

European Court of Human Rights: May 2015-April 2016

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1 THE COURT'S WORKLOAD AND CHANGES TO THE APPLICATIONS PROCESS

During 2015 the European Court of Human Rights (hereinafter "the Court") delivered 823 judgments, in respect of 2,441 applications.¹ The Grand Chamber of the Court issued 22 of those judgments.² Single-Judge Formations determined (i.e. declared inadmissible or struck-out) 36,314 applications in 2015.³ This was less than half the number of Single-Judge Formation decisions in the previous year. The explanation being that this mechanism, introduced in 2010, has now enabled the backlog of inadmissible applications to be virtually eradicated. At the beginning of 2016 the Court had 64,850 applications pending, a 7% decrease from the start of 2015.⁴ About half of the pending applications are "repetitive" cases (new applications concerning systemic problems in States which have previously been found to breach the European Convention on Human Rights (hereinafter "the Convention" or "the ECHR"). President Raimondi has stated that the Court has the technical capacity to dispose of those cases but it also depends upon the response of the relevant States. Overall he expressed the view that the Court's workload situation was "generally satisfactory" in January 2016.⁵

In a previous Rapport we noted the introduction, elaborated in revised Rule 47 of the Rules of Court, of stricter requirements for applicants seeking to lodge complaints with the Court.⁶ In essence these required applicants to complete all parts of the official application form and submit it, together with specified supporting documentation, to the Court within six months of the final domestic decision being challenged. In June 2015 the Filtering Section of the Court's Registry issued a report on the operation of the new requirements.⁷ This disclosed that during 2014 twenty-three percent of applications received at Strasbourg (12,191 applications out of a total of 52,758) failed to satisfy all the Rule 47 submission requirements. The most common defects were: failing to submit complaints on the official application form, failure to provide documents concerning the domestic decision being challenged and the exhaustion of domestic remedies by the applicant, and failure to specify the alleged violations of the Convention. The report observed that this high failure rate demonstrated that prior to 2014 a significant amount of Registry resources had been expended in processing incomplete applications. However, under the new system, exceptionally applications which had not satisfied Rule 47 were still being allocated for determination by a judge. These included: requests for interim measures (when applicants sought the urgent intervention of the Court they were expected to provide a complete application and supporting documentation shortly after lodging their request), where the applicant provided an adequate explanation for not complying with the Rule (e.g. applications from the conflict region in Ukraine where public services are

¹ *Analysis of Statistics 2015*, January 2016, Strasbourg, 5.

² *Annual Report 2015*, January 2016, Strasbourg, 65.

³ *Supra* n.1 at 4.

⁴ *Ibid.*

⁵ Annual Press Conference, 28 Jan. 2016, Strasbourg.

⁶ A. Mowbray, *ECTHR May 2013-April 2014*, 20(4) Eur. Pub. L. 584 (2014)

⁷ *Report of the implementation of the revised rule on the lodging of new applications*, Strasbourg, 2 June 2015.

not functioning normally and obtaining official documentation is thereby affected) and very exceptional cases raising important general issues under the Convention. The President of the Court is consulted about applications which raise novel Rule 47 questions.

Regarding the six-month deadline the Report disclosed that the percentage of applications being rejected for this reason had declined in 2014 (from between 9 to 12 percent in previous years to 8 percent). The Filtering Section considered that domestic lawyers had quickly learnt of the need to submit complete applications within the six-month deadline. The Report identified the benefits for the Court of the new Rule as including: case-processing divisions of the Registry have less correspondence to deal with, applications are better organised, and the time saved by the Registry enables it to focus on meritorious cases. "In sum, the amended Rule has proved itself a useful tool for the Court in managing the influx of incoming complaints and strengthened the Court's capacity to deal with its caseload."⁸ Applicants and their lawyers will need to be even more proactive in compiling and submitting their applications when Protocol No. 15 comes into force and reduces the time-limit for lodging applications to four months.

In early July 2015 the plenary Court, exercising its power under Article 25(e) of the ECHR, elected Roderick Liddell to succeed Erik Fribergh as Registrar of the Court from 1 December 2015. Mr Liddle is a British lawyer who has worked in the Registry since 1988 holding a number of senior positions, including a period as a Section Registrar. Mr Liddle has been appointed for a five-year term of office.⁹ Subsequently, in September 2015, the plenary Court, elected (under Article 25(a)) Judge Guido Raimondi, from Italy, as its new President. He will serve a three year term of office. Before his election Judge Raimondi had been on the Court since 2010 and he had performed the role of a Vice-President for three years. Prior to joining the Court President Raimondi had undertaken a number of legal roles including being the Agent for the Italian Government before the Court and working as the Legal Adviser to the International Labour Office.¹⁰ The plenary Court also elected Judge Isil Karakas, from Turkey, and Judge Andras Sajó, from Hungary, as Vice Presidents of the Court.¹¹ At the same time Judges Mirjana Trajkovski, from "The Former Yugoslav Republic of Macedonia", and Angelika Nussberger, from Germany, were elected as Section Presidents.¹² So now a majority of the Sections of the Court are presided over by female judges.¹³ One month later the plenary Court elected a female Deputy Registrar.¹⁴ Françoise Elens-Passos, a Belgian national, had started working for the former European Commission of Human Rights in 1981 and since 2013 has been a Section Registrar for the Court.

ARTICLE 2: WITHDRAWAL OF ARTIFICIAL NUTRITION AND HYDRATION

A Grand Chamber delivered the Court's first judgment concerning the withdrawal of artificial nutrition and hydration to a person in a vegetative state in *Lambert and Others v. France*¹⁵. Vincent Lambert, born in 1976, was a nurse who sustained very serious

⁸ *Ibid.* at p.3.

⁹ Press Release ECHR232 (2015), Strasbourg, 6 July 2015.

¹⁰ Press Release, ECHR 281(2015), Strasbourg, 21 September 2015.

¹¹ Press Release, ECHR 282 (2015), Strasbourg, 21 September 2015.

¹² Press Release, ECHR 283 (2015), Strasbourg, 21 September 2015.

¹³ On the issue of the gender balance of the Court see, A. Mowbray, *The Consideration of Gender in the Process of Appointing Judges to the European Court of Human Rights*, 8(3) Human Rights Law Review 549 (2008).

¹⁴ Press Release, ECHR 326 (2015), Strasbourg, 19 October 2015.

¹⁵ No. 46043/14, 5 June 2015.

injuries caused by a road accident during September 2008. The injuries left him in a chronic vegetative state with tetraplegia and complete dependency (including the need for artificial nutrition and hydration via a gastric tube). Furthermore his family was deeply divided regarding his continued treatment. His parents, who held strong religious beliefs, together with his sister and a half-brother were the applicants and they wanted the feeding and hydration of Vincent to be continued. However, Rachel Lambert, the wife of Vincent, and six of his brothers wanted the treatment to be discontinued. During the domestic proceedings the French courts had found that before the accident Vincent's relationship with his parents had been "conflictual" as he had not shared their religious commitment and moral beliefs.¹⁶

After the accident Vincent had been cared for in various French hospitals. From 2009 Reims University Hospital had been caring for him. Despite physiotherapy sessions and speech/language therapy it had not been possible to establish any form of communication with Vincent. In 2012 his care team came to the view that Vincent was demonstrating resistance to his daily care. Therefore, in 2013 they initiated the collective procedure, provided for by the "Leonetti" Act of 2005, which enabled the discontinuance of medical treatment where its continuation would amount to "unreasonable obstinacy". The collective procedure elaborated in the Act required the care team to obtain the views of at least one external consultant doctor, to take account of the wishes of the patient (e.g. via an advance directive) and of the patient's family. Following this procedure Dr Kariger, the doctor in charge of Vincent's care, authorised the cessation of the provision of nutrition and the reduction of hydration to Vincent in early April 2013. A few weeks later the applicants sought an injunction, from the local Administrative Court, ordering the hospital to resume the feeding and normal hydration of Vincent. The Administrative Court issued the injunction and ordered the continuation of the collective procedure; finding, *inter alia*, that whilst Rachel had been consulted the applicants had not been involved in the process. A new collective procedure was begun in September 2013 and Dr Kariger consulted six doctors (including three external to the hospital chosen by Vincent's parents, Rachel and the Reims' medical team). Two meetings were held with the family, attended by the applicants and Rachel together with the six brothers who supported her stance. In January 2014 Dr Kariger produced a thirteen page report, a summary of which was explained to the family, in which he concluded that Vincent's condition involved irreversible brain damage and that the treatment was futile and disproportionate, with no effect other than to sustain Vincent's life artificially. Therefore, to continue such treatment would constitute "unreasonable obstinacy" under the Act and it should cease. The applicants immediately made another urgent application to the local Administrative Court seeking the continued treatment of Vincent and his transfer to another specialist care facility. A full bench of nine judges found that Dr Kariger had incorrectly assessed Vincent's wishes and therefore ordered that Vincent's treatment should be continued at the Reims University Hospital. Thereupon, the hospital and Rachel appealed against that ruling to the *Conseil d'État*, whilst the applicants cross-appealed the Administrative Court's refusal to order the transfer of Vincent to another nursing facility.

The *Conseil d'État* determined that it should sit as a seventeen-member Judicial Assembly. Furthermore, before deciding the case it would receive a medical report on Vincent's condition by experts nominated by national medical organisations. Subsequently those experts reported that Vincent had suffered irreversible brain damage and he was in a vegetative state. In their opinion he was not able to communicate with those caring for him. The *Conseil d'État* also requested that Mr Jean Leonetti, the rapporteur for the 2005 Act, submit written observations on the case. In his report Mr Leonetti observed that the Act was intended to apply to patients who had suffered incurable brain damage but who were not necessarily at the end of life and that doctors had been given the responsibility of determining whether to cease treatment (so as to avoid family members feeling guilty about having to make the decision and to ensure that an identifiable person was

¹⁶ *Ibid.*, at para. 27.

responsible for making the decision). Judgment was delivered on 24 June 2014 when the *Conseil d'État* ruled that national law did:

...not allow a doctor to take a life-threatening decision to limit or withdraw the treatment of a person incapable of expressing his or her wishes, except on the dual, strict condition that continuation of that treatment would amount to unreasonable obstinacy and that the requisite safeguards are observed, namely that account is taken of any wishes expressed by the patient and that at least one other doctor and the care team are consulted, as well as the person of trust, the family or another person close to the patient. Any such decision by a doctor is open to appeal before the courts in order to review compliance with the conditions laid down by law.

Hence the disputed provisions of the Public Health Code, taken together, in view of their purpose and the conditions attaching to their implementation, cannot be said to be incompatible with the requirements of Article 2 of the Convention ..., or with those of Article 8...¹⁷

The procedure followed by Dr Kariger was not tainted by any irregularity, indeed it went beyond the statutory safeguards e.g. by involving greater numbers of external consultants; therefore, the *Conseil d'État* set aside the Administrative Court's judgment and rejected the applicants' requests.

The applicants lodged their application with the Court on 23 June 2014, claiming that the withdrawal of Vincent's artificial nutrition and hydration would breach Articles 2, 3 and 8 of the Convention. The next day the Chamber decided to accord the application priority. During November 2014 the Chamber relinquished jurisdiction, under Article 30 of the ECHR, to the Grand Chamber. Rachel Lambert was given leave to submit written observations and participate in the hearing before the Grand Chamber as a third-party.

The first issue for the Grand Chamber was whether any of the persons appearing before the Court had standing to act in the name of and on behalf of Vincent. This was clearly a difficult matter given the deeply divided attitudes and beliefs of the various family members. The applicants' asserted that their standing had not been challenged in the domestic proceedings. However, Rachel contended that the applicants' did not have standing to represent Vincent, because, *inter alia*, unlike herself they had not been taken into Vincent's confidence prior to the accident. The respondent government believed that whether the applicants could bring the case on behalf of Vincent was devoid of purpose. A large majority of the Grand Chamber (twelve votes to five) determined that the applicants did not have standing to bring the case in Vincent's name. A key factor for the majority was the *Conseil d'État's* finding, based on the evidence of Rachel and other family members, that Vincent's wishes prior to the accident were not to live in a vegetative state. Consequently, there was not a convergence of interests between the applicants and Vincent. Whereas, the dissenters reached a diametrically opposing conclusion as those judges believed the case centred upon Vincent's right not to be starved to death. The Grand Chamber was united in ruling that Rachel was not entitled to act in Vincent's name when she was a third-party intervener, as The Rules of Court Rule 44(3) provide that such an intervener is any person "who is not the applicant". Hence, the Grand Chamber avoided formally recognising any of Vincent's divided family members as his representative. Instead the unanimous Grand Chamber held that the applicants' complaint under Article 2 was admissible on their own behalf, as the close-relatives of a person whose death would follow in a short time if the State withdrew artificial nutrition and hydration.

The Grand Chamber noted that the 2005 Act did not authorise euthanasia or assisted suicide, therefore only the respondent State's positive obligations under Article 2 were relevant to this case. The applicants argued that the Act was not applicable to Vincent, as he was not at the end of life, and the procedures leading to the withdrawal decision of January 2014 did not satisfy the positive obligations derived from Article 2. The respondent State replied that the Act sought to balance patients' right to life and their right to refuse treatment. The legislation contained procedural safeguards and doctors'

¹⁷ *Ibid.*, at para.47.

decisions were subject to judicial review. Rachel submitted that the Act contained many safeguards and the process followed by Dr Kariger had been reasoned and professional.

The Grand Chamber acknowledged that its previous jurisprudence had held that States had a margin of appreciation in determining matters concerning the beginning and end of life due to the complexity of the scientific, legal and ethical issues involved. Furthermore:

The Court notes that no consensus exists among the Council of Europe member States in favour of permitting the withdrawal of artificial life-sustaining treatment, although the majority of States appear to allow it. While the detailed arrangements governing the withdrawal of treatment vary from one country to another, there is nevertheless consensus as to the paramount importance of the patient's wishes in the decision-making process, however those wishes are expressed...¹⁸

Therefore, the Grand Chamber held that:

...States must be afforded a margin of appreciation, not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as regards the means of striking a balance between the protection of patients' right to life and the protection of their right to respect for their private life and their personal autonomy...¹⁹

Turning to the 2005 Act the *Conseil d'État's* ruling in the present case was the first time the Act had been subject to interpretation by the domestic courts. The Grand Chamber considered that ruling had provided a sufficiently clear legal framework governing withdrawal of life sustaining treatment to satisfy the respondent State's positive obligations under Article 2 of the ECHR. Regarding the decision-making process in Vincent's case the Grand Chamber found that French law provided for the family to be consulted, but did not prioritise the views of different members of his family nor mandate mediation where there was disagreement amongst the family. Given the varied procedures followed by different European States where the authorisation of the withdrawal of life-sustaining treatment was permitted the Grand Chamber concluded that:

...the organisation of the decision-making process, including the designation of the person who takes the final decision to withdraw treatment and the detailed arrangements for the taking of the decision, fall within the State's margin of appreciation. It notes that the procedure in the present case was lengthy and meticulous, exceeding the requirements laid down by the law, and considers that, although the applicants disagree with the outcome, that procedure satisfied the requirements flowing from Article 2 of the Convention...²⁰

Finally, the Grand Chamber examined the domestic judicial remedies available to the applicants. The former found the latter fully compliant with the respondent State's obligations under Article 2. Therefore, the overwhelming majority of the Grand Chamber (twelve votes to five) concluded that there would be no breach of Article 2 if the *Conseil d'État's* judgment of June 2014 was implemented. In the light of that finding the majority determine that it was not necessary to rule on the applicants' complaint under Article 8 of an alleged breach of their right to respect for their family life with Vincent.

Judges Hajiyevev, Sikuta, Tsotsoria, De Gaetano and Gritco were the dissenters. For them, "[t]he case before this Court is one of euthanasia, even if under a different name."²¹ They believed that feeding a person enterally "is an act of ordinary care".²² Therefore, they agreed with the applicants that the relevant domestic law was unclear in distinguishing

¹⁸ *Ibid.*, at para. 147.

¹⁹ *Ibid.*, at para. 148.

²⁰ *Ibid.*, at para. 168.

²¹ Joint Partly Dissenting Opinion at para. 9.

²² *Ibid.*, at para. 10.

between ordinary and extraordinary treatment and what amounts to sustaining life artificially. Emotionally the dissenters concluded by expressing the view that the Court had forfeited its claim to be the "conscience of Europe" by delivering the judgment it had in this case.

The sad facts confronting the Court in *Lambert* involved not only the terrible predicament Vincent was in following his accident but also the deeply divided opinions of his various family members regarding his future existence. The approach of the large majority in the Grand Chamber was to apply the Court's well-established deference to national regulation of beginning and end of life decisions. By invoking the contentious margin of appreciation doctrine²³ the Grand Chamber recognised that it was primarily for national authorities to decide whether to allow the withdrawal of artificial nutrition and hydration to patients and to elaborate the procedures for reaching those decisions in particular cases where domestic law authorised such action. The Court's subsidiary role²⁴ was to examine whether the procedure followed in the domestic arena was sufficiently robust to satisfy the State's positive obligations under Article 2. Clearly, the elaborate process used by Dr Kariger and the wide-ranging judicial scrutiny undertaken by the *Conseil d'État* met those requirements. Given the varied personal circumstances of these tragic patients it is domestic medical and judicial bodies that are the most suitable fora to determine whether it is in the best interests of individual patients to have their artificial nutrition and hydration withdrawn.

On 25 June 2015 the Grand Chamber issued a rectified version of its judgment altering the texts of paragraphs 138 and 139 of its original judgment. This was because, on 11 June 2015, I had notified the Registrar that those paragraphs contained legal errors regarding the earlier judgment of *Glass v. UK*²⁵.

In the Grand Chamber judgment *Lambert v. France* (5 June 2015) para. 138 the Court states in respect of *Glass v. UK* "...in its judgment of 9 March 2004 it held that there had been no violation of Art 8 of the Convention." Further para. 139 of *Lambert* says "...with the exception of the procedural violation of Art 8 in *Koch*... it did not find a violation of the Convention in any of these cases." These statements in *Lambert* are not correct. Here is the text of para 83 of *Glass* (which I have just downloaded from HUDOC): "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." Furthermore the first provision in the operative part of the *Glass* judgment reads: "Holds that there has been a violation of Article 8 of the Convention" I hope these comments are useful to you. My analysis of *Glass* can be found on p.519 of A. Mowbray, "Cases, Materials and Commentary on the ECHR" 3rd ed (OUP:2012). The Registry thanked me for identifying these errors, on 12 June 2015, and said that the text of the original judgment would be rapidly corrected. The Court used its power under Rule 81 of its Rules of Court to correct the text.²⁶ The rectified text of these paragraphs now states:

²³ For the doctrine's inclusion in Protocol No.15 see *supra* n.6 at p.580.

²⁴ More generally on this topic see, A. Mowbray, *Subsidiarity and the European Convention on Human Rights*, 15(2) Human Rights Law Review 313 (2015).

²⁵ No. 61827/00, 9 March 2004.

²⁶ Rule 81 provides: "Without prejudice to the provisions on revision of judgments and on restoration to the list of applications, the Court may, of its own motion or at the request of a party made within one month of the delivery of a decision or a judgment, rectify clerical errors, errors in calculation or obvious mistakes." (Strasbourg, 1 June 2015).

138. In a second group of cases the applicants took issue with the administering or withdrawal of treatment.

In *Glass*, cited above, the applicants complained of the administering of diamorphine to their sick child by hospital doctors without their consent, and of the "do not resuscitate" order entered in his medical notes. In its decision of 18 March 2003, cited above, the Court found that their complaint under Article 2 of the Convention was manifestly ill-founded; in its judgment of 9 March 2004 it held that there had been a violation of Article 8 of the Convention. ...

139. The Court observes that, with the exception of the violations of Article 8 in *Glass* and *Koch*, cited above, it did not find a violation of the Convention in any of these cases.²⁷

ARTICLE 2: PROCEDURAL DUTIES TO INVESTIGATE MISTAKEN KILLING BY POLICE OFFICERS OF AN INNOCENT PERSON

A Grand Chamber delivered its lengthy judgment in *Armani Da Silva v The United Kingdom*²⁸, after many months of deliberation following the oral hearing held in June 2015. The application concerned the much publicised lethal shooting of the applicant's cousin, Jean Charles de Menezes, by the London police in July 2005, during operations following a second round of (unsuccessful) suicide bombings on the London public transport system²⁹. After the attempted suicide bombers abandoned their explosive devices on underground trains and a bus in London on the 21 July 2005 the Metropolitan (London) Police Service (MPS) initiated an operation to arrest the culprits. In the early hours of the following day Commander McDowall, who headed the operation, was notified that a suspected bomber (Hussain Osman) had been identified. The Commander ordered police officers to mount covert surveillance outside of Osman's flat and to arrest him if he (or another suspect) left the building. The Commander delegated responsibility for the surveillance operation to Commander Dick. Two police surveillance teams were hidden outside the entrance to the flats where Osman lived. Specialist firearms officers were briefed that they might be deployed to stop suspects, possibly including suicide bombers, from leaving the flats. Just after 9:30am Jean Charles, a Brazilian national who lived in a different flat in the building, left the main entrance to go to work. One of the surveillance officers expressed the view that Jean Charles was someone who the police should have a "look" at. Other surveillance officers followed Jean Charles and concluded that he bore "a good possible likeness" to Osman. However, a few minutes later other surveillance officers considered that he was "not identical" to Osman. Jean Charles caught a bus towards Brixton and was then seen by surveillance officers leaving the bus to make a mobile phone call. He reboarded the bus. The specialist firearms officers were deployed and they later claimed that police radio communications stated that Jean Charles "was definitely our man and that he was nervous and twitchy". Jean Charles alighted the bus and walked toward the entrance of Stockwell underground station. Commander Dick initially ordered the surveillance officers to stop Jean Charles but after being told that the specialist firearms officers had arrived at the scene she ordered that the latter officers stop him. The firearms officers were instructed it was a Code Red situation (an armed interception was imminent and they were in control). CCTV recordings later showed Jean Charles wearing a thin jacket and not carrying anything walking into the station. He sat down in a train carriage and was subsequently restrained by two firearms officers who shot him several times in the head killing him.

²⁷ Rectified Judgment, 25 June 2015.

²⁸ No.5878/08, 30 March 2016.

²⁹ For separate Strasbourg litigation concerning the questioning and convictions of the second round perpetrators see my commentary on *Ibrahim and Others v UK*, Nos 50541/08, 50571/08 and 40351/09, 16 December 2014 in *ECTHR: May 2014- April 2015*, 21(4) Eur. Pub. L. 607 at p.611.

The Anti-Terrorism Branch of the MPS took control of the scene of the killing. Later that day the Department of Professional Standards of the MPS began their investigation into the killing. The two firearms officers were taken to a police station and, after receiving legal advice, declined to make statements at that time. The next day, having been notified that Jean Charles was by then known not to have been involved with the attempted bombings, they made their statements together. Later it was discovered some of their assertions were false (e.g. that Jean Charles was wearing a bulky jacket).

A post-mortem examination conducted on the 23 July recorded Jean Charles cause of death as multiple gunshot wounds to the head. Two days later the MPS formally referred the investigation into the killing of Jean Charles to the Independent Police Complaints Commission (IPCC). Given the public interest into the killing the Chair of the IPCC personally oversaw the investigation undertaken by IPCC staff. 890 witness statements were taken from civilians, police officers and forensic experts. 800 pieces of evidence were collected. Jean Charles' family and their legal representatives were given detailed updates on the progress of the IPCC investigation. A representative of the MPS had gone to meet Jean Charles' family in Brazil soon after it was discovered that he was an innocent victim to apologise and the MPS provide them with immediate financial help and advised the family to seek legal advice in the UK (with the costs being met by the British authorities). The Commissioner of the MPS and the British Prime Minister had also expressed profound regret for the death of Jean Charles within a few days of his killing.

The IPCC report on the Stockwell shooting of Jean Charles was completed and submitted to the Crown Prosecution Service (CPS) on the 19 January 2006. The report acknowledged that an entirely innocent person had been killed, but that it was not the result of a deliberate act designed to endanger the life of any innocent third party. However a number of failings by the police were identified including (1) the briefings given to the specialist firearms officers, (2) the failure to deploy the firearms officers to the building where Osman was believed to be living earlier in the day and (3) the MPS' delay in handing the investigation over to the IPCC. The report identified specific police officers who might be prosecuted by the CPS including: (1) the two firearms officers who shot Jean Charles (for possible murder charges), (2) Commander Dick (whether her command of the operation to stop Jean Charles amounted to gross negligence), (3) surveillance and firearms officers present at the time of the shooting of Jean Charles (for possible conspiracy to pervert the course of justice). During March 2006 the IPCC briefed the legal representatives of Jean Charles' family on its report and offered to travel to Brazil to speak to family members living there.

On 17 July 2006 the CPS informed Jean Charles' family that the Director of Public Prosecutions had decided to prosecute the Office of the Commissioner of Police for the Metropolis (OCPM), in its legal capacity as an employer, for allegedly breaching health and safety requirements applicable to Jean Charles (it is a criminal offence under the Health and Safety at Work Act 1974 for an employer to fail to conduct his undertaking in a way that, so far as reasonably practicable, persons not employed by him are not thereby exposed to risks to their health and safety). However, the DPP had concluded that there was "insufficient evidence to provide a realistic prospect of conviction against any individual police officer" so no prosecutions should be brought against any of the officers identified in the IPCC report. These decisions were further elaborated in a fifty page long Review Note.

The applicant sought to bring a judicial review action challenging the refusal to prosecute individual officers, claiming, *inter alia*, it was incompatible with Article 2 of the ECHR. The High Court dismissed the application finding that the evidential test applied by the DPP satisfied the requirements of Article 2. The House of Lords declined to hear an appeal against that judgment.

The criminal trial of the OCPM began in October 2007 and forty-seven witnesses, including Commanders McDowall and Dick, gave evidence. The jury found the OCPM guilty but attached a rider to its verdict that Commander Dick bore no "personal culpability" for the failings of the police operation. The trial judge supported the rider. The OCPM was fined £175,000 and ordered to pay costs of £385,000. In the light of these findings the

IPCC decided not to recommend disciplinary proceedings against the senior police officers involved in the operation against Jean Charles.

The inquest into the death of Jean Charles had been adjourned until the completion of the criminal proceedings against the OCPM. Seventy-one witnesses were heard during the inquest, including the two Commanders and the two specialist firearms officers who shot him. The de Menezes family were represented at the inquest (with their legal costs paid for by the British authorities) and participated in the cross-examination of witnesses. The Coroner ruled that the jury could not return a verdict of unlawful killing regarding the actions of the two firearms officers as it could not be proven, beyond reasonable doubt, that the officers did not honestly believe that the man they shot posed a deadly threat to those persons around them on the underground train. Having regard to the evidence concerning the senior police officers the Coroner decided that the jury should be left with the choice of lawful killing or open verdicts. Jean Charles' mother applied for judicial review to challenge the Coroner's ruling. The High Court refused leave finding that the Coroner's decisions satisfied the requirements of Article 2 of the ECHR and were not *Wednesbury* unreasonable (so unreasonable that no reasonable coroner could have made them). The jury delivered an open verdict in December 2008 noting a number of contributory factors to his death including, the failure to provide the surveillance officers with better photographs of Osman, the failure of the police to stop Jean Charles before he reached public transport and technical shortcomings in the police communications system. Following the verdict the Coroner produced a report identifying weaknesses in the systems of the MPS that created a risk of other deaths in the future, reviewing changes that had been implemented and making recommendations for further reforms.

After the completion of the inquest the de Menezes family asked the DPP to review his decision not to prosecute any individual police officers. The DPP replied that there was still insufficient evidence to justify such prosecutions. Subsequently the Chairman of the IPCC refused the family's request to reconsider the decision not to bring disciplinary proceedings against any police officers.

Civil proceedings for damages were brought by the de Menezes family, including the applicant, against the Metropolitan Police Commissioner. They were settled on a confidential basis by mediation in November 2009.

Significant changes were made by the MPS to improve its command and control systems for dealing with counter-terrorism operations after the killing of Jean Charles. These included creating a new group of senior firearm commanders and the construction of a counter-terrorism control room. Police communications systems were upgraded to enable effective radio communications across the London underground system and a new photo and data delivery system was commissioned. Furthermore, police officers involved in the death or serious injury of persons are no longer permitted to collaborate in producing their written accounts of the incident.

In her complaint to the Court the applicant did not allege a breach of the substantive right to life of her cousin, guaranteed by Article 2 of the Convention, presumably because the confidential damages settlement resolved that matter. However, Judges Karakas, Wojtyczek and Dedov began their joint dissent by noting that, "had the case been brought under the substantive limb of Article 2, the Court would have had to find a violation of this provision."³⁰ Instead she focussed on the, implied, procedural limb of Article 2. She contended that as no individual police officer had been prosecuted following the killing of her cousin the investigatory and accountability obligations flowing from the procedural limb had not been complied with. The Chamber of the Court relinquished jurisdiction over the case to the Grand Chamber in accordance with Article 30 of the ECHR.

Before the Grand Chamber the applicant submitted that the domestic law test for lawful self-defence, applied to assess the actions of the firearms officers who shot Jean Charles, was below the standard demanded by Article 2. This was because English law permitted honest (but mistaken) beliefs by the police officer using lethal force that he was

³⁰ *Supra* n.28, Joint Dissenting Opinion at para. 2.

under imminent threat even where such a belief was wholly unreasonable. Furthermore, the CPS applied a threshold evidential test when determining whether to bring a prosecution (a realistic prospect of conviction) that was too high. She also criticised the CPS for reaching prosecution decisions without hearing oral testimony. The government responded that the domestic test of self-defence was consistent with the Article 2 jurisprudence and provided an appropriate balance between protecting the public from lethal attacks and safeguarding the rights of persons subject to police operations. Regarding the threshold evidential test it was not a purely mathematical calculation but an assessment of the merits of bringing a prosecution. The well-established evidential test had been subject to regular public consultation and human rights bodies, including the statutory Equality and Human Rights Commission, had not criticised the test. Nevertheless, the latter organisation in its third-party written submission to the Court asserted that the threshold evidential test was too high. Between 1993 and 2005 thirty persons had been shot dead by the police in England and Wales and only two prosecutions had been brought (since 1990 no English/Welsh police officer had been convicted in connection with fatal shootings).

After restating the justification for the procedural limb of Article 2, to reinforce the substantive right to life including protection from unlawful killings by State agents³¹, the Grand Chamber referred to the key elements of effective investigations including independence of the investigators, adequate in their methodology and accessible to the victim's family. The Grand Chamber noted that the applicant had not made general complaints about the investigation into the killing of Jean Charles, which had been undertaken by an independent body (the IPCC). Turning to the applicant's complaint about the self-defence test applied by the English authorities the Grand Chamber began by citing the Court's established legal standard first enunciated in *McCann and Others v UK*³²:

[T]he use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.³³

The Grand Chamber rejected the submission of the Equality and Human Rights Commission that the honest belief should be assessed objectively. In *McCann* and subsequent case law the Court had determined the existence of good reasons subjectively.

In this regard, it is particularly significant that the Court has never found that a person purporting to act in self-defence honestly believed that the use of force was necessary but proceeded to find a violation of Article 2 on the ground that the belief was not perceived, for good reasons, to be valid at the time. Rather, in cases of alleged self-defence it has only found a violation of Article 2 where it refused to accept that a belief was honest (see, for example, *Akhmadov and Others v. Russia*, no. 21586/02, § 101, 14 November 2008 and *Suleymanova v. Russia*, no. 9191/06, § 85, 12 May 2010) or where the degree of force used was wholly disproportionate...³⁴

³¹ See A. Mowbray, *The Development of Positive Obligations under the ECHR by the European Court of Human Rights* (Hart 2004) p.27 for an elaboration of the background to the Court's creation of this obligation and its requirements.

³² No.18984/91, 27 September 1995.

³³ *Ibid.* at para. 200.

³⁴ *Supra* n.28 at para. 248.

As to the test applied by the domestic authorities in the aftermath of the IPCC investigation into the shooting of Jean Charles the Grand Chamber considered that it did not fall below the legal requirements of Article 2. Furthermore, those independent bodies had “carefully examined” the subjective reasonableness of the two firearms officers’ belief that Jean Charles was a suicide bomber who could detonate an explosive device at any moment.

Regarding the adequacy of the investigation the only issue was whether the decision not to prosecute any individual police officers could amount to a procedural breach of Article 2. Previously the Court had never faulted a prosecution decision based upon an investigation which of itself satisfied the requirements of Article 2. Indeed, the Court was generally “deferential” to individual prosecution decisions taken by Contracting States. However, occasionally the Court had found “institutional deficiencies” in national prosecution or criminal justice systems that resulted in breaches of Article 2. In this case the applicant accepted that the CPS met the independence requirements of Article 2. The Grand Chamber also noted that in at least twenty-five Contracting States the decision to bring a prosecution was made by public prosecutors and that was acceptable under Article 2 provided the prosecutor was sufficiently independent and objective. The Grand Chamber rejected the applicant’s argument that prosecutors were obliged to hear oral testimony before making prosecution decisions, there was nothing in the Court’s jurisprudence imposing such a duty. Therefore, the Grand Chamber found no institutional deficiencies in the CPS’ consideration of the killing of Jean Charles.

Examining the threshold evidential test applied by the CPS (was there a realistic prospect of conviction and if so was a prosecution needed in the public interest) the Grand Chamber held that States should be accorded “a certain margin of appreciation in setting that threshold”.³⁵ This was for two reasons. Firstly prosecution decisions involved balancing potentially conflicting interests (including those of victims, potential defendants and the general public) and domestic authorities were better placed than the Court to evaluate those considerations.³⁶ Here the test applied by English and Welsh prosecutors was not arbitrary.

On the contrary, it has been the subject of frequent reviews, public consultations and political scrutiny. In particular, detailed reviews of the Code were carried out in 2003, 2010 and 2012. It is also a threshold that applies across the board, that is, in respect of all offences and by whomsoever they were potentially committed.³⁷

Secondly, there was no uniformity as to the threshold evidential test applied by the Contracting States. This was in part explained by the different forms of criminal justice systems operating in the various States. In common law countries a higher threshold test could be explained because once the decision to prosecute had been reached the domestic courts had very limited authority to stop criminal trials proceeding. Therefore, the test applied by the CPS did not fall outside the State’s margin of appreciation. As to the applicant’s proposal that the threshold should be lower in cases involving killings by State agents the Grand Chamber held that it was not supported by the Court’s jurisprudence.

In any case, it is clear that the domestic authorities have given thorough consideration to lowering the threshold in cases engaging the responsibility of the State, but decided that it would be both unfair and inconsistent to place an increased burden on potential defendants in these cases. Nevertheless, they did ensure that a number of safeguards were built into the system in cases of police shootings and deaths in custody: the DPP personally reviews all charging decisions; in all cases other than the most straightforward a decision not to prosecute has to be reviewed by independent counsel; the prosecutor has to write to the family of the victim to explain his or her decision; and the family has to be offered a meeting with the prosecutor to explain the decision... While it is true that there are not frequent

³⁵ *Ibid.* at para. 267.

³⁶ On Strasbourg deference to national authorities see *supra* n.24

³⁷ *Supra* n.28 at para. 268.

prosecutions for police killings in the United Kingdom (as submitted by the third party ...), this can be explained by the extremely restrictive policy on the use of firearms by State agents... As the Government have pointed out, between 2003/4 and 2012/13 the annual number of police operations resulting in the discharge of weapons has always been in single figures, even though the annual number of operations in which the use of weapons has been authorised has ranged from ten thousand to twenty thousand...³⁸

The Grand Chamber also ruled that there was no uniformity regarding the existence or scope of judicial review of public prosecution decisions amongst the Contracting States. Here the High Court had applied Strasbourg case-law when rejecting the applicant's challenge against the DPP, consequently the Grand Chamber dismissed her claim that the English standard was too narrow.

The Grand Chamber began its conclusion by expressly recognising that, "[t]he facts of the present case are undoubtedly tragic and the frustration of Mr de Menezes' family at the absence of any individual prosecutions is understandable."³⁹ But, as the government contended, sometimes failures in systems resulted in the loss of lives without criminal or disciplinary liability being attached to the actions of individual officials. Here the decision not to prosecute any individual police officer was not:

...due to any failings in the investigation or the State's tolerance of or collusion in unlawful acts; rather, it was due to the fact that, following a thorough investigation, a prosecutor considered all the facts of the case and concluded that there was insufficient evidence against any individual officer to meet the threshold evidential test in respect of any criminal offence. Nevertheless, institutional and operational failings were identified and detailed recommendations were made to ensure that the mistakes leading to the death of Mr de Menezes were not repeated.⁴⁰

Furthermore the Grand Chamber did not find the conviction and financial penalties imposed on the OCMF for breach of health and safety laws to be a manifestly disproportionate sanction. Therefore, by thirteen votes to four, the Grand Chamber found that there had been no violation of the procedural limb of Article 2 of the Convention.

In their joint dissent Judges Karakas, Wojtyczek and Dedov expressed the view that:

[w]e note that in the instant case criminal proceedings were instituted against the police service. Criminal proceedings against legal entities may be helpful for establishing the facts. However, the Convention requires that criminal law should provide for the punishment of individuals and that an investigation should be able to lead to such punishment. Under the Convention, criminal liability of legal entities can never replace criminal liability of individuals. In the instant case, the criminal liability of the police service as such is not sufficient to satisfy the Convention criteria. Furthermore, gross negligence on the part of a legal entity always stems from the misconduct of specific individuals.⁴¹

They also identified defects in the investigations into the killing of Jean Charles including, the initial delays in the MPS handing over the scene of the shooting to the IPCC, allowing the firearms officers to confer and collaborate in the writing of their report on the shooting and delays of years before the inquest began.

Judge Lopez Guerra issued a separate dissenting opinion in which he found a breach of the procedural limb of Article 2 due to the fact that no individual responsibility for the

³⁸ *Ibid.* at para. 274.

³⁹ *Ibid.* at para. 283.

⁴⁰ *Ibid.* at para. 284.

⁴¹ *Supra* n. 30 at para. 8.

death of Jean Charles was attached to any police officer despite the, officially acknowledged, "very serious deficiencies in all aspects of the policing operation".⁴²

So once again, note *Lambert* above, we see the Court granting States a margin of appreciation in regard to another aspect of Article 2. In *Armani Da Silva* the Grand Chamber, acknowledging the diversity of criminal justice systems across the Contracting States and the primary role/expertise of national prosecution authorities, adopted a generally deferential attitude towards the legal tests applied by prosecutors when deciding whether to bring a public prosecution. Nevertheless, it is a reflection of how extensive the Court's elaboration of the implied (judicially created) procedural limb of Article 2 has become that the Grand Chamber was able to conduct such an exhaustive review of the numerous different inquires and official decision-making that followed the tragic killing of Jean Charles. It is to be hoped that the de Menezes family will now be able to find some closure as important changes have occurred to English and Welsh police procedures, both operationally (e.g. command and control of major counter-terrorism operations) and investigative/disciplinary (e.g. preventing collaborative report writing by officers involved in the death or serious injury of a person), as a consequence of his death. In early March 2016 the UK Government had already announced that the IPCC would be renamed (to become the "Office for Police Conduct"), reformed with a new organisational model (the individual Commissioners will be replaced by a Director General, appointed by the Queen- in reality by the Prime Minister/Home Secretary) and a board, with a majority of lay persons, appointed by the Home Secretary, will oversee the work of the organisation. The Government claimed that "these changes will deliver a more capable and resilient IPCC with clear lines of accountability and decision-making".⁴³ The powers of the reformed organisation will also be expanded to allow the Office for Police Conduct to initiate its own investigations, rather than having to wait for complaints/cases to be referred to it.

ARTICLE 3: FACE SLAPPING OF SUSPECTS BY POLICE CONSTITUTES DEGRADING TREATMENT

A Grand Chamber overruled the unanimous judgment of a Chamber to hold that such mistreatment violated Article 3 in *Bouyid v Belgium*⁴⁴. The application was brought by two brothers who lived with their family next to the local police station in a district of Brussels. It appears that relations between officers based at that station and the applicants' family were strained, the applicants claimed their family had been harassed by local police officers as one of the officers believed a family member had intentionally damaged his car. In December 2003 the first applicant contended that whilst he was trying to enter the family home, he had forgotten his keys, he was confronted by a plain-clothes policeman who demanded that the applicant show his identity card. The applicant refused, requiring the officer to show his credentials. The officer then, allegedly, forced the applicant into the police station and, whilst alone with the applicant, slapped him on the face. Once the applicant's identity had been established he was permitted to leave the station. The officer lodged a criminal complaint against the applicant, accusing him of resisting an officer and abusive behaviour. A few hours later the applicant obtained a medical note from his doctor stating he was in a state of shock and had erythema (redness of skin) on his left cheek. In February 2004 the second applicant was at the police station being interviewed about an alleged confrontation between him and his mother with another person (who had complained to the police). The applicant alleged that the officer questioning him had slapped his face as the applicant had been leaning on the officer's desk. He obtained a doctor's certificate later that day reporting bruising on the applicant's cheek. Subsequently

⁴² Dissenting Opinion of Judge Lopez Guerra at para. 1.

⁴³ 7 March 2016, Press Release.

⁴⁴ No. 23380/09, 28 September 2015.

both applicants made formal complaints against the officers involved in the above incidents. The two officers were charged with using violence against individuals in the course of their duties. The investigating judge closed the investigation after a few months and one year later the Crown Prosecutor requested the discontinuance of the case, as sufficient evidence of criminal behaviour had not been established. Two years later the court discontinued the proceedings against the officers. Subsequent appeals by the applicants were unsuccessful.

The applicants complained to Strasbourg contending, *inter alia*, that their mistreatment by the police amounted to degrading treatment. The Chamber held, supposing the slapping had occurred as claimed by the applicants, that "...acts of this type, though unacceptable, cannot be regarded as generating a sufficient degree of humiliation or debasement for a breach of Article 3 of the Convention to be established."⁴⁵ Thereupon the applicants successfully petitioned for the case to be reheard by the Grand Chamber.

Before the Grand Chamber the applicants argued that the Chamber's judgment was not in accordance with the former's jurisprudence on Article 3. Whilst the respondent State submitted that there was more than reasonable doubt as to the facts alleged by the applicants. Third-party written comments were received from the Human Rights Centre of the University of Ghent which considered that the Chamber had taken account of irrelevant facts, including the allegedly disrespectful attitude of the applicants towards the police; the Centre believed that a slap could have serious psychological effects on the recipient (e.g. as a threat of more serious violence to be inflicted if the victim did not cooperate) and that in some Brussels police stations slapping was "virtually a routine occurrence".⁴⁶ REDRESS, the British non-governmental organization, also submitted third-party comments in which it argued that international human rights law only permitted police officers to use physical force that was necessary and proportionate.

The Grand Chamber began by restating the relevant established principles governing Article 3 which include the burden of proof on States to provide convincing explanations, based on evidence, regarding injuries occurring to detainees and that any use of force by law enforcement officers on a person, that is not strictly necessary because of that person's actions, will in principle be a breach of Article 3. Previous case-law had also identified the connection between degrading treatment and infringing a person's dignity. The Grand Chamber applied the first principle above to conclude that the applicants had been slapped by police officers as the respondent State had failed to produce evidence likely to refute the applicants' allegations which were supported by medical certificates. Regarding the use of force by State officials:

The Court emphasises that the words "in principle" cannot be taken to mean that there might be situations in which such a finding of a violation is not called for, because the above-mentioned severity threshold...has not been attained. Any interference with human dignity strikes at the very essence of the Convention... For that reason any conduct by law-enforcement officers *vis-à-vis* an individual which diminishes human dignity constitutes a violation of Article 3 of the Convention. That applies in particular to their use of physical force against an individual where it is not made strictly necessary by his conduct, whatever the impact on the person in question.⁴⁷

In the view of the Grand Chamber the officers slapped the applicants impulsively as a response to the perceived disrespectful conduct of the applicants. Such use of physical force was not necessary and amounted to an undermining of the applicants' dignity which constituted a breach of Article 3. The Grand Chamber expressed the opinion that a slap, particularly to the face, has serious effects on the victim, including causing the latter to suffer humiliation.

⁴⁵ Judgment of 21 November 2013 at para. 51.

⁴⁶ *Supra*. n.44 at para. 76.

⁴⁷ *Ibid.* at para. 101.

That is particularly true when the slap is inflicted by law-enforcement officers on persons under their control, because it highlights the superiority and inferiority which by definition characterise the relationship between the former and the latter in such circumstances. The fact that the victims know that such an act is unlawful, constituting a breach of moral and professional ethics by those officers and – as the Chamber rightly emphasised in its judgment – also being unacceptable, may furthermore arouse in them a feeling of arbitrary treatment, injustice and powerlessness...⁴⁸

However, the Grand Chamber expressly disagreed with the Chamber's approach of taking account of the allegedly disrespectful behaviour by the applicants which provoked the police officers to slap the applicants. "In a democratic society ill-treatment is never an appropriate response to problems facing the authorities."⁴⁹ Another, secondary, factor for the Grand Chamber was that one of the applicants was a minor (17 years old) when he was slapped. Acknowledging the vulnerability of minors the Grand Chamber stated that police officers must demonstrate even greater self-control when dealing with such persons. Given the slight physical injuries suffered by the applicants and the absence of serious mental suffering a large majority of the Grand Chamber (14 votes to 3) held that the applicants had experienced degrading treatment in violation of Article 3 of the Convention. They were each awarded EUR 5,000 just satisfaction for their non-pecuniary damage. The Grand Chamber was unanimous in finding a breach of the effective investigation obligation, implicit in Article 3, regarding the applicants' complaints that they had been slapped by police officers.

Judges De Gaetano, Lemmens and Mahoney issued a joint partly dissenting opinion in which they began by emphasising that police officers slapping persons is unacceptable. Furthermore, such misbehaviour should be subject to tortious and criminal liabilities. However, the dissenters believed that the majority had gone too far beyond the established Article 3 jurisprudence in holding that any interference with human dignity by police officers using force against a person would breach that Article. "We fear that the judgment may impose an unrealistic standard by rendering meaningless the requirement of a minimum level of severity for acts of violence by law-enforcement officers."⁵⁰ The dissenters feared the trivialisation of judgments finding breaches of Article 3 in circumstances like the present case compared to other much more serious mistreatment by law-enforcement officials dealt with by the Court. Would the majority's approach now prevent State Parties deporting or extraditing foreign nationals to States where the individual was at risk of being slapped (once) by a public official? For the dissenters the applicants had not suffered mistreatment of sufficient severity to fall within Article 3.

So whilst all the judges in the Chamber and Grand Chamber agreed that the police officers' slapping of the two applicants was unacceptable there were profound differences in the Court as to whether this misbehaviour was sufficiently serious to be characterised as a breach of Article 3. The expansive approach of the Grand Chamber majority to encompass all conduct by law-enforcement officials which diminishes a person's human dignity as a violation of Article 3 may well come back to haunt the Court as a ruling that has uncertain implications as posited by the dissenters. It also reveals the ever widening spectrum of official mistreatment now encompassed within Article 3 from "Palestinian hanging" (being suspended from your arms in a manner which caused permanent paralysis)⁵¹ to a facial slap.

ARTICLE 8: INTERCEPTION OF MOBILE PHONE COMMUNICATIONS IN RUSSIA

⁴⁸ *Ibid.* at para. 106.

⁴⁹ *Ibid.* at para. 108.

⁵⁰ Joint Partly Dissenting Opinion at para.7.

⁵¹ *Aksoy v Turkey*, No.21987/93. 18 December 1996.

In *Roman Zakharov v Russia*⁵², a unanimous Grand Chamber found a number of defects in the system of secret surveillance of mobile phone communications in Russia which enabled the authorities to access the real-time communications of all mobile phone users in that country. The applicant, a magazine editor and chairperson of a non-governmental organization concerned with freedom of speech, had brought proceedings before the national courts claiming that his right to privacy of his communications had been violated as Order No. 70, issued by the Ministry of Communications in 1999, required mobile network operators to install equipment which enabled the Federal Security Service (FSB) to intercept all communications. Furthermore, the Order had never been published. The domestic courts rejected his claims on the basis that he had not established that his mobile phone communications had been intercepted. He then lodged an application with the Court, in October 2006, alleging, *inter alia*, that the Russian system of secret surveillance violated his right to respect for his private life and correspondence guaranteed by Article 8 of the Convention. Three years later the application was communicated to the respondent Government and in March 2014 the Chamber relinquished jurisdiction, under Article 30 of the ECHR, to the Grand Chamber. The latter body held an oral hearing in September 2014.

Before the Grand Chamber the respondent State contended that the applicant was not eligible to bring a complaint before the Court as he had not alleged that his mobile phone communications had been intercepted consequently he was not a "victim" as required by Article 34 of the Convention. That Article did not permit a person to lodge an application that was *actio popularis* with the purpose of challenging a national law *in abstracto*. The applicant responded that previous case-law of the Court enabled applicants to lodge complaints where legislation permitted secret surveillance and such applicants did not have to prove that their communications had actually been intercepted. The Grand Chamber observed that it was well established that the Convention did not establish a procedure for *action popularis* complaints and that the Court did not generally evaluate national laws *in abstracto*. However, the Court had considered some general challenges to legislative regimes authorising secret surveillance by State authorities because of the need to ensure that such systems were subject to appropriate controls. The Grand Chamber held that it was necessary to "clarify" when applicants could bring Article 8 complaints regarding secret surveillance powers without having to establish that they had actually been subject to these measures. The judgment of the Chamber in *Kennedy v UK*⁵³ provided a good approach to ensuring secret surveillance systems were subject to domestic and Strasbourg judicial supervision.

...Accordingly, the Court accepts that an applicant can claim to be the victim of a violation occasioned by the mere existence of secret surveillance measures, or legislation permitting secret surveillance measures, if the following conditions are satisfied. Firstly, the Court will take into account the scope of the legislation permitting secret surveillance measures by examining whether the applicant can possibly be affected by it, either because he or she belongs to a group of persons targeted by the contested legislation or because the legislation directly affects all users of communication services by instituting a system where any person can have his or her communications intercepted. Secondly, the Court will take into account the availability of remedies at the national level and will adjust the degree of scrutiny depending on the effectiveness of such remedies.⁵⁴

Where domestic law failed to provide effective remedies for complainants the Court would permit, as an exception to the rule prohibiting *in abstracto* complaints, applications without the need for the applicants to prove that they were actually subject to secret surveillance.

⁵² No. 47143/06, 4 December 2015.

⁵³ No. 26839/05, 18 May 2010 and see A. Mowbray, *Cases, Materials & Commentary on the ECHR* (3d ed., Oxford U. Press, 2012) p.561.

⁵⁴ *Supra* n.52 at para. 171.

However, if there were effective remedies at the national level then applications would only be admissible at Strasbourg to challenge legislation permitting secret surveillance where applicants demonstrated that, due to their personal circumstances, they were "potentially at risk of being subjected to such measures".⁵⁵

The Grand Chamber went on to find that Russian law did not provide effective remedies for a person who suspected that their mobile phone communications had been secretly intercepted. This was because, *inter alia*, persons whose communications had been subject to secret surveillance were never notified of that fact in Russia; the possibility of persons complaining of secret State surveillance to a superior official was not a sufficiently independent remedy nor were there effective remedies before the Russian courts for persons who believed their mobile phone communications had been intercepted. Consequently, the Grand Chamber determined that the applicant was entitled to claim he was a victim of the Russian legislation authorizing secret surveillance, without having to establish that his mobile phone communications had been intercepted.

The applicant contended that the technical addendums to Order No. 70, specifying the interception equipment that network operators had to install to permit State surveillance of mobile phone communications, had never been published and therefore failed to satisfy the transparency requirements of Article 8(2) of the Convention. The Government responded that this technical detail need not be published, but in fact a specialist magazine published by the Ministry of Communications in 1999 had contained those details and they were also available via a privately-established website. Whilst the Grand Chamber regretted that there was not a generally accessible official publication of the totality of Order No. 70, given the above forms of publication it was not necessary for the Court to pursue further the domestic accessibility of the legal basis for secret surveillance measures. Instead the Grand Chamber focussed on whether there were sufficient safeguards in the domestic arrangements governing mobile phone surveillance measures to meet the requirement, enshrined in Article 8(2) of the Convention, that any interferences with the privacy and correspondence of persons in Russia was "necessary in a democratic society". The Grand Chamber, upholding many of the defects identified by the applicant, concluded:

...that Russian legal provisions governing interceptions of communications do not provide for adequate and effective guarantees against arbitrariness and the risk of abuse which is inherent in any system of secret surveillance, and which is particularly high in a system where the secret services and the police have direct access, by technical means, to all mobile telephone communications. In particular, the circumstances in which public authorities are empowered to resort to secret surveillance measures are not defined with sufficient clarity. Provisions on discontinuation of secret surveillance measures do not provide sufficient guarantees against arbitrary interference. The domestic law permits automatic storage of clearly irrelevant data and is not sufficiently clear as to the circumstances in which the intercept material will be stored and destroyed after the end of a trial. The authorisation procedures are not capable of ensuring that secret surveillance measures are ordered only when "necessary in a democratic society". The supervision of interceptions, as it is currently organised, does not comply with the requirements of independence, powers and competence which are sufficient to exercise an effective and continuous control, public scrutiny and effectiveness in practice. The effectiveness of the remedies is undermined by the absence of notification at any point of interceptions, or adequate access to documents relating to interceptions.⁵⁶

Therefore the Russian legal framework governing secret surveillance of mobile phone communications was found to be in breach of Article 8. The applicant had claimed EUR 8,000 as compensation for non-pecuniary damage. The respondent Government argued

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* at para. 302.

that as the applicant had brought an *in abstracto* challenge to the Russian law and not claimed he had been personally affected, he should not be awarded any financial compensation. Subject to the dissent of Judge Ziemele the Grand Chamber agreed with the Russian submission and did not award any financial just satisfaction to the applicant.

Judge Dedov, from Russia, issued a Concurring Opinion that was critical of the Court's willingness to undertake *in abstracto* reviews of Contracting States' surveillance laws. He noted that in the earlier *Kennedy* and *Klass and Others v Germany*⁵⁷ cases, involving "prominent democratic States"⁵⁸, the Court had found no breaches of Article 8.

However, and regrettably, we cannot ignore the fact that both of these States have recently been involved in major well-publicised surveillance scandals. Firstly, the mobile telephone conversations of the Federal Chancellor of Germany were unlawfully intercepted by the national secret service; and secondly, the UK authorities provided a US secret service with access to and information about the former State's entire communication database, with the result that the US authorities were able to intercept all UK citizens without being subject to any appropriate domestic safeguards at all.⁵⁹

Therefore, he believed that the Court's approach was wrong and it should focus on complaints alleging actual breaches of the applicants' Article 8 rights.

Nonetheless, I have voted for admissibility and for the finding of a violation of Article 8 of the Convention on account of the fact that the fundamental importance of safeguards to protect private communications against arbitrary surveillance, especially in the non-criminal context, was never addressed in the domestic proceedings. The Russian courts refused to address the applicant's allegations on the merits, mistakenly referring to the technical nature of the impugned ministerial orders. As a national judge, I cannot ignore the fact that a widespread suspicion exists in Russian society that surveillance is exercised over political and economic figures, including human-rights activists, opposition activists and leaders, journalists, State officials, managers of State property – in other words, over all those who are involved in public affairs. Such a suspicion is based on past experience of the totalitarian regime during the Soviet era, and even on the long history of the Russian Empire.⁶⁰

Judge Dedov concluded by quoting Edward Snowden! "With each court victory, with every change in the law, we demonstrate facts are more convincing than fear. As a society, we rediscover that the value of the right is not in what it hides, but in what it protects".⁶¹

The Grand Chamber's elaboration of a differential test for determining when it would examine *in abstracto* challenges to national laws authorising secret surveillance measures can be viewed as yet another facet of the Court's subsidiary relationship with domestic authorities noted above in our discussions of *Lambert* and *Armani Da Silva*. The test endorsed in *Zakharov* means that the greater the range of effective domestic remedies available to challenge surveillance laws the less likely the Court is to permit such laws to be questioned via *in abstracto* proceedings at Strasbourg. There is a logical symmetry to this approach, but in reality it may lead to complicated admissibility arguments with applicants contending that they had no such domestic remedies whilst respondent States claim the opposite.

Given the serious legal defects found in the Russian mobile phone surveillance system and the growing scale of its use, official statistics contained in the judgment

⁵⁷ No.5029/71, 6 September 1978.

⁵⁸ Concurring Opinion of Judge Dedov at p.83.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* at p.88.

⁶¹ *Ibid.* at p.89.

revealed a doubling in authorisations of surveillance requests between 2009-2013 with approximately 600,000 authorisations being approved by the Russian courts in 2013⁶², it is rather disconcerting that the Court took over nine years to determine Mr Zakharov's case! It is not possible from the judgment to know why it took four and a half years from the communication of the application to the Russian Government to the Chamber deciding to relinquishing jurisdiction to the Grand Chamber, of course delays may have been caused by the parties. However, one might be much more critical of the Grand Chamber, which according to the judgment was unanimous, taking over one year to draft that judgment from the date of the oral hearing before the Court. Does this time-period suggest that the judges, in private, took a long time to agree a common stance?

Article 10: RESPONSIBILITIES OF AN INTERNET NEWS PORTAL FOR USERS' COMMENTS
A Grand Chamber examined this issue for the first time in *Delfi AS v Estonia*⁶³. The applicant company operates one of the largest news portals in the respondent State (and it also has sites in other Baltic countries). In 2006 the company published about 300 news articles a day on its Estonian portal. Below the news articles there was a section where readers could add their own comments (with the option to give their names). The site contained rules governing content including the prohibition of comments containing threats, insults and incitements to violence. Users' comments were automatically uploaded to the site and not edited by the company. However, the company had an electronic system that automatically deleted comments containing certain obscene words. Also the company operated a notice-and-take-down system whereby readers could mark a comment as being insulting and the comment would then be removed. During 2005 an Estonian newspaper had published a call to the Minister of Justice, the Chief Public Prosecutor and the Chancellor of Justice to deal with the brutal mocking of people on public websites like the one operated by Delfi. The officials responded noting that civil and criminal remedies were available to victims.

In January 2006 Delfi published an article headed "SLK Destroyed Planned Ice Road" which claimed that the named ferry company had sailed its ships in ways that broke-up public routes over frozen sea between the mainland and certain islands (thereby obliging drivers to use ferries). Within two days of the article's publication 185 comments had been posted on the applicant's portal. About 20 of them contained personal threats and offensive terminology aimed at the person who was the owner of the relevant ferry company (L). These included: "...burn in your own ship, sick Jew!", "...go ahead, guys, [L] into the oven!" and "[little L] go and drown yourself". A few weeks later L's lawyers requested that Delfi remove the abusive comments and pay EUR 32,000 compensation for L's non-pecuniary damage. Delfi immediately took-down the comments but refused the claim for compensation. L then sued Delfi and after lengthy litigation the Supreme Court upheld an award of EUR 32 against Delfi. The Supreme Court, *inter alia*, found that Delfi could not rely upon domestic legislation implementing the European Union's Directive 2000/31/EC (Directive on electronic commerce) as Delfi's portal amounted to the provision of "content services". Following delivery of the Supreme Court's judgment Delfi established a team of moderators who checked users' comments for compliance with the Portal's rules governing postings. About 8 percent of comments were removed for being spam or irrelevant and less than 0.5 percent were removed for being defamatory.

Delfi applied to the Court contending that its liability under national law for the users' comments on its portal violated the company's right to freedom of expression

⁶² *Supra* n.52 at para. 194.

⁶³ No.64569/09, 16 June 2015.

guaranteed by Article 10 of the ECHR. The Chamber, unanimously, found no breach.⁶⁴ Subsequently, the Grand Chamber accepted the company's request for the case to be referred under Article 43. Before the Grand Chamber Delfi submitted that user-created content on the internet was of increasing importance and hosting companies should not be liable for that content if they swiftly deleted illegal postings after they became aware of them. The respondent government argued that following the Court's established jurisprudence it was for domestic courts to interpret national law and the Supreme Court had decided that domestic legislation implementing the EU Directive was not applicable to the applicant's conduct. Despite the judgment against Delfi the number of comments on its portal had continued to expand and the company now had five employees dealing with take-down requests. Several third-party party interveners also made written submissions to the Grand Chamber. The Helsinki Foundation for Human Rights contended that intermediary service providers should not be subject to the same legal liabilities as the traditional media. The non-governmental organisation Article 19 believed that the EU Directive was intended to protect websites against liability for users' comments. The Media Legal Defence Initiative, representing a number of non-governmental organisations and media companies, stated that the majority of media organisations in North America and Europe did not screen users' comments before they were posted, but they did engage in post-publication moderation. A joint submission by the European Digital Media Association, the European Computer and Communications Industry Association and the Association of European Internet Service Providers contended that operating a news portal, like Delfi's, was technological identical to hosting services such as social media platforms. EU and domestic law in other European States recognised that a notice-and-take-down system was a practical method of balancing freedom of expression and the removal of unlawful speech by internet hosting platforms.

The Grand Chamber began by observing that:

...user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression. That is undisputed and has been recognised by the Court on previous occasions (see *Ahmet Yildirim v. Turkey*, no. 3111/10, § 48, ECHR 2012, and *Times Newspapers Ltd (nos. 1 and 2) v. the United Kingdom*, nos. 3002/03 and 23676/03, § 27, ECHR 2009). However, alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online. These two conflicting realities lie at the heart of this case. Bearing in mind the need to protect the values underlying the Convention, and considering that the rights under Article 10 and 8 of the Convention deserve equal respect, a balance must be struck that retains the essence of both rights. Thus, while the Court acknowledges that important benefits can be derived from the Internet in the exercise of freedom of expression, it is also mindful that liability for defamatory or other types of unlawful speech must, in principle, be retained and constitute an effective remedy for violations of personality rights.⁶⁵

The Grand Chamber endorsed the Estonian Supreme Court's recognition of differences between internet portal operators and traditional publishers, therefore the former held that the "duties and responsibilities" of portal operators under Article 10(2) of the ECHR could differ from those of traditional publishers regarding users' comments. But the Grand Chamber stressed that Delfi was a major commercial news portal operator and therefore the present case did not concern other types of internet sites such as bulletin boards and personal blogs. Furthermore, public concerns about the content of users' comments on Delfi had already been expressed in Estonia before the events in this case arose. Also the impugned comments in this case were manifestly unlawful as the Supreme Court had classified them as involving hate speech and advocacy of violence.

⁶⁴ Judgment of 10 October 2013.

⁶⁵ *Supra* n.63 at para. 110.

Regarding Delfi's claim that the domestic courts should have evaluated its liability for users' comments by applying the national legislation implementing the European Directive, the Grand Chamber repeated the Chamber's ruling that it is primarily for domestic courts to determine which national laws are applicable. The parties accepted that the domestic judgments against Delfi had the legitimate aim, under Article 10(2) of the ECHR, of protecting the reputation and rights of others (namely, L). Furthermore, the Grand Chamber noted that previous case-law had determined that the protection of a person's reputation fell within the right to respect for private life, guaranteed by Article 8 of the Convention, and States were accorded a wide margin of appreciation when balancing the competing rights contained in Articles 8 and 10.

When assessing the proportionality of the liability placed upon Delfi the Grand Chamber noted that the majority of the relevant user comments on the portal constituted hate speech or incitement to violence falling outside the protection of Article 10. Also Delfi invited user comments and the greater the number of visitors to the site the more advertising revenue the company generated. Once uploaded to the portal only Delfi could amend or delete postings. Therefore, the Grand Chamber found the Supreme Court had sufficient reasons to conclude that Delfi was more than a passive service provider. The Grand Chamber was unimpressed with the efficacy of Delfi's automatic word-based filtering system as it had failed to detect the relevant user comments which contained clear expressions of hatred and threats. Regarding Delfi's notice-and-take-down system:

If accompanied by effective procedures allowing for rapid response, this system can in the Court's view function in many cases as an appropriate tool for balancing the rights and interests of all those involved. However, in cases such as the present one, where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals, as understood in the Court's case-law... the Court considers... that the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 of the Convention, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties.⁶⁶

Given the limited amount of damages awarded against Delfi, the scale of the applicant's internet operations and the fact that it has continued to be the most popular news site for user comments in Estonia the overwhelming majority of the Grand Chamber (fifteen votes to two) concluded that the sanctions imposed on Delfi were not a disproportionate interference with the company's freedom of expression. Hence no breach of Article 10 had occurred.

Judges Sajo and Tsotsoria issued a joint dissenting opinion in which they criticised the majority for failing to heed the "prophetic warnings" of Professor Jack Balkin⁶⁷ about the dangers of States fostering "collateral censorship" by placing legal liabilities on internet operators for the expression of other persons. The dissenters considered that the majority had ignored the fact that: "In the overwhelming majority of the member States of the Council of Europe, and also in genuine democracies all over the world, the regulatory system (in conformity with the expectations of the rule of law) is based on the concept of actual knowledge. A safe harbour is provided by the rule of notice and action (primarily "notice and take down")."⁶⁸ Delfi's news article on the ice roads was of public interest according to the dissenters and they queried whether all the impugned user comments amounted to hate speech or threats of violence.

So the overwhelming majority in the Grand Chamber were not willing to accept that an internet portal's notice-and-take-down system for dealing with complaints about

⁶⁶ *Ibid.*, at para. 159.

⁶⁷ J M Balkin, *Old-School/New-School Speech Regulation* 127 Harvard Law Review 2296 (2014).

⁶⁸ *Supra* n.63 Joint Dissenting Opinion of Judges Sajo and Tsotsoria at para. 7.

posted comments made by members of the public would always be sufficient for a portal operator to remain immune from legal action by the victim of those comments. In the circumstances of *Delfi* the Grand Chamber did not consider the civil liability of the operator infringed the company's freedom of expression under Article 10. Clearly, the relevant comments made by the users against L should not have been allowed to be posted. For the majority the commercial scale of Delfi's internet operations meant that they should have had a more proactive (human?) screening system in place to prevent the comments being posted on the company's portal. The fact that subsequently Delfi instituted such a system suggests that it was not too burdensome for a substantial internet news business.