

European Court of Human Rights: May 2013-April 2014

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1 THE COURT'S WORKLOAD, NEW PROTOCOLS AND CHANGES TO THE APPLICATIONS PROCESS

During 2013 the European Court of Human Rights (hereinafter "the Court") delivered 916 judgments, in respect of 3,659 applications.¹ The Grand Chamber gave 5 judgments in relinquishment cases, under Article 30 of the European Convention on Human Rights (hereinafter "the Convention" or "the ECHR") and 7 in rehearing cases (appeals), under Article 43 of the Convention.² Very significantly, for the second year running, the Court was able to erode its backlog of cases, particularly via the use of Single Judge Formations (created by Protocol No. 14). By the end of 2013 the Court had reduced its backlog of pending application to 99,900 compared with 128,100 at the start of the year.³ These achievements coupled with a relatively stable number of new applications received during the year (66,000⁴) enabled the Court's President to observe that:

The results are impressive, because we have managed to achieve an even greater output than last year. One aspect that is particularly pleasing to note is that for a number of high case-count countries, such as Turkey and Poland, the backlog of manifestly inadmissible applications has already been eliminated. Other countries, such as Germany and France, now have no backlog at all.⁵

Remarkably the last year has seen the promulgation of two Protocols to the ECHR. Protocol No. 15, was opened for signature on the 24th of June 2013 and is primarily a product of the Brighton Conference, and its Declaration, convened by the British government in April 2012.⁶ According to the Parliamentary Assembly of the Council of Europe this Protocol contains mainly "technical and uncontroversial" amendments to the ECHR.⁷ Article 1 of the Protocol adds a new recital to the end of the preamble of the Convention:

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they

¹ *Analysis of Statistics 2013*, Jan. 2014, Strasbourg, p.4.

² *Annual Report 2013*, Jan. 2014, Strasbourg, p. 61.

³ *Ibid.*

⁴ President Spielmann, Press Conference, Jan. 30, 2014, Strasbourg.

⁵ *Ibid.*

⁶ Discussed in my earlier *Rapport* for 2011-12: 18 *Eur. Pub. L.* 566 (2012).

⁷ Opinion 283(2013): Apr. 26, 2013.

enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

Officially this amendment is designed to “enhance the transparency and accessibility” of the principle of subsidiarity and the doctrine of the margin of appreciation.⁸ However, the amendment reflects the political compromise agreed amongst States, at the Brighton Conference, in response to the British government’s wish to limit the authority of the European Court of Human Rights (hereinafter “the Court”). It seems highly unlikely that the Court will become more deferential to domestic governmental decisions and judgments because the above two concepts have been added to the preamble of the Convention.

Article 2 of Protocol No. 15 amends the age qualification for judges at the Court by providing that candidates, nominated by High Contracting Parties, must be less than 65 years of age at the date that the Parliamentary Assembly requests the relevant Party to provide its list of three candidates. This means that a judge appointed at the age of sixty four could continue in office until they were seventy three, an extension of three years compared to the compulsory retirement age of seventy introduced by Protocol No. 11.⁹ This is a welcome alteration as several leading judges (including Presidents Wildhaber and Costa) were forced to retire because they had reached seventy. Under the new Protocol the Court will be able to continue to benefit from the wisdom and experience of older judges.

Article 3 of the Protocol removes the ability of any party to block the desire of a Chamber to relinquish jurisdiction to the Grand Chamber over proceedings which raise serious questions of interpretation of the ECHR or may involve departing from the Court’s settled case-law.¹⁰ This reform has the purpose of expediting the Grand Chamber’s ability to determine such important cases. However, applicants are less likely to welcome Article 4 of Protocol No. 15 which reduces the time limit for lodging applications with the Court to four months (from six months), beginning with the date on which the final domestic decision/judgment was taken.¹¹ This reduction has been introduced because of evolutions in communications and developments (reductions) in time limits for domestic judicial proceedings. The final reform of Protocol No. 15 also removes a procedural protection for individual applicants who have not suffered a significant disadvantage in the view of the Court. Protocol No. 15 will enable the Court to declare such applicants inadmissible even if no domestic tribunal has considered the case. This change is justified in accordance with the desire to ensure that the Court’s precious resources are not wasted on trivial complaints.

⁸ Explanatory Report to Protocol No. 15, para. 7.

⁹ ECHR Article 23(2), which is to be deleted under Protocol No.15 Article 2(3).

¹⁰ Under ECHR Article 30.

¹¹ ECHR Article 35(1).

Protocol No.15 will only come into effect after all the High Contracting Parties have ratified it.¹² The Parliamentary Assembly has urged all Member States to do so rapidly.¹³

In October 2013, Protocol No. 16 was opened for signature. It empowers the Court to provide advisory opinions on “questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto” at the request of the “highest courts and tribunals” of relevant High Contracting Parties.¹⁴ The origin of the idea of giving the Court this power was the 2006 Report of the Group of Wise Persons¹⁵, appointed by the Committee of Ministers to consider the long term effectiveness of the Court. The Group believed that such a jurisdiction would help promote the dialogue between the Court and the highest national courts, together with strengthening the Court’s “constitutional” role¹⁶. The Izmir Conference¹⁷, organised by the Turkish government, recommended that the Committee of Ministers examine the desirability of conferring such a jurisdiction on the Court. Prior to the Brighton Conference the Court issued a Reflection Paper¹⁸ on the proposal. The Court believed that at first the creation of this new jurisdiction could create more work for the Court but that over time the aim would be to encourage the satisfactory determination of greater numbers of cases within national systems. The Court considered that it should have a discretion to refuse requests for an advisory opinion and that it should not be bound to give reasons for rejecting a request.

The Court is aware that a rejection of a domestic court’s request for an advisory opinion without giving reasons may run counter to the objective of fostering dialogue with that court. It could therefore be envisaged that the Court adopt a set of general guidelines on requests by national courts for advisory opinions explaining the scope, the aim and the functioning of the procedure, to which it could possibly refer in case of the rejection of a request.¹⁹

The Court was divided as to whether an advisory opinion delivered by the Court should be binding on the national court that had requested it. There was “considerable support” amongst the Strasbourg judges for its advisory opinions not to be binding, but “a number of judges” thought they should be binding.²⁰ It was noted that advisory opinions

¹² Protocol No.15 Article 7.

¹³ *Supra* n. 2.

¹⁴ Protocol No.16 Article 1(1).

¹⁵ CM(2006)203 and see. A. Mowbray, *Cases, Materials & Commentary on the ECHR* 62 (3d ed., Oxford 2012).

¹⁶ For an academic analysis of this see Wildhaber/Greer ***HRLR***.

¹⁷ Apr. 26-27, 2011.

¹⁸ Ref. no. 3853038, Mar., 2012, Strasbourg.

¹⁹ *Ibid.*, para. 36.

²⁰ *Ibid.*, para. 42.

were not binding before the Inter-American Court of Human Rights and the African Court of Human and People's Rights. The Court ought to follow its advisory opinions when giving judgment in any relevant later individual application. The Brighton Declaration invited the Committee of Ministers to draft an optional protocol enabling the Court to give advisory opinions. The detailed work on the drafting was subsequently undertaken by the Committee of Minister's Steering Committee for Human Rights (CDDH). A final draft protocol was produced by CDDH in March 2013. Two months later the Court agreed an Opinion on draft Protocol No. 16.²¹ The Court welcomed the fact that the drafters had taken account of the Court's earlier Reflection Paper. However, the Court noted that the draft protocol required the Court to give reasons for refusing a request for an advisory opinion and that went against the Court's view in its Reflection Paper. Furthermore, the Court "opposed" the implications in the Explanatory Report, accompanying the draft protocol, that the Court should be responsible for translating requests for advisory opinions and their accompanying documentation from national languages into the official languages of the Court. Likewise the Court had "hesitations" about the Explanatory Report's recommendation that the Court would "co-operate" with national authorities in translating its advisory opinions into national languages. Both these processes would be costly and time-consuming for the Court.

The Parliamentary Assembly supported the draft protocol, observing that in it would promote the dialogue between the Court and the highest national courts together with helping to shift:

from *ex post* to *ex ante*, the resolution of a number of questions of interpretation of the Convention's provisions in the domestic forum, saving – in the long run – the valuable resources of the Court; the speedier resolution of similar cases on the domestic plane will also reinforce the principle of subsidiarity.²²

Protocol No. 16 provides that ratifying High Contracting Parties will identify their relevant courts and tribunals that can make requests for advisory opinions from the Court.²³ Specified judicial bodies can only seek an advisory opinion in regard to an actual case they are determining.²⁴ This is designed to avoid requests concerning abstract legal queries being submitted to the Court. Also, the requesting judicial body must give reasons for its request and explain the legal and factual background of the domestic case.²⁵ The Explanatory Report to the Protocol indicates that these obligations are meant to ensure that requesting bodies have thought about the necessity of seeking an advisory opinion and that they inform the Court of the relevant domestic legal and Convention issues at stake, the views of the parties to the proceedings and, if possible, the view of the domestic judiciary.²⁶

Article 2 of Protocol No. 16 states that it is a panel of five judges, from the Grand Chamber of the Court, who will determine whether to accept a request for an advisory opinion. This procedural mechanism echoes the system for deciding which Chamber

²¹ May 6, 2013, Strasbourg.

²² Opinion 285(2013): Jun. 28, 2013.

²³ By a declaration addressed to the Secretary General of the Council of Europe: *supra* n.9, Article 10.

²⁴ *Ibid.*, Article 1(2).

²⁵ *Ibid.*, Article 1(3).

²⁶ Explanatory Report to Protocol No. 16, paras. 11-12.

judgments will be reheard by the Grand Chamber, under ECHR Article 43. However, Article 2 of the Protocol requires the panel to give reasons if it decides to decline a request. As we have discussed above this duty on the panel, to give reasons, is contrary to the wishes of the Court. The Explanatory Report believes that the Court will “hesitate” to refuse qualifying requests and that the panel’s obligation to provide reasons for a rejection should help deter future inappropriate requests.²⁷ The judge elected in respect of the State whose judiciary have made the request will sit on the Grand Chamber that delivers the advisory opinion.²⁸

Under Article 3 of the Protocol the Council of Europe’s Commissioner for Human Rights and the government of the High Contracting Party whose judiciary have made the request have the right to submit written comments and take part in any hearing before the Grand Chamber. Other Member States or third-parties can be given similar permissions by the Court’s President.

According to Article 4 of the Protocol advisory opinions must be reasoned and Grand Chamber judges may deliver dissenting opinions. This is identical to the existing provision for the Court to give advisory opinions on institutional and procedural queries at the request of the Committee of Ministers (under ECHR, Article 49).

Article 5 of the Protocol succinctly provides that advisory opinions are not binding. According to the Explanatory Report this means that the requesting judicial body will then determine the implications of the advisory opinion for the case before it. The Report goes on to elaborate that if a party to the domestic proceedings subsequently lodges an individual application with the Court it would be “expected” that, if the national judiciary has “effectively followed” the advisory opinion then those parts of the application to Strasbourg would be declared inadmissible or struck-out by the Court. Whilst advisory opinions would not have a “direct effect” on other later applications to the Court they will form part of the Court’s case-law. Given that advisory opinions will be delivered by the Grand Chamber we should expect them to have considerable jurisprudential weight in the Court’s future decision-making.

Articles 6 and 7 confirm that Protocol No. 16 is optional and that High Contracting Parties decide whether to become bound by it. The Protocol will come into effect, for those relevant Parties, three months after 10 Parties have formally submitted instruments of ratification/acceptance.

It is fascinating that Protocol No. 16 has been agreed by the Committee of Ministers and endorsed by the Parliamentary Assembly even though the Court has, publicly, expressed its opposition to aspects of the process. We shall now have to wait and see how many High Contracting Parties ratify the Protocol and then it will be illuminating to discover the response of their judicial bodies to the new advisory jurisdiction. Are they going to seek an early dialogue with the Court by making requests for advisory opinions or will they prefer to give their own judgments and wait for aggrieved individuals to bring complaints against their rulings at Strasbourg?

Stricter new provisions governing the lodging of applications with the Court came into effect on 1 January 2014. The amended text of Rule 47 “Contents of an individual application”²⁹ now requires such applicants to provide all the information, together with supporting documentation, specified by the (simplified) application form available from the Court’s website. Furthermore, this information must be in a “concise and legible” form and any supplementary text elaborating the applicants’ assertion of facts or legal arguments must not exceed 20 pages.³⁰ Failure to comply with these requirements will

²⁷ *Ibid.*, paras. 14-15.

²⁸ *Supra* n. 9, Article 2(3).

²⁹ Rules of Court, Jul. 1, 2013.

³⁰ *Ibid.*, Rule 47(2)(b).

normally result in the application not being examined by the Court.³¹ Very significantly the new rule also introduces a tougher approach to determining the date at which an applicant will be deemed to have satisfied the Convention's time limit for submitting an application. Under the previous version of Rule 47 applicants were deemed to have introduced their application when the Court received "the first communication from the applicant setting out, even summarily, the subject matter of the application". Now: "[t]he date of introduction of the application for the purposes of Article 35(1) of the Convention shall be the date on which an application form satisfying the requirements of this Rule is sent to the Court. The date of dispatch shall be the date of the postmark."³² The Registrar of the Court has announced that incomplete applications will "no longer be taken into consideration for the purposes of interrupting the running of the six-month period."³³ These reforms have the objectives of expediting the determination of applications and increasing the efficiency of the Court.

ARTICLE 2: TEMPORAL JURISDICTION

A major war crime committed by Soviet authorities during the Second World War created the origins of the complaints in *Janowiec and Others v Russia*³⁴. It was accepted by the parties before the Court that the applicants' relatives had been servicemen in the Polish Army who had been captured following the Soviet invasion of eastern Poland in the autumn of 1939 (the occupation had been provided for by a secret agreement between Nazi Germany and the USSR). They were then detained, for a few months, in NKVD (People's Commissariat for Internal Affairs: a predecessor of the KGB- State Security Committee) camps in the western part of the USSR. In March 1940, the Head of the NKVD (L. Beira) recommended to J. Stalin (the Secretary General of the USSR Communist Party) that the Polish prisoners of war (numbering nearly 15,000 persons) and a further 11,000 prisoners (including former Polish government officials and land/factory owners) should be shot as they were "enemies of the Soviet authorities". Later that month the Politburo of the Central Committee of the USSR authorised the NKVD to shoot all those detained persons, who were sentenced to capital punishment under a "special procedure" without the detainees being notified of the charges against them. The killings took place in April and May 1940 including at the Katyn Forest, near Smolensk. Subsequently, the German army occupied that area and in 1943 discovered mass burial sites (now referred to as the Katyn massacre). A commission of international forensic experts was appointed to investigate the sites and it conclude that Soviet authorities had been responsible for the killings. The Soviet authorities contended that it was the Germans who had murdered the victims. A few months later the Red Army re-occupied that territory and the NKVD established a commission which determined that the Germans had killed the prisoners in 1941. During the Nuremberg Tribunal war crimes trials the USSR prosecutor charged the defendants with the execution of 11,000 Polish prisoners of war in 1941 and referred to the Katyn killings as a war crime. However, the judgment of the Tribunal did not refer to the Katyn killings. In March 1959 the Chairman of the KGB proposed to N. Khrushchev, the Secretary General of the USSR Communist Party, that the documents relating to the killing of the 21,857 Polish prisoners should be destroyed. A few of those documents were preserved, in a special file only accessible by the Secretary General. The Russian State Archive placed the retained documents (including Beira's proposal and the Politburo decision of 1940) on its website in 2010.

³¹ Rule 47(5)(1).

³² Rule 47(6)(a).

³³ Press Release, ECHR 345(2013), Dec. 11, 2013.

³⁴ Nos. 55508/07 and 29520/09, Oct.21, 2013.

In 1990 the Kharkov regional prosecutor began a criminal investigation into mass graves found in the city and linked to the above killings of Polish prisoners. Later that year the Chief Military Prosecutor's Office of the USSR took over the investigation (as case 159). During the next year Polish and Russian experts exhumed bodies at a number of sites, including Kharkov and Katyn, and interviewed witnesses. In 1992 Russian President Yeltsin acknowledged the role of Stalin and the Politburo in the death of Polish soldiers. Three years later prosecutors from Russia, Poland and Belarus met to discuss progress on case 159. Between 2001 and 2004 the President of the Polish Institute for National Remembrance unsuccessfully sought access to the Russian Military Prosecutor's investigation of the case. In September 2004 the Russian Chief Military Prosecutor's Office decided to end the investigation, on the basis that the suspects were dead. The Russian body responsible for state secrets classified 36 (of 183) volumes of the case file as "top secret", including the decision to terminate the investigation. The Russian Military Prosecutor made public the decision in 2005.

The applicants, fifteen Polish nationals, unsuccessfully challenged the 2004 decision to discontinue the criminal investigation before the Russian courts. Then they applied to the Court alleging breaches of Articles 2 and 3 of the ECHR. A Chamber, by four votes to three, found it had no jurisdiction *ratione temporis* to examine the applicants' alleged breach of Article 2, but (by 5 votes to 2) 10 applicants had suffered a violation of Article 3. A bare majority of the Chamber also found that Russia had failed to comply with their duty, under Article 38, to assist the Court in its determination of the case.³⁵ The applicants successfully petitioned the Grand Chamber to rehear the case under Article 43.

Before the Grand Chamber the applicants accepted that the Katyn massacre fell outside the temporal scope of the Convention in regard to the substantive right to life. However, they contended that the Court had jurisdiction to consider the procedural limb of Article 2 of the ECHR. In the submission of the applicants Contracting Parties to the Convention were obliged to undertake effective investigations into totalitarian crimes and such an investigation into the Katyn massacre was necessary for the "rehabilitation" of their murdered relatives. They claimed that there were a number of defects in the Russian investigations, including the failure to undertake comprehensive excavations at all the burial sites and a lack of transparency in the process. Amnesty International, in its' third-party comments, argued that the duty to investigate war crimes and crimes against humanity applied to such atrocities committed prior to the drafting of the ECHR. Furthermore, the Inter-American Court had regularly found State parties were bound to investigate acts committed before the entry into force of the American Convention on Human Rights. The Russian government contended that from the perspective of the substantive aspect of Article 2 the "Katyn events" "did not legally exist" as they had predated the creation of the Convention by 10 years (and Russia's ratification by 58 years). Therefore, Russia was not under an Article 2 procedural obligation to investigate those events (the criminal case no. 159 investigation had been conducted as a political goodwill gesture).

The Grand Chamber began by emphasising that:

...the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party ("the critical date"). This is an established principle in the Court's case-law based on the general rule of international law embodied in Article 28 of the Vienna Convention on the Law of Treaties of 23 May 1969...³⁶

Nor are States under a specific Convention obligation to provide redress for wrongs committed before their critical dates. The Court's temporal jurisdiction is dependent upon the precise timing of the alleged violation. Regarding Article 2 the procedural

³⁵ Judgment of Apr.16, 2012.

³⁶ *Supra* n.24 at para. 128.

obligation to undertake an effective investigation was now recognised as an autonomous duty that could bind a State even when the relevant death occurred prior to the critical date. But the temporal jurisdiction in respect of such procedural obligations was not open-ended. The Court had previously held that:

162. First, it is clear that, where the death occurred before the critical date, only procedural acts and/or omissions occurring after that date can fall within the Court's temporal jurisdiction.

163. Second, there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect.

Thus a significant proportion of the procedural steps required by this provision – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account – will have been or ought to have been carried out after the critical date.

However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.³⁷

Subsequently, the Court had also distinguished between the investigation obligations in respect of suspicious deaths and suspicious disappearances:

A disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred... This situation is very often drawn out over time, prolonging the torment of the victim's relatives. It cannot therefore be said that a disappearance is, simply, an 'instantaneous' act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation... This is so, even where death may, eventually, be presumed.³⁸

Despite the application of the above principles in a number of later cases the Grand Chamber considered that the Court's case-law needed further clarification. Regarding the "genuine connection" test the Grand Chamber believed that the time period between the triggering event and the respondent State's critical date should not exceed 10 years. Furthermore, for that test to be satisfied the majority of the investigations must/should have been completed after the critical date. Following *Silih* the Grand Chamber acknowledged that there might be "extraordinary situations" which failed to meet the "genuine connection" test but which should be subject to ECHR obligations in order to respect "Convention values".

Like the Chamber, the Grand Chamber considers the reference to the underlying values of the Convention to mean that the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments.

151. The heinous nature and gravity of such crimes prompted the contracting parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity to agree that they must be imprescriptible

³⁷ *Silih v Slovenia*, No. 71463/01 Apr.9, 2009.

³⁸ *Varnava and Others v Turkey*, Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Sep.18, 2009.

and not subject to any statutory limitation in the domestic legal order. The Court nonetheless considers that the "Convention values" clause cannot be applied to events which occurred prior to the adoption of the Convention, on 4 November 1950, for it was only then that the Convention began its existence as an international human rights treaty. Hence, a Contracting Party cannot be held responsible under the Convention for not investigating even the most serious crimes under international law if they predated the Convention. Although the Court is sensitive to the argument that even today some countries have successfully tried those responsible for war crimes committed during the Second World War, it emphasises the fundamental difference between having the possibility to prosecute an individual for a serious crime under international law where circumstances allow it, and being obliged to do so by the Convention.³⁹

Applying the above refined principles the Grand Chamber determined that neither of the "genuine connection" criteria had been satisfied by the facts of this case. The applicants' relatives had been executed 58 years before Russia became a party to the ECHR and that period was "too long". Additionally, most of the investigatory steps into the killing of the Polish prisoners had been undertaken before Russia's "critical date" in 1998.

Finally, it remains to be determined whether there were exceptional circumstances in the instant case which could justify derogating from the "genuine connection" requirement by applying the Convention values standard. As the Court has established, the events that might have triggered the obligation to investigate under Article 2 took place in early 1940, that is, more than ten years before the Convention came into existence. The Court therefore upholds the Chamber's finding that there were no elements capable of providing a bridge from the distant past into the recent post-entry into force period.⁴⁰

Therefore, a very large majority of the Grand Chamber (thirteen votes to four) held that *ratione temporis* the Court had no competence to examine the applicant's procedural complaint under Article 2.

Judges Ziemele, De Gaetano, Laffranque and Keller issued a joint partly dissenting opinion. They began by characterising the mass killings of the Polish prisoners of war as war crimes, whereas *Silih* had concerned a death caused by medical malpractice. The dissenters did not agree with the majority limiting "genuine connection" cases to those involving deaths occurring within 10 years of the respondent State becoming bound by the Convention. Nor did they accept the majority's application of the "underlying values" criterion, which the dissenters referred to as "the humanitarian clause". Given the seriousness of the war crimes committed in 1940 and the attitude of the Russian authorities to the investigation of those events after Russian ratification of the Convention, the dissenters considered that "the humanitarian clause" granted the Court provided the Court with temporal jurisdiction over the applicants' Article 2 complaint.

We regret the majority's interpretation of the humanitarian clause in the most non-humanitarian way. ...We express our profound disagreement and dissatisfaction with the findings of the majority in this case, a case of most hideous human rights violations, which turn the applicants' long history of justice delayed into a permanent case of justice denied.⁴¹

In respect of the applicants' complaint that they had suffered inhuman or degrading treatment, in breach of Article 3, because of the Russian authorities' attitude towards the fate of their relatives an overwhelming majority of the Grand Chamber

³⁹ *Supra* n.24 at paras. 150-151.

⁴⁰ *Ibid.* at para. 160.

⁴¹ Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller at paras. 35-36.

(twelve votes to five) found no violation. Whilst the majority recognised the “profound grief and distress that the applicants have experienced as a consequence of the extrajudicial execution of their family members”⁴²; the applicants had not been left in a state of uncertainty over the fate of their relatives since 1998 (when Russia became a party to the ECHR). “The magnitude of the crime committed in 1940 by the Soviet authorities is a powerful emotional factor, yet, from a purely legal point of view, the Court cannot accept it as a compelling reason for departing from its case-law on the status of the family members of “disappeared persons” as victims of a violation of Article 3 and conferring that status on the applicants, for whom the death of their relatives was a certainty.”⁴³

The Grand Chamber was united in finding that Russia’s failure to supply the Court with a copy of the 2004 decision to discontinue the criminal investigation into the mass killings, despite repeated request by the Court, amounted to a breach of Article 38. The Grand Chamber reaffirmed that respondent States’ “procedural obligations under Articles 34 and 38 of the Convention must be enforced irrespective of the eventual outcome of the proceedings and in such a manner as to avoid any actual or potential chilling effect on the applicants or their representatives.”⁴⁴

The above judgment provides detailed guidelines on the Court’s competence to examine complaints relating to events occurring before the respondent State became a party to the Convention. It is now clear that contracting States cannot generally be held to have Convention based effective investigation duties in respect of deaths occurring more than 10 years prior to the respondent State becoming bound by the ECHR. Even an extraordinary event could not trigger the “Convention values” temporal criterion if it occurred before the adoption of the ECHR in 1950. The joint partly dissenting opinion is notable for the strength of its criticism of the majority’s approach. Nevertheless, given the current caseload of the Court there are strong pragmatic reasons why it should not allow itself to become the focus of litigation regarding events, however dreadful, occurring many decades ago.

ARTICLE 3: WHOLE LIFE SENTENCES

A Grand Chamber clarified the Court’s approach to the lawfulness of these sentences under Article 3 in *Vinter and Others v United Kingdom*⁴⁵. The three applicants had each been convicted of murder; Vinter for a second time, Bamber for the premeditated killing of five members of his family and Moore for the serial killing of four homosexuals. Judges imposed whole life sentences on them, meaning that they would never be eligible to apply for release on licence (parole). Under domestic law their only hope of obtaining release from prison was the Secretary of State (the Justice Secretary) exercising his statutory discretion, granted by section 30(1) of the Crime (Sentences) Act 1997, to order the release of a life sentence prisoner on licence where he is satisfied that exceptional circumstances justify the release on compassionate grounds. However, Prison Service Orders elaborated that the Secretary would only authorise such a release if, *inter alia*, the prisoner was within a few months of dying from a terminal illness or paralysed. In fact since 2000 no whole life sentence prisoner had been released under that power (at the time of the Grand Chamber judgment there were 41 prisoners in England and Wales serving such sentences). The applicants complained to the Court that

⁴² *Supra* n.24 at para. 186.

⁴³ *Ibid.*

⁴⁴ *Ibid.* at para. 209.

⁴⁵ Nos. 66069/09, 130/10 and 3896/10, Jul.9, 2013.

their whole life sentences were incompatible with Article 3. A Chamber, by four votes to three, found no violation of that provision.⁴⁶ The applicants then successfully petitioned the Grand Chamber to rehear their case. They criticised the Chamber for failing to require that whole life sentences contained a review mechanism that enabled the determination of whether the continued incarceration of a particular prisoner was justifiable under Article 3. The applicants noted that until 2003 such a review had been undertaken by the Secretary of State after a prisoner had served 25 years of his/her sentence. The government sought to justify the ending of the 25 year review by retorting that it was part of a reform designed to remove ministerial involvement in the sentencing of life prisoners. Furthermore, the government contended that there was a lack of consensus amongst the Member States regarding life sentences and the well-established English policy embodied the views of Parliament and the domestic judiciary.

The Grand Chamber endorsed the Chamber's view, supported by the applicants and the government, that a grossly disproportionate sentence imposed on a convicted person would breach Article 3. But, the Grand Chamber noted that it would be rare for a sentence to fall into that category. Furthermore, the applicants did not claim that their sentences were grossly disproportionate. The Grand Chamber confirmed that States should be accorded a margin of appreciation in determining the appropriate length of sentences for specific crimes, as that was a matter of "rational debate and civilised disagreement".⁴⁷ Furthermore, Member States were free to impose life sentences on adults convicted of especially serious crimes. Nevertheless, following *Kafkaris v Cyprus*⁴⁸, the imposition of an irreducible life sentence on an adult might create an issue under Article 3. The Grand Chamber elaborated that there would not be an issue if the specific prisoner was shown to still pose a danger to society. However, for a life sentence to be compatible with Article 3 there had to be "both a prospect of release and a possibility of review".⁴⁹ Prisoners can only be detained if there are legitimate penological grounds for their incarceration, such as punishment, deterrence, public protection and rehabilitation. According to the Grand Chamber:

Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence.⁵⁰

The Court considered that European and international law now supported the possibility of release for rehabilitated prisoners. This was found in the European Prison Rules, Comments by the United Nations Human Rights Committee and the Rome Statute of the International Criminal Court (which established reviews of life sentences after 25 years).

For the foregoing reasons, the Court considers that, in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards

⁴⁶ Judgment of 17 Jan. 2012.

⁴⁷ *Supra* n. ** at para. 105.

⁴⁸ No. 21906/04, *****2008.

⁴⁹ *Supra* n. ** at para. 110.

⁵⁰ *Ibid.* at para. 112.

rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.⁵¹

Given States' margin of appreciation regarding sentencing the Grand Chamber declined to rule on whether the above reviews should be undertaken by domestic judicial or executive bodies, nor would the Court specify after what period of detention the initial review should take place. However, the Grand Chamber pointedly observed that comparative and international law examples demonstrated that such reviews generally occurred no later than 25 years after sentencing. The Court did state that whole life prisoners should be informed at the start of their sentences when they would be eligible for the above review.

The Grand Chamber supported the Chamber's opinion that the respondent government had not provided a plausible explanation of why the 25 year review of English/Welsh whole life prisoners had been abandoned in 2003. Additionally, the Grand Chamber considered that the domestic law governing the release of life prisoners lacked clarity. The Justice Secretary's statutory discretion to authorise the compassionate release of such prisoners was broadly drawn, but the Secretary had adopted a very restrictive policy governing its use. When combined with the absence of a specific review mechanism to consider the desirability of release on licence of whole life prisoners the Grand Chamber, subject to one dissent, found a breach of Article 3 as none of the applicants was subject to a reducible life sentence. The Court noted that the applicants had not argued that there were no legitimate grounds for their continued detention so, "[t]he finding of a violation in their cases cannot therefore be understood as giving them the prospect of imminent release."⁵²

Judge Villiger dissented as he believed that the majority had failed to correctly apply Article 3.

The judgment makes no reference as to whether the minimum severity of treatment has been attained in respect of the applicants in order to bring about the application of Article 3. Neither is there a qualification as to whether the irreducible prison sentence amounts to inhuman or degrading punishment, or indeed to torture. Reference is made solely to "Article 3".⁵³

He also doubted if the Grand Chamber's judgment respected the principle of subsidiarity.

The judgment of the overwhelming majority of the Grand Chamber in *Vinter and Others* now requires States that have whole life sentences in their criminal justice systems to provide a review mechanism to determine, after a couple of decades of imprisonment, whether a prisoner serving such a sentence has been rehabilitated sufficiently to be released on licence. The driving forces of this procedural obligation were the European consensus and similar developments on the wider international level. It was also significant that England and Wales had an executive review procedure before 2003 and the Court was not impressed with the respondent government's attempts to

⁵¹ *Ibid.* at para.119.

⁵² *Ibid.* at para. 131.

⁵³ Partly Dissention Opinion of Judge Villiger.

justify the abolition of that process. Despite Judge Villiger's concern about the majority not giving sufficient deference to varied national criminal justice systems, the Grand Chamber judgment expressly declined to rule on whether the review process had to be undertaken by judicial or executive bodies, nor did the Court specify exactly at what time during a whole life sentence the first review had to take place. Therefore, the respondent government has been given some leeway in deciding how it will implement the judgment. Nevertheless, the immediate political response of the British government was highly negative with Prime Minister David Cameron declaring that he "profoundly disagrees with the Court's ruling".⁵⁴ *Vinter* is therefore likely to join the prisoners' voting case of *Hirst*⁵⁵ as a judgment which aggravates those in the UK who believe the Court is unjustifiably interfering in sensitive domestic affairs, whilst supporters can claim that it is merely the latest in a long line of Strasbourg judgments⁵⁶ where the Court has sought to ensure that human rights do not end at the prison entrance.

A unanimous Chamber subsequently applied *Vinter* when determining that the "aggravated" whole life sentence imposed upon Abdullah Ocalan, the founder of the PKK (Kurdistan Workers' Party), violated Article 3 due to the impossibility of him obtaining conditional release. In *Ocalan v Turkey (No.2)*⁵⁷, as in *Vinter*, the Chamber found that the domestic legislation did not create any mechanism whereby the continuing need for the applicant's detention on penological grounds could be reviewed after a minimum term. This judgment is likely to be as controversial in Turkey as *Vinter* is in the UK.

ARTICLE 3: POSITIVE OBLIGATION TO PROTECT

The Court dealt with the Convention responsibilities of the Irish government to protect young pupils, being taught in schools run by religious bodies, from sexual abuse by their teachers in the case of *O'Keeffe v Ireland*⁵⁸. In 1968, when she was aged four, the applicant began attending Dunderrow National School. This type of school was financed by the state but was owned and run by denominational bodies. At that time about 94% of all Irish primary schools were National Schools and 91% of the latter type of schools were owned and managed by the Catholic Church. In 2011, 96% of Irish primary schools were under denominational patronage and management (with the Catholic Church managing 90% of these schools). Dunderrow was owned by the Catholic Bishop of Cork and the Manager of the school was the local parish priest. The school had two teachers of whom L.H. (Leo Hickey⁵⁹) was the school's Principal. During 1971 a parent of a pupil at Dunderrow complained to the Manager that L.H. had sexually abused her child. The

⁵⁴ BBC news 9 Jul. 2013.

⁵⁵ *Hirst v UK (No.2)*, NO.74025/01, 6 Oct. 2005.

⁵⁶ Beginning with *Golder v UK*, No.4451/70, 21 Feb. 1975.

⁵⁷ Nos. 24069/03, 197/04, 6201/06 et 10464/07, 18 Mar. 2014. See A. Mowbray, *Cases, Materials & Commentary on the ECHR*, 3rd edn (Oxford : Oxford University Press, 2012) p.135 for an examination of the applicant's earlier litigation at Strasbourg.

⁵⁸ No.35810/09, 28 Jan. 2014.

⁵⁹ According to the "Irish Examiner", 29 Jan 2014.

Manager took no action in response to the complaint. In the first half of 1973 the applicant was subjected to about 20 sexual assaults, during music lessons in the school, by L.H.. In September 1973 other parents alerted the applicant's parents about complaints of sexual abuse by L.H.. The Manager chaired a meeting of parents regarding L.H.'s behaviour and he then went on sick-leave followed swiftly by his resignation from Dunderrow. The Manager did not inform the police or any other state authority of the allegations against L.H.. A few months later the Manager notified the Department of Education and Science of L.H.'s resignation. L.H. took up a teaching post at another National School where he remained until his retirement in 1995.

An Inspector employed by the state visited Dunderrow six times between 1969 and 1973. No complaint regarding L.H. was made to him during those inspections.

The applicant suffered serious psychological difficulties in later years, but she had suppressed the sexual abuse that L.H. had inflicted on her. However, in 1996 the police contacted her as they were investigating L.H. after another former pupil at Dunderrow had complained to them, in the previous year, about him. The applicant gave the police a statement and was referred for counselling. L.H. was charged with 386 offences of sexual abuse involving 21 former pupils at Dunderrow over a period of 10 years. In 1998 L.H. pleaded guilty to 21 sample charges and was sentenced to (3 years⁶⁰) imprisonment. Following the trial and medical treatment the applicant realised the connection between L.H.'s abuse and her psychological problems. Later that year she accepted an award of roughly 54,000 euros from the Criminal Injuries Compensation Tribunal. She also began civil actions against L.H. and state authorities. L.H. did not lodge any defence and the High Court awarded the applicant 305,000 euros damages payable by him. Eventually the Supreme Court dismissed the applicant's claims against the state, finding, *inter alia*, that given the allocation of responsibilities under the National School system the government was not vicariously liable for the wrongs committed against the applicant.

The applicant's main complaint before the Strasbourg Court was that the state authorities in Ireland had failed to establish an adequate legal framework to protect children from sexual abuse in National Schools in breach of the respondent's positive obligation of protection under Article 3 of the ECHR. The Chamber relinquished jurisdiction to the Grand Chamber. The respondent government contended that L.H. had not been a state employee and the National School system resulted in the state devolving ownership and management of such schools to denominational bodies. Furthermore, in 1973 awareness of the risk of child sex abuse was "almost non-existent" and contemporary insights and standards should not be applied retrospectively. The Grand Chamber accepted the latter submission.

The relevant facts of the present case took place in 1973. The Court must, as the Government underlined, assess any related State responsibility from the point of view of facts and standards of 1973 and, notably, disregarding the awareness in society today of the risk of sexual abuse of minors in an educational context, which

⁶⁰ *Ibid.*

knowledge is the result of recent public controversies on the subject, including in Ireland...⁶¹

However, the Grand Chamber noted that:

...having regard to the fundamental nature of the rights guaranteed by Article 3 and the particularly vulnerable nature of children, it is an inherent obligation of government to ensure their protection from ill-treatment, especially in a primary education context, through the adoption, as necessary, of special measures and safeguards.⁶²

Regarding positive obligations on States the Grand Chamber observed that the Court had held that the Convention placed such duties on States in its fifth judgment delivered in 1968.⁶³ Additionally established case-law provided that States remained liable under the Convention for the protection of pupils in schools run by private organisations. That liability did not, however, prevent States from adopting, for ideological reasons, non-state managed school systems. Regarding the “unique” Irish primary school system the Grand Chamber concluded that:

...it was an inherent positive obligation of government in the 1970s to protect children from ill-treatment. It was, moreover, an obligation of acute importance in a primary education context. That obligation was not fulfilled when the Irish State, which must be considered to have been aware of the sexual abuse of children by adults through, *inter alia*, its prosecution of such crimes at a significant rate, nevertheless continued to entrust the management of the primary education of the vast majority of young Irish children to non-State actors (National Schools), without putting in place any mechanism of effective State control against the risks of such abuse occurring. On the contrary, potential complainants were directed away from the State authorities and towards the non-State denominational Managers. The consequences in the present case were the failure by the non-State Manager to act on prior complaints of sexual abuse by LH, the applicant’s later abuse by LH and, more broadly, the prolonged and serious sexual misconduct by LH against numerous other students in that same National School.

169. In such circumstances, the State must be considered to have failed to fulfil its positive obligation to protect the present applicant from the sexual abuse to which she was subjected in 1973 whilst a pupil in Dunderrow National School. There has therefore been a violation of her rights under Article 3 of the Convention.⁶⁴

The Grand Chamber also found a breach of Article 13 (right to an effective domestic remedy) combined with the above violation of Article 3. Taking account of the compensation and damages the applicant had been awarded in Ireland the Grand

⁶¹ *Supra* n.52 at para. 143.

⁶² *Ibid.* at para. 146.

⁶³ *Case relating to certain aspects of the laws on the use of languages in education in Belgium*, A.6, Jul. 23, 1968.

⁶⁴ *Supra* n.52 at paras. 168-169.

Chamber also directed that she be given 30,000 euros just satisfaction regarding her pecuniary and non-pecuniary losses suffered in respect of Convention violations.

Six judges dissented from the Grand Chamber's findings of the above violations. Five of them issued a partly dissenting opinion in which they rejected the majority's determination that the Irish state knew, or ought, to have known about some inherent risk of child abuse within National Schools during the 1970s. Also:

We disagree with the retrospective application of the present-day understanding of positive obligations of the State to a situation obtaining about forty years ago. It is Kafkaesque to blame the Irish authorities for not complying at the time with requirements and standards developed gradually by the case-law of the Court only in subsequent decades.⁶⁵

The Irish, *ad hoc*, Judge Charleton wrote a separate dissenting opinion in which he concluded that the applicant had not exhausted domestic remedies and he did not believe that it had been established that Ireland knew/should have known of the risks facing the applicant at Dunderrow School.

No one in 1971 to 1973 then anticipated a head teacher in a primary school to be a serial paedophile. It is also accepted by the majority that the Department of Education knew nothing about the predation on school children by their teacher L.H. ...It is not supportable to find Ireland liable on the basis of not having programmes that only modern experience and a more open recognition of the criminal sickness of paedophilia and its repetitive nature have now revealed.⁶⁶

Whilst in no way seeking to diminish the awful suffering of the applicant, we should note that the original Court's jurisprudence did not begin to seriously develop implied positive obligations until the late 1970s. The earlier case-law on positive obligations mainly focused on those which were expressly elaborated in the text of the Convention.⁶⁷ Therefore, there is some substance to the dissenters' views that the majority were applying contemporary legal requirements retrospectively. Nevertheless, the above judgment provides a salutary warning to Member States that they are now under a clear Convention obligation to establish effective supervisory and complaints systems to protect school pupils from sexual abuse by their teachers irrespective of whether those schools are owned or managed by the state or non-public bodies. Hopefully, such systems will today eradicate the risks faced by vulnerable pupils like the applicant in 1973.

ARTICLE 7: RETROSPECTIVE INCREASE IN A CRIMINAL PENALTY

A highly controversial judgment was delivered by a Grand Chamber on the relatively rarely litigated prohibition on the retrospective imposition of a heavier penalty than was specified at the time the offence was committed, contained in Article 7 of the ECHR, in

⁶⁵ Joint Partly Dissenting Opinion of Judges Zupancic, Gyulumyan, Kalaydjieva, De Gaetano and Wojtyczek at para. 9.

⁶⁶ Dissenting Opinion of Judge Charleton at paras. 19 and 27.

⁶⁷ See, A. Mowbray, *The Development of Positive Obligations under the ECHR by the European Court of Human Rights* (Hart, Oxford, 2004), Ch.9.

*Del Rio Prada v Spain*⁶⁸. The applicant had been convicted, after a series of trials held between 1988 and 2000, of 23 murders, 57 attempted murders and many other serious crimes of violence connected with her membership of ETA (the Basque separatist/terrorist group). She was given prison sentences totalling over 3,000 years in respect of her numerous convictions. However, in November 2000 the *Audiencia Nacional* (court) informed her that under the 1973 Criminal Code (in force when she committed the offences) her convictions could be aggregated and she was given a maximum term of 30 years' imprisonment. In the following year the *Audiencia Nacional*, taking account of the fact that she had been detained since 1987, set the date for the discharge of her sentence as 27 July 2017. During the spring of 2008 the authorities at the prison where the applicant was being held sought the approval of the *Audiencia Nacional* for her release in July of that year, because she had accumulated over 3,000 days remission due to work and studies undertaken whilst in prison. In May 2008, the *Audiencia Nacional* rejected the authorities' request, basing its decision on a new precedent governing the calculation of remission for prisoners (delivered by the Supreme Court in 2006 in a case concerning another former ETA member: referred to after his name as the "Parot doctrine"). Under the new method remissions were not applied to the maximum thirty year sentence, but successively to each of the individual sentences imposed on a prisoner. Applying the new approach the *Audiencia Nacional* approved a proposal, from the prison authorities, that the applicant should be released in June 2017. The applicant unsuccessfully challenged that decision through the Spanish judicial system. She then complained to Strasbourg alleging, *inter alia*, that the retrospective application of the Parot doctrine to her case violated Article 7.

A unanimous Chamber upheld her complaint in July 2012. The respondent government successfully petitioned the Grand Chamber to rehear the case under Article 43 of the Convention. Before the Grand Chamber the government contended that the Chamber had not followed the Court's established jurisprudence regarding the distinction between measures concerning the "execution" of a sentence, which fell outside the scope of Article 7, and the retrospective increase of a "penalty", that was prohibited under that Article. The calculation of the applicant's release date was a matter of "execution". The applicant supported the Chamber's finding that she had suffered a violation of Article 7 through the application of the Supreme Court's unforeseeable departure from its established case-law regarding the calculation of remission announced in 2006. The International Commission of Jurists submitted third-party comments in which the organisation argued that the principle of non-retroactivity should encompass rules governing the execution of sentences that had serious effects on convicted persons. The Grand Chamber noted that the Court's distinction between "penalties" and measures of "execution" "may not always be clear-cut".⁶⁹ The notion of a "penalty" was for the Court to evaluate as an autonomous concept.

In order to determine whether a measure taken during the execution of a sentence concerns only the manner of execution of the sentence or, on the contrary, affects its scope, the Court must examine in each case what the "penalty" imposed actually entailed under the domestic law in force at the material time, or in other

⁶⁸ No. 42750/09, Oct. 21, 2013.

⁶⁹ *Ibid.*, at para. 85.

words, what its intrinsic nature was. In doing so it must have regard to the domestic law as a whole and the way it was applied at the material time...⁷⁰

After examining the Spanish Criminal Code of 1973 and the relevant domestic case-law the Grand Chamber agreed with the finding of the Chamber that at the time the applicant committed her offences domestic law provided a maximum penalty of thirty years' imprisonment from which any remission would be deducted. Furthermore, in the view of the Grand Chamber the "Parot doctrine" was directed at the "penalty" imposed on convicted persons.

...the recourse in the present case to the new approach to the application of remissions of sentence for work done in detention introduced by the "Parot doctrine" cannot be regarded as a measure relating solely to the execution of the penalty imposed on the applicant as the Government have argued. This measure taken by the court that convicted the applicant also led to the redefinition of the scope of the "penalty" imposed. As a result of the "Parot doctrine", the maximum term of thirty years' imprisonment ceased to be an independent sentence to which remissions of sentence for work done in detention were applied, and instead became a thirty-year sentence to which no such remissions would effectively be applied.⁷¹

The Grand Chamber went on to conclude that the Supreme Court's elaboration of the "Parot doctrine" in 2006 was not foreseeable.

...when the applicant was convicted and at the time when she was notified of the decision to combine her sentences and set a maximum term of imprisonment, there was no indication of any perceptible line of case-law development in keeping with the Supreme Court's judgment of 28 February 2006. The applicant therefore had no reason to believe that the Supreme Court would depart from its previous case-law and, that the *Audiencia Nacional*, as a result, would apply the remissions of sentence granted to her not in relation to the maximum thirty-year term of imprisonment to be served, but successively to each of the sentences she had received. As the Court has noted above ..., this departure from the case-law had the effect of modifying the scope of the penalty imposed, to the applicant's detriment.⁷²

Therefore, by a very large majority (fifteen votes to two) the Grand Chamber determined that there had been a breach of Article 7.

The Grand Chamber, unanimously, went on to find that the applicant's continued imprisonment after 2nd July 2008, the date the prison authorities had originally proposed for her release based upon the established method of calculating remission, was in breach of Article 5 of the ECHR (right to liberty), because the domestic law governing her continued detention was not adequately foreseeable. By sixteen votes to one the Grand Chamber exercised its authority, derived from Article 46 of the ECHR- the duty of

⁷⁰ *Ibid.*, at para. 90.

⁷¹ *Ibid.*, at para. 109.

⁷² *Ibid.*, at para. 117.

State Parties to abide by final judgments of the Court, in “exceptional cases” to give a binding indication to a respondent State as to the action it must take to remedy the breaches found.

Having regard to the particular circumstances of the case and to the urgent need to put an end to the violations of the Convention it has found, it considers it incumbent on the respondent State to ensure that the applicant is released at the earliest possible date.⁷³

By a much narrower majority (of ten votes to seven) the Grand Chamber ruled that Spain also had to pay the applicant 30,000 euros (she had claimed 60,000 euros) as compensation for her non-pecuniary damages suffered through her unlawful detention since July 2008. In doing so the majority implicitly rejected the government’s argument that awarding compensation to “a person convicted of acts as murderous as those committed by the applicant—who had been guilty in judicial proceedings that met all the requirements of a fair trial- would be difficult to understand.”⁷⁴ However, the dissenters were sympathetic to that stance:

The applicant, in the instant case, stands convicted of many serious terrorist offences that involved the murders and attempted murders of and the infliction of grievous bodily harm upon numerous individuals. Against that background, we prefer to adopt the approach of the Court in *McCann and Others v. the United Kingdom* (27 September 1995, § 219, Series A no. 324). Consequently, having regard to the special circumstances pertaining to the context of this case, we do not consider it appropriate to make an award for non-pecuniary or moral damage. In our view, the Court’s finding of violation taken together with the measure indicated pursuant to Article 46 constitute sufficient just satisfaction.⁷⁵

Judges Mahoney and Vehabovic dissented regarding the application of Article to the applicant’s case. They considered that the way the Spanish authorities had dealt with the applicant’s length of imprisonment had been “disquieting from the point of view of the fairness of treatment of prisoners, especially those who have the prospect of spending a large part of their life incarcerated.”⁷⁶ However, the dissenters believed that the calculation of the applicant’s remission date did not fall within the domain of Article 7. “Our concern is that the majority appear to have stretched the concept of a “penalty”, even understood as being “the scope of the penalty”, beyond its natural and legitimate meaning in order to bring a perceived instance of unfair treatment of convicted prisoners within the ambit of Article 7.”⁷⁷ Judge Mahoney also issued a separate Partly Dissenting Opinion in which he explained that as he had found no breach of Article 7 he did not think it appropriate for the Court to require Spain to release the applicant at the earliest

⁷³ *Ibid.*, at para. 139.

⁷⁴ *Ibid.*, at para. 144.

⁷⁵ Joint Partly Dissenting Opinion of Judges Villiger, Steiner, Power-Forde, Lemmens and Gritco, with the agreement of Judges Mahoney and Vehabovic.

⁷⁶ Joint Partly Dissenting Opinion of Judges Mahoney and Vehabovic at p. 61.

⁷⁷ *Ibid.* at p. 64.

possible date on the basis that her continued detention since 2008 had been dependent upon defective Spanish law.

The Spanish authorities are to be commended for the swift implementation of the above judgment as the prosecutor immediately applied to the High Court for her release based upon the Grand Chamber's rulings. She was released from prison on 22nd October 2013.⁷⁸ It was reported that her release caused "fury and disbelief" in Spain and a demonstration held in Madrid was attended by "thousands" of protestors.⁷⁹ The Strasbourg judgment has been applied to 56 other ETA prisoners and the release of some of those convicted persons has been accompanied by "angry scenes" outside various Spanish prisons.⁸⁰ From a legal perspective the Grand Chamber, whilst formally maintaining the application of Article 7 to the imposition of retrospective higher "penalties", demonstrated the murky boundaries between that concept and matters concerned with the execution of sentences. However, it was clear that all the Grand Chamber's judges were troubled by the Spanish court's unforeseen creation of the "Parot doctrine". The remedial aspects of the judgment are also notable for a rare example of the Court requiring a State to release a person from detention and the express view of a significant minority of the Grand Chamber that the violent criminal behaviour of a convicted terrorist undermined the legitimacy of her claim for non-pecuniary damages.

ARTICLE 8: RESPECTING FAMILY LIFE

A Grand Chamber relaxed the criteria that have to be satisfied to establish "family life" protected under Article 8 and reinforced the application of Article 14 (prohibition of discrimination) when combined with Article 8 in regard to discrimination against same-sex couples in *Vallianatos and others v Greece*⁸¹. The first applicant and his same-sex partner live together in Athens, four of the applicants in the second (joined) application live together as same-sex couples, two other applicants are in a long term single sex-relationship (but do not live together) and the final applicant was a non-governmental organisation (NGO) providing support to gays and lesbians in Athens (Synthessi). The applicants complained to the Court that Law no. 3719/2008 "Reforms concerning the family, children and society", enacted by the Greek Parliament in November 2008, violated their rights under Article 8 combined with Article 14 as the legal status of "civil unions" created by the Law only covered different-sex couples. During the passage of the Law the Church of Greece had condemned the proposed civil unions as "prostitution". While the National Human Rights Commission had informed the Minister of Justice that it believed the proposed legislation discriminated against same-sex couples and, therefore, should be extended to apply to such relationships. However, the Minister of Justice refused to extend the scope of the proposed Law as the governing

⁷⁸ "Spain releases Eta convict after European Court ruling", BBC News, Oct. 22, 2013.

⁷⁹ "Basque Eta: Spain's frozen peace process", BBC News, Dec. 26 2013.

⁸⁰ *Ibid.*

⁸¹ Nos. 29381/09 and 3268/09, Nov.7, 2013.

party was opposed to enabling same-sex couples to register their relationships as civil unions. A Chamber decided to relinquish the joined applications to the Grand Chamber.

The government argued that the applications were inadmissible because, *inter alia*, Synthessi as a legal entity could not claim to be a victim regarding the inability of same-sex couples to register a civil union and all the applicants had failed to exhaust domestic remedies. The Grand Chamber accepted the government's *ratione personae* challenge to the standing of Synthessi. But, by a an undisclosed majority (given Judge Pinto de Albuquerque's partial dissent, discussed below, I suspect the majority was 16 judges to one) the Grand Chamber found that all the individual applicants could claim to be "victims" and they did not have any effective domestic remedies to challenge their inability to register their relationships under Law no. 3719/2008. Consequently, their complaints were not inadmissible. Regarding the merits of their complaints the individual applicants argued that Greece was the only European State to have enacted an alternative legal status to marriage that was restricted to different-sex couples. They believed that Law no. 3719/2008 reinforced prejudice against single-sex couples. The government responded that the Law had been enacted as a progressive measure designed to provide legal guarantees for unmarried different-sex couples who had children. Furthermore, the government did not consider that non-cohabiting same-sex couples fell within the concept of "family life" under Article 8. The Grand Chamber expressly rejected the latter submission.

The Court notes, on the basis of the case file, that the applicants form stable same-sex couples. Furthermore, it is not disputed that their relationships fall within the notion of "private life" within the meaning of Article 8 of the Convention. The Court also points out that in its judgment in *Schalk and Kopf [v Austria]*, No. 30141/04, Jun. 24, 2010], it considered that, in view of the rapid evolution in a considerable number of member States regarding the granting of legal recognition to same-sex couples, "it [would be] artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple [could not] enjoy 'family life' for the purposes of Article 8" (see *Schalk and Kopf*, cited above, § 94). Accordingly, the Court is of the view that the applicants' relationships in the present case fall within the notion of "private life" and that of "family life", just as would the relationships of different-sex couples in the same situation. It can see no basis for drawing the distinction requested by the Government ...between those applicants who live together and those who – for professional and social reasons – do not ... since in the instant case the fact of not cohabiting does not deprive the couples concerned of the stability which brings them within the scope of family life within the meaning of Article 8.⁸²

The Grand Chamber observed that the applicants were complaining that Law no. 3719/2008 discriminated against them, not that Greece was under a Convention duty to legislate for legal recognition of same-sex relationships. Repeating its established jurisprudence the Grand Chamber noted that States had a narrow margin of appreciation when treating people differently due to their sexual orientation and States were required to establish weighty reasons why such differentiation was justified under Article 14. In the opinion of the Grand Chamber the applicants, as parties to stable relationships, were "in a comparable situation to different-sex couples as regards their need for legal

⁸² *Ibid.*, at para.73.

recognition and protection of their relationship".⁸³ Regarding the government's submission that Law no.3719/2008 could be justified as it sought to protect children born outside marriage the Grand Chamber acknowledged that was a legitimate aim for the purposes of the Convention. However, the Court also had to examine if the Law was a proportional/necessary measure. The explanatory report on the Law did not reveal why the legislation only applied to different-sex couples and the National Human Rights Commission had expressed the view that the proposed Law was discriminatory.

In addition, the Court would point to the fact that, although there is no consensus among the legal systems of the Council of Europe member States, a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships. Nine member States provide for same-sex marriage. In addition, seventeen member States authorise some form of civil partnership for same-sex couples. As to the specific issue raised by the present case, the Court considers that the trend emerging in the legal systems of the Council of Europe member States is clear: of the nineteen States which authorise some form of registered partnership other than marriage, Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples. In other words, with two exceptions, Council of Europe member States, when they opt to enact legislation introducing a new system of registered partnership as an alternative to marriage for unmarried couples, include same-sex couples in its scope.⁸⁴

Therefore, the Grand Chamber concluded that the government had not provided an adequate justification for excluding same-sex couples from being entitled to register civil unions under the above Law and a breach of Article 14 in conjunction with Article 8 had occurred. The Court went on to award each of the individual applicants 5,000 euros just satisfaction to compensate them for the non-pecuniary damage they had suffered.

Judge Pinto de Albuquerque issued a partly dissenting opinion in which he criticised the majority of the Grand Chamber for engaging in "an abstract review of the "conventionality" of a Greek law, while acting as a court of first instance."⁸⁵ He defined that process as the Court reviewing "the compatibility of a national law with the Convention independently of a specific case where this law has been applied".⁸⁶ He was particularly concerned that the national courts had been given no opportunity to rule on the applicants' complaints. Therefore, after an examination of Greek judicial review, he concluded that the applicants had failed to exhaust effective domestic remedies and the Court should not have considered the merits of their complaints.

The Grand Chamber judgment in *Vallianatos* has clearly ruled that cohabitation is not an essential component of a couple's relationship in order for that bond to be classified as "family life" protected by Article 8 of the ECHR. When determining if the applicants' relationships amounted to family life the Grand Chamber focused upon the "stability" of those associations. The Grand Chamber did not define that term, but

⁸³ *Ibid.*, at para. 78.

⁸⁴ *Ibid.*, at para. 91.

⁸⁵ Partly Dissenting Opinion of Judge Pinto de Albuquerque at p.38.

⁸⁶ *Ibid.*, at footnote 1.

financial support between a couple appears to be one factor that underpins the finding of the existence of a stable relationship. In the above case one of the partners in the non-cohabiting couple paid the other's social-security contributions. The judgment also confirms the strict scrutiny the Court applies when assessing if a State can justify discriminatory treatment of persons based upon their sexual orientation.

ARTICLE 10: ACCESS TO OFFICIAL INFORMATION

The Court has taken another cautious step in its development of "the freedom to receive information" enshrined in Article 10 via the judgment of *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung Eines Wirtschaftlich Gesunden Land- und Forst-Wirtschaftlichen Grundbesitzes v Austria*⁸⁷. The applicant association, a non-governmental organisation (NGO) based in Vienna, researches transfers of property ownership concerning agricultural and forestry land. The association also provides its views on draft legislation affecting such transfers. Each region in Austria has a Regional Real Property Transactions Commission which authorise agricultural and forestry land transactions with the objective of protecting those lands from development. All the regional Commissions, apart from the Tyrol Commission, provide the applicant with their decisions (in anonymised form). The association requested such information from the Tyrol Commission and offered to pay the costs involved. The Tyrol Commission declined to provide that information citing the resource implications and their detrimental effect on the work of the Commission. Following litigation the Constitutional Court eventually ruled against the association finding, *inter alia*, that Article 10 did not oblige public authorities to grant access to information.

In its complaint to the Court the applicant submitted that Article 10 did impose some obligations on public authorities to make information available to the public. Respecting the rule of law meant that judicial bodies should make their decisions available via online or hard-copy means. Furthermore, the Austrian authorities had not provided any detail to support their claim that it would be unduly burdensome for the Tyrol Commission to provide the requested information. The respondent government argued that Article 10 did not oblige States to provide access to confidential information and therefore the applicant could not claim a special interest in all the decisions made by the Tyrol Commission. If, however, Article 10 was relevant to the applicant's claim then the Commission's refusal to provide the information could be justified under Article 10(2) as being for the legitimate aims of protecting the rights of others and preventing the disclosure of confidential information.

The Chamber noted that the Article 10 jurisprudence had for many years recognised the essential role of the press in obtaining and disseminating information to the public on matters of general interest. More recently⁸⁸ the Court had also acknowledged that NGOs undertook similar activities "which are an essential element of informed public debate".⁸⁹ Given the work of the applicant, the Chamber held that there

⁸⁷ No. 39534/07, 28 Nov. 2013.

⁸⁸ For example in *Tarasag a Szabadsagjogokert v Hungary*, No. 37374/05, 14 Apr. 2009; and see my discussion of this judgment in *****Annual Lecture***.

⁸⁹ *Supra* n.36 at para. 34.

had been an interference with the association's right to receive and impart information guaranteed by Article 10(1). The Chamber went on to uphold the respondent government's defence that the refusal to supply the requested information to the applicant had been done for the legitimate aim of protecting the rights of others. In *Tarsasag* the Court had "recently advanced towards a broader interpretation of the notion of the "freedom to receive information" and thereby towards the recognition of a right of access to information".⁹⁰ Nevertheless, the Chamber was not willing to find that its jurisprudence imposed a general obligation on States to establish electronic databases or provide hard-copy versions of decisions reached by public authorities. Instead the Chamber focussed on whether the Austrian authorities had provided "relevant and sufficient" reasons for declining the applicant's request for copies of the Commission's decisions.

Given that the Commission is a public authority deciding disputes over "civil rights" within the meaning of Article 6 of the Convention (see, *Eisenstecken v. Austria*, no. 29477/95, § 20, ECHR 2000-X, with further references), which are, moreover, of considerable public interest, the Court finds it striking that none of the Commission's decisions was published, whether in an electronic database or in any other form. Consequently, much of the anticipated difficulty referred to by the Commission as a reason for its refusal to provide the applicant association with copies of numerous decisions given over a lengthy period was generated by its own choice not to publish any of its decisions. In this context the Court notes the applicant association's submission - which has not been disputed by the Government - that it receives anonymised copies of decisions from all other Regional Real Property Commissions without any particular difficulties.⁹¹

Consequently, the Chamber determined that the domestic authorities had failed to provide adequate reasons for refusing the applicant's request for access to the Commission's decisions. Furthermore; "[w]hile it is not for the Court to establish in which manner the Commission could and should have granted the applicant association access to its decisions, it finds that a complete refusal to give access to any of its decisions was disproportionate."⁹² Therefore, Article 10 had been violated.

Judge Mose dissented as he believed that the applicant's request for information was of a different scale from that in *Tarsasag*, which concerned the denial of access to one constitutional complaint. Whereas, the applicant sought access to hundreds of decisions which would have to be converted into anonymised reports by the Commission.

The above Chamber judgment discloses that whilst the Court is gradually moving towards the recognition of a right of access to information held by public authorities, under Article 10, it is an incremental process. Despite the facts that the Tyrol Commission was the only regional property authority refusing to provide anonymous decisions to the applicant and those decisions concerned legal determinations of general public interest, the Chamber was not willing to impose a general obligation of public disclosure on the domestic authorities. However, the Chamber's positive attitude towards

⁹⁰ *Ibid.* at para. 41.

⁹¹ *Ibid.* at para. 46.

⁹² *Ibid.* at para. 47.

the role of NGOs in facilitating public debate about topics of general interest was a central element in the Court's finding of a breach of Article 10.

ARTICLE 11: SECONDARY STRIKES

A unanimous Chamber ruled, on a new issue for the Court, as to whether secondary strikes/action taken by a trade union and its members against other companies/employers in support of their claims against a primary company/employer fell within Article 11 (freedom of association) in *The National Union of Rail, Maritime and Transport Workers v UK*⁹³. The applicant (hereafter "RMT") complained, *inter alia*, that the statutory removal of immunity from actions in tort against trade unions inducing their members to engage in secondary action (initially enacted in the Employment Act 1990) unduly restricted its freedom of association. The RMT based this complaint on its inability to take secondary strike action against a secondary/associated company (where the RMT had more members employed) to support its members primary strike action over plans by a company (Hydrex) to reduce their salaries. Eventually, the RMT's members had to accept a revised offer from Hydrex.

The Chamber did not adopt the respondent government's literal interpretation of Article 11(1) to exclude secondary action. Instead, having regard to the views of supervisory bodies operating under the International Labour Organisation system and the European Social Charter, together with the practice of many European States:

It may well be that, by its nature, secondary industrial action constitutes an accessory rather than a core aspect of trade union freedom, a point to which the Court will revert in the next stage of its analysis. Nonetheless, the taking of secondary industrial action by a trade union, including strike action, against one employer in order to further a dispute in which the union's members are engaged with another employer must be regarded as part of trade union activity covered by Article 11.⁹⁴

Therefore, the statutory "ban" on secondary action in the UK had to meet the requirements of Article 11(2). The parties accepted that it was "prescribed by law" but disputed that it was for a legitimate aim and "necessary in a democratic society". The Chamber upheld the government's contention that the ban had the legitimate aim of protecting the rights of others not connected with the primary dispute. Secondary action could cause widespread economic disruption and hinder the provision of services to the public. Furthermore, the Chamber expressly declined to rule on whether the taking of industrial action by trade unionists was an "essential element" of their right to freedom of association. Regarding the Hydrex industrial dispute the Chamber considered that the statutory ban on the RMT organising secondary action did not affect the core of the RMT's freedom of association, consequently the State was to be accorded a wider margin of appreciation to balance the conflicting interests. Relevant factors were the maintenance of the statutory ban on secondary action by the UK Parliament for over two decades (with different governing parties) and the extent of the European consensus

⁹³ No.31054/10, Apr. 8, 2014.

⁹⁴ *Ibid.*, at para. 77.

regarding secondary action. The Court concluded that the UK's complete ban on secondary action was "at one end of the comparative spectrum"⁹⁵. In regard to the various other international bodies that had examined the UK's ban:

...the interpretative opinions emitted by the competent bodies set up under the most relevant international instruments mirrors the conclusion reached on the comparative material before the Court, to wit that with its outright ban on secondary industrial action, the respondent State finds itself at the most restrictive end of a spectrum of national regulatory approaches on this point and is out of line with a discernible international trend calling for a less restrictive approach.⁹⁶

However, the Chamber emphasised that it was not its function to evaluate the statutory ban in the abstract.

The foregoing considerations lead the Court to conclude that the facts of the specific situation challenged in the present case do not disclose an unjustified interference with the applicant's right to freedom of association, the essential elements of which the applicant was able to exercise, in representing its members, in negotiating with the employer on behalf of its members who were in dispute with the employer and in organising a strike of those members at their place of work. In this legislative policy area of recognised sensitivity, the respondent State enjoys a margin of appreciation broad enough to encompass the existing statutory ban on secondary action, there being no basis in the circumstances of this case to consider the operation of that ban in relation to the impugned facts at Hydrex as entailing a disproportionate restriction on the applicant's right under Article 11.⁹⁷

The above judgment reveals the Court accepting a broad view of the scope of trade unions' rights under Article 11(1) as encompassing the organising of secondary industrial action/strikes, but tempering that with a deferential attitude towards a State's ability to justify limitations (including bans) on this type of action in accordance with Article 11(2). Given the implicit nature of the right to strike, in both primary and secondary disputes, under the ECHR it is perhaps not surprising that the Chamber adopted a nuanced approach in its judgment. Indeed, in a joint concurring opinion, three judges observed that with respect to secondary action:

Given the nature of such strikes and the implications for economic policy considerations, the issue is best dealt with as part of the on-going dialogue between the specialised monitoring bodies in the field of social and labour rights. That kind of softer process allows the respondent State to continue examining its economic options. A judgment of the European Court of Human Rights finding a violation would have the effect of putting an abrupt end to such a process.⁹⁸

⁹⁵ *Ibid.*, at para. 91.

⁹⁶ *Ibid.*, at para. 98.

⁹⁷ *Ibid.*, at para. 104.

⁹⁸ Joint Concurring Opinion of Judges Ziemele, Hirvela and Bianku at para. 3.

ARTICLE 33: INTER-STATE APPLICATION

On 13 March 2014 Ukraine lodged an application with the Court against Russia. The detailed allegations by Ukraine have yet to be published; however the ongoing crisis concerning the territorial status of the Crimea and the revolutionary political developments within Ukraine provided the context of the application. The President of the Court's Third Section determined that, as there was a continuing risk of serious violations of the Convention, interim measures should be indicated to the parties. Therefore, the President called upon both States to "refrain from taking any measures, in particular military actions, which might entail breaches of the Convention rights of the civilian population, including putting their life and health at risk, and to comply with their engagements under the Convention, notably in respect of Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment)."⁹⁹

It is very rare for inter-State applications to be brought under the ECHR. Only 16 such applications, several being multiple applications involving the same parties, have been lodged throughout the history of the Convention. Furthermore, so far, the Court has pronounced judgment on the merits of just two inter-State applications.¹⁰⁰ There are currently two inter-State applications, brought by Georgia against Russia¹⁰¹, pending before the Grand Chamber. The second Georgian application concerns the armed conflict that occurred between the two parties in the summer of 2008. Given the time it is taking the Court to determine these complex and internationally sensitive cases we can anticipate that there may well be a long time to wait before the Court adjudicates upon the Ukrainian application.

Ukraine is also the respondent in two individual applications, brought under Article 34, by participants in the Kyiv public protests from November 2013 to February 2014 that were met with the use of lethal force and eventually resulted in the incumbent President fleeing the country.¹⁰²

⁹⁹ ECHR Press Release, 073 (2014), Mar. 13, 2014.

¹⁰⁰ *Ireland v UK*, No.5310/71, Jan. 18, 1978 (for a fascinating analysis of the legal, diplomatic and political manoeuvrings engaged in by the parties during this protracted litigation see D. Bonner, "Of outrage and misunderstanding: *Ireland v UK*- governmental perspectives on an inter-state application under the ECHR", 34(1) *Legal Studies* 47-75 (2014)) and *Cyprus v Turkey (IV)*, No.25781/94, May 10, 2001.

¹⁰¹ *Georgia v Russia (I)*, No.13255/07, lodged on Mar. 26, 2007 and *Georgia v Russia (II)*, No. 38263/08, lodged on Aug. 12, 2008.

¹⁰² *Sirenko v Ukraine*, No. 9078/14, lodged Feb. 2, 2014 and *Derevyanko v Ukraine*, No. 7684/14, given priority on Feb. 21, 2014.

