the United Kingdom, no. 10626/83, Commission decision of 7 May 1985, Decisions and Reports (DR) 42, p. 205, and Baybora and Others v. Cyprus (dec.), no. 77116/01, 22 October 2002).

193. In the present case the Court notes that the applicant's conviction was upheld by the Čakovec County Court on 17 May 2005. The applicant subsequently lodged a request for extraordinary review of a final judgment with the Supreme Court. This request was dismissed on 22 November 2005. The applicant then lodged a constitutional complaint and on 23 February 2006 the Constitutional Court declared it inadmissible.

194. The application to the Court was introduced on 16 May 2006, that is, less than six months from the date of the decisions of the Supreme Court and the Constitutional Court, but more than six months after the date of the Čakovec County Court's judgment. It follows that the Court may only deal with the application if a request for extraordinary review of a final judgment and a constitutional complaint against the decision of the Supreme Court dismissing

the applicant's request are considered remedies within the meaning of Article 35 § 1 of the Convention, in which case the six-month period provided for in that Article should be calculated from the date of the decision of the Constitutional Court.

195. The Court notes that it has jurisdiction in every case to assess in the light of the particular facts whether any given remedy appears to offer the possibility of effective and sufficient redress within the meaning of the generally recognised rules of international law concerning the exhaustion of domestic remedies and, if not, to exclude it from consideration in applying the six-month time-limit.

196. The Court reiterates that, according to its established case-law, the purpose of the domestic-remedies rule contained in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged before they are submitted to the Court. The Court notes that the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism (see Akdivar and Others v. Turkey, 16 September 1996, Reports 1996-IV, § 69).

197. The Court reiterates that an applicant is required to make normal use of domestic remedies which are effective, sufficient and accessible. It also observes that, in the event of there being a number of remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance (see Croke v. Ireland (dec.), no. 33267/96, 15 June 1999). In other words, when a remedy has been pursued, the use of another remedy which has essentially the same objective is not required (see Moreira Barbosa v. Portugal (dec.), no. 65681/01, ECHR 2004-V, and Jeličić v. Bosnia and Herzegovina (dec.), no. 41183/02, 15 November 2005).

198. The Court firstly notes that the applicant made use of an extraordinary remedy - a request for extraordinary review of a final judgment. Under domestic law, several remedies against final judgments exist both in respect of civil and criminal proceedings. So far, the Court has dealt with a number of Croatian cases where an appeal on points of law to the Supreme Court against a final judgment adopted in the course of civil proceedings has been regarded as a remedy to be exhausted (see, for example, Blečić v. Croatia, no. 59532/00, §§ 22-24, 29 July 2004; Debelić v. Croatia, no. 2448/03, §§ 10 and 11, 26 May 2005; and Pitra v. Croatia, no. 41075/02, § 9, 16 June 2005). The same has been applied in cases against Bosnia where an identical remedy exists (see Jeličić v. Bosnia and Herzegovina, no. 41183/02, § 17, ECHR 2006 ...). As to the criminal-law remedy at issue, the Court has in a previous case (see

Kovač v. Croatia (no. 503/05, 12 July 2007)) taken into consideration proceedings before the Supreme Court concerning a request for extraordinary review of a final judgment by a defendant in a criminal case.

199. A request for extraordinary review of a final judgment is available only to the defendant (the prosecution is barred from its use) and may be filed within one month following the service of the judgment on the defendant in respect of strictly limited errors of law that operate to the defendant's detriment. The applicant in the present case lodged such a request on account of, inter alia, an alleged infringement of his defence rights at the main hearing, which is, under Article 427, one of the statutory grounds for lodging such a request. The Court therefore considers that in the present case precisely this remedy afforded the applicant an opportunity to address the alleged violation at issue. The Court notes that in this case this remedy afforded the applicant an opportunity to complain of the alleged violation. Therefore, and notwithstanding the Constitutional Court's finding that the Supreme Court's decision following such a request did not concern the merits of the case, the Court considers that the applicant made proper use of the available domestic remedies and complied with the six-month rule.

200. As to the applicant's subsequent constitutional complaint, the Court notes that, under section 62 of the Constitutional Court Act, anyone who deems that an individual act of a State body determining his or rights and obligations, or a suspicion or accusation of a criminal act, has violated his or her human rights or fundamental freedoms may lodge a constitutional complaint against such act. The applicant in the present case, both in his request for extraordinary review of a final judgment and in his constitutional complaint, alleged an infringement of his defence rights at the main hearing in the criminal proceedings against him. Without questioning the decision of the Constitutional Court as to the relevant criteria for assessing the admissibility of constitutional complaints, the Court considers that from the wording of section 62 of the Constitutional Court Act, the applicant had reason to believe that his constitutional complaint against the Supreme Court's decision dismissing his request for extraordinary review of a final judgment, whereby he complained of the violation of his right to a fair trial, was a remedy to be exhausted.

201. In view of the Court's conclusions that in the present case the request for extraordinary review of a final judgment was a remedy to be exhausted and notwithstanding the Constitutional Court's finding that the decision adopted upon such a request by the Supreme Court did not concern the merits of the case, the Court finds that the applicant made proper

use of available domestic remedies and complied with the six-month rule. The Government's objections in that regard must therefore be rejected.

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

B. Merits

The parties' arguments

203. The applicant complained under Article 6 §§ 1[8] and 3(b) and (c)[39] of the Convention that he had not had a fair trial in the criminal proceedings against him. He maintained that although during his pre-trial detention he had been officially assigned several defence lawyers, he had had no real opportunity to communicate with them and prepare his defence. Furthermore, he had not been able to have sufficient access to his case file or to obtain a copy of all relevant documents in it. Although his requests to that effect had been formally allowed, he had actually exercised that right only once, before his conviction. He also argued that on 30 March 2005 his officially appointed defence counsel had been automatically discharged since he had been released from pre-trial detention that day. The next hearing had been held on 1 April 2005 and his request that the hearing be adjourned so that he would have time to find a new defence counsel had been denied. Although he had then stated that he would not present his defence since he had had no defence counsel, the court conducting the proceedings had wrongly noted that the applicant had waived his right to be legally represented and had decided to remain silent. It had proceeded with the hearing and concluded the trial, finding the applicant guilty.

204. The Government argued that the applicant had been officially assigned a defence counsel throughout his pre-trial detention, as required under the relevant provisions of the Code of Criminal Procedure and had had ample time and opportunity to prepare his defence. At the hearing held on 30 March 2005 the applicant had expressly waived his right to be legally represented, as had been recorded in the record of the hearing.

The Court's assessment

205. Bearing in mind that the requirements of paragraph 3 (b) and (c) of Article 6 of the Convention amount to specific elements of the right to a fair trial guaranteed under paragraph 1, the Court will examine all the complaints under both provisions taken together (see, in

particular, Hadjianastassiou v. Greece, 16 December 1992, § 31, and G.B. v. France, no. 44069/98, § 57, ECHR 2001 X).

206. The Court reiterates that Article 6 of the Convention, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. The concept of "effective participation" in a criminal trial includes the right to compile notes in order to facilitate the conduct of the defence, irrespective of whether or not the accused is represented by counsel. Indeed, the defence of the accused's interests may best be served by the contribution which the accused makes to his lawyer's conduct of the case before the accused is called to give evidence (see Matyjek v. Poland, no. 38184/03, § 59, ECHR 2007-..., and Pullicino v. Malta (dec.), no. 45441/99, 15 June 2000).

207. The Court reiterates further that, according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his or her case under conditions that do not place the individual at a substantial disadvantage vis-à-vis the opponent (see, for example, Bulut v. Austria, 22 February 1996, § 47, Reports of Judgments and Decisions 1996 II, and Foucher v. France, 18 March 1997, § 34, Reportss 1997 II). The Court further observes that, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see Doorson v. the Netherlands, 26 March 1996, § 72, Reports 1996 II, and Van Mechelen and Others v. the Netherlands, 23 April 1997, § 54, Reports 1997 III).

208. The Court points out that Article 6 § 3 (b^{64}) guarantees the accused "adequate time and facilities for the preparation of his defence" and therefore implies that the substantive defence activity on his behalf may comprise everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings (see Connolly v. the United Kingdom (dec.), no. 27245/95, 26 June 1996, and Mayzit v. Russia, no. 63378/00, § 78, 20 January 2005). Furthermore, the facilities which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself for the purposes of preparing his defence with the results of investigations carried out throughout the proceedings (see C.G.P. v. the Netherlands, (dec.), no. 29835/96, 15 January 1997; Foucher, cited above, §§ 26-38; and Galstyan v. Armenia, no. 26986/03, § 84, 15 November 2007). The issue of adequacy of

time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case.

209. In the instant case, several considerations are of crucial importance. The Court notes firstly that the charges against the applicant consisted of more than twenty counts of theft and aggravated theft and that the applicant was liable to an unconditional prison sentence. The case file, a copy of which was submitted by the Government, was quite voluminous.

210. The Court observes that the judgment adopted by the Prelog Municipal Court on 26 August 2004 in the criminal proceedings against the applicant was quashed by the appellate court on 14 January 2005 on the grounds that, inter alia, the applicant's defence rights had been violated. The case was then remitted to the court of first instance. The Court will therefore examine whether the proceedings after 14 January 2005 complied with the requirements of Article 6 of the Convention.

211. The Court notes that the applicant was represented by various officially appointed defence lawyers throughout the proceedings, save from 30 March to 1 April 2005. The ground for appointing defence counsel was the fact that the applicant was detained during the trial, since under Article 65 of the Code of Criminal Procedure all detainees must be legally represented, irrespective of the gravity of the charges against them.

212. In the fresh proceedings before the Prelog Municipal Court a new defence counsel was appointed to the applicant on 4 February 2005, following the request of the previous counsel to be relieved of his duties owing to disagreements with the applicant. Although the applicant was allowed unrestricted telephone communication with his new counsel, it appears that there was no such contact at least until 14 February 2005, when the applicant complained to the presiding judge that he had not been able to contact counsel because there had been no answer to his calls to the number given to the applicant as that of counsel. The applicant further requested permission for a visit to the prison from his counsel, but there was no answer to this request. However, it is true that the hearing scheduled for 17 February 2005 was adjourned at counsel's oral request in order to enable him to prepare the applicant's defence. There is no evidence that counsel actually visited the applicant at all. In the Court's view, bearing in mind that the applicant was in pre-trial detention, it would have been expected of the relevant authorities to keep a record of the appointed counsel's visits to the applicant in prison in order to make sure that the defence rights of the accused were respected.

213. The Court notes further that on 7 March 2005 the applicant lodged a request to consult the case file, but received no answer. The hearing of 10 March 2005 was adjourned because the applicant had insulted the presiding judge when it started. The applicant was released on 30 March 2005 since the maximum time for his detention had expired. At that time his defence counsel was relieved of his duties since, under domestic law, the ground for obligatory legal representation of the applicant in the criminal proceedings had ceased to exist. Thus, at the hearing held on 1 April 2005 before the Prelog Municipal Court the applicant was legally unrepresented. The applicant's and the Government's account of what happened at the hearing differ in some significant respects. While the Government asserted that the applicant, after having been properly informed of his rights, waived his right to be legally represented and decided to remain silent, the applicant contended that his objection to the effect that he had not been able to prepare his defence since his request to consult the case file had not been properly complied with had remained completely ignored.

214. The Court notes that on 2 April 2005, even before having received a written copy of the judgment pronounced on 1 April 2005, the applicant lodged an appeal alleging, inter alia, that his defence rights had been violated in that he had not been able to prepare his defence since he had had no real opportunity to consult the case file. In his appeal the applicant also complained that his objections to that effect at the hearing had been completely ignored. In view of such a prompt complaint by the applicant and the fact that the transcript of the hearing held on 1 April 2005 was not signed by the applicant, the Court cannot give decisive importance to the record in the transcript that the applicant had waived his right to be legally represented and decided to remain silent. While it is established that the applicant did not make any defence submissions at that hearing, it cannot be unreservedly accepted that he did so because he did not wish to defend himself. In this connection the applicant's assertion that he could not defend himself since he had never been given proper access to the case file bears some significance.

215. As to the circumstances surrounding the applicant's request to consult the case file, the Court notes that during his entire trial, save for two days between 30 March and 1 April 2005, the applicant was in detention and thus not in a position to freely consult his case file. He was brought to the Municipal Court conducting the criminal trial against him on 1 October 2004, when he examined the case file and copied certain documents. However, the judgment adopted on 26 August 2004 was quashed on 14 January 2005 on the grounds, inter alia, that the applicant had neither had sufficient contact with his defence counsel nor sufficient time to prepare his defence. Furthermore, on 7 March 2005, in the resumed proceedings before the

Municipal Court, the applicant made a further request to consult the case file. He explained that on 1 October 2004 he had had insufficient time to consult the case file – which had been voluminous – and that not all requested documents had been copied. However, his request remained unanswered. The applicant reiterated his complaints about not being given a real opportunity to consult the case file in his appeal against the first-instance judgment of 1 April 2005. Thus, the fact that the applicant did consult the case file on 1 October 2004 cannot be regarded as satisfying the requirement that the applicant be afforded adequate means and facilities for the preparation of his defence. In this connection the Court observes that the Convention "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive" (see Artico v. Italy, 13 May 1980, § 33, Series A no. 37).

216. The applicant's further request to consult the case file, made during the appellate proceedings; was allowed by the president of the Prelog Municipal Court, but when asked to fix the date for that purpose the president answered that the case file had been sent to the appellate court. It appears that no contact was made between the trial and the appellate courts in order to facilitate compliance with the applicant's request. After the appellate court upheld the first-instance judgment on 17 May 2005, the applicant made several further requests to consult the case file. In view of the possibility of using further remedies in the criminal proceedings against him, the Court considers that the applicant had a legitimate interest in studying the case file. However, his requests were denied on the grounds that the case file had been forwarded to the Supreme Court. In the Court's view, however, the fact that the case file was with the Supreme Court, does not in itself justify denying the applicant's request.

217. Even after the Supreme Court upheld the lower courts' judgment, the applicant still had the possibility of lodging a constitutional complaint, and thus his interest in consulting the case file remained. However, his further request to that effect of 23 January 2006 was again denied, this time on the grounds that the case file had been sent to the Varaždin Municipal Court. The Court cannot see how the fact that the case was at the latter court could in itself justify refusing the applicant's request.

218. The Court has already found that unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, were important guarantees of a fair trial in criminal proceedings (see Matyjek, cited above, §§ 59 and 63; Luboch v. Poland, no. 37469/05, §§ 64 and 68, 15 January 2008;

and Moiseyev v. Russia, no. 62936/00, § 217, 9 October 2008). As the applicant in the present case did not have such access, he was unable to prepare an adequate defence and was not afforded equality of arms (see Foucher, cited above, § 36). Regard being had to all the circumstances of the case, the Court finds that the applicant's defence rights in the criminal proceedings against him taken as a whole were infringed to such a degree that it constitutes a violation of Article 6 § 1 of the Convention taken together with Article 6 § 3[64].

IV. APPLICATION OF ARTICLE 41[46] OF THE CONVENTION

219. 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

220. The applicant claimed 51,793 euros (EUR) in respect of non-pecuniary damage and EUR 7,655.17 in respect of pecuniary damage. As to the latter, he explained that the amount of EUR 758.62 referred to lost income during his unlawful incarceration from 2 to 30 March 2005 and the remaining amount referred to the value of the items taken from him during the criminal proceedings on the grounds that they had been stolen from third parties.

221. The Government deemed the applicant's request in respect of pecuniary damage unfounded and his request in respect of non-pecuniary damage excessive.

222. The Court notes that it has found that the applicant's rights guaranteed by Articles 3 and 6 of the Convention have been violated. In particular, it has found that there was no required investigation into his allegations of ill-treatment in respect of two separate incidents and that in the criminal proceedings against him his defence rights were violated. These facts have indisputably caused him some physical and mental suffering. Consequently, ruling on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 1,000 under this head, plus any tax that may be chargeable to him. On the other hand, the Court does not discern any causal link between the violations found and the pecuniary damage alleged: it therefore rejects this claim

B. Costs and expenses

223. The applicant also claimed HRK 24,400 for his legal representation before the Court.

224. The Government deemed the claim excessive.

225. The Court considers that the amount claimed is not excessive in the light of the nature of the dispute, particularly given the complexity of the case. It therefore considers that the applicant's costs and expenses should be met in full and thus awards him EUR 3,400 less the EUR 850 already received in legal aid from the Council of Europe, plus any tax that may be chargeable to him.

C. Default interest

226. 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.

6.10.4. The Court's decision

1. Declares unanimously admissible the complaints concerning:

- the general conditions of the applicant's detention from 6 July 2005 to 5 November 2007;

- the alleged assaults on the applicant by the prison personnel and the lack of an effective and thorough investigation into those allegations;

- the lack of adequate psychiatric care during the applicant's detention; and

- the applicant's right to a fair hearing in the criminal proceedings against him; and declares

- the remainder of the application inadmissible;

2. Holds unanimously that there has been no violation of Article 3[39] of the Convention on account of the general conditions of the applicant's detention from 6 July 2005 to 5 November 2007;

3. Holds unanimously that there has been no violation of the substantive aspect of Article 3 of the Convention on account of the alleged assaults on the applicant by prison personnel;

4. Holds unanimously that there has been a violation of the procedural aspect of Article 3 of the Convention on account of the lack of an effective and thorough investigation by independent bodies in respect of the applicant's allegations that he had been assaulted by

prison guards on 18 September 2006 and 21 January 2007 and no such violation in respect of the incident of 17 February 2007.

5. Holds by four votes to three that there has been no violation of Article 8^{21} of the Convention on account of the lack of adequate and continuous treatment for the applicant's psychiatric condition;

6. Holds unanimously that there has been a violation of Article 6 §§ 1^{8} and 3^{64} of the Convention;

7. Holds

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2^{9} of the Convention, the following amounts which are to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 1,000 (one thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant;

(ii) EUR 2,550 (two thousand five hundred fifty euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;

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

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

Chapter 7 Freedom of expression. Selected case law.

7.1. Freedom of expression

According to the Article 10[10] of the European Convention everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

7.2. Case of Frankowicz V. Poland

(Chapter 4: 4.2.)

7.3. Case of Hoffer And Annen V. Germany[23]

7.3.1. The procedure

1. The case originated in two applications (nos. 397/07 and 2322/07) against the Federal Republic of Germany lodged with the Court under Article 34[10] of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Ms Collene Hoffer, who has Australian and Italian nationality, and a German national, Mr Klaus Annen ("the applicants"), on 22 December 2006.

2. The applicants were represented by Mr L. Lennartz, a lawyer practising in Euskirchen. The German Government ("the Government") were represented by their Agent, Mrs A. Wittling-Vogel, of the Federal Ministry of Justice.

3. The applicants alleged, in particular, that their criminal convictions violated their right to freedom of expression and that the length of the proceedings before the Federal Constitutional Court was in breach of the "reasonable time" requirement of Article 6 § 1[8].

4. On 4 February 2010 the President of the Fifth Section decided to give notice of the applications to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1[12]). Having been informed of the case by a letter of

9 February 2010, the Italian Government did not express any wish to intervene under Article 36 § 1 of the Convention.

5. Mrs R. Jaeger, the judge elected in respect of Germany, having withdrawn from sitting in the case, the Government appointed Mr Bertram Schmitt to sit as an ad hoc judge.

[23] Fifth Section; Case Of Hoffer And Annen V. Germany; (Applications Nos. 397/07 And 2322/07); Strasbourg 13 January 2011; Final 20/06/2011

7.3.2. The facts

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1945 and 1951 respectively and live in Heilbronn and Weinheim.

7. On 8 October 1997 the applicants distributed four-page folded pamphlets to passers-by in front of a Nuremberg medical centre. The front page contained the following text:

“'Killing specialist' for unborn children Dr. F. [is] on the premises of the Northern medical centre, Nuremberg”.

8. The middle pages contained information on the development of the human foetus and about abortion techniques. It further contained the appeals:

“Please support our struggle against the unpunished killing of unborn children”

and

“Therefore: No to abortion”

The verso read as follows:

“Support our protest and our work. Help to ensure that the Fifth Commandment “Thou shall not kill” and the Basic Law of the Federal Republic of Germany are in future respected by all doctors in Nuremberg!

Stop the murder of children in their mother's womb on the premises of the Northern medical centre.

then: Holocaust

today: Babycaust

(damals: Holocaust heute: Babycaust)

Whoever remains silent becomes guilty too!”

9. The pamphlet bore the name and address of the second applicant as the person legally responsible for its content.

10. On behalf of the medical centre and Dr F., the City of Nuremberg brought criminal charges against the applicants for defamation.

11. On 16 July 1998 the Nuremberg District Court (Amtsgericht) acquitted the applicants on the grounds that their action was justified under section 193 of the Criminal Code (Strafgesetzbuch, see Relevant domestic law below). According to the District Court, the dissemination of the pamphlets was covered by the right to freedom of expression as guaranteed by Article 5 of the German Basic Law, since the pamphlet, taken as a whole, was not intended to debase Dr F. or the medical centre, but to express the applicants' general rejection of the performance of abortions. The District Court noted that the applicants considered the number of abortions performed in Germany to be crimes which were as abhorrent as the Holocaust. It was not up to the court to evaluate this statement, which was covered by the right to freedom of expression.

12. Following an examination of the statements contained in the pamphlet, the District Court considered that the applicant's right to freedom of expression had to prevail over the doctor's interest in the protection of his personal honour.

13. On 26 May 1999 the Nuremberg-Fürth Regional Court (Landgericht) quashed the District Court's judgment and convicted the applicants of defamation to the detriment of the medical centre and of Dr F. The Regional Court considered that the statement “then: Holocaust / today: Babycaust”, seen in the context of the other statements made in the pamphlet, had to be interpreted as putting the lawful activity performed by Dr F. on a level with the Holocaust, a synonym for the most abhorrent and unjustifiable crimes against humanity. According to the Regional Court, this statement was not covered by the applicants' right to freedom of expression, as it debased the doctor in a way which had not been necessary in order to express the applicants' opinion. While expressions of opinion which related to questions of public interest enjoyed a higher degree of protection than those relating to purely private interests, it had to be taken into account if and to which extent the person addressed had participated in the public debate. Furthermore, it had to be considered if the person expressing his thoughts could be at least expected to replace his statement by a statement which was less detrimental to the other person's honour. Applying these principles, the Regional Court considered that the applicants had failed sufficiently to take into account the doctor's interests. It had to be conceded that the applicants, as anti-abortion activists, had a political aim which they were allowed to pursue even by use of exaggerated and polemic criticism. However, by putting the doctor's legal actions on one level with the arbitrary killings of human beings performed by a

regime of injustice, the applicants literally qualified him as a mass murderer. According to the Regional Court, this statement amounted to unjustifiable abusive insult (Schmähkritik).

14. The Regional Court further considered that the other statements contained in the pamphlet were covered by the applicants' right to freedom of expression and had to be accepted. Having regard to all the factors of the case, the Regional Court considered it appropriate to impose twenty daily fines of 20 German marks (DEM) each on the first applicant and thirty daily fines of 60 DEM each on the second applicant, as the person having assumed legal responsibility for the pamphlet's content.

15. On 8 December 1999 the Bavarian Court of Appeal (Bayerisches Oberstes Landesgericht) rejected the applicants' appeal on points of law.

16. On 7 January 2000 the applicants lodged complaints with the Federal Constitutional Court.

17. On 24 May 2006 the Federal Constitutional Court, sitting as a panel of three judges, quashed the Regional Court's judgment insofar as the applicants had been convicted of defamation to the detriment of the medical centre and dismissed the remainder of the applicants' complaints.

18. The Federal Constitutional Court considered, at the outset, that the criminal courts, when interpreting and applying the criminal law, had to respect the limits imposed by the right to freedom of expression as guaranteed by Article 5 of the Basic Law. The court further considered that the Regional Court had respected these principles.

19. According to the Federal Constitutional Court, the applicants had not confined themselves generally to criticising the performance of abortions – which they remained free to do – but had directed their statements directly against Dr F. It was clear from the overall context that the incriminated statement referred to Dr F., who was expressly mentioned on the front page. The Federal Constitutional Court further noted that the lower courts had assumed that the impugned statement put the doctor's professional activities on the same level as the Holocaust. It further observed that the Federal Court of Justice, in separate proceedings referring to the same pamphlet, assumed that the statement was meant to express the opinion that the abortions performed by the doctor amounted to mass homicide. However, this interpretation of the statement, which also contained the Holocaust reference, also contained a serious interference with the doctor's personality rights.

20. The Federal Constitutional Court further considered that the statement seriously infringed the doctor's personality rights. While the applicants' statement did not qualify as abusive insult, the Regional Court's decision was not objectionable as that court had duly weighed the conflicting interests – that is, the applicants' right to freedom of expression and the doctor's personality rights. In particular, the Regional Court had taken into account that the doctor had practised within the framework of the law and had not actively participated in the public debate on abortion. Furthermore, the applicants could have been reasonably expected to express their general criticism without the serious violation of the doctor's personality rights. This decision was served on the applicants' counsel on 22 June 2006.

21. On 9 November 2006 the Nuremberg Regional Court, following remittal, re-assessed the fines imposed as a penalty for defamation to the doctor's detriment. On 26 June 2007 the Nuremberg Court of Appeal quashed this judgment and remitted the case to the Nuremberg Regional Court.

22. On 25 September 2008 the Nuremberg Regional Court re-assessed the sentences and imposed fifteen daily fines of 10 EUR each on the first applicant and ten daily fines of 10 EUR each on the second applicant, thereby taking into account the second applicant's previous convictions.

23. On 2 April 2009 the Nuremberg Court of Appeal dismissed the applicants' appeal on points of law.

II. RELEVANT DOMESTIC LAW AND PRACTICE

24. Article 5 of the German Basic Law provides:

"(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour."

25. The relevant provisions of the German criminal code read:

Section 185

Defamation

“Defamation shall be punished with imprisonment of not more than one year or a fine and, if the defamation is committed by means of an assault, with imprisonment of not more than two years or a fine.”

Section 193

Safeguarding legitimate interests

“...utterances made in order to exercise or protect rights or to safeguard legitimate interests...shall only entail liability to the extent that the existence of defamation results from the form of the utterance or the circumstances under which it was made.”

26. On 30 May 2000 the Federal Court of Justice, in separate proceedings, rejected the Nuremberg clinic's civil action for an injunction against the applicants to desist from further distributing the pamphlet which forms the subject matter of the proceedings before the Court. The Federal Court of Justice interpreted the statement “then: Holocaust / today: Babycaust” as expressing the opinion that the performance of abortions constituted a reprehensible mass killing of human life. The Federal Court of Justice further considered that, in the context of the public debate on the fundamental question of the protection of unborn life, the clinic had to accept the applicants' expression of opinion.

27. On 25 October 2005 the Federal Constitutional Court, in different proceedings (no. 115/2005), confirmed its previous case-law that, in examining criminal or civil law sanctions for expressions of opinion which were made in the past, the right to freedom of expression was violated if, in case of an ambiguous statement, the courts based their considerations on the meaning leading to a conviction, without having previously ruled out other possible meanings which could not justify the sanction. However, these standards did not apply to the same degree to rights to desist from making future statements.

7.3.3. The law

I. JOINDER

28. Having regard to the similar subject matter of the applications, the Court finds it appropriate to join them.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

29. The applicants complained that their criminal convictions for distributing the pamphlets violated their right to freedom of expression as provided in Article 10 of the Convention, which reads as follows:

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

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

They complained, in particular, that the criminal courts misinterpreted their statement, which had not been directed against any particular person, but against the performance of abortions in general.

30. The Government contested that argument.

A. Admissibility

31. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3[14] of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicants' submissions

32. According to the applicants, the domestic courts had erroneously assumed that Dr F. had not given them any reason to single him out.

In 1996, Dr F., together with other physicians, lodged a constitutional complaint in which he complained about certain restrictions imposed on the performance of abortions by the Bavarian Pregnant Women's Aid Amendment Act. The proceedings and the judgment given

by the Federal Constitutional Court in the physicians' favour on 27 October 1998 drew a considerable amount of public attention.

33. The fact that the performance of abortions after obligatory counselling was, under German law, not subject to criminal liability was exactly the reason why such a hefty debate arose as to whether and to what extent abortions were or were not permissible.

34. The applicants further submitted that the Federal Constitutional Court, by decision of 25 October 2005, had changed its case-law and let, in case of doubt, personality rights prevail over the right to freedom of expression. Had the Federal Constitutional Court adjudicated the applicants' case at an earlier date, they would have profited from the more liberal standards applied before. The change of the Federal Constitutional Court's case-law had not been foreseeable for them.

35. The applicants' conviction was not necessary in a democratic society. There was no German law which prohibited linking criticism to a particular person. This case had to be seen against the background of the broad social debate on the laws ruling abortions, which must not be compromised one-sidedly by the Government for the purpose of preserving other concepts and notions. The Government could not rely on the Court's decision on the second applicant's previous complaint (compare Annen v. Germany (dec.), no. 2373/07 and 2396/07, 30 March 2010), as the instant case concerned criminal convictions which weighed more heavily than the convictions to desist which formed the subject matter of the aforementioned proceedings.

2. The Government's submissions

36. The Government submitted that the interference with the applicants' right to freedom of expression was justified under paragraph 2 of Article 10 of the Convention as being necessary in a democratic society.

37. Taking into account all circumstances of the case, the domestic courts had interpreted that the statement “Then: Holocaust / today: Babycaust” directly referred to Dr F. The domestic courts had duly weighed up the applicants' right to freedom of expression and Dr F.'s personality rights. The impugned statement, by putting the abortions performed by the applicant on the same level as the Holocaust, constituted a particularly serious interference with the doctor's personality rights and the sanctions imposed were relatively low.

38. The fact that Dr F. had, in 1996, lodged a constitutional complaint could not be held against him as, in a State governed by the Rule of Law, the fact that a citizen made use of the legal possibilities which were offered to protect his rights could not result in a diminished protection of personality rights.

39. The Federal Constitutional Court's judgment given on

25 October 2005 (see paragraph 27, above) had not changed that court's case-law regarding criminal convictions for ambiguous statements, as it exclusively referred to the civil obligation to desist from making such statements in the future.

3. Assessment by the Court

40. The Court considers, and it was not disputed by the Government, that the applicants' convictions by the national courts amounted to an "interference" with their right to freedom of expression. Such interference will infringe the Convention if it does not satisfy the requirements of paragraph 2 of Article 10[48]. It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" in order to achieve those aims.

41. The Court notes that the applicants' convictions were based on section 185 of the Criminal Code. The Court reiterates that, according to its case-law, the relevant national law must be formulated with sufficient precision to enable the persons concerned – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among many other authorities, Grigoriades v. Greece, 25 November 1997, § 37, Reports of Judgments and Decisions 1997 VII). It is true that section 185 of the Criminal Code is couched in rather broad terms. Nonetheless, in the Court's view, it met the above standard. On the ordinary meaning of the word "defamation" it ought to have been clear to the applicants that they risked incurring a criminal sanction. It follows that the interference complained of was "prescribed by law".

42. The Court further observes that the applicants' convictions were designed to protect "the reputation or rights of others", namely Dr F.'s reputation and personality rights.

43. It remains to be determined whether the interferences were "necessary in a democratic society". This implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in

hand with supervision by the Court (see, among many other authorities, Perna v. Italy [GC], no. 48898/99, § 39, ECHR 2003-V).

44. In exercising its supervisory function, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among many other authorities, Chauvy and Others v. France, no. 64915/01, § 70, ECHR 2004-VI).

The Court will also have regard to the special degree of protection afforded to expressions of opinions which were made in the course of a debate on matters of public interest (compare for example Sürek v. Turkey (no. 1) [GC], no. 26682/95, § 61, ECHR 1999 IV and Kubaszewski v. Poland,

no. 571/04, § 38, 2 February 2010).

45. Turning to the circumstances of the instant case the Court notes, at the outset, that the Regional Court expressly acknowledged that the applicants' statements addressed questions of public interest and that they were allowed to pursue their political aims even by use of exaggerated and polemic criticism. They were therefore prepared to accept that all other statements contained in the pamphlet, except for the statement

“Then: Holocaust / today: Babycaust”, constituted an acceptable element of a public debate falling within the scope of freedom of expression.

The Court will thus limit its examination to the latter statement.

46. In the view of the domestic courts the applicants, by comparing the performance of abortions to the mass-homicide committed during the Holocaust, had violated the physician's personality rights in a particular serious way and could have been expected to express their criticism in a way which was less detrimental to the physician's honour.

47. The Court further notes that the Federal Constitutional Court acknowledged the fact that the applicants' statement could be interpreted in different ways, but considered that all possible interpretations amounted to a very serious violation of the physician's personality rights.

48. The Court observes that the impact an expression of opinion has on another person's personality rights cannot be detached from the historical and social context in which the

statement was made. The reference to the Holocaust must also be seen in the specific context of the German past.

The Court therefore accepts the domestic courts' conclusion that the impugned statement constituted a very serious violation of the physician's personality rights.

49. In conclusion, the Court considers that the domestic courts have duly balanced the applicants' right to freedom of expression against the physician's personality rights. It follows that the reasons relied on by the domestic courts were sufficient to show that the interference complained of was "necessary in a democratic society". Moreover, the relatively modest criminal sanctions imposed were proportionate. Having regard to all the foregoing factors, and in particular the margin of appreciation afforded to the State in this area, the Court considers that the domestic courts struck a fair balance between the competing interests involved.

50. There has accordingly been no violation of Article 10[48] of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1[8] OF THE CONVENTION

51. The applicants complained that the length of the proceedings before the Federal Constitutional Court had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

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

52. The Government conceded that the proceedings before the Federal Constitutional Court lasted for a relatively long time.

53. The period to be taken into consideration began on 7 January 2000 when the applicants lodged their constitutional complaints and ended on

22 June 2006 when the Federal Constitutional Court's decision was served on the applicants' counsel. It thus lasted almost six and a half years for one level of jurisdiction.

A. Admissibility

54. The Cour[14]t notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

55. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute (see, among many other authorities, Frydlender v. France [GC], no. 30979/96, § 43, ECHR 2000-VII).

56. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case

(see, among other authorities, Leela Förderkreis e.V. and Others

v. Germany, no. 58911/00, §§ 59 - 66, 6 November 2008 and Kaemena and Thöneböhn v. Germany, nos. 45749/06 and 51115/06, §§ 61-65,

22 January 2009).

57. Having examined all the material submitted to it, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

58. There has accordingly been a breach of Article 6 § 1.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

59. Relying on Articles 7 § 1[65], 10[48] and 6[23] of the Convention, the applicants further complained that they had not been aware of the interpretation that the criminal courts would attach to their statement. It followed that they did not have the intention to commit a criminal act. Furthermore, the proceedings before the Federal Constitutional Court had been unfair because the case should have been adjudicated by the full senate instead of a panel of three judges. The second applicant further complained that his sentence had been increased merely because he had assumed legal responsibility for the pamphlet's content.

60. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. There is, in particular, no indication of a retroactive application of a criminal law.

61. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4[47] of the Convention.

V. APPLICATION OF ARTICLE 41[46] OF THE CONVENTION

62. 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

63. The applicants left the assessment of non-pecuniary damages to the Court's discretion.

64. The Government did not express an opinion on the matter.

65. The Court, ruling on an equitable basis, awards each applicant EUR 4,000 in respect of non-pecuniary damage for the length of the proceedings before the Federal Constitutional Court.

B. Costs and expenses

66. The first applicant claimed EUR 4,364.52 for the costs and expenses incurred before the domestic courts and EUR 2,403.80 for those incurred before the Court. The second applicant claimed EUR 6,479.27 for the costs and expenses incurred before the domestic courts and EUR 2,403.80 for those incurred before the Court.

67. The Government submitted that the second applicant had partly misstated the costs incurred in the criminal proceedings.

68. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers that the applicants have not established that the costs and expenses claimed for the proceedings before the domestic courts were incurred by them in order to seek prevention or rectification of the specific violation caused by the excessive length of the proceedings. The Court therefore rejects the claim for costs and expenses in the domestic proceedings.

69. As regards counsel fees for the proceedings before the Court, the Court, taking into account that the applicants' claims were only partly successful, considers it reasonable to award each applicant EUR 1,000 under this head, plus any tax that may be chargeable to the applicants on that amount.

C. Default interest

70. 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.

7.3.4. The Court's decision

1. Decides to join the applications;

2. Declares the complaints under Article 10[48] of the Convention and under Article 6 § 1[8] of the Convention about the length of the proceedings before the Federal Constitutional Court admissible and the remainder of the applications inadmissible;

3. Holds that there has been no violation of Article 10 of the Convention;

4. Holds that there has been a violation of Article 6 § 1 of the Convention with regard to the length of the proceedings before the Federal Constitutional Court;

5. Holds

(a) that the respondent State is to pay each of the applicants, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2[9] of the Convention,

(i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicants, for costs and expenses;

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

6. Dismisses the remainder of the applicants' claim for just satisfaction.

Chapter 8 Prohibition of discrimination. Selected case law.

8.1. Prohibition of discrimination

According to the Article 14[45] of the European Convention 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.

8.2. Case of Klamecki V. Poland

(Chapter 5: 5.2.)

8.3. Case of Kiyutin V. Russia

(Chapter 5: 5.3.)

[1] 1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.
[2] 1. Once an application made under Article 34 of the Convention has been declared admissible, the Chamber or its President may invite the parties to submit further evidence and written observations.
[3] 3. The Chamber may decide, either at the request of a party or of its own motion, to hold a hearing on the merits if it considers that the discharge of its functions under the Convention so requires.
[4] pre-trial establishments (SIZOs)
[5] Constitution of Ukraine: Every person has the right to freedom and personal inviolability. No one shall be arrested or held in custody other than pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law.
In the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours. The detained person shall be released immediately, if he or she has not been provided, within seventy-two hours from the moment of detention, with a substantiated court decision in regard to the holding in custody.
Everyone arrested or detained shall be informed without delay of the reasons for his or her arrest or detention, apprised of his or her rights, and from the moment of detention shall be given the opportunity to personally defend himself or herself, or to have the legal assistance of a defender.
Everyone detained has the right to challenge his or her detention in court at any time.
Relatives of an arrested or detained person shall be informed immediately of his or her arrest or detention.
[6] the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so
[7] Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
[8] . In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
[9] 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.
[10] The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.
[11] In determining the order in which cases are to be dealt with, the Court shall have regard to the importance and urgency of the issues raised on the basis of criteria fixed by it. The Chamber, or its President, may, however, derogate from these criteria so as to give priority to a particular application.
[12] 1. If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.
2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.
[13] (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him
[14] The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.
[15] 4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.
[16] Relinquishment of jurisdiction to the Grand ChamberWhere a case pending before a Chamber raises a serious

question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

[17] Relinquishment of jurisdiction by a Chamber in favour of the Grand Chamber

1. In accordance with Article 30 of the Convention, where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto or where the resolution of a question before it might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case has objected in accordance with paragraph 2 of this Rule. Reasons need not be given for the decision to relinquish.

2. The Registrar shall notify the parties of the Chamber's intention to relinquish jurisdiction. The parties shall have one month from the date of that notification within which to file at the Registry a duly reasoned objection. An objection which does not fulfil these conditions shall be considered invalid by the Chamber.

[18] 2. The decision shall be final. 18 19

3. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination.

[19] 4. The judges and substitute judges designated in accordance with the above provisions shall continue to sit in the Grand Chamber for the consideration of the case until the proceedings have been completed. Even after the end of their terms of office, they shall continue to deal with the case if they have participated in the consideration of the merits. These provisions shall also apply to proceedings relating to advisory opinions.

[20] 2. (a) The Grand Chamber shall include the President and the Vice-Presidents of the Court and the Presidents of the Sections. Any Vice-President of the Court or President of a Section who is unable to sit as a member of the Grand Chamber shall be replaced by the Vice-President of the relevant Section.

3. If any judges are prevented from sitting, they shall be replaced by the substitute judges in the order in which the latter were selected under paragraph 2 (e) of this Rule.

[21] Right to respect for private and family life

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

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

[22] Establishment of the Court

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, hereinafter referred to as "the Court". It shall function on a permanent basis.

[23] Right to a fair trial

[24] Latin for "among other things." This phrase is often found in legal pleadings and writings to specify one example out of many possibilities.

[25] Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

[26] (...) Exclusionary rule. If a criminal defendant's statement is obtained by methods whichconstitute coercion, the trial court must exclude the statement to prevent a violation of the FifthAmendment. Hence, a statement made under coercion as the result of torture likely will bedeemed inadmissible as evidence in a criminal proceeding, unless it is used against a personaccused of torture, in which case it may be admissible only for limited purposes (e.g., asevidence that the statement was made, but not for the statement's truth). The specific grounds for exclusion may vary depending on the facts of the given case. In a crimina proceeding, an incriminating statement by the defendant may be excluded as an involuntaryconfession, as illegally obtained evidence, or as a violation of his constitutional rights.292. A confession given during custodial law enforcement interrogation is subject to specific (...)

[27] 2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

[28] Compensation of the Moral Damage

If the citizen has been inflicted a moral damage (the physical or moral sufferings) by the actions, violating his personal non-property rights or infringing upon the other non- material values in his possession, and also in the other law-stipulated cases, the court may impose upon the culprit the duty to pay out the monetary compensation for the said damage. When determining the size of compensation for the moral damage, the court shall take into consideration the extent of the culprit's guilt and the other circumstances, worthy of attention. The court shall also take into account the depth of the physical and moral sufferings, connected with the individual features of the person, to whom the damage has been done.

[29] Liability for the Injury Inflicted by State and Local Self-government Bodies, and Also by Their Officials

The injury inflicted on an individual or a legal entity as a result of unlawful actions (inaction) of state and local self-government bodies or of their officials, including as a result of the issuance of an act of a state or self-government body inconsistent with the law or any other legal act, shall be subject to redress. The injury shall be redressed at the expense of the state treasury of the Russian Federation, the respective subject of the Russian Federation or the respective municipal body, as the case may be.

[30] The Subjects of the Rights, Certified by the Security

1. The rights, certified by the security, may belong to: 1) the bearer of the security (the security to bearer);

2) the person, named in the security (the registered security);

3) the person, named in the security, who shall exercise these rights himself or shall appoint by his instruction (order) another authorized person (the order security);

2. The law may preclude the possibility of issuing a certain kind of securities as the registered ones, or the order ones, or those to bearer.

[31] The Order of Participation of the Russian Federation, of the Subjects of the Russian Federation and of the Municipal Entities in the Relationships, Regulated by the Civil Legislation

1. The right to acquire and exercise by their actions the property and the personal rights, and to come out in the court on behalf of the Russian Federation and of the subjects of the Russian Federation shall be vested in the state power bodies within the scope of their jurisdiction, established by the acts, defining the status of these bodies.

2. The right to acquire and exercise by their actions the rights and duties, indicated in Item 1 of the present Article, on behalf of the municipal entities shall be vested in the local self-government bodies within the scope of their jurisdiction, established by the acts, defining the status of these bodies.

3. In the cases and in conformity with the procedure, stipulated by the federal laws, by the decrees of the President of the Russian Federation and the decisions of the Government of the Russian Federation, by the normative acts of the subjects of the Russian Federation and of the municipal entities, the state bodies, the local self-government bodies, and also the legal entities and the citizens may come out on their behalf upon their special order.

[32] Formation of the Production Cooperative

1. The constituent document of the production cooperative shall be its Rules, endorsed by the general meeting of its members.

2. The Rules of the production cooperative shall contain, in addition to the data, indicated in Item 2 of Article 52 of the present Code, the terms for the size of the share contributions to be made by the cooperative members; for the structure and the order of making the share contributions by the cooperative members and for their liability in case of violating the obligation on making the share contributions; for the nature and the order of the labour participation by its members in the cooperative's activity and for their liability in case of violating the obligation on the personal labour participation; for the order of the distribution of the cooperative's profits and losses; for the size of and the terms for the subsidiary liability of its members by the cooperative's debts; for the structure and the scope of jurisdiction of the cooperative's management bodies and the order of their decision-making, including on the issues, the decisions on which shall be adopted unanimously or by a qualified majority of votes.

3. The number of cooperative members shall be not less than 5 persons.

[33] Article 210. The Burden of Maintaining the Property

The owner shall bear the burden of maintaining the property in his ownership, unless otherwise stipulated by the law or by the contract.

Article 211. The Risk of an Accidental Destruction of the Property

The risk of an accidental destruction of the property or of an accidental damage inflicted on it shall be borne by its owner, unless otherwise stipulated by the law or by the contract.

[34] The Unitary Enterprise

1. The unitary enterprise shall be recognized as a commercial organization, not endowed with the right of ownership to the property, allotted to it by the property owner. The unitary enterprise's property shall be

indivisible and shall not be distributed according to the instalments (the participation shares, the shares), including among the workers of the given enterprise. The Rules of the unitary enterprise shall contain, in addition to the information, indicated in Item 2 of Article 52 of the present Code, that on the subject and on the goals of the enterprise's activity, and also on the size of its authorized fund and on the order and the sources of its formation, except for treasury enterprises.
Only the state-run and the municipal enterprises shall be set up in the form of unitary enterprises.
2. The property of the state-run or the municipal unitary enterprise shall correspondingly be in the state or in the municipal ownership, and shall belong to such an enterprise by the right of economic or operative management.
3. The trade name of the unitary enterprise shall contain an indication of the owner of its property.
4. The unitary enterprise shall be managed by its head, who shall be appointed either by the owner or by the owner's authorized body, and shall report to these.
5. The unitary enterprise shall be answerable by its obligations with the entire property in its possession. The unitary enterprise shall not bear responsibility by the obligations of the owner of its property.
6. The legal status of the state-run and municipal unitary enterprises shall be defined by the present Code and by the Law on the State-Run and Municipal Unitary Enterprises.
[35] The Content of the Right of Ownership
1. The owner shall be entitled to the rights of the possession, the use and the disposal of his property.
2. The owner shall have the right at his own discretion to perform with respect to the property in his ownership any actions, not contradicting the law and the other legal acts, and not violating the rights and the law-protected interests of the other persons, including the alienation of his property into the ownership of the other persons, the transfer to them, while himself remaining the owner of the property, of the rights of its possession, use and disposal, the putting of his property in pledge and its burdening in other ways, as well as the disposal thereof in a different manner.
3. The possession, the use and the disposal of the land and of the other natural resources so far as their circulation is admitted by the law (Article 129), shall be freely effected by their owner, unless this inflicts damage to the natural environment or violates the rights and the legal interests of the other persons.
4. The owner may pass his property over into the confidential management, or into the trusteeship (to a confidential manager, or to the trustee). The transfer of the property into the confidential management shall not entail the transfer of the rights of ownership to the confidential manager, who shall be obliged to perform the management of the property in the interest of the owner or of the third person the owner has named.
[36] The Concept of the Legal Entity
1. The legal entity shall be recognized as an organization, which has in its ownership, economic management or operative management the set-apart property and which is answerable by its obligations with this property and may on its own behalf acquire and exercise the property and the personal non- property rights, to discharge duties and to come out as a plaintiff and as a defendant in the court. The legal entities shall have an independent balance or an estimate.
[37] Admissibility criteria
1. The Court may only deal with the matter after all domestic
remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
[38] Right to an effective remedy
Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.
[39] Prohibition of torture
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
[40] Posttraumatic stress disorder (PTSD) is a severe anxiety disorder that can develop after exposure to any event that results in psychological trauma.
[41] e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
[42] Soviet Criminal Law and Procedure: The Rsfsr Codes
[43] 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
[44] – Interim measures
1. The Chamber or, where appropriate, its President may, at the request of a party or of any other personconcerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.
2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.

3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.

[45] Prohibition of discrimination

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.

[46] Just satisfactionIf 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 neces-sary, afford just satisfaction to the injured party.

[47] Admissibility criteria

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

2. The Court shall not deal with any application submitted under Article 34 that

(a) is anonymous; or

(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

[48] Freedom of expression

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

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

[49] – Assignment of applications to the Sections

1. Any application made under Article 34 of the Convention shall be assigned to a Section by the President of the Court, who in so doing shall endeavour to ensure a fair distribution of cases between the Sections.

2. The Chamber of seven judges provided for in Article 26 § 1 of the Convention shall be constituted by the President of the Section concerned in accordance with Rule 26 § 1.

3. Pending the constitution of a Chamber in accordance with paragraph 2 of this Rule, the President of the Section shall exercise any powers conferred on the President of the Chamber by these Rules.

[50] 1. A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination.

[51] Single-judge formation, Committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.

2. At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.

3. When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.

4. There shall sit as an ex-officio member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.

5. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand

Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.

[52] Plenary Court

The plenary Court shall

(a) elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;

(b) set up Chambers, constituted for a fixed period of time;

(c) elect the Presidents of the Chambers of the Court; they may be re-elected;

(d) adopt the rules of the Court;

(e) elect the Registrar and one or more Deputy Registrars;

(f) make any request under Article 26, paragraph 2.

[53] 2. If the Council of Europe Commissioner for Human Rights wishes to exercise the right under Article 36 § 3 of the Convention to submit written observations or take part in a hearing, he or she shall so advise the Registrar in writing not later than twelve weeks after transmission of the application to the respondent Contracting Party or notification to it of the decision to hold an oral hearing. Another time-limit may be fixed by the President of the Chamber for exceptional reasons.

[54] Procedure before a Chamber

1. The Chamber may at once declare the application inadmissible or strike it out of the Court's list of cases.

2. Alternatively, the Chamber or its President may decide to

(a) request the parties to submit any factual information, documents or other material considered by the Chamber or its President to be relevant;

(b) give notice of the application to the respondent Contracting Party and invite that Party to submit written observations on the application and, upon receipt thereof, invite the applicant to submit observations in reply;

(c) invite the parties to submit further observations in writing.

3. Before taking its decision on the admissibility, the Chamber may decide, either at the request of a party or of its own motion, to hold a hearing if it considers that the discharge of its functions under the Convention so requires. In that event, unless the Chamber shall exceptionally decide otherwise, the parties shall also be invited to address the issues arising in relation to the merits of the application.

[55] 2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who 22 23is not the applicant to submit written comments or take part in hearings.

[56] 2. If the Council of Europe Commissioner for Human Rights wishes to exercise the right under Article 36 § 3 of the Convention to submit written observations or take part in a hearing, he or she shall so advise the Registrar in writing not later than twelve weeks after transmission of the application to the respondent Contracting Party or notification to it of the decision to hold an oral hearing. Another time-limit may be fixed by the President of the Chamber for exceptional reasons. Should the Commissioner for Human Rights be unable to take part in the proceedings before the Court himself, he or she shall indicate the name of the person or persons from his or her Office whom he or she has appointed to represent him. He or she may be assisted by an advocate.

[57] 2. 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.

[58] (b) If a Contracting Party wishes to exercise its right under Article 36 § 1 of the Convention to submit written comments or to take part in a hearing, it shall so advise the Registrar in writing not later than twelve weeks after the transmission or notification referred to in the preceding sub-paragraph. Another time-limit may be fixed by the President of the Chamber for exceptional reasons.

[59] 3. Applicants who do not wish their identity to be disclosed to the public shall so indicate and shall submit a statement of the reasons justifying such a departure from the normal rule of public access to information in proceedings before the Court. The President of the Chamber may authorise anonymity or grant it of his or her own motion.

[60] Examination of the case

The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

[61] Friendly settlement

1. Once an application has been declared admissible, the Registrar, acting on the instructions of the Chamber or its President, shall enter into contact with the parties with a view to securing a friendly settlement of the matter in accordance with Article 39 § 1 of the Convention. The Chamber shall take any steps that appear appropriate to facilitate such a settlement.

2. In accordance with Article 39 § 2 of the Convention, the friendly-settlement negotiations shall be confidential and without prejudice to the parties' arguments in the contentious proceedings. No written or oral

communication and no offer or concession made in the framework of the attempt to secure a friendly settlement may be referred to or relied on in the contentious proceedings.
3. If the Chamber is informed by the Registrar that the parties have agreed to a friendly settlement, it shall, after verifying that the settlement has been reached on the basis of respect for human rights as defined in the Convention and the Protocols thereto, strike the case out of the Court's list in accordance with Rule 43 § 3.
4. Paragraphs 2 and 3 apply, mutatis mutandis, to the procedure under Rule 54A.

[62] Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape
of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

[63] – Request by a party for referral of a case to the Grand Chamber

1. In accordance with Article 43 of the Convention, any party to a case may exceptionally, within a period of three months from the date of delivery of the judgment of a Chamber, file in writing at the Registry a request that the case be referred to the Grand Chamber. The party shall specify in its request the serious question affecting the interpretation or application of the Convention or the Protocols thereto, or the serious issue of general importance, which in its view warrants consideration by the Grand Chamber.
2. A panel of five judges of the Grand Chamber constituted in accordance with Rule 24 § 5 shall examine the request solely on the basis of the existing case file. It shall accept the request only if it considers that the case does raise such a question or issue. Reasons need not be given for a refusal of the request.
3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

[64] 3. Everyone charged with a criminal offence has the following
minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[65] No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitutea criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.