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Justitieombudsmannen
Lilian Wiklund

Kritik mot gymnasieskolor i Karlstads kommun för att de har agerat i strid med objektivitetsprincipen i 1 kap. 9 § regeringsformen

Beslutet i korthet: Kommunistiska Partiets ungdomsförbund nekades i samband med riksdagsvalet 2014 tillträde till Karlstads kommunala gymnasieskolor för att anordna bokbord. Kommunen motiverade detta med att man bara skulle tillåta riksdagspartier att besöka skolorna för att sprida politisk information.

Det har enligt JO inte funnits något lagligt hinder mot att de aktuella gymnasieskolorna på eget initiativ bjöd in endast de partier som fanns representerade i riksdagen till skolorna. Enligt vad som kom fram under JO:s utredning hade skolorna emellertid inte erbjudit Kommunistiska Partiets ungdomsförbund något alternativt sätt att lämna sin information. Att på det viset helt utesluta ungdomsförbundet från att delta i verksamheten står i strid med regeringsformens objektivitetsprincip. Gymnasieskolorna får därför kritik för sitt agerande.

Beslutet innehåller även vissa generella uttalanden om hur JO ser på frågorna om politiska partiers medverkan i skolans samhällsinformation.

Anmälan

I en anmälan till JO framförde AA klagomål mot Nobelgymnasiet, Sundstagymnasiet, Tingvallagymnasiet och Älvkullegymnasiet samt Karlstads-Hammarö gymnasieförvaltning i Karlstads kommun.

AA anförde i huvudsak följande: Kommunistiska Partiets ungdomsförbund, Revolutionär Kommunistisk Ungdom, blev under hösten 2014 förhindrat att besöka Karlstads kommunala gymnasieskolor då förvaltningen gjorde bedömningen att man bara skulle tillåta riksdagspartier att besöka skolorna för att sprida politisk information.

Utredning

JO begärde att Karlstads-Hammarö gymnasienämnd i Karlstads kommun skulle yttra sig över vad som hade framförts i anmälan.

Gymnasienämnden anförde att den bedömde att verksamhetschefernas/rektorernas urval av vilka partier som erbjudits tillträde till skolorna hade gjorts på objektiva och sakliga grunder. Nämnden bifogade som beslutsunderlag

Karlstads-Hammarö gymnasieförvaltnings tjänsteyttrande undertecknat av BB, skoldirektör, och CC, verksamhetschef. I yttrandet anfördes bl.a. följande:

> I samband med valet 2014 erbjöds de partier, som fanns representerade i riksdagen tillträde till gymnasieskolans lokaler.
>
> Revolutionär Kommunistisk Ungdom kontaktade verksamhetschefer/rektorer och ville anordna ett bokbord på gymnasieskolorna i Karlstad. Då Kommunistiska Partiet inte fanns representerat i varken riksdagen eller kommunfullmäktige, nekades de tillträde till skolorna.
>
> Revolutionär Kommunistisk Ungdom anordnade trots detta olovligen ett bokbord på en av gymnasieskolorna, varpå de ombads lämna skolans område.

Karlstads-Hammarö gymnasienämnds bedömning

Gällande rätt

Det finns inte någon författning, som uttryckligen reglerar frågor om politisk opinionsbildning och besök av politiska partier i skolan. Det finns däremot viss praxis gällande de rättsliga förutsättningarna för politiska partiers besök i skolan. Praxisen kommer från beslut från JO och JK samt i någon dom från Högsta Förvaltningsdomstolen (dåvarande Regeringsrätten).

Enligt skollagen (2010:800) ska utbildningen utformas i överenskommelse med grundläggande demokratiska värderingar och de mänskliga rättigheterna, som människolivets okränkbarhet, individens frihet och integritet, alla människors lika värde, jämställdhet samt solidaritet mellan människor.

Skolans demokratiska uppdrag framgår av läroplanerna för varje skolform.

Av l kap. 9 § regeringsformen framgår, att domstolar och förvaltningsmyndigheter och andra som fullgör offentliga förvaltningsuppgifter i sin verksamhet, ska beakta allas likhet inför lagen samt iaktta saklighet och opartiskhet.

I praxis har det gjorts ett antal uttalanden, som kan sammanfattas enligt följande. Skolan är inte en allmän plats. Yttrandefriheten innebär inte någon rätt för en enskild eller en grupp personer, att få tillträde till en skola för att där sprida ett budskap. En skola måste inte bjuda in politiska partier till skolan, men om skolan gör det, måste den grundlagsfästa objektivitetsprincipen tillämpas. Rektorn är ansvarig för att upprätthålla ordningen på skolan och får bestämma om vem som får vistas på skolan. Om en skola har valt att bjuda in ett på objektiva grunder begränsat antal partier och ett annat parti anmäler intresse att komma till skolan i ett mycket sent skede, står det inte i strid med objektivitetsprincipen att avslå begäran, under förutsättning att rektorns beslut grundas på rent praktiska överväganden.

Bedömning

Karlstads-Hammarö gymnasienämnd vill inledningsvis framhålla, att frågan om politisk information i skolan är komplicerad och det är i någon mån problematiskt, att det saknas författningsregleringar över hur frågorna ska hanteras.

Mot bakgrund av skollagens bestämmelser samt skolans uppdrag, att förbereda elever för ett aktivt deltagande i demokratin, är samtliga kommunala gymnasieskolor i Karlstad positiva till att politiska partier kommer till skolan. Detta genomförs varje år och sker bl.a. genom att det anordnas bokbord i skolans lokaler för att sprida politisk information. Även om den enklaste lösningen är, att helt förbjuda besök av politiska partier i skolan, har rektorerna valt att inte göra så.

Karlstads-Hammarö gymnasienämnd har inte beslutat om några riktlinjer för besök av politiska partier i skolan utan, mot bakgrund av rektorns ansvar för

ordningen, är det respektive skolas rektor, som beslutar om och hur politiska partier ska ges tillträde till de kommunala gymnasieskolorna i Karlstad.

Samtliga rektorer har valt att begränsa urvalet av partier till de partier, som är representerade i riksdagen eller kommunfullmäktige. Det finns ingen praxis, som hindrar ett urval och ett sådant måste tillåtas att ske, för att inte komma i konflikt med skolans övriga uppdrag. Vidare uppstår det praktiska svårigheter om samtliga tänkbara organisationer skulle lämna politisk information i skolan. Nämnden har självfallet förståelse för, att urval i sig alltid är problematiskt i frågor som dessa, men om ett urval inte kan tillåtas är det tveksamt om det är möjligt att i framtiden tillåta information av politiska partier i skolan.

Nämndens uppfattning är, att urvalet skett på sakliga grunder och att urvalet inte står i strid med den grundlagsfästa objektivitetsprincipen.

Urvalet har inte på något sätt baserats på de åsikter, som partiet har eller förväntas föra fram, utan på sakliga grunder. Urvalet av partier har inte heller begränsat rätten till åsikts- och yttrandefrihet.

Med anledning av ovanstående bedömer nämnden, att rektorernas urval av vilka partier, som erbjudits tillträde till skolorna, har skett på objektiva och sakliga grunder. Någon anledning att rikta kritik mot urvalet finns sammanfattningsvis inte, även om ett urval alltid kan diskuteras.

Mot bakgrund av det som framförs i JO-anmälan avser nämnden, att informera rektorer och övrig berörd personal, om den praxis som finns i frågan och det stödmaterial som bl.a. Skolverket tagit fram.

De i anmälan angivna personerna har beretts tillfälle, att yttra sig över anmälan samt ett utkast till detta yttrande. Ingen av personerna har haft något att tillägga.

AA yttrade sig över nämndens remissvar. Han anförde bl.a. följande: Revolutionär Kommunistisk Ungdom har vägrats tillträde till de aktuella skolorna. Skolorna har inte erbjudit några andra tillfällen under likvärdiga förutsättningar. Det har rört sig om en konkret förfrågan om att få besöka skolorna.

Bedömning

Allmänna utgångspunkter

Domstolar samt förvaltningsmyndigheter och andra som fullgör offentliga förvaltningsuppgifter ska i sin verksamhet beakta allas likhet inför lagen samt iaktta saklighet och opartiskhet (1 kap. 9 § regeringsformen).

JO har vid ett flertal tillfällen uttalat sig i frågor som uppkommit i samband med att politiska partier har önskat lämna politisk information i skolor. Här kan nämnas bl.a. JO 2007/08 s. 462 (dnr 3238-2006), JO 2007/08 s. 464 (dnr 3940-2006 och 3941-2006), JO 2008/09 s. 396 (dnr 4192-2006), JO 2008/09 s. 400 (dnr 2322-2006), JO 2008/09 s. 405 (dnr 2364-2006), JO 2012/13 s. 419 (dnr 5142-2010), JO 2013/14 s. 546 (dnr 2459-2011) och JO:s beslut den 27 september 2010 i ärendet med dnr 3110-2009.

En skola är inte en allmän plats. Yttrandefriheten enligt regeringsformen ger inte medborgarna, eller en sammanslutning av sådana, någon rätt att få tillträde till en skola för att sprida ett budskap där. På motsvarande sätt förhåller det sig med den rätt att sprida tryckta skrifter som garanteras i tryckfrihets-förordningen. Skolledningen kan dock ge tillstånd för utomstående att sprida

information eller tryckta skrifter i skolan. Jag vill i sammanhanget särskilt betona att det i en sådan situation inte är fråga om att partierna har någon rätt att få tillgång till skolan. Utgångspunkten är i stället att det är eleverna som har rätt att få tillgång till saklig och allsidig kunskap. Skolan har ett ansvar för att ge elever den kunskapen så att eleverna själva kan bilda sig en uppfattning. När skolledningen tar ställning till om ett politiskt parti ska få tillträde till en skola för att sprida sitt budskap måste emellertid den övergripande bestämmelsen i 1 kap. 9 § regeringsformen beaktas.

Det aktuella ärendet

I samband med riksdagsvalet 2014 erbjöd Nobelgymnasiet, Sundstagymnasiet, Tingvallagymnasiet och Älvkullegymnasiet i Karlstads kommun de partier som fanns representerade i riksdagen tillträde till skolornas lokaler. I remissvaret anges att skolorna varje år ser till att partier bl.a. får hålla bokbord för att sprida politisk information. Jag uppfattar svaret så att riksdagspartierna bjöds in till gymnasieskolorna, men det är oklart om det var frågan om en inbjudan till ett specifikt arrangemang en viss dag eller inte.

En skola kan av praktiska skäl behöva begränsa antalet politiska partier som den bjuder in för att lämna politisk information i skolan. En sådan ordning har inte ansetts strida mot lagen under förutsättning att urvalet görs objektivt och inte innebär att övriga organisationer utesluts från att i en eller annan form delta i verksamheten (se Regeringsrättens årsbok 1981 ref. 2:26 nr I och II samt JO:s beslut den 22 maj 1989 i ärendet med dnr 1967-1988). Att av praktiska skäl begränsa inbjudningarna till exempelvis partier som är representerade i riksdagen eller kommunfullmäktige har bedömts vara ett objektivt urval.

Det har alltså inte funnits något lagligt hinder mot att de aktuella gymnasieskolorna i samband med riksdagsvalet 2014 på eget initiativ bjöd in endast de partier som fanns representerade i riksdagen till skolorna.

Revolutionär Kommunistisk Ungdom begärde därefter att få tillträde till kommunens gymnasieskolor för att anordna bokbord men nekades detta med förklaringen att ungdomsförbundet inte fanns representerat i vare sig riksdagen eller kommunfullmäktige. Enligt vad som kommit fram har skolorna i detta fall inte erbjudit ungdomsförbundet något alternativt sätt att lämna sin information. Att på det viset helt utesluta Revolutionär Kommunistisk Ungdom från att delta i verksamheten står i strid med objektivitetsprincipen i 1 kap. 9 § regeringsformen. Gymnasieskolornas respektive skolledning förtjänar kritik för sitt agerande.

Avslutande synpunkter

Frågorna om politiska partiers medverkan i skolans samhällsinformation har diskuterats sedan slutet av 1960-talet. De kommer i fokus under varje valrörelse, inte minst under det s.k. supervalåret 2014, när det hölls val till såväl Europaparlamentet som riksdagen. Mot bakgrund av den debatt som fördes bl.a.

i medierna under sommaren 2014 vill jag utveckla min syn på dessa frågor något.

Yttrandefriheten är en av de grundläggande fri- och rättigheterna i ett demokratiskt samhälle. Möjligheten att uttrycka sin åsikt och bilda opinion i olika frågor är en viktig förutsättning för att de politiska processerna ska fungera på ett demokratiskt sätt. Var och en ska kunna ta del av en mångfald av åsikter i alla de frågor som vi fattar gemensamma beslut om.

Det är mot bl.a. den bakgrunden viktigt att skolan ger eleverna möjlighet att ta del av politisk opinionsbildning och att eleverna får allsidig information om de politiska partierna. Samverkan med politiska organisationer behöver dock inte alltid innebära att företrädare för organisationerna kommer till skolan. Den kan också bestå i t.ex. att elever besöker valstugor, intervjuar representanter för organisationer eller på annat sätt följer deras arbete. Eleverna kan även sätta sig in i frågorna genom att studera skriftligt material som organisationer ställer till skolans förfogande.

I ett flertal av de ärenden som JO har prövat genom åren har JO ansett att skolors agerande har stått i strid med objektivitetsprincipen i regeringsformen. JO har i de fallen gjort bedömningen att det har funnits ett direkt eller indirekt samband mellan skolornas agerande och de åsikter som ett parti har förväntats föra fram. Frågan som JO har haft att ta ställning till har huvudsakligen varit om det har funnits godtagbara skäl att neka *ett enstaka parti* tillträde eller begränsa dess möjlighet att lämna information i skolan. JO har alltså inte prövat något ärende där en skola, som utifrån ett objektivt urval har bjudit in vissa partier till t.ex. en debatt eller för att hålla bokbord, har behövt ta ställning till krav från ett flertal andra partier att skolan ska anordna motsvarande aktiviteter där de får delta. Det ligger i sakens natur att utrymmet för att neka tillträde med hänvisning till allmänna ordningsskäl eller praktiska överväganden är större om det är många oinbjudna partier som vill delta i en viss aktivitet i skolan än om det är ett enda parti som anmäler ett sådant intresse.

Som framgår av de tidigare redovisade avgörandena från Regeringsrätten kan en skolledning bjuda in representanter för riksdagspartierna eller kommunfullmäktige till en debatt, förutsatt att det inte innebär att övriga partier utesluts från att i en eller annan form delta i verksamheten. En sådan form för deltagande för övriga partier som anmäler intresse av att komma till skolan skulle exempelvis kunna vara att dessa erbjuds att lämna in skriftligt material, som skolan sedan använder i utbildningen. Det skulle enligt min mening inte stå i strid med objektivitetsprincipen i 1 kap. 9 § regeringsformen.

Oavsett i vilken form en skola väljer att ge eleverna information i politiska frågor måste skolan ha möjlighet att planera sin verksamhet på ett rimligt sätt. Det finns inte skäl att anta att antalet partier och andra grupper som vill få tillträde till skolorna kommer att minska. Det kan därför vara lämpligt om en skolledning som avser att ta initiativ till någon form av samverkan med

politiska partier har tänkt igenom hur man ska hantera eventuella intresseanmälningar från partier som man inte har bjudit in. Jag vill dock återigen understryka att när en skolledning tar ställning till om ett politiskt parti ska ges tillträde till skolan får bedömningen inte vara beroende av vilka åsikter som partiet kan förväntas föra fram.

Avslutningsvis erinrar jag om att regeringen den 21 augusti 2014 beslutade att tillkalla en särskild utredare med uppdrag att analysera de bestämmelser som reglerar hur skolor ska förhålla sig när det gäller att bjuda in politiska partier i skolorna. Enligt direktiven ska utredaren också överväga om skolan ska kunna begränsa det antal politiska partier som skolan tar emot på objektiva grunder, t.ex. till att avse sådana partier som vid tillfället är representerade i riksdagen. Utredaren ska även, om så bedöms möjligt och lämpligt, lämna nödvändiga författningsförslag (dir. 2014:117 och 2015:55). Utredningen ska redovisa sitt uppdrag senast den 12 januari 2016. I avvaktan på utredningens förslag finner jag inte skäl att ytterligare uppehålla mig vid saken.

Ärendet avslutas.

Justitieombudsmannen
Thomas Norling

En tjänsteman hos Försäkringskassan får allvarlig kritik för att hon har gjort uttalanden som strider mot saklighetskravet i 1 kap. 9 § regeringsformen

Beslutet i korthet: En handläggare hos Försäkringskassan har av misstag lämnat ett meddelande som innehåller svordomar och nedsättande uttalanden på en försäkrads telefonsvarare. I beslutet uttalas bl.a. att handläggarens agerande tyder på en oförmåga att hålla sig till sakfrågan och att det strider mot saklighetskravet 1 kap. 9 § regeringsformen. Hon får allvarlig kritik.

Anmälan

I en anmälan till JO anförde AA att hon den 6 mars 2018 hade fått två telefonmeddelanden från sin handläggare och att ett av dem hade spelats in av misstag. I det meddelandet hördes handläggaren kalla henne ”dryg i pallet” och inför någon annan säga att hon ”ska fan svara i telefon” och att hon ju ”bara har ryggproblem” och inte är något ”psykiskt kvadd som ligger och skriker i soffan”. En ljudfil med det aktuella meddelandet bifogades anmälan.

Utredning

Den 26 mars 2018 kontaktade JO internutredaren BB på Försäkringskassan för att få information om vilka åtgärder myndigheten vidtagit mot den handläggare som talat in meddelandet på AA:s telefonsvarare. Av informationen framgick bl.a. att en omplaceringsutredning hade påbörjats eftersom man gjort bedömningen att den aktuella tjänstemannen inte borde ha fortsatt kundkontakt. JO hämtade senare även in uppgiften att det var handläggaren CC som talat in meddelandet.

Ärendet remitterades till Försäkringskassan som förutom att yttra sig över anmälan ombads att lämna en generell redogörelse för hur myndigheten arbetar med bemötandefrågor och för hur klagomål i sådana frågor tas om hand. Försäkringskassan anförde följande i sitt remissvar (bilagorna här utlämnade):

Utredning

Den 6 mars 2018 sökte handläggaren AA för att informera om att Försäkringskassan övervägde att inte bevilja fortsatt sjukpenning. I väntan på svar pratade handläggaren med en kollega.

Försäkringskassans slutsatser

Handläggaren var vid tillfället stressad över den aktuella arbetsbelastningen och irriterad över att hon inte fick något svar från AA. Hon har inte någon egentlig förklaring till varför hon sa det hon sa. Försäkringskassan ser allvarligt på situationen och handläggaren arbetar nu med anpassade arbetsuppgifter som inte innefattar kontakt med enskilda. Hon har på nytt genomgått utbildningar kring bemötande och statstjänstemannarollen. Försäkringskassan har bett AA om ursäkt.

Försäkringskassan bedriver sedan några år tillbaka ett mycket aktivt arbete för att främja en god förvaltningskultur. Sedan februari 2017 finns en särskild enhet för värdegrundsfrågor på Försäkringskassan. Enheten har i uppdrag att styra, stödja och följa upp arbetet med frågor kring mänskliga rättigheter, den statliga värdegrunden och myndighetens etiska kod. Försäkringskassan har tagit fram ett stödmaterial som riktar sig till alla lednings- och arbetsgrupper inom myndigheten. Det innehåller bland annat underlag för dilemmadiskussioner utifrån de olika principerna i den statliga värdegrunden. Avsikten är att arbetet med att föra ut den statliga värdegrunden och den etiska koden ska bedrivas fortlöpande och att så sker följs regelbundet upp av Försäkringskassans ledning. Allt material som rör den statliga värdegrunden nås via en särskild sida på Försäkringskassans inträna t, se bilaga.

De riktlinjer som Försäkringskassan tidigare hade kring bemötande är sedan 2017 inskrivna i Försäkringskassan vägledning (2004:7) *Förvaltningsrätt i praktiken* för att tydliggöra vikten av ett korrekt bemötande. Vägledningen innehåller också en redovisning av den statliga värdegrunden för att klargöra att den ska genomsyra handläggningen hos myndigheten.

Försäkringskassan har också integrerat den statliga värdegrunden i den gemensamma introduktionsutbildningen för medarbetarna och har även tagit fram specifika bemötandeutbildningar och utbildningar inom till exempel samtalsmetodik för att stärka handläggarna i sitt arbete.

Försäkringskassan har riktlinjer (2011:17 och 2013: 05) för den praktiska hanteringen av de skrivelser och synpunkter som på olika sätt kommer in till myndigheten. De beskriver hur ärendena ska hanteras och vem som ska besvara de synpunkter, förbättringsförslag eller klagomål som kommer in till myndigheten. Som bilaga till detta yttrande finns de nu gällande versionerna. När klagomålen gäller en sådan oroande händelse som i detta fall, lämnas också ärendet vidare till de internutredare som finns på Försäkringskassan för fortsatt granskning och hantering av frågan även utanför den egentliga händelsen.

AA gavs tillfälle att yttra sig över remissvaret.

Bedömning

Kravet på korrekt bemötande är reglerat i grundlag och följer av 1 kap. 9 § regeringsformen där det anges att myndigheter i sin verksamhet ska beakta allas likhet inför lagen samt iaktta saklighet och opartiskhet. Reglerna om saklighet och opartiskhet överlappar i viss mån varandra. Kravet på saklighet innefattar dock annat och mer än vad kraven på likabehandling och opartiskhet medför, t.ex. vad gäller bemötande, formuleringar och förmåga att hålla sig till den sakfråga som myndigheten vanligen har att avgöra i förhållande till den enskilde

(se Bull och Sterzel, Regeringsformen – en kommentar, tredje upplagen s. 53 f.).

Jag har tagit del av ljudupptagningen av det meddelande som av misstag spelades in på AA:s telefonsvarare. Meddelandet innehåller flera svordomar och nedlåtande uttalanden, både om AA och om sjukskrivna personer i allmänhet. Att inspelningen skedde av misstag saknar betydelse. CC:s agerande tyder på en oförmåga att hålla sig till sakfrågan och strider mot saklighetskravet i 1 kap. 9 § regeringsformen. För detta förtjänar hon allvarlig kritik.

Det hör självfallet till en god förvaltningskultur att upprätthålla kravet på ett korrekt bemötande. Att enskilda bemöts och behandlas på ett professionellt och respektfullt sätt är också viktigt för att allmänheten ska kunna känna förtroende för myndigheterna. I remissvaret har Försäkringskassan redogjort för sitt löpande arbete med bemötandefrågor m.m. Av de handlingar som bilagts framgår bl.a. att myndigheten lägger stor vikt vid att informera sina anställda om den statliga värdegrunden. Jag utgår från att Försäkringskassan fortsätter sitt arbete med att främja en god förvaltningskultur och verkar för att det ska nå ut till hela myndighetens personal, både till nyanställda och till dem som varit anställda en längre tid.

Ärendet avslutas.

Justitieombudsmannen
Lars Lindström

Kritik mot Partille kommun för förbud för personal att under arbetstid bära tröjor associerade till kampanjer av Lärarförbundet och det s.k. Förskoleuppproret

Beslutet i korthet: Arbetsgivaren Partille kommun uttalade att personal under arbetstid inte får bära tröjor med texten ”Förskoleuppproret #pressatläge” och ”Lärareffekten avgör, Lärarförbundet #lärareffekten”.

Enligt 2 kap. 1 § regeringsformen är varje medborgare tillförsäkrad yttrandefrihet gentemot det allmänna. JO konstaterar att budskapet på tröjorna inte strider mot någon lag. Textinnehållet liksom den omständigheten att personalen, såvitt framkommit, utför arbetet i sina privata kläder ger vidare intryck av att budskapen utgör personalens privata åsikter. Det finns ingen utredning som visar att bärandet av tröjorna haft någon negativ inverkan på verksamheten.

Mot denna bakgrund kommer JO fram till att Partille kommun inte haft fog för sina restriktioner när det gäller personalens klädsel. Kommunens agerande har därmed utgjort en kränkning av personalens grundlagsfästa yttrandefrihet. Kommunen får kritik.

Anmälan

AA klagade, som ordförande för Lärarförbundet avdelning Partille, i en anmälan till JO i juni 2018 på Partille kommun. Klagomålet avsåg att kommunens HR-avdelning hade uppgett att personal under arbetstid inte får bära tröjor med texten ”Förskoleuppproret #pressatläge” och ”Lärareffekten avgör, Lärarförbundet #lärareffekten”.

Utredning

JO uppmanade Kommunstyrelsen i Partille kommun att lämna upplysningar om och yttra sig över det som framförts i anmälan.

Kommunstyrelsen lämnade i huvudsak följande yttrande till JO:

Bakgrund

I april 2018 inkom frågeställningar till Partille kommuns HR-avdelning, där personal på utbildningsförvaltningen ville ha svar på hur Partille kommun förhöll sig till manifestationen ”Förskoleuppproret” och önskemål om att få bära deras t-shirts på arbetsplatsen. HR-avdelningen bedömde att det inte var förenligt med

anställningen att bedriva politisk opinion under arbetstid. Samtidigt lämnades också information om att vad medarbetare gör på sin fritid avseende opinionsbildning är att utöva medborgliga rättigheter.

Även lärarförbundets påverkanskampanj Lärareffekten och frågan om huruvida personalen fick bära deras t-shirtar på arbetstid bemöttes på motsvarande sätt i maj 2018.

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Rättslig reglering

Regeringsformen; objektivitetsprincipen och yttrandefriheten

Domstolar samt förvaltningsmyndigheter och andra som fullgör offentliga förvaltningsuppgifter ska, enligt 1 kap. 9 § regeringsformen, i sin verksamhet beakta allas likhet inför lagen samt iaktta saklighet och opartiskhet.

Var och en är enligt 2 kap. 1 § regeringsformen gentemot det allmänna tillförsäkrad yttrandefrihet definierad som frihet att i tal, skrift eller bild eller på annat sätt meddela upplysningar samt uttrycka tankar, åsikter och känslor.

Yttrandefriheten får begränsas endast i den utsträckning och på det sätt som framgår av föreskrifterna i 2 kap. 20, 21 och 23 §§ regeringsformen.

Medbestämmandelagen och kommunallagen: rätten till inflytande för arbetstagare

Genom medbestämmandelagen har arbetstagare tillförsäkrats inflytande avseende förhållandet arbetsgivare och arbetstagare. Även kommunallagen ger rätt för arbetstagare att genom personalföreträdare delta i möten med arbetsgivare.

Skollagen m m; skolans värdegrund och uppdrag

För varje skolform och för fritidshemmet ska enligt 1 kap. 11 § skollagen gälla en läroplan som utgår från bestämmelserna i denna lag och som anger utbildningens värdegrund och uppdrag.

Av läroplanerna Lpfö 98 och Lgr 11, i båda läroplanerna under avsnitt 1 Skolans värdegrund och uppdrag, framgår bl.a. följande. Undervisningen ska vara saklig och allsidig. Alla föräldrar ska med samma förtroende kunna skicka sina barn till skolan, förvissade om att barnen inte blir ensidigt påverkade till förmån för den ena eller andra åskådningen. Alla som verkar i skolan ska hävda de grundläggande värden som anges i skollagen och i läroplanerna för respektive skolform och klart ta avstånd från det som strider mot dem.

Skäl för inställning

Partille kommun har att förhålla sig till och följa de grundlagsfästa stadgandena om objektivitet och yttrandefrihet i sin skolverksamhet. I skollagen med tillhörande läroplaner som styr skolverksamheten uttrycks objektivitetsprincipen i termer av saklighet och allsidighet.

Skyddet för yttrandefriheten innebär att en myndighet inte får ingripa mot en anställd hos myndigheten för att han eller hon använt sig av sin grundlagsskyddade rätt att ge uttryck för sin uppfattning. Yttrandefriheten kan dock inte utövas vid vilken tidpunkt som helst.

Räckvidden av den grundlagsfästa yttrandefriheten för offentligt anställda är således inte obegränsad. Arbetsuppgifter och andra skyldigheter som följer med anställningen kan innebära att en anställd inte alltid kan åberopa yttrandefriheten om ett sådant åberopande leder till att den anställde därigenom åsidosätter sina åligganden. Den anställdes yttrandefrihet innebär alltså inte att arbetsgivaren inte får ställa krav på att arbetsuppgifterna fullgörs även om detta innebär en faktisk begränsning av den anställdes möjlighet att just då begagna sig av yttrandefriheten (jfr JO 1993/94 s 489 ff).

Den situation som nu är föremål för anmälan är följande. De inom skolan anställda hävdar att de velat utöva sin yttrandefrihet genom att bära Förskoleupprorets eller Lärarförbundets t-shirtar på arbetstid. På så sätt har de velat skapa opinion och föra upp skolpersonalens arbetsförhållanden på de politiska partiernas agenda inför valet. På arbetsplatsen vistas i huvudsak barn och anställda. En risk föreligger då för att det i skolverksamheten uppstår en situation där anställdas skyldighet att förhålla sig sakliga och allsidiga kan komma i konflikt med deras rätt till yttrandefrihet.

Kommunstyrelsen har under inga omständigheter haft eller har synpunkter på hur och när varje enskild anställd utövar sin grundlagsskyddade rätt till att bedriva politisk opinion på sin fritid. Under arbetstid har kommunen dock ett ansvar för att de anställda ska bedriva skolverksamhet och att den ska vara saklig och allsidig. Kommunstyrelsen inser också att det i många sammanhang i skolverksamheten finns situationer under arbetstid där det naturligtvis är motiverat för den enskilda att utöva sin yttrandefrihet. På motsvarande sätt finns situationer där det inte framstår som självklart vad som gäller. I sammanhanget väljer kommunstyrelsen att exemplifiera med följande ur JO:s beslut den 20 februari 1998, dnr 1867-1997.

> De kontakter en lärare har med föräldrar och andra vårdnadshavare rörande eleverna kan naturligtvis beröra frågor om skolans möjligheter att tillgodose elevernas behov av skilda slag. Indragningar av tjänster liksom andra nedskärningar till följd av minskade anslag är självfallet inte tabubelagda frågor utan skall så långt det är möjligt besvaras. Den information som lämnas till föräldrarna måste vara byggd på objektivitet; läraren uppträder här i sin yrkesroll och företräder därmed skolan. Föräldrarna har därför rätt förvänta sig att svaren överensstämmer med skolans officiella uppfattning i aktuella frågor. En lärare är emellertid oförhindrad att därutöver framhålla sin egen uppfattning i saken. Läraren måste då självfallet noga skilja på uppgifter som är ”lämnade i tjänsten” och sådant som utgör den personliga uppfattningen.

Kommunen är ansvarig huvudman och arbetsgivare för de anställda i den kommunala skolverksamheten. I rollen som arbetsgivare ingår att leda de anställda inom skolan och fördela arbetet dem emellan. Därigenom ska arbetsgivaren se till att skolverksamheten uppfyller de i skollagen uppställda kraven som genom läroplaner har brutits ner i olika delar.

De inom skolan anställda har även de att förhålla sig till skollagen och läroplanerna. När anställda inom skolan är i tjänst är de företrädare för skolan. De uppgifter eller de ställningstaganden som manifesteras av anställda under arbetstid och som förmedlas ut till elever och andra brukare ska spegla skolans officiella uppfattning i den aktuella frågan. Om en uppgift eller ett ställningstagande är personligt är det väldigt viktigt att det framgår.

Genom att ett flertal anställda bär likadana t-shirts på arbetsplatsen uppstår ett kollektivt ställningstagande i en politisk fråga. Primärt är det förskolebarn eller elever som i skolverksamheten kommer att mötas av budskapet som t-shirtsen förmedlar. Att som anställd inom skolan vända sig till barn/elever med ensidiga/onyanserade opinionsbildande yttranden är oförenligt med kravet på att skolverksamheten ska vara saklig och allsidig. De skolanställdas kollektiva ställningstagande skulle också ur barnens/elevernas, vårdnadshavares och andra brukares perspektiv kunna förväxlas som varandes den officiella för skolan. I situationer av förevarande karaktär går det utanför skolpersonalens uppdrag och skolans värdegrund att som anställd ta arbetstid i anspråk för att varje gång fråga uppstår, från bland andra elever, tydliggöra och förmedla syftet med att bära t -shirten.

Även arbetsgivaren måste bedöma frågan objektivt och då även beakta anställda som inte vill delta i den typen av kampanjer som det nu är fråga om. Det är också

> viktigt att budskap som genom ett kollektiv lämnas till våra brukare otvetydigt utgörs av sådana budskap som skolan känner till och kan ställa sig bakom.
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> Kommunstyrelsen vill i detta sammanhang framföra att det inom ramen för den kommunala organisationen finns väl utvecklade former för arbetstagare att under arbetstid föra fram synpunkter avseende bland annat arbetsförhållanden. Genom medbestämmandelagen och kommunallagen finns det forum för samverkan mellan arbetsgivaren och arbetstagarna där nämnda synpunkter kan föras fram och diskuteras. För samverkansmöten mellan parterna finns tider avsatta. De anställda har därför både rätten och möjligheten att under arbetstid och genom personalföreträdare framföra åsikter som rör anställningsförhållandena i skolverksamheten. Genom att föra dialogen i forum för arbetsmarknadens parter stävjas också att situationer uppstår där skolverksamhetens sakliga och allsidiga bedrivande ifrågasätts av elever, föräldrar eller andra brukare.
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> Kommunstyrelsen delar således HR-avdelningens gjorda bedömning i det nu aktuella ärendet.

AA kommenterade remissvaret.

Bedömning

Av 2 kap. 1 § regeringsformen (RF) framgår att varje medborgare är tillförsäkrad yttrandefrihet gentemot det allmänna, dvs. en frihet att i tal, skrift eller bild, eller på annat sätt, meddela upplysningar och uttrycka tankar, åsikter och känslor. Enligt 2 kap. 20 § RF får yttrandefriheten begränsas genom lag i den utsträckning som medges i 21–24 §§.

Det skydd för yttrandefriheten som RF anger är ett skydd mot ”det allmänna”. Skyddet innebär att en myndighet inte får ingripa vare sig formellt eller informellt mot en anställd vid myndigheten för att han eller hon använt sig av sin grundlagsskyddade rätt att ge uttryck för sin uppfattning. En myndighet får inte heller försöka motarbeta att den anställde använder sig av sina rättigheter eller, genom generella uttalanden eller kritik i enskilda fall, försöka påverka arbetstagaren i fråga om det sätt på vilket denne utnyttjar sin yttrandefrihet.

JO har som en särskild uppgift att utöva tillsyn över att medborgarnas grundläggande fri- och rättigheter respekteras i den offentliga verksamheten. Det framgår av 3 § lagen (1986:765) med instruktion för Riksdagens ombudsmän. JO utreder emellertid som regel inte klagomål som gäller förhållandet mellan arbetsgivare och arbetstagare. Det beror på att det finns en särskild ordning för hur sådana tvister ska lösas. Detta sker genom fackliga förhandlingar eller i sista hand enligt bestämmelserna i lagen (1974:371) om rättegången i arbetstvister. Min granskning i det här ärendet har därför inriktats på hur kommunens förbud för personal att bära tröjor med texten ”Förskoleupproret #pressatläge” och ”Lärareffekten avgör, Lärarförbundet, #lärareffekten” förhåller sig till yttrandefriheten.

Av utredningen framgår att kommunens HR-avdelning motiverat förbudet att bära tröjorna med att det inte är förenligt med anställningen att bedriva politisk opinion under arbetstid. I sitt remissvar till JO anser kommunen att tröjförbudet inte utgör en otillåten begränsning av yttrandefriheten. Kommunen har förklarat

sitt ställningstagande med att ensidiga eller onyanserade opinionsbildande yttranden är oförenliga med kravet på att skolverksamheten ska bedrivas sakligt och allsidigt. Kommunen har vidare framfört att det finns risk för att utomstående, t.ex. elever och vårdnadshavare, uppfattar personalens ställningstaganden som skolans officiella ståndpunkt och hänvisat till att det inom ramen för den kommunala organisationen finns väl utvecklade former för framförande av synpunkter på arbets- och anställningsförhållanden.

Jag vill med anledning av vad kommunen framfört inledningsvis understryka att yttrandefriheten innebär att offentligt anställda har rätt att uttrycka sin personliga uppfattning om arbetsgivarens verksamhet även på arbetstid (se t.ex. JO 1993/94 s. 489, dnr 1148-1992 och 1853-1992 samt JO:s beslut den 10 september 2018 med dnr 6024-2017). Yttrandefriheten är emellertid inte absolut. Det kan finnas begränsningar i lag, t.ex. att uppgifter omfattas av sekretess enligt offentlighets- och sekretesslagen (2009:400). Det är vidare, som kommunen också påtalar, inte självklart att en anställd kan utnyttja rättigheten vid varje tillfälle. En arbetsgivare måste kunna ställa krav på att arbetsuppgifterna fullgörs även om det innebär en faktisk begränsning av de anställdas möjligheter att just då använda sin yttrandefrihet (se JO 1993/94 s. 496, dnr 3903-1992).

I detta fall är det fråga om personalens rätt att utnyttja sin yttrandefrihet genom att på arbetsplatsen bära tröjor med ett visst textinnehåll. Jag konstaterar inledningsvis att budskapen på tröjorna inte strider mot någon lag. Textinnehållet liksom den omständigheten att personalen, såvitt framkommit, utför arbetet i sina privata kläder ger vidare intryck av att budskapen utgör personalens privata åsikter. Det finns ingen utredning som visar att bärandet av tröjorna haft någon negativ inverkan på verksamheten.

Mot denna bakgrund finner jag inte att Partille kommun haft fog för sina restriktioner när det gäller personalens klädsel. Kommunens agerande har därmed utgjort en kränkning av personalens grundlagsfästa yttrandefrihet. Jag är kritisk till detta.

Det som i övrigt har kommit fram ger inte anledning till någon åtgärd eller något uttalande från min sida.

Ärendet avslutas.

Justitieombudsmannen
Per Lennerbrant

I samband med utfärdande av ett föreläggande av ordningsbot har en polis agerat på ett sätt som inte är förenligt med regeringsformens krav på saklighet och skyldigheten för en polis att uppträda på ett sätt som inger förtroende

Beslutet i korthet: En polis stoppade en man vid en trafikkontroll för att han inte hade stannat sin bil vid stopplikt. Mannen ville inte godta ett föreläggande av ordningsbot men ändrade inställning när polisen, efter viss diskussion, förklarat att han hade för avsikt att omhänderta mannens körkort. Polisen utfärdade ett föreläggande av ordningsbot och lät mannen behålla körkortet.

JO, som konstaterar att det inte funnits förutsättningar att omhänderta mannens körkort, uttalar att en befogenhet att besluta om ett körkortsomhändertagande eller andra åtgärder aldrig får användas för att påverka den enskilde att godkänna ett föreläggande av ordningsbot. JO uttalar också att det självfallet inte heller får förekomma något köpslående i samband med diskussioner om godtagande av ordningsbotsföreläggande i stället för att polisen upprättar en rapport över förseelsen.

Polisens agerande har enligt JO stått i strid med regeringsformens krav på saklighet och skyldigheten för en polis att uppträda på ett sätt som inger förtroende. Polisen har åsidosatt de krav som ställs på en polis, och han kritiseras för sitt agerande.

Anmälan

I en anmälan till JO förde AA fram klagomål mot Polismyndigheten, polisregion Väst, och polisen BB för hans agerande i samband med utfärdandet av en ordningsbot. AA anförde i huvudsak följande.

Han stoppades av BB den 1 april 2018. BB hävdade att AA inte hade stannat på ett korrekt sätt vid stopplikt och ville skriva ut en ordningsbot. AA förklarade att han ansåg att han hade stannat korrekt och bad att BB i stället skulle rapportera förseelsen. Efter viss diskussion blev BB upprörd och sa att en rapport skulle sluta i tingsrätten och att BB då skulle bli tvungen att vittna. BB uttryckte också att AA inte kunde anses vara lämplig som bilförare om han inte var medveten om att han inte hade stannat vid stopplikten och inte var villig att godta en ordningsbot. BB hotade att återkalla hans körkort på plats och tog fram en blankett för detta. AA vädjade då till BB att ändra sig och skrev på

ordningsboten. Han anser att BB har gått långt utanför sina befogenheter och berövat honom rätten till en prövning av om han stannat vid stopplikten.

Utredning

Polismyndigheten (CC) yttrade sig över AA:s anmälan efter att ha hämtat in uppgifter från berörda befattningshavare.

Polismyndigheten redovisade följande synpunkter från polisassistenten BB.

> Den aktuella dagen kontrollerade jag och min kollega … bilisters agerande vid den stopplikt som finns i korsningen Storgatan/Rostocksvägen. Vid korsningen är det delvis skymd sikt och fordon på huvudleden kör ofta för fort genom korsningen.
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> AA körde på Storgatan. Han saktade ner vid korsningen men stannade inte vid stopplikten. Därefter körde han ut på Rostocksvägen. Efter att ha stoppat AA hävdade han att han stannat vid stopplikten. Jag förklarade att vi sett att han inte stannat och att jag kommer att rapportera honom för det aktuella trafikbrottet.
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> Under det samtal som följde förklarade jag att det finns två olika alternativ. Det ena alternativet är att en ordningsbot skrivs ut på plats, vilket innebär en lagakraftvunnen dom. Det andra alternativet är att en rapport upprättas för vidare handläggning av åklagare. Jag förklarade att sådan handläggning brukar leda till tingsrättsförhandling där en polis blir kallad som vittne. Vidare förklarade jag att denna typ av ärenden erfarenhetsmässigt brukar leda till en fällande dom.
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> Under mitt samtal med AA om själva situationen resonerade AA på ett sätt som gjorde att jag blev tveksam till om han överhuvudtaget visste vad han gjort och inte gjort när han framförde sin bil. Detta ledde i sin tur till att jag började fundera på om jag skulle omhänderta hans körkort direkt på plats. Jag förklarade för AA att aktuellt brott i sig kan leda till att polisman på plats gör ett körkorts-omhändertagande samt att polisman även kan göra ett omhändertagande på grunder som rör förmågan att framföra ett fordon på ett trafiksäkert sätt. Samtalet mynnade ut i att jag förklarade för AA att jag ämnade skriva en rapport och att jag även ämnade omhänderta hans körkort eftersom jag uppfattade att han saknade förutsättningar att framföra sin bil på ett trafiksäkert sätt.
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> Därefter gick jag tillbaka till polisbilen och påbörjade processen med en rapport och ett omhändertagande av körkortet. Efter ett tag kom AA fram till mig och uppgav att vi skulle strunta i allt och att han ville skriva på en ordningsbot. Jag lyssnade på detta och bedömde att AA fört sitt tidigare resonemang i syfte att undkomma påföljd för gärningen. Jag funderade över situationen och kom sedan fram till att jag utifrån en sammantagen bedömning kunde utfärda en ordningsbot i enlighet med myndighetens föreskrifter och allmänna råd (RPSFS 2008:1, FAP 261-1). Utifrån samma sammantagna bedömning och AA:s omsvängning och numera raka dialog kring händelsen omvärderade jag även mitt beslut gällande ett körkortsomhändertagande. På min uppmaning utfärdade … därefter ett ordningsföreläggande.
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> Jag har under inga omständigheter hotat AA, på något sätt, i syfte att få honom att skriva på en ordningsbot. Jag har heller inte nekat honom att få sin sak prövad och han skrev på ordningsboten av egen fri vilja.

Polismyndigheten redovisade följande bedömning.

> Inledningsvis ska noteras att det som kommit fram i utredningen, enligt Polismyndighetens bedömning, inte ger ett tillräckligt stöd för slutsatsen att BB framställt något hot eller ultimatum i samband med utfärdandet av

ordningsbotsföreläggandet. Hans agerande kan dock starkt ifrågasättas vilket utvecklas nedan.

Utgångspunkten var att BB och … hade observerat att AA passerat den aktuella korsningen utan att stanna, trots att det rådde stopplikt. Enligt Polismyndigheten saknas det anledning att ifrågasätta att polismännen uppfattat detta på ett korrekt sätt.

Redan inledningsvis efter att ha stoppats klargjorde AA att han var av uppfattningen att han hade stannat sitt fordon på ett korrekt sätt vid korsningen. I en sådan situation föreligger hinder mot utfärdande av ordningsbot enligt 48 kap. 15 § [rättegångsbalken] och RPSFS 2008:1, FAP 261-1. Det borde därför ha upprättats en rapport över förseelsen. BB valde dock att allmänt redogöra för de två olika alternativen (ordningsbot och rapport) och för körkortslagens bestämmelser om omhändertagande av körkort. Vidare uttalade han en avsikt att omhänderta AA:s körkort. Genom BB:s uttalanden i denna del kan AA inte gärna fått en annan uppfattning än att han skulle få en sämre behandling om han inte godkände en ordningsbot. Rimligen stärktes denna uppfattning när AA undertecknade ordningsboten och BB förklarade att han omvärderade beslutet om ett omhändertagande av körkortet. Även om BB:s avsikt inte var att genom hot eller ultimatum förmå AA att godkänna ordningsboten borde han ha insett risken för att AA skulle komma att uppfatta det så.

Det ska särskilt framhållas att Polismyndigheten inte kan se att förutsättningarna för ett omhändertagande av körkortet varit uppfyllda. Den bild som framträder i utredningen är inte att AA till följd av sjukdom, skada eller dylikt saknade förutsättningar att köra sitt fordon på ett trafiksäkert sätt (5 kap. 7 § första stycket 3 körkortslagen). Med utgångspunkt i vad som framkommit om själva förseelsen får det också anses stå förhållandevis klart att gärningen i sig inte var av den arten att det kunde antas att körkortet skulle komma att återkallas (5 kap. 7 § första stycket 2 och RÅ 1994 ref. 9). Sammanfattningsvis anser Polismyndigheten att BB:s uttalanden om ett omhändertagande var direkt olämpliga.

En polisman ska agera på ett objektivt och sakligt sätt. Det är av naturliga skäl särskilt viktigt i samband med att en polisman efterhör hur en misstänkt ställer sig till frågan om godkännande av en ordningsbot. Enligt Polismyndigheten kan BB:s tillvägagångssätt och uttalanden enligt ovan inte anses förenliga med de grundläggande kraven på saklighet och opartiskhet samt skyldigheten för polisanställda att uppträda på ett sätt som inger förtroende (1 kap. 9 § [regeringsformen] och 10 § polisförordningen). Tillvägagångssättet och uttalandena riskerar tvärtom att bidra till att underminera allmänhetens förtroende för polisen. Polismyndigheten tar därför avstånd från nämnda agerande.

Rättslig reglering

Bestämmelser om utfärdande av ordningsbot finns i 48 kap. rättegångsbalken (RB). Ordningsbot får utfärdas bl.a. vid underlåtenhet att stanna på korrekt sätt vid stopplikt eller trafiksignal (48 kap. 14 § andra stycket RB och Riksåklagarens föreskrifter [1999:178] om ordningsbot för vissa brott). Ett föreläggande av ordningsbot får inte utfärdas om den misstänkte förnekar gärningen (48 kap. 15 § RB).

En polis bör på grundval av gjorda iakttagelser, den misstänktes berättelse och övriga omständigheter bedöma om det finns förutsättningar att utfärda föreläggande av ordningsbot. Den misstänkte bör tillfrågas hur han ställer sig till frågan om godkännande innan föreläggandet skrivs ut. (Se det allmänna

rådet till 10 § Rikspolisstyrelsens föreskrifter och allmänna råd om tillämpningen av ordningsbot inom Polisen, RPSFS 2008:1, FAP 261-1.)

Ett körkort ska omhändertas bl.a. om det på sannolika skäl kan antas att det kommer att återkallas på grund av att körkortshavaren har underlåtit att iaktta stopplikt och överträdelsen inte kan anses som ringa eller om körkortshavaren till följd av sjukdom, skada eller dylikt saknar förutsättningar att köra ett körkortspliktigt fordon på ett trafiksäkert sätt (5 kap. 7 § första stycket 2 och 3 och 3 § 4 körkortslagen). Om en varning av särskilda skäl kan anses vara en tillräcklig åtgärd ska ett körkort inte återkallas (5 kap. 9 § körkortslagen).

En polis ska iaktta saklighet och opartiskhet och i kontakter med allmänheten agera så hänsynsfullt som möjligt, visa behärskning och uppträda på ett sätt som inger förtroende (1 kap. 9 § regeringsformen och 10 § polisförordningen).

Bedömning

Av utredningen framgår att AA, omedelbart när han stoppades av BB och hans kollega, uppgav att han ansåg sig ha stannat på ett korrekt sätt vid stopplikten. Som Polismyndigheten angett i sitt yttrande har det därmed inte funnits förutsättningar att utfärda ett föreläggande av ordningsbot. Redan i det skedet borde BB ha upprättat en rapport över förseelsen.

BB inledde emellertid en diskussion med AA och förklarade därefter för AA att han hade för avsikt att omhänderta dennes körkort eftersom han bedömde att AA saknade förutsättningar att framföra sin bil på ett trafiksäkert sätt.

Enligt min mening ger varken BB:s egna uppgifter om hur han resonerade i frågan om ett körkortsomhändertagande eller utredningen i övrigt något stöd för att det funnits förutsättningar att omhänderta AA:s körkort på den angivna grunden. Av utredningen kan jag inte dra någon annan slutsats än att detta också måste ha stått klart för BB. När BB i det läget, och som situationen utvecklats, förklarade att han omedelbart skulle omhänderta AA:s körkort måste BB ha förstått att det fanns en uppenbar risk att det skulle kunna uppfattas som en påtryckning i syfte att AA skulle ändra inställning och godta ett föreläggande av ordningsbot. Att BB lät AA behålla körkortet sedan han förklarat sig villig att godkänna föreläggandet förstärker intrycket av att BB agerade i detta syfte.

En polis får i sin tjänsteutövning aldrig låta sig påverkas av att han eller hon känner ilska eller irritation över en persons uppträdande eller inställning i samband med ett ingripande. Han eller hon får självfallet inte heller försöka förmå en enskild att agera på ett visst sätt endast för att det är mest förenligt med polisens egen bekvämlighet, t.ex. förmå en person att godkänna ett föreläggande av ordningsbot för att polisen ska slippa inställa sig som vittne i en rättegång. Jag har inget att invända mot att en polis sakligt och objektivt informerar om hur ett ärende rättsligt kommer att hanteras om en person inte är beredd att godta ett föreläggande av ordningsbot. Det får emellertid inte ske på ett sådant sätt att det riskerar att av den enskilde uppfattas som ett

påtryckningsmedel. Givetvis får en befogenhet att besluta om ett körkortsomhändertagande eller andra åtgärder aldrig användas för att påverka den enskilde i en sådan situation. Självfallet får det inte heller förekomma något köpslående i samband med diskussioner om godtagande av ordningsbotsföreläggande i stället för att polisen upprättar en rapport över förseelsen.

BB:s agerande har stått i strid med regeringsformens krav på saklighet och skyldigheten för en polis att uppträda på ett sätt som inger förtroende. Han har således åsidosatt de krav som ställs på en polis.

Jag ser allvarligt på det inträffade. När en polis uppträder på det sätt som BB har gjort är det inte bara olämpligt i det enskilda fallet. Det riskerar också att påverka allmänhetens förtroende för polisen i stort på ett negativt sätt. BB ska kritiseras för sitt agerande och för de uttalanden han gjorde i samband med ingripandet mot AA.

JO har under det senaste året fått liknande klagomål som det som är aktuellt i detta ärende när det gäller polisens agerande i samband med ingripanden vid trafikförseelser. Mot den bakgrunden kan det finnas anledning för Polismyndigheten att i samband med utbildningar och i myndighetens arbete med bemötandefrågor uppmärksamma hur en polis ska uppträda vid utfärdande av föreläggande av ordningsbot.

Ärendet avslutas.

NJA 1996 s. 577

En person, som bland människor på allmän plats burit vissa märken på sin klädsel med anknytning till nationalsocialistiska rörelser, har dömts för hets mot folkgrupp.

TR:n

Allmän åklagare väckte vid Gotlands TR åtal mot B.B. född 1979, bl a, under åtalspunkt 1, för hets mot folkgrupp alternativt förargelseväckande beteende enligt följande gärningsbeskrivning: B.B. har d 30 nov 1995 utanför Åhlens på Österväg i Visby burit kläder med följande nazistsymboler synliga: solkors, kugghjul och sädesax, bältesspänne i form av solkors, märke för Frisinnade unionspartiet, metallmärke föreställande solkors, tygmärke örn med odalruna, pinsmärke föreställande Livets träd och pinsmärke föreställande odalrunan. Symbolerna representerar en våldsinriktad ideologi med förhärligande av den ariska rasen. Genom att bära dem har B.B. uppsåtligen spritt ett meddelande som uttrycker hot och missaktning för andra folkgrupper. – B.B. har i vart fall genom att bära dessa märken på allmän plats betett sig på sätt som varit ägnat att väcka förargelse hos allmänheten.

Till förtydligande av gärningsbeskrivningen uppgav åklagaren att märket för Frisinnade unionspartiet var identiskt med de först angivna symbolerna solkors, kugghjul och sädesax.

Åklagaren yrkade förverkande av de i beslag tagna märkena.

Domskäl

TR:n (ordf tingsfiskalen Schalin) anförde i dom d 29 mars 1996 under rubriken Domskäl angående åtalspunkt 1: När det gäller åtalet för hets mot folkgrupp så har B.B. medgett att han burit de angivna märkena men bestritt att dessa är att anse som nazistsymboler och att han genom att bära dem skulle ha gjort sig skyldig till hets mot folkgrupp

På åklagarens begäran har målsägandeförhör hållits med polisassistenten K.N.

K.N. har i huvudsak uppgett följande. Den aktuella kvällen befann sig B.B. med några kamrater utanför Åhlens vid Östercentrum i Visby. B.B. bar svart keps, svart bomberjacka, svarta byxor och svarta kängor. På kepsen och jackan bar han de nu aktuella märkena och symbolerna. Platsen var väl upplyst och de märken han bar på sin klädsel var väl synliga. B.B:s jacka var uppknäppt och K.N. tror att även ett bältesspänne i form av ett solkors syntes. B.B. fick följa med till polisstationen där de märken han bar på sin keps och bomberjacka avlägsnades och togs i beslag. Även bältesspännet togs i beslag. B.B. lämnade därefter polisstationen och återförenade sig med sina kamrater. K.N. följde efter gruppen till taxi Öster vid Kung Magnus väg där han bad att få titta på innehållet i en väska som B.B. bar på. Väskan visade sig innehålla bl a ett baseballträ fullklottrat med rasistiska slagord. B.B. förklarade att det var hans baseballträ som han hade för att försvara sig med. K.N. tog baseballträet i beslag och lät B.B. och hans vänner avlägsna sig.

Närmare hörd över åtalet har B.B. uppgett i huvudsak följande. Han befann sig vid Åhlens i Östercentrum med några kamrater när en polisbil kom till platsen. Polismännen grep honom trots att han bad att få åka hem och ta av sig märkena. – B.B. anser sig vara antirasist. De märken han bar på sig den aktuella kvällen har inte någon främlingsfientlig innebörd. I vart fall saknar han kännedom om någon sådan innebörd. B.B. är emellertid asatroende. Märkena och symbolerna bör bedömas mot den bakgrunden. När det gäller de märken han bar den aktuella kvällen kan han säga följande. Tygmärket med en örn och en odalruna bar han på höger ärm. Odalrunan står för odling och kultur. Örnen är en bakgrundssymbol som har till uppgift att vaka över odalrunan. Ett metallmärke föreställande solkorset var fäst i jackans dragkedja. Solkorset symboliserar solens

livgivande kraft. Märket för Frisinnade unionspartiet bar han på ena jackfickans utsida. Det Frisinnade unionspartiet är ett lokalt parti på Orust som inte framför några främlingsfientliga åsikter. Symbolen föreställande livets träd bar han också på jackan. Den ifrågavarande symbolen skall vara lyckobringande. På kepsen bar han ett metallmärke föreställande odalrunan. Bältesspännet i form av ett Northumberlandkors är en symbol för ett anglosachsiskt kungarike vars landområde idag hör till Storbritannien. Båltesspännet bars dessutom under en tröja och var därför inte synligt. När det slutligen gällde baseballträet så fick han tillbaka det av några kamrater den aktuella dagen. Den enda inskription han gjort på slagträet är ett solkors. De övriga inskriptionerna har hans kamrater gjort.

TR:ns bedömning. När det gäller åtalet för hets mot folkgrupp gör TR:n följande bedömning.

B.B. har i centrala delarna av Visby fullt synligt burit de märken och symboler på mössan och jackan som åklagaren har angett. Frågan är om han därigenom spridit ett sådant meddelande som utgör hets mot folkgrupp. Av förarbetena till bestämmelsen om hets mot folkgrupp framgår att ordet meddelande bör ges en vidsträckt innebörd och omfatta inte endast muntlig eller skriftlig framställning utan även t ex åtbörder eller framställning i bild som ej kan anses som skrift (NJA II 1970 s 531f). Detta torde, enligt TR:ns uppfattning, innebära att märken och andra symboler som bärs synliga på kläder kan utgöra sådant meddelande som bestämmelsen avser.

Vid bedömningen av om märkena utgjort ett sådant meddelande är B.B:s klädsel av betydelse. Av utredningen har framkommit att B.B. vid det aktuella tillfället bar svart keps, svart bomberjacka, svarta byxor och svarta kängor med stålhättor. På kepsen bar han ett märke i form av odalrunan. På jackans högra ärm bar han ett märke föreställande en örn sittande på en lagerkrans som omger odalrunan. l jackans dragkedja bar han ett märke i form av solkorset. På jackan bar han dessutom ett märke föreställande livets träd, eller livsrunan, och ett märke för frisinnade unionspartiet i form av solkorset omgivet av ett kugghjul och sädesax. Av redogörelsen framgår att B.B. varit klädd på ett sätt som i hög grad påminner om klädseln hos medlemmarna av de nationalsocialistiska så kallade stormavdelningarna (SA) och skyddsgrupperna (SS) i Tyskland på 1930- och 1940-talen.

Av de märken som B.B. burit påminner det som suttit på jackans högra ärm starkt om en av de vanligast förekommande nationalsocialistiska symbolerna i det tyska Tredje riket. Märket skiljer sig från den i Tyskland använda symbolen endast på så sätt att hakkorset är utbytt mot odalrunan. Enligt TR:ns mening är märket avsett att förmedla samma nationalsocialistiska budskap som den i Tyskland förekommande symbolen. Övriga märken har inte var för sig samma direkta anknytning till den nationalsocialistiska ideologin. I det förevarande fallet har de emellertid varit ägnade att förstärka det budskap som det först angivna märket har förmedlat. Nationalsocialismen kännetecknas av ett förhärligande av den nordiska rasen och ett mycket starkt förakt för andra folkgrupper vilket under det andra världskriget ledde till utrotning av flera miljoner människor främst av judisk härkomst. Genom att bära märkena på mössan och jackan har B.B. spridit meddelanden som uttrycker missaktning mot människor tillhörande andra folkgrupper än den nordiska - i synnerhet människor av judiskt ursprung. Detta kan han inte ha undgått att inse. Den omständigheten att B.B. när polis kom till platsen erbjöd sig att åka hem och ta av märkena befriar honom inte från ansvar för gärningen. Det gör inte heller det förhållandet att han några dagar före den nu aktuella händelsen av en polisman erhållit beskedet att bärande av märkena inte skulle medföra något straff. Åtalet för hets mot folkgrupp skall därför bifallas såvitt avser de märken som B.B. burit på jackan och på mössan. När det gäller bältesspännet så är det inte tillförlitligen utrett att det överhuvudtaget varit synligt vid det aktuella tillfället. Åtalet skall därför ogillas såvitt avser bältesspännet.

Det har inte framkommit att det meddelande som märkena inneburit fått någon större spridning. Mot bakgrund därav och med hänsyn till övriga omständigheter bör brottet bedömas som ringa.

TR:n fann B.B. skyldig också till förolämpning, våldsamt motstånd och ofredande samt till hets mot folkgrupp, bestående i vissa uttalanden under en debatt i en skola i Visby d 7 febr 1996.

Domslut

Domslut. TR:n dömde B.B. enligt 16 kap 8 § BrB för hets mot folkgrupp

samt enligt 4 kap 7 §, 5 kap 3 § 1 st och 17 kap 4 § BrB för ofredande, förolämpning och våldsamt motstånd till 100 dagsböter å 30 kr.

De i beslag tagna märkena förklarades förverkade. Yrkandet om förverkande av ett bältesspänne ogillades.

Svea HovR

B.B. överklagade i Svea HovR med yrkande bl a att åtalet för hets mot folkgrupp d 30 nov 1995 skulle ogillas och de i beslag tagna märkena återlämnas till honom.

Åklagaren bestred ändring.

HovR:n (hovrättsrådet Korfitsen, referent, tf hovrättsassessorn Törnqvist Norman och nämndemannen Breile) anförde i dom d 11 juni 1996 under rubriken Domskäl. rörande åtalspunkt 1: B.B. har i HovR:n lämnat i huvudsak samma uppgifter som vid TR:n. Han har förnekat att han genom att bära svarta kläder och de märken åtalet avser sökt att efterlikna någon uniform. Klädseln är enligt honom en "modegrej" och ett sätt att söka gemenskap. Däremot har han sökt att manifestera "tillhörighet till sitt folk".

Lika med TR:n finner HovR:n att de märken som B.B. burit måste bedömas med utgångspunkt från det samlade intryck märkena ger tillsammans med de kläder på vilka de anbringats och övriga omständigheter. Vad som förekommit i HovR:n föranleder då inte annan bedömning än TR:n gjort.

Domslut

Domslut. HovR:n ändrade TR:ns domslut endast på det sättet att åtalet för ofredande lämnades utan bifall.

Hovrättsrådet Möller och nämndemannen Nilsson var skiljaktiga i fråga om åtalspunkt 1 och anförde: Åklagaren har i första hand påstått att B.B. genom att bära vissa kläder försedda med nazistsymboler gjort sig skyldig till hets mot folkgrupp. Vid bedömning av frågan om detta utgör ett sådant brott bör först beaktas 2 kap 1 § regeringsformen enligt vilken varje medborgare gentemot det allmänna är tillförsäkrad bl a yttrandefrihet, dvs frihet att i tal, skrift eller bild eller på annat sätt meddela upplysningar samt uttrycka tankar, åsikter och känslor. Enligt 12 och 13 §§ samma kap får emellertid yttrandefriheten under vissa förutsättningar begränsas. En sådan begränsning har gjorts genom att hets mot folkgrupp kriminaliserats i 16 kap 8 § BrB. Av det lagrummet kan dock inte direkt utläsas att B.B:s handlande utgör brott. Med hänsyn till den restriktivitet som skall iakttas när det gäller att tillämpa ett straffstadgande extensivt och mot bakgrund av den grundläggande bestämmelsen om individens yttrandefrihet anser vi att B.B:s förfarande - hur förkastligt det än må vara - ej kan anses utgöra hets mot folkgrupp.

Vad gäller åklagarens andrahandspåstående om förargelseväckande beteende får visserligen antas att B.B:s utstyrsel varit förargelseväckande. Straffbestämmelsen får emellertid inte tolkas så att den kommer att fungera som en yttrandefrihetsbegränsning (se prop 1975/76:209 s 142, jfr även Strahl i SvJT 1967 s 412). B.B. kan därför inte dömas för förargelseväckande beteende.

På grund av det ovan anförda anser vi att B.B. inte med stöd av nu gällande lag gjort sig skyldig till brott, varför åtalet skall ogillas i denna del.

Högsta domstolen

Sedan B.B. överklagat HovR:ns dom meddelade HD prövningstillstånd beträffande dels ansvar enligt åtalspunkten 1 dels förverkande av märken som tagits i beslag dels ock påföljden men fann inte skäl att meddela prövningstillstånd i övrigt.

B.B. (offentlig försvarare advokaten K.J.) yrkade att han skulle frikännas från ansvar för hets mot folkgrupp och att i beslag tagna märken skulle återlämnas till honom. Han yrkade vidare att bötesstraffet skulle sättas ner.

Riksåklagaren bestred ändring.

Målet avgjordes efter huvudförhandling (Riksåklagaren genom byråchefen A.E.).

HD (JustR:n Knutsson, Solerud, Lambe, referent, och Lennander) beslöt följande dom: Domskäl. Riksåklagaren har i HD till komplettering av vad tidigare förekommit rörande de påtalade märkenas innebörd anfört: Örnen nyttjades av Nazi-Tyskland som symbol för den tyska staten. Den örn som fanns på märket på höger ärm var utförd på samma sätt som motsvarande nazistiska symbol. Detsamma gäller lagerkransen på samma märke. Odalrunan förekom som kännetecken för ett par av SS-divisionerna under andra världskriget. Den används nu i Sverige av Riksfronten, ett parti som står under inflytande av nationalsocialistiska idéer. Symbolen Livets träd förekom i Nazi-Tyskland inom SS-organisationen. Den är fortfarande i bruk inom en underavdelning av Riksfronten. Det i emblemet för Frisinnade unionspartiet - en utbrytning ur Nordiska rikspartiet - förekommande kugghjulet har sin motsvarighet i symbolen för ett nederländskt nationalsocialistiskt parti. Vad gäller kelterkorset eller solkorset står det som symbol för "vit makt".

Riksåklagaren har vidare hänvisat till det baseballträ som togs i beslag i anslutning till den åtalade händelsen och som är fullklottrat med symboler och slagord.

Straffbudet i 16 kap 8 § BrB rörande hets mot folkgrupp stadgar straff för den som i uttalande eller i annat meddelande som sprids hotar eller uttrycker missaktning för folkgrupp eller annan sådan grupp av personer med anspelning på ras, hudfärg, nationellt eller etniskt ursprung eller trosbekännelse. Bestämmelsen innebär en inskränkning i den envar medborgare genom 2 kap. regeringsformen tillförsäkrade friheten att ge uttryck åt sina åsikter. Att det är fråga om ett undantag från en grundlagsskyddad rättighet ger en särskild anledning till restriktivitet vid tolkningen av bestämmelsen.

Mot den angivna bakgrunden har HD att ta ställning till om B.B. genom att bära märkena spritt ett meddelande i lagens mening. Lagstiftaren utgår från att meddelandet i huvudfallet sprids i skriftlig eller muntlig form. Men lagen har genom uttrycket "annat meddelande" givit ett visst utrymme för att med uttalanden likställa andra uttrycksformer. I förarbetena nämns som exempel åtbörder och framställning i bild som ej kan anses som skrift (NJA II 1970 s 531f). I den mån sådana indirekta åsiktsyttringar entydigt förmedlar ett budskap ligger det nära till hands att inrymma dem under lagrummet. En jämförbar indirekt åsiktsyttring kan vara bärande av emblem eller uppträdande i viss klädsel. Om emblemet och/eller klädseln otvetydigt ger en koppling till en viss åsiktsriktning är det befogat att se detta som ett meddelande i lagens mening.

Bland märkena på B.B:s klädsel ger örnen och lagerkransen på höger ärm genom sin likhet med symboler, frekvent använda i Nazi-Tyskland, en tydlig koppling till Tredje riket. Vad gäller övriga märken är även dessa sådana att de kan - ehuru mindre allmänt kända - förknippas med symboler använda av nationalsocialistiska rörelser under 1930- och 1940-talen.

Vissa vid nyssnämnda tid förekommande symboler får idag anses vara starkt förknippade inte endast med de nämnda rörelserna i och för sig utan i hög grad också med idéerna om rasöverlägsenhet och rashat som ledde till förföljelse och utrotning särskilt av människor av judisk härkomst och som är intimt förbundna med dessa rörelsers ideologi. Exempel på en sådan symbol som, i linje med det sagda, numera också förknippas med en allmän nedvärdering av andra folkgrupper än den nordiska utgör hakkorset. Till väsentligen samma kategori får hänföras också det märke med örn och lagerkrans som B.B. bar. De övriga symboler som omfattas av åtalet är närmast ägnade att förstärka det budskap som örnmärket sålunda får anses förmedla. Det kan för övrigt anmärkas att bärande av märken som kanske inte ensamma kan anses sprida ett meddelande av angivet slag kan innebära en sådan spridning när de bärs tillsammans med t ex klädsel av viss färg och visst snitt.

Genom att bära märkena bland andra människor på den i gärningsbeskrivningen angivna platsen har B.B. spritt ett sådant budskap som nyss berörts. Detta måste han ha insett. Budskapet uttrycker missaktning av människor tillhörande andra folkgrupper än den nordiska. HovR:ns domslut skall fastställas.

Domslut. HD fastställer HovR:ns domslut.

JustR Gregow var skiljaktig på sätt framgår av följande yttrande: För att någon skall kunna fällas till ansvar för brottet hets mot folkgrupp fordras det enligt 16 kap 8 § BrB att han i uttalande eller i annat meddelande som spritts har hotat eller uttryckt missaktning för en folkgrupp eller annan sådan grupp av personer med anspelning på ras, hudfärg, nationellt eller etniskt ursprung eller trosbekännelse.

Vad som i bestämmelsen sägs om meddelande ger utrymme för en förhållandevis vidsträckt innebörd. Meddelande bör sålunda kunna ske, förutom genom muntlig eller skriftlig framställning, också t ex genom bilder eller konstnärlig framställning; även åtbörder har ansetts kunna innefatta ett budskap och därmed utgöra ett meddelande. Mot bakgrund härav måste också bärande av märken och emblem kunna innefatta ett meddelande, om därmed förmedlas ett budskap om något förhållande.

De märken som B.B. burit på sin jacka och mössa har utgjort symboler som kan förknippas med den nationalsocialistiska, dvs nazistiska, rörelsen i Tyskland under 1930- och 1940-talen. Bärandet av märkena måste anses ge uttryck för en sympati för nämnda rörelse. B.B:s handlande får därmed anses innefatta ett meddelande i bestämmelsens mening. Genom att märkena har burits på allmän plats där andra personer uppehöll sig har meddelandet spritts.

För straffansvar krävs som nämnts vidare att meddelandet innebär uttryck för hot mot eller missaktning för en persongrupp med avseende på ras eller andra sådana egenskaper som berörts i det föregående. Vid bedömande av den närmare innebörden härav beträffande fall av nu förevarande slag bör särskilt beaktas följande förhållanden. Straffbestämmelsen utgör en inskränkning i yttrandefriheten. Det är fråga om ett allvarligt brott för vilket straffet är enbart fängelse, när inte brottet undantagsvis kan bedömas som ringa. Ifall åtgärder, som i och för sig enbart utgör sympatiyttring för en politisk eller liknande rörelse med mer eller mindre starka rasistiska inslag på sitt program, anses innefatta uttryck för sådant hot eller sådan missaktning som anges i bestämmelsen blir straffansvaret mycket långtgående. Bestämmelsen får då också en vag och oklar innebörd vilket kan föranleda betydande svårigheter i tillämpningen.

Mot bakgrund av vad nu sagts bör det för straffansvar vid bärande av märken eller symboler och andra liknande åtgärder krävas att hot mot eller missaktning för viss persongrupp har kommit till ett mera konkret och därmed klart och otvetydigt uttryck. En sådan tillämpning ligger också i linje med den restriktivitet som i 1970 års lagstiftningsärende avseende straffbestämmelsen uttalades av första lagutskottet i fråga om en annan aspekt på rekvisitet missaktning (ILU 1970:41, NJA II 1970 s 535). Utskottet framhöll att uttrycket måste tolkas med viss försiktighet samt att därunder inte borde innefattas alla uttalanden av nedsättande eller förnedrande natur, utan för straffbarhet borde krävas att det var fullt klart att uttalandet överskred gränsen för en saklig och vederhäftig diskussion rörande folkgruppen i fråga. Dessa uttalanden åberopades också i 1982 års lagstiftningsärende rörande bestämmelsen (bet 1981/82JU41, NJA II 1982 s 145).

B.B:s bärande av de ifrågavarande märkena får, som nämnts i det föregående, anses ge uttryck för sympati för nazismen, oavsett vilken närmare inställning han själv haft till den rörelsen, och detta måste han ha insett. Oaktat handlandet på grund av den nazistiska rörelsens ideologi fört tanken även till dess ståndpunkt om andra rasers underlägsenhet och att andra därför kan ha känt sig kränkta, kan handlandet med hänsyn till märkenas beskaffenhet inte - vare sig märkena ses vart för sig eller i förening - anses ge ett tillräckligt klart uttryck för hot mot eller missaktning för någon persongrupp. Åtalet för hets mot folkgrupp kan därför - trots det klandervärda i beteendet - inte bifallas.

Överröstad härutinnan saknar jag anledning att uttala mig om andrahandsyrkandet i förverkandefrågan.

HD:s dom meddelades d 17 okt 1996 (mål nr B 3203/96).

HÖGSTA DOMSTOLENS

BESLUT

Mål nr

meddelat i Stockholm den 25 februari 2014

Ö 461-11

SÖKANDE OCH KLAGANDE

BillerudKorsnäs Sweden AB, 556876-2974

Ombud: Advokat EW och advokat OG

MOTPART

Naturvårdsverket

SAKEN

Ansökan om resning och klagan över domvilla

TIDIGARE AVGÖRANDE

Svea hovrätts, Miljööverdomstolen, dom 2010-09-14 i mål M 7801-09

_____

HÖGSTA DOMSTOLEN
Riddarhustorget 8

Postadress
Box 2066
103 12 Stockholm

Telefon 08-561 666 00
Telefax 08-561 666 86
E-post:
hogsta.domstolen@dom.se
www.hogstadomstolen.se

Expeditionstid
08:45-12:00
13:15-15:00

EUROPEISKA UNIONENS DOMSTOLS FÖRHANDSAVGÖRANDE

Högsta domstolen beslutade den 24 april 2012 med stöd av artikel 267 i Fördraget om Europeiska unionens funktionssätt att tillställa EU-domstolen en begäran om förhandsavgörande. EU-domstolen har den 17 oktober 2013 meddelat dom (mål C-203).

HÖGSTA DOMSTOLENS AVGÖRANDE

Högsta domstolen avslår BillerudKorsnäs Sweden AB:s ansökan om resning och klagan över domvilla.

YRKANDEN M.M.

BillerudKorsnäs Sweden AB har yrkat att Högsta domstolen beviljar resning och förordnar att målet åter ska tas upp i Mark- och miljööverdomstolen. Bolaget har i andra hand yrkat att Högsta domstolen på grund av domvilla undanröjer domen och beslutar att ny handläggning ska äga rum i Mark- och miljööverdomstolen.

Naturvårdsverket har motsatt sig yrkandena.

Billerudbolagen har under tiden målet pågått i Högsta domstolen först ändrat firma till BillerudKorsnäs Karlsborg Aktiebolag respektive BillerudKorsnäs Skärblacka Aktiebolag och sedan upplösts genom fusion och därvid uppgått i BillerudKorsnäs Sweden AB (i fortsättningen Billerud).

SKÄL

Rättslig reglering

1. Europaparlamentets och rådets direktiv 2003/87/EG av den 13 oktober 2003 om ett system för handel med utsläppsrätter för växthusgaser inom gemenskapen och om ändring av rådets direktiv 96/61/EG (handelsdirektivet) tillkom för att bidra till ett effektivare fullgörande av EU:s och medlemsstaternas åtaganden enligt Kyotoprotokollet.

2. Enligt artikel 12.3 i handelsdirektivet ska verksamhetsutövaren senast den 30 april varje år överlämna det antal utsläppsrätter som motsvarar de sammanlagda utsläppen från anläggningen under föregående kalenderår för att annulleras. Påföljden för en överträdelse som består i underlåtenhet att i rätt tid överlämna utsläppsrätter för annullering regleras i artikel 16.3. Enligt dessa bestämmelser ska verksamhetsutövaren betala 100 euro för varje ton koldioxidekvivalenter som verksamhetsutövaren inte har överlämnat utsläppsrätter för. Under åren 2005–2007 gällde dock enligt artikel 16.4 ett lägre avgiftsbelopp om 40 euro för varje ton.

3. Direktivet har genomförts i svensk rätt genom lagen (2004:1199) om handel med utsläppsrätter. En bestämmelse motsvarande artikel 12.3 finns i 6 kap. 1 § och en bestämmelse motsvarande artikel 16.3 finns i 8 kap. 6 §. En bestämmelse motsvarande artikel 16.4 fanns vid den i målet aktuella tiden i paragrafens andra stycke.

Avgörandena i det ordinära förfarandet

4. Naturvårdsverket beslutade med stöd av 8 kap. 6 § lagen om handel med utsläppsrätter att Billerud Karlsborg Aktiebolag skulle betala en avgift om

3 959 366 kr, motsvarande 40 euro per ton. Avgiften gällde underlåtenhet att överföra utsläppsrätter för år 2006. Ett motsvarande beslut fattades beträffande Billerud Skärblacka Aktiebolag, varvid avgiften bestämdes till 15 516 051 kr.

5. Billerudbolagen överklagade Naturvårdsverkets beslut till miljödomstolen och Miljööverdomstolen, som var sista instans. Domstolarna ändrade inte Naturvårdsverkets beslut.

Ansökan om resning och klagan över domvilla

6. Billerudbolagen har ansökt om resning och klagat över domvilla beträffande Miljööverdomstolens dom.

7. Bolagen anförde i sin ansökan sammanfattningsvis följande. Miljööverdomstolens rättstillämpning strider uppenbart mot lag. Handelsdirektivet och lagen om handel med utsläppsrätter ger endast stöd för den utdömda avgiften när det är fråga om en materiell försyndelse – överskridande utsläpp – vilket inte är fallet här. Att utsläppsrätterna inte överlämnades i tid berodde på en brist i företagens administrativa rutiner på lägre nivå. De systemtekniska åtgärder som krävdes för att att formellt överlämna utsläppsrätterna utfördes av misstag inte. Bolagen hade tillräckligt många utsläppsrätter på sitt transaktionskonto den 30 april 2007 för utsläppen under år 2006. Den utdömda avgiften strider därför mot legalitetsprincipen. Miljööverdomstolen åsidosatte proportionalitetsprincipen när bolagens agerande likställdes med en verksamhetsutövare som har släppt ut koldioxid utan att ha tillräckligt antal utsläppsrätter. Miljööverdomstolens underlåtenhet att inhämta förhandsavgörande från EU-domstolen utgjorde ett grovt rättegångsfel som kan antas ha inverkat på målets utgång.

EU-domstolens förhandsavgörande och Billeruds inställning till detta

8. Högsta domstolen har frågat EU-domstolen huruvida artikel 16.3 och 16.4 i handelsdirektivet innebär att avgift ska betalas oavsett orsaken till underlåtenheten, t.ex. när verksamhetsutövaren visserligen hade ett tillräckligt antal utsläppsrätter men inte överlämnat dem på grund av ett förbiseende, administrativt fel eller tekniska problem och, om svaret på frågan är ja, om artikeln innebär att avgiften ska eller kan efterges eller jämkas i sådana fall.

9. Enligt EU-domstolens dom ska artikel 16.3 och 16.4 tolkas så att en verksamhetsutövare som inte har överlämnat ett tillräckligt antal utsläppsrätter senast den 30 april ska betala avgift, även om denne då innehade ett tillräckligt antal utsläppsrätter. Utan att direktivet innehåller någon sådan bestämmelse kan det emellertid föreligga en force majeure-situation som innebär att utsläppsrätterna inte kunde överlämnas. Det krävs då att det är fråga om yttre orsaker som får sådana oundvikliga konsekvenser att det blir objektivt omöjligt att uppfylla förpliktelsen. Det ankommer enligt EU-domstolen på Högsta domstolen att pröva om Billerud drabbades av sådana onormala och oförutsebara omständigheter som de inte kunde kontrollera och som var något mer än bara ett internt fel. (Se domen p. 31.)

10. Vidare uttalar EU-domstolen att artiklarna 16.3 och 16.4 ska tolkas så, att avgiftsbeloppet inte kan justeras av den nationella domstolen med stöd av proportionalitetsprincipen. Det förhållandet att det saknas möjlighet för den nationella domstolen att justera avgiftsbeloppet kan enligt EU-domstolen inte anses strida mot proportionalitetsprincipen (se domen p. 38).

11. Efter EU-domstolens dom har Billerud gjort gällande att unionsrätten, såsom den har uttolkats av EU-domstolen, strider mot Europakonventionen. Enligt Billerud bör Högsta domstolen därför pröva sanktionsavgiftens förenlighet med Europakonventionen och underkänna den svenska regleringen till den del den inte tillåter jämkning av beloppet. Billerud har vidare gjort gällande att en force majeure-liknande situation har förelegat, varför avgiften ska efterges på den grunden.

Förhållandet mellan Europakonventionen och unionsrätten

12. De grundläggande rättigheterna såsom de garanteras enligt Europakonventionen ingår i unionsrätten som allmänna principer. Det framgår såväl av EU-fördraget (artikel 6.3 i Fördraget om Europeiska Unionen) som av EU-domstolens praxis. Bestämmelser i Europeiska unionens stadga, som motsvaras av bestämmelser i Europakonventionen, ska ha samma innebörd och räckvidd som i konventionen. Ingen bestämmelse i stadgan får tolkas så att den inskränker eller inkräktar på de mänskliga rättigheter och grundläggande friheter som erkänns i Europakonventionen. (Artiklarna 52.3 och 53.) EU-domstolen beaktar Europadomstolens praxis vid tolkningen av unionsrätten.

13. Proportionalitetsprincipen är enligt Europadomstolens praxis en grundläggande princip som genomsyrar konventionsrätten. Det är också en allmän rättsprincip som ingår i unionsrätten (se artiklarna 5.1 och 5.4 i Fördraget om Europeiska unionen och artikel 49.3 i Europeiska unionens stadga).

14. Europadomstolen (stor kammare) framhöll i en dom år 2005, dvs. före tillkomsten av de nu redovisade bestämmelserna, att skyddet av mänskliga rättigheter inom EG fick anses vara likvärdigt med skyddet enligt kon-

ventionen och att det därför finns en presumtion för att EG-rätten respekterar konventionen. Presumtionen kan motbevisas om det i det enskilda fallet finns omständigheter som innebär att skyddet för konventionsrättigheterna är uppenbart otillräckligt (manifestly deficient). (Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi [Bosphorus Airways] mot Irland, no. 45036/98, dom 30 juni 2005, se p. 165 med hänvisningar).

Högsta domstolens bedömning

15. Principen om unionsrättens företräde innebär att svenska domstolar och myndigheter är förhindrade att tolka en bestämmelse som har beslutats på EU-nivå på ett sätt som ändrar dess innehåll eller effekt och att de är bundna av EU-domstolens tolkning av EU-rätten. Samtidigt har Sverige en folkrättslig förpliktelse och ett eget ansvar för att tillse att rättigheterna enligt Europakonventionen inte kränks i det enskilda fallet.

16. I enlighet med Europadomstolens praxis har Högsta domstolen att vid prövningen utgå från presumtionen att bestämmelserna i artiklarna 16.3 och 16.4 i handelsdirektivet är förenliga med Europakonventionen (se p. 14). EU-domstolen har i sitt förhandsavgörande lämnat besked om hur bestämmelserna ska tolkas och har särskilt prövat deras förenlighet med proportionalitetsprincipen, en prövning som måste anses inbegripa proportionalitetsprincipen också i den mening som Europadomstolen lägger i begreppet (jfr p. 13).

17. En svensk domstol kan frångå vad som följer av EU-domstolens tolkning av en EU-bestämmelse endast om tillämpningen i det enskilda fallet annars skulle utgöra en allvarlig och otvetydig kränkning av Europakonventionen. Det betyder att det faktiska utrymmet för en sådan avvikelse är ytterst begränsat.

18. Förutsättningar för att frångå EU-domstolens tolkning av artiklarna 16.3 och 16.4 i handelsdirektivet föreligger inte i detta fall. Den aktuella tillämpningen av de likalydande bestämmelserna i 8 kap. 6 § lagen om handel med utsläppsrätter kan därför inte anses kränka Billeruds rättigheter enligt Europakonventionen.

19. Det sagda innebär att den rättstillämpning som ligger till grund för Miljööverdomstolens dom inte strider mot lag.

20. Vad Billerud har anfört i målet rörande omständigheterna kring underlåtenheten att överlämna utsläppsrätterna utgör inte force majeure.

21. Sammanfattningsvis har Billerud inte visat någon omständighet som kan föranleda resning eller som utgör domvilla.

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_____ _____ _____

_____ _____

I avgörandet har deltagit: justitieråden Stefan Lindskog, Lena Moore (referent), Ingemar Persson, Lars Edlund och Anders Eka
Föredragande justitiesekreterare: Stefan Mattsson

HÖGSTA DOMSTOLENS

DOM

Mål nr

meddelad i Stockholm den 28 september 2018

B 2646-18

PARTER

Klagande

FA

Ombud och offentlig försvarare: MN

Motpart

Riksåklagaren

Box 5553

114 85 Stockholm

SAKEN

Grovt vapenbrott

HÖGSTA DOMSTOLEN
Riddarhustorget 8

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Expeditionstid
08:45–12:00
13:15–15:00

ÖVERKLAGAT AVGÖRANDE

Hovrätten över Skåne och Blekinges dom 2018-04-27 i mål B 896-18

_____

DOMSLUT

Högsta domstolen fastställer hovrättens domslut.

MN ska få ersättning av allmänna medel för försvaret av FA i Högsta domstolen med 30 395 kr. Av beloppet avser 12 231 kr arbete, 6 225 kr tidsspillan, 5 860 kr utlägg och 6 079 kr mervärdesskatt. Staten ska svara för kostnaden.

YRKANDEN I HÖGSTA DOMSTOLEN

FA har yrkat att gärningen bedöms som vapenbrott av normalgraden och att straffet sätts ned.

Riksåklagaren har motsatt sig att hovrättens dom ändras.

DOMSKÄL

Bakgrund

Inledning

1. FA åtalades för grovt vapenbrott (9 kap. 1 a § första stycket vapenlagen, 1996:67). Enligt åtalet hade han den 22 januari 2018 i Malmö innehaft en revolver utan ha rätt till det. Brottet var enligt åtalet grovt eftersom det avsåg ett laddat vapen som innehafts i ett fordon på allmän plats. Det fanns också risk att vapnet kunde komma till vidare brottslig användning.

2. Tingsrätten dömde FA för grovt vapenbrott och bestämde påföljden till fängelse i två år. Hovrätten har fastställt tingsrättens domslut.

3. Domstolarna tillämpade 9 kap. 1 a § första stycket vapenlagen i dess lydelse från och med den 1 januari 2018 (SFS 2017:1139). Den nya lydelsen innebar en straffskärpning.

Frågorna i målet

4. En fråga i målet är om det vapenbrott FA har begått ska rubriceras som grovt.

5. I målet har även frågan väckts om stadgad ordning i något väsentligt hänseende har åsidosatts vid tillkomsten av de ändrade bestämmelserna i vapenlagen (jfr 11 kap. 14 § första stycket andra meningen regeringsformen).

Rubriceringen av vapenbrottet

Utredningen

6. FA greps på allmän plats i Malmö. Han innehade då en tillståndspliktig omgjord startrevolver utan att ha rätt till det. Revolvern var laddad med fem rundkulor av metall och fem krutladdningar. I FAs bil fanns ytterligare ammunition. Av utredningen framgår att startrevolvern har modifierats på så sätt att en förträngning i pipan har avlägsnats och ett nytt pipfoder monterats. Även trumman har modifierats. Vapnet kan därigenom användas som skjutvapen.

7. Vid provskjutning med vapnet har en genomsnittlig hastighet om 346 m/s på rundkulorna uppmätts, vilket med den i målet aktuella ammunitionen ger en anslagsenergi om 52,6 joule cirka två meter från vapenmynningen.

8. Vidare framgår av utredningen att vapnet med provskjuten ammunition förmår slå igenom oskyddad hud på ett avstånd upp till 172 meter och hud skyddad av vinterklädsel på ett avstånd upp till 74 meter.

9. Även om anslagsenergin är tämligen låg i jämförelse med andra handeldvapen framgår det av utredningen att vapnet har varit tillräckligt kraftfullt för att kunna orsaka allvarlig eller dödlig skada. Det gäller särskilt på sådana kortare avstånd där enhandsvapen typiskt sett kan komma till användning.

Den rättsliga regleringen

10. Enligt 9 kap. 1 § första stycket vapenlagen döms den som uppsåtligen innehar ett skjutvapen utan att ha rätt till det eller överlåter eller lånar ut ett skjutvapen till någon som inte har rätt att inneha vapnet för vapenbrott till fängelse i högst tre år. Före den 1 januari 2018 var straffet fängelse i högst två år.

11. Om ett vapenbrott är grovt döms enligt 9 kap. 1 a § första stycket till fängelse i lägst två och högst fem år. Före den 1 januari 2018 var straffskalan fängelse i lägst ett och högst fyra år. Vid bedömningen av om brottet är grovt ska det särskilt beaktas om 1. vapnet har innehafts på allmän plats eller på en annan plats där människor brukar samlas eller har samlats eller i ett fordon på en sådan plats, 2. vapnet har varit av särskilt farlig beskaffenhet, 3. innehavet, överlåtelsen eller utlåningen har avsett flera vapen, eller 4. gärningen annars har varit av särskilt farlig art. Innehav av ett skarpladdat vapen på de platser som anges i 9 kap. 1 a § första stycket 1 bör regelmässigt bedömas som grovt (se prop. 2013/14:226 s. 39 ff. och 45 ff.).

Rubricering och straffvärde i detta fall

12. FA har innehaft en skarpladdad revolver på allmän plats. Eftersom det inte föreligger några omständigheter som starkt talar i annan riktning bör brottet bedömas som grovt (jfr NJA 2016 s. 553).

13. Straffvärdet får anses motsvara minimistraffet för grovt vapenbrott.

Lagprövning

Lagstiftningsärendet

14. Straffskalan för grovt vapenbrott höjdes den 1 januari 2018 från fängelse i lägst ett och högst fyra år till fängelse i lägst två och högst fem år. Samtidigt höjdes straffmaximum för vapenbrott av normalgraden till fängelse i högst tre år. Straffminimum för synnerligen grovt vapenbrott höjdes till fängelse i fyra år. Motsvarande ändringar gjordes samtidigt i lagen (2010:1011) om brandfarliga och explosiva varor. (Se prop. 2017/18:26.)

15. I lagstiftningsärendet rörande höjning av straffskalorna beslutade regeringen att inhämta Lagrådets yttrande. Lagrådsremissen byggde på departementspromemorian Skjutvapen och explosiva varor – Skärpta straff för de grova brotten (Ds 2017:24).

16. Lagrådet avstyrkte i sitt yttrande förslaget med hänvisning till att beredningen av promemorian inte var godtagbar. Enligt Lagrådet kunde det inte anses att regeringsformens beredningskrav var uppfyllt. Remissen kunde därför inte läggas till grund för lagstiftning.

17. Lagrådet anförde i yttrandet sammanfattningsvis följande. Förslagen i promemorian var långt ifrån okomplicerade. Remissinstanserna fick mindre än en månad på sig att yttra sig och remisstiden inföll under sommaren då arbetsbelastningen är särskilt hög hos myndigheter och organisationer. Innebörden och konsekvenserna av förslaget var inte tillräckligt redovisade i promemorian. Det har t.ex. inte redovisats varför vissa gärningar skulle ha ett straffvärde som föranleder de straffskalor som föreslås och det framgår inte heller klart hur vissa konkurrenssituationer ska lösas. Avsaknaden av analyser av nu nämnda slag i kombination med den korta remisstiden måste ha försvårat för remissinstanserna att bedöma förslagens konsekvenser. Det måste krävas

alldeles särskilda skäl för att godta en avvikelse från det gängse beredningskravet genom en så kort remisstid som det nu var fråga om och några sådana skäl har inte anförts i ärendet.

18. I propositionen anförde regeringen beträffande ärendets beredning att förslagen inte utgjorde någon nykriminalisering och att omfattningen av förslagen var begränsad. Analyserna i promemorian bedömdes vara tillräckliga och det hade inte, med undantag för två remissinstansers kommentarer, framkommit att den korta svarstiden skulle ha medfört svårigheter för remissinstanserna att lämna sina yttranden i tid eller att de inte skulle ha hunnit sätta sig in i lagstiftningsärendets centrala frågor. Beredningsunderlaget var enligt regeringen därför tillräckligt. (Se a. prop. s. 15 f.)

19. Vid riksdagsbehandlingen godtog justitieutskottet propositionens förslag till lagändringar. Utskottet instämde emellertid i Lagrådets bedömning att regeringen hade brustit i beredningen av ärendet, bl.a. genom en alltför kort remisstid och en bristande motivering för denna avvikelse från det gängse beredningskravet. Utskottet underströk vikten av att kravet på beredning iakttas, samtidigt som utskottet delade regeringens bedömning att det mot bakgrund av bl.a. brottsutvecklingen var angeläget att de aktuella straffskärpningarna snarast träder i kraft. Eftersom den stora majoriteten av remissinstanserna hade inkommit med remissvar trots den korta svarstiden var utskottet berett att, i detta fall, ställa sig bakom propositionen trots att beredningen i delar varit bristfällig. (Se bet. 2017/18:JuU8 s. 11 f.)

Lagprövning – efterhandskontroll

20. I 11 kap. 14 § första stycket regeringsformen finns bestämmelser om lagprövning. Om en domstol finner att en föreskrift står i strid med en bestämmelse i grundlag eller annan överordnad författning får föreskriften inte tillämpas. Detsamma gäller om stadgad ordning i något väsentligt hänseende har åsidosatts vid föreskriftens tillkomst. Vid prövningen ska det enligt andra

stycket särskilt beaktas att riksdagen är folkets främsta företrädare och att grundlag går före lag. Likalydande bestämmelser om lagprövning finns för förvaltningens del i 12 kap. 10 §.

21. Målet berör inte frågan om det höjda minimistraffet för grovt vapenbrott står i strid med en grundlag eller annan överordnad författning eller om bestämmelsens utformning i något hänseende är bristfällig. Frågan är i stället om stadgad ordning i något väsentligt hänseende har åsidosatts vid föreskriftens tillkomst (11 kap. 14 § första stycket andra meningen).

22. Om förhållandena är sådana att stadgad ordning har åsidosatts är domstol alltså förhindrad att tillämpa en föreskrift som riksdagen har antagit, även om föreskriften inte har någon sådan brist som anges i 11 kap. 14 § första stycket första meningen. Vid denna prövning ska vad som sägs i 11 kap. 14 § andra stycket om riksdagen som folkets främsta företrädare beaktas. Den bestämmelsen infördes vid grundlagsändringarna 2010 i samband med att det s.k. uppenbarhetsrekvisitet vid lagprövning togs bort. Det uttalades då att bestämmelsen i andra stycket utgör en påminnelse om att riksdagen är att betrakta som grundlagens främsta uttolkare samtidigt som bestämmelsen tydliggör att det politiska beslutsfattandet i en rättsstat är bundet av vissa begränsningar. (Se prop. 2009/10:80 s. 148.)

Lagrådet - förhandskontroll

23. Den normkontroll som regleras i regeringsformens bestämmelser om lagprövning innebär en efterhandsprövning. En förhandskontroll sker vid lagstiftning genom att Lagrådet avger rådgivande yttranden över lagförslag.

24. Bestämmelser om Lagrådet finns i 8 kap. 20–22 §§ regeringsformen. Yttrande från Lagrådet inhämtas enligt 21 § första stycket av regeringen samt i vissa angivna fall av ett riksdagsutskott. I andra stycket anges i sju punkter det s.k. obligatoriska lagrådsområdet – yttrande ska inhämtas innan lag beslutas på

dessa områden. Lagrådets granskning är inte nödvändig om granskningen skulle sakna betydelse på grund av frågans beskaffenhet eller skulle fördröja en lagstiftningsfrågas behandling så att avsevärt men uppkommer; regeringen måste enligt tredje stycket i sådana fall för riksdagen redovisa skälen för att det inte har hämtats in något yttrande från Lagrådet. Att Lagrådet inte har hörts över ett lagförslag utgör enligt tredje stycket sista meningen aldrig hinder mot att lagen tillämpas.

25. I 22 § räknas i fem punkter upp vad Lagrådets granskning ska avse, nämligen hur ett förslag förhåller sig till grundlagarna och rättsordningen i övrigt, hur föreskrifter i ett förslag förhåller sig till varandra, hur förslaget förhåller sig till rättssäkerhetens krav, om förslaget är utformat så att lagen kan antas tillgodose de syften som har angetts och vilka problem som kan uppstå vid tillämpningen.

26. Trots att det inte nämns uttryckligen i 22 § är ett viktigt inslag i Lagrådets granskning att bedöma frågan om lagstiftningsärendet har beretts i föreskriven ordning (jfr SOU 2007:85 s. 56).

27. Det nu aktuella lagförslaget om skärpningar av straffen för vapenbrott och brott mot lagen om brandfarliga och explosiva varor faller inom det s.k. obligatoriska lagrådsområdet.

Beredningskravet

28. I 7 kap. regeringsformen finns bestämmelser om regeringsarbetet. Beträffande ärendenas beredning gäller att behövliga upplysningar och yttranden ska inhämtas från berörda myndigheter. Upplysningar och yttranden ska också i den omfattning som behövs inhämtas från kommuner. Även sammanslutningar och enskilda ska i den omfattning som behövs ges möjlighet att yttra sig. (Se 2 §.)

29. Formerna för hur beredningskravet ska uppfyllas är inte närmare reglerat i regeringsformen. När det gäller beredning av ett lagstiftningsärende är remissförfarandet emellertid centralt (se t.ex. bet. 2008/09:KU10 s. 59). Några i författning bindande föreskrifter om remisstidens längd finns inte. Konstitutionsutskottet har dock flera gånger pekat på vikten av att remisstider eller motsvarande bör vara så väl tilltagna att remissinstanserna ges en reell möjlighet att överväga förslagen (se t.ex. yttr. 2013/14:KU6y s. 5 f.). Utskottet har framhållit att remissbehandling medför att kvaliteten på regeringens och, i förlängningen, i vissa fall även riksdagens beslutsfattande ökar (se t.ex. bet. 2008/09:KU10 s. 63). I den inom Statsrådsberedningen utarbetade s.k. Propositionshandboken Ds 1997:1 finns riktlinjer för regeringsarbetet. Det anges där att remisstiden som huvudregel inte bör sättas kortare än tre månader (se s. 32).

30. I granskningsbetänkandet 2015/16:KU20 yttrade utskottet beträffande vissa frågor om hantering av flyktingmottagandet m.m. att beredningskravet inte är lika för alla fall, att beredningsrutinerna endast i liten utsträckning är reglerade i regeringsformen och att det därför finns ett utrymme för flexibilitet för allvarliga och brådskande fall, t.ex. när det gäller möjligheten till förkortad tidsfrist för att lämna synpunkter. Samtidigt framhöll utskottet att regeringsformens beredningskrav är av väsentlig betydelse, även i krissituationer. (Se s. 479.)

31. I samband med riksdagsbehandlingen av prop. 2017/18:252 Extra ändringsbudget för 2018 – Ny möjlighet till uppehållstillstånd beredde finansutskottet tillfälle för konstitutionsutskottet att yttra sig. Utskottet begränsade sitt yttrande till propositionens förenlighet med regeringsformens beredningskrav. Konstitutionsutskottet angav att riksdagen i varje enskilt ärende har att ta ställning till om regeringens motivering till en skyndsam beredning är tillräckligt stark och om beredningskravet kan anses tillräckligt. Frågan om beredningskravet i ett enskilt ärende är tillräckligt för att riksdagen ska kunna

ta ställning till förslaget bör enligt konstitutionsutskottet bedömas av beredande utskott. I det sammanhanget kan enligt utskottet även beaktas vad utskottet tidigare uttalat om beredningskravet. (Se konstitutionsutskottets yttr. 2017/18:KU9y s. 9, se även yttr. 2013/14:KU6y s. 6.)

Lagprövning vid bristfällig beredning

32. Normkontrollen är alltså fördelad mellan flera olika instanser med delvis skilda uppgifter och tar sikte på olika skeden av lagstiftningsarbetet, från förhandskontroll av lagen som helhet till efterhandsprövning vid tillämpning av en föreskrift i ett enskilt fall. Den fråga som aktualiseras i det här målet är hur långt lagprövningen sträcker sig enligt 11 kap. 14 § första stycket andra meningen regeringsformen eller med andra ord i vilken omfattning en domstol är förhindrad att tillämpa en föreskrift därför att det har gjorts formella fel när föreskriften kom till.

33. Lagprövningen är generellt utformad och tar enligt ordalydelsen sikte på allt som kan hänföras till ”stadgad ordning” för lagstiftningsarbetet. Klart är att den omfattar kompetensfördelningen mellan olika beslutande organ och de interna beslutsformerna. Som exempel kan anges att regeringen har reglerat en fråga som krävt beslut av riksdagen (jfr NJA 1996 s. 370) och att riksdagen har fattat beslut med enkel majoritet trots att ett kvalificerat förfarande skulle ha iakttagits. (Jfr Anders Eka m.fl., Regeringsformen – med kommentarer, 2 uppl. 2018, s. 579 och Erik Holmberg m.fl., Grundlagarna, 3 uppl. 2012, s. 546.)

34. Lagprövningen omfattar emellertid också andra fel vid förfarandet än sådana som består i att beslut inte har fattats i behörig ordning. En begränsning ligger dock i att den stadgade ordningen ska ha satts åt sidan i något ”väsentligt hänseende” för att föreskriften inte ska få tillämpas. Det kan noteras att regeringen i propositionen till nuvarande lydelse av grundlags-

bestämmelsen om lagprövning angav statsorganens arbetssätt och funktionsuppdelning som exempel på områden där det framstod som motiverat med ett mer begränsat utnyttjande av möjligheten till lagprövning (se prop. 2009/10:80 s. 147). Med hänsyn till bestämmelsens ordalydelse får det ses som uteslutet att en domstol vid lagprövning som avser andra förfarandefel än behörighetsöverskridanden underkänner en föreskrift baserat på en rent formell bedömning av lagstiftningsarbetet, där brister i proceduren ses isolerade från de konsekvenser som de kan ha orsakat i ett visst lagstiftningsärende. Väsentlighetsprövningen bör innefatta åtminstone en viss bedömning av felets återverkningar i ärendet, så långt dessa låter sig överblickas i ett enskilt fall.

35. Vad som ställs på sin spets i det här målet är om en bristfällig beredning kan leda till att en föreskrift efter lagprövning inte får tillämpas. Som framgår av redovisningen i p. 28–31 utgör remissförfarandet och beredningen i övrigt en central del av stadgad ordning för ett lagstiftningsärende. Beredningen omfattas därmed av lagprövningen enligt andra meningen i 11 kap. 14 § första stycket regeringsformen.

36. Av betydelse vid lagprövningen är att beredningskravet inte är närmare preciserat i regeringsformen. Det finns ett utrymme för variationer beroende på ärendets natur och omständigheterna i övrigt.

37. Brister vid beredningen måste för att få betydelse vid lagprövningen vara väsentliga. Detta torde endast i undantagsfall bli aktuellt och lagprövningen skiljer sig alltså från Lagrådets bredare granskning. Lagprövningen får när det gäller beredningen anses ta sikte på i vad mån frågor av betydelse för rättssäkerheten har utretts och belysts. Om det tydligt brister i det avseendet samtidigt som det har förekommit ett ofullständigt remissförfarande bör det kunna inverka vid en lagprövning. Lagstiftningsärendets natur och om det har funnits någon reell möjlighet för remissinstanserna att överväga förslagen och tillföra ärendet sakkunskap och synpunkter blir då av betydelse. Om återverkningarna för enskilda i något

centralt hänseende framstår som helt outredda eller oöverblickbara, trots att upplysningar rimligtvis hade kunnat hämtas in genom ett mer sedvanligt remissförfarande, skulle detta kunna leda till bedömningen att stadgad ordning har satts åt sidan i ett väsentligt hänseende.

38. En begränsning följer vidare av påminnelsen i andra stycket i 11 kap. 14 § regeringsformen om att riksdagen är att betrakta som grundlagens främsta uttolkare (se p. 22). I en lagprövning enligt 14 § första stycket andra meningen får då anses ligga att domstolen ska ta särskild hänsyn till om riksdagen har funnit att beredningen, på av regeringen eller utskottet anförda grunder, kan godtas trots en avvikelse från sedvanlig beredning.

39. Den uppgift som domstolarna har enligt regeringsformen innebär att en domstol inte kan inskränka sig till att enbart konstatera att frågan har uppmärksammats av riksdagen. Det ankommer på domstolen att göra en egen bedömning av om avvikelsen från det normala förfarandet vid lagstiftning är av sådan natur att föreskriften inte får tillämpas. Andra stycket i 11 kap. 14 § måste i sammanhanget så förstås att domstolen ska ge riksdagens tolkning stor tyngd och att det krävs starka skäl, närmast av allmänt rättsstatlig karaktär, för att gå ifrån den tolkningen (jfr bet. 2009/10:KU19 s. 39). Ett sådant försteg för riksdagens tolkning får dock anses förutsätta att riksdagsbehandlingen innefattar en uttolkning av regeringsformen i förhållande till den aktuella bristen i beredningen av lagstiftningsärendet. I detta sammanhang får det särskild betydelse att riksdagen redovisar sin bedömning av Lagrådets yttrande.

Bedömningen i detta fall

40. Som justitieutskottet konstaterat har beredningen av ändringarna i vapenlagen varit bristfällig. Remisstiden har varit alltför kort och motiveringen för denna avvikelse har varit bristande. Detta gäller även om det beaktas att lagstiftningsärendet har haft en begränsad omfattning. Stadgad ordning har därmed inte följts fullt ut. Det saknas dock stöd för slutsatsen att

återverkningarna för den enskilde som en följd av den korta remisstiden har blivit helt outredda eller oöverblickbara. Inte heller kan bristerna på någon annan grund bedömas som väsentliga i den mening som avses i 11 kap. 14 § första stycket andra meningen regeringsformen.

41. Den nya lydelse som vapenlagen har fått genom SFS 2017:1139 ska alltså tillämpas i detta mål.

Slutsats

42. FA ska dömas för grovt vapenbrott. Påföljden bestäms till fängelse i två år.

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_____ _____ _____

_____ _____

I avgörandet har deltagit: justitieråden Gudmund Toijer, Ingemar Persson (referent), Lars Edlund, Stefan Johansson och Malin Bonthron
Föredragande justitiesekreterare: Maria Arnell

HÖGSTA DOMSTOLENS DOM

Mål nr T 853-18

meddelad i Stockholm den 23 januari 2020

PARTER

Klagande och motpart

Staten genom Justitiekanslern

Ombud: Advokaterna Hans Forsell och Jonas Löttiger, Eversheds Sutherland

Klagande och motpart

Girjas sameby

Ombud: Advokaterna Peter Danowsky och Andreas Eriksson, Danowsky & Partners

SAKEN Bättre rätt till småviltsjakt och fiske m.m.

DOMSLUT

Med ändring av hovrättens dom i huvudsaken fastställer Högsta domstolen följande såvitt gäller den mark inom Girjas samebys nuvarande byområde som avses i 32 § rennäringslagen (området). – Girjas sameby får utan hinder av 31–34 §§ rennäringslagen upplåta rätt till småviltsjakt och fiske på området utan statens samtycke. – Staten får inte upplåta rätt till småviltsjakt och fiske på området. Staten ska ersätta Girjas sameby för rättegångskostnad i Högsta domstolen med 5 056 644 kr, varav 4 937 500 kr avser ombudsarvode, samt ränta enligt 6 § räntelagen från dagen för denna dom. Högsta domstolen avvisar statens påstående att jakträtten och fiskerätten på området tillhör staten därför att det utgör en riksallmänning.

YRKANDEN I HÖGSTA DOMSTOLEN

Girjas sameby har yrkat att Högsta domstolen, med ändring av hovrättens dom, fastställer dels att samebyn i förhållande till staten ensam har rätt till småviltsjakt och fiske inom samebyns område på Gällivare kronoöverloppsmark 2:1, vilket enligt beskrivning i 32 § rennäringslagen (1971:437) utgör sådan kronomark ovanför odlingsgränsen som står under statens omedelbara disposition, dels att staten, som en konsekvens av samebyns ensamrätt, inte får upplåta rätt till småviltsjakt och fiske på området, dels att samebyn får upplåta rätt till småviltsjakt och fiske på området utan statens samtycke. Samebyn har i andra hand yrkat att Högsta domstolen fastställer att rätt till jakt på småvilt och fiske

inom området, med undantag för den rätt som följer av 31 § andra stycket rennäringslagen, får upplåtas endast av samebyn och staten gemensamt.

Staten har yrkat att Högsta domstolen ogillar samebyns talan i dess helhet, befriar staten från skyldigheten att ersätta samebyn för rättegångskostnader i tingsrätten och hovrätten och förpliktar samebyn att ersätta staten för rättegångskostnader i tingsrätten och hovrätten med där yrkade belopp. Parterna har motsatt sig varandras ändringsyrkanden. Parterna har yrkat ersättning för rättegångskostnader i Högsta domstolen. Sedan staten i Högsta domstolen påstått att staten har jakträtten och fiskerätten på området därför att det utgör en s.k. riksallmänning, har samebyn gjort gällande att påståendet utgör en ny omständighet som ska avvisas. Staten har motsatt sig avvisningsyrkandet.

DOMSKÄL

Bakgrund

1. Girjas är en sameby som genom sina medlemmar bedriver renskötsel på vissa marker i Norrbottens län, bl.a. på det område som detta mål gäller. Detta område – som ingår i samebyns byområde – sträcker sig från den s.k. odlingsgränsen1 i öst till gränsen mot Norge i väst. Området ligger i nära anslutning till Kaitumälven och dess tillflöden och avgränsas i norr främst av Kebnekaisemassivet och Kalixälven. Det är i sin helhet beläget inom fastigheten Gällivare kronoöverloppsmark 2:1, som staten år 1956 beviljades lagfart på. Det är väsentligen obebyggt.

2. Girjas sameby väckte år 2009 talan mot staten med yrkanden som avsåg rätten till småviltsjakt och fiske. Samebyn ville i första hand få fastställt att samebyn hade ensamrätt till småviltsjakt och fiske på området, att staten inte hade rätt att upplåta jakt och fiske där och att samebyn hade rätt att göra sådana upplåtelser utan statens samtycke. Staten bestred samebyns talan.
3. Tingsrätten biföll samebyns talan i dess helhet.
4. Hovrätten har fastställt att samebyn har bättre rätt än staten till småviltsjakt och fiske på området och att staten inte i egenskap av fastighetsägare får upplåta småviltsjakt och fiske där. Hovrätten har ogillat samebyns yrkande om rätt för samebyn att utan statens samtycke upplåta småviltsjakt och fiske.

Parternas talan i Högsta domstolen

5. Samebyn har till grund för sin talan gjort gällande följande. Samerna har ensamma jagat och fiskat samt bedrivit renskötsel på området. Nyttjandet har skett under lång tid, kontinuerligt och utan konkurrens. Det har också skett i god tro och utan protester från andra. Samernas bruk har medfört att samebyn i förhållande till staten ensam har rätt till småviltsjakt och fiske på området.

6. Enligt samebyn följer en ensamrätt till jakt och fiske direkt av rennäringslagen. I vart fall har samernas renskötsel på området – i vilken jakt och fiske utgör en del – gett upphov till en ensamrätt till jakt och fiske genom sedvana eller urminnes hävd. Under alla förhållanden har samernas jakt och fiske på området genom sedvana eller urminnes hävd lett till en sådan ensamrätt. I anslutning till påståendena om sedvana och urminnes hävd har samebyn framhållit att samebyns rättigheter måste bedömas med beaktande av att samerna utgör ett urfolk.
7. Till stöd för sitt andrahandsyrkande – om att upplåtelse av småviltsjakt och fiske får ske enbart av samebyn och staten gemensamt – har samebyn gjort gällande att samebyn åtminstone har en med staten delad rätt till jakt och fiske. Staten kan därför inte upplåta jakt och fiske annat än gemensamt med samebyn.
8. Samebyn har gjort gällande att de särskilda upplåtelsereglerna i 31–34 §§ rennäringslagen ska åsidosättas. Reglerna – som innebär att samebyn är förhindrad att upplåta jakt- eller fiskerätt och att det i stället är länsstyrelsen som beslutar om upplåtelser – strider enligt samebyn mot dels diskrimineringsförbudet och egendomsskyddet i 2 kap. 12 § respektive 2 kap. 15 § regeringsformen, dels diskrimineringsförbudet i artikel 14 i Europakonventionen och egendomsskyddet i artikel 1 i första tilläggsprotokollet till samma konvention.
9. Staten har till grund för sitt bestridande av samebyns talan gjort gällande att den äger den aktuella fastigheten och såsom fastighetsägare innehar jakträtten och fiskerätten, dvs. rådigheten över jakten och fisket, och därmed upplåtelserätten. I vart fall tillkommer jakträtten och fiskerätten staten därför att området utgör en riksallmänning. Den rätt som samebyn har är endast en rätt att utöva jakt och fiske. Enligt staten kan rennäringslagen inte förstås så att jakträtten och fiskerätten i stället tillkommer samebyn. Samebyn innehar inte heller jakträtten eller fiskerätten till följd av sedvana eller urminnes hävd.
10. Skulle det anses att staten inte innehar den jakträtt och fiskerätt på området som normalt följer med äganderätten till en fastighet, är det statens inställning att 31–34 §§ rennäringslagen som en konsekvens av detta inte ska tillämpas för området.
11. Samebyn har förklarat dels att den inte vitsordar att staten är ägare till den del av fastigheten som målet gäller, dels att den jakträtt och fiskerätt som görs gällande i målet inte är beroende av att samebyn själv är ägare till området.

Frågan om avvisning av ny omständighet i Högsta domstolen

12. Staten har gjort gällande att det område som tvisten avser har tillhört staten åtminstone sedan år 1683. I Högsta domstolen har staten tillagt att området i vart fall ska bedömas som en riksallmänning, där staten till följd av sin höghetsrätt har samma jakträtt och fiskerätt som en fastighetsägare.
13. Samebyn har hävdat att statens påstående om att området i vart fall är en riksallmänning utgör en ny omständighet, att staten inte har haft giltig ursäkt för att inte åberopa denna omständighet tidigare och att den därför ska avvisas.

14. Statens påstående att området ska bedömas som en riksallmänning på vilken jakträtten och fiskerätten tillkommer staten utgör en först i Högsta domstolen åberopad omständighet. Denna omständighet hade kunnat åberopas redan i lägre rätt och staten har inte angett någon giltig ursäkt för att så inte skedde. Omständigheten ska därför avvisas (55 kap. 13 § rättegångsbalken).

Utredningen i Högsta domstolen

15. Parterna har i Högsta domstolen åberopat samma skriftliga och muntliga bevisning som i tingsrätten och hovrätten. De har också redovisat ett omfattande skriftligt material framför allt till belysning av rättsutvecklingen.

Allmänt om renskötselrätt

16. Bestämmelser om samers rätt att bedriva renskötsel finns i dag i rennäringslagen. I 1 § föreskrivs att den som är av samisk härkomst (same) får använda mark och vatten till underhåll för sig och sina renar enligt bestämmelserna i lagen. Denna rätt (renskötselrätt) tillkommer, enligt paragrafens andra stycke, den samiska befolkningen och grundas på urminnes hävd. Den får emellertid utövas endast av den som är medlem i en sameby. Rättigheten, som har beskrivits som en ”starkt skyddad bruksrätt av speciellt slag” (se ”Skattefjällsdomen” NJA 1981 s. 1, närmare berörd i p. 142 ff.), är av civilrättslig karaktär och omfattas därmed av bl.a. reglerna om egendomsskydd i 2 kap. 15 § regeringsformen.
17. I renskötselrätten ingår, utöver rätten att bedriva renskötsel, vissa ytterligare rättigheter, däribland en rätt att jaga och fiska (se närmare 15–25 §§ rennäringslagen).
18. En sameby utgör en juridisk person, besläktad med associationsformen ekonomisk förening. Den har till ändamål att för medlemmarnas gemensamma bästa ombesörja renskötseln inom byns betesområde (9 § rennäringslagen) och företräder medlemmarna i frågor som rör renskötselrätten eller medlemmarnas gemensamma intressen inom rennäringen i övrigt (10 § andra stycket).
19. I 11 och 12 §§ rennäringslagen uppställs vissa begränsningar i fråga om vem som kan vara medlem i en sameby. En förutsättning är att personen är same. Ytterligare en förutsättning är att personen deltar eller har deltagit i byns renskötsel. Lagen tillåter dock även att vissa närstående till samer som bedriver eller har bedrivit renskötsel antas som medlemmar.
20. I 3 § rennäringslagen regleras på vilken mark och under vilken del av året som renskötsel får bedrivas. Viss mark utgör s.k. åretruntmark, där renskötsel får bedrivas under hela året. Det gäller bl.a. de s.k. renbetesfjällen i Jämtlands län samt Norrbottens och Västerbottens läns lappmarker3 ovanför odlingsgränsen. Enligt 6 § ska den mark som får användas för renskötsel fördelas mellan samebyarna i särskilda byområden. Dessa utgör tillsammans med övriga områden som samebyn nyttjar för renskötsel byns betesområde.

[pp 21-33 uteslutna]

Omfattningen av Högsta domstolens prövning

34. Som redan har konstaterats innefattar såväl jakträtt som fiskerätt flera olika befogenheter (jfr p. 24 och 27). Det finns särskilt anledning att skilja på rätten att utöva jakt och fiske och rätten att upplåta jakt och fiske. Högsta domstolen har uppfattat samebyns talan så att den avser enbart den del av jakträtten respektive fiskerätten som rör rätten att göra upplåtelser.
35. Frågorna i målet är därför i första hand om Girjas sameby har rätt att upplåta jakt och fiske på området och, om så är fallet, om denna rätt utgör en ensamrätt i förhållande till staten. Eftersom samebyn till grund för talan har gjort gällande att befogenheten att upplåta jakt och fiske kan härledas från samer på området, aktualiseras även frågor om vem eller vilka som har eller tidigare har haft de olika befogenheter som ingår i jakträtten och fiskerätten.
36. Som redan har framgått är rätten till jakt och fiske som huvudregel knuten till äganderätten till mark och vatten. Svensk rätt utesluter emellertid inte att ett rättssubjekt har jakt- eller fiskerätten på ett område som tillhör någon annan. Detta blir bl.a. fallet om någon genom urminnes hävd har förvärvat jakt- eller fiskerätt på ett område som annan äger. Så kan också bli fallet om jakt- eller fiskerätten följer av särskild lagstiftning. Det sista kan få betydelse om den rätt att jaga eller fiska, som rennäringslagen tillerkänner medlemmar i en sameby, skulle anses innefatta en rätt för dessa och för samebyn att ensamma råda över jakten och fisket genom upplåtelser till andra. I båda fallen föreligger en jakträtt eller fiskerätt som inte är beroende av vem som äger marken.
37. I detta mål har samebyn inte påstått att den äger området. I stället har samebyn gjort gällande att den innehar en rätt att upplåta jakt och fiske som är oberoende av äganderätten till området och som utesluter att staten, även om staten skulle vara fastighetsägare, innehar motsvarande rättigheter.
38. Det finns mot den bakgrunden inte anledning för Högsta domstolen att ta ställning till vem som äger området. Det som domstolen i stället ska pröva är om samebyn har en – av äganderätten till området oberoende – rätt att upplåta jakt och fiske som är en ensamrätt i förhållande till staten och som grundas på rennäringslagen, sedvana eller urminnes hävd.
39. En fråga i målet är alltså om de rättigheter som samebyn gör gällande utgör ensamrättigheter i förhållande till staten. Eftersom samebyn har väckt talan enbart mot staten, får domstolens ställningstagande i målet rättskraft endast mot staten. Domstolen har därför inte anledning att gå in på samebyns rätt i förhållande till andra.
40. Som samebyn har utformat sin talan är det naturligt att först pröva om den rätt att upplåta jakt och fiske som görs gällande i målet kan grundas på en tillämpning av rennäringslagen. Om en sådan prövning inte leder till bifall, får det bedömas om det som är utrett om samers bruk av området medför att samebyn har en motsvarande rätt på grund av sedvana eller urminnes hävd.
41. Om samebyns förstahandsyrkande inte vinner bifall får det prövas om jakt och fiske på det aktuella området kan upplåtas enbart av staten och samebyn gemensamt.

Jakträtt och fiskerätt grundad på rennäringslagen

Bakgrund och förarbeten till rennäringslagen och motsvarande äldre lagstiftning

Rennäringslagen måste tolkas mot bakgrund av tidigare renbeteslagar

42. Rennäringslagen går i väsentliga avseenden tillbaka på tre tidigare renbeteslagar, utfärdade år 1886, 1898 respektive 1928. Även om den gällande lagen delvis har en annan utformning än de äldre lagarna ger varken lagtexten eller förarbetena anledning att anta att lagstiftaren har avsett att den i nu aktuella avseenden skulle ha någon annan innebörd än de tidigare lagarna. Vid tolkningen av rennäringslagen får det därför stor betydelse vilken innebörd renbeteslagarna kan ges.

Förhållandena i Norrland före tillkomsten av 1886 års renbeteslag

43. Vid en tolkning av den första lagen – lagen (1886:38) angående de svenska lapparnes rätt till renbete i Sverige – måste såväl samernas och rennäringens förhållanden vid tiden för lagens tillkomst som den då gällande allmänna rättsuppfattningen om rådigheten över de områden där renskötsel bedrevs beaktas. Vid tolkningen får också den vid denna tid gällande allmänna lagstiftningen om jakt och fiske betydelse.
44. Samer bedrev vid denna tid renskötsel från norra Dalarna till nordligaste Lappland. Även om det råder en hel del osäkerhet om samernas äldre historia (se vidare p. 168, 169 och 172 ff.) står det klart att samer hade vistats i dessa delar av Sverige under mycket lång tid och att det huvudsakliga näringsfånget för flertalet samer sedan länge hade varit renskötsel, i större eller mindre utsträckning förenad med jakt och fiske.
45. Tillkomsten av 1886 års lag hade ett direkt samband med den allt större ekonomiska betydelse som Norrland hade fått under 1700- och 1800-talen. Lagen ska också ses mot bakgrund av den fasta bebyggelsens utveckling i Norrlands inland. Den utvecklingen hade staten på flera sätt försökt främja, bl.a. genom utfärdande av olika nybyggarförfattningar. I fråga om Lappland utfärdades sådana författningar åren 1673, 1695 och 1749. Utvecklingen hade tagit fart från mitten av 1700-talet och lett till en ökande konkurrens mellan rennäringen och andra näringar. På flera håll hade utvecklingen fått till följd att samernas ställning, från 1700-talet och framåt, hade blivit alltmer trängd.
46. De olika delar av landet där renskötsel bedrevs skilde sig dock åt, t.ex. i fråga om klimat, växtlighet och historiska förhållanden. Skillnaderna var särskilt stora mellan å ena sidan Jämtland och Härjedalen och å andra sidan Västerbottens och Norrbottens län. Det fanns också skillnader inom den samiska befolkningen. Många samer var s.k. fjällsamer som ägnade sig åt en omfattande renskötsel. Det fanns vidare skogs- och fiskesamer för vilka renskötseln inte var det väsentliga näringsfånget. Det fanns slutligen samer som hade blivit nybyggare och bedrev jordbruk. Inom det område som lagen skulle reglera fanns

det dessutom nybyggare, eller ättlingar till nybyggare, som inte hade samisk härkomst. Antalet nybyggare, liksom avståndet mellan de renskötande samerna och nybyggarna, växlade betydligt mellan de olika delar av landet där renskötsel bedrevs.

47. 1886 års lag hade föregåtts av andra statliga åtgärder med syfte att balansera olika gruppers intressen mot varandra. Redan i mitten av 1700-talet hade den s.k. lappmarksgränsen dragits upp mellan å ena sidan Västerbottens och Norrbottens kustlandskap och å andra sidan Lappland. Avsikten med denna gräns hade framför allt varit att motverka att Lapplands resurser togs i anspråk av kustlandets befolkning. År 1867 beslutades att det även skulle dras en s.k. odlingsgräns inom Lappland. Odlingsgränsen var avsedd att avskilja de områden i väster och norr där några ytterligare nybyggen inte skulle få anläggas. En provisorisk odlingsgräns blev färdig år 1871, men den definitiva gränsen fastställdes först år 1890. Områdena ovanför odlingsgränsen kom senare att betecknas som ”områden anvisade till lapparnas uteslutande begagnande”. Redan när gränsen fastställdes fanns det dock en hel del nybyggen på dessa områden och det skulle senare anläggas ännu fler.
48. Under 1800-talet inleddes också slutförandet av avvittringarna, dvs. avgränsandet av enskilda hemman från det som ansågs vara kronans marker. I Jämtland och Härjedalen genomfördes avvittringarna huvudsakligen under den första hälften av 1800-talet. Det skedde på ett sätt som gynnade jordbruksbefolkningen på samernas bekostnad. Detta var lagstiftaren medveten om när avvittringarna i Lappland kom igång under andra hälften av 1800-talet. Avvittringarna kom där att genomföras under större hänsynstagande till de renskötande samernas intressen. Det borde, sades det i förarbetena till de nya avvittringsbestämmelserna, inte komma i fråga ”att genom lagstiftningsåtgärder frånhända Lapparne någon rätt, hvaraf de fortfarande äro i laglig besittning” (se prop. 1873:4 s. 13).
49. Till grund för avvittringarna i Lappland låg 1873 års avvittringsstadga. Enligt stadgan skulle hemman och nybyggen vid avvittringarna tilldelas ”nödiga områden” av kronans mark. Förfarandet innebar att enskilda fastigheter kom att gränsbestämmas permanent. De marker som inte avvittrades avsattes till kronoparker eller blev s.k. kronoöverloppsmark. För fastighetsägarna innebar avvittringarna vanligen att de befogenheter som de dittills hade haft avseende kringliggande mark begränsades till att gälla inom den gränsbestämda fastigheten.
50. I 8 § avvittringsstadgan angavs att samerna ”såsom hittills” skulle vara berättigade att begagna bete på all skogsmark inom lappmarkernas dåvarande område (med visst undantag för enskilda skogar nedanför odlingsgränsen). För de samer som inte själva var nybyggare synes avvittringarna inte ha rubbat några av de rättigheter som samer vid denna tid ansågs ha.
51. Avvittringarna i Lappland genomfördes successivt och avslutades först efter tillkomsten av 1886 års lag. I exempelvis Gällivare socken fattade länsstyrelsen beslut om avvittring år 1887.

Statens anspråk på Norrlands inland

52. Jämsides med att bebyggelsen hade utvecklats i Norrlands inland hade staten successivt ökat sina anspråk på överhöghet eller äganderätt.
53. I ett av Gustav Vasa år 1542 utfärdat brev hade det gjorts gällande att ”sådana äger som obygde liggie, höre Gud, oss, och Swerigis Crone till, och ingen annen”.
Brevet uppfattades fram till början av 1900-talet som ett kronans anspråk på äganderätt till obebyggda marker i Norrland. Senare har det emellertid vanligen tolkats som enbart ett anspråk på överhöghet (”dominium eminens”). Höghetsrätten ansågs dock vara tillräckligt stark för att ge kronan rätt att upplåta mark för nybyggen.
54. Sedan början av 1900-talet har grunden för statens anspråk på äganderätt i stället ansetts vara en år 1683 utfärdad skogsordning. Skogsordningen hänvisar till Gustav Vasas brev och ger uttryck för att obebyggda skogar ”tillhör” kronan. Huruvida skogsordningens syfte var att grunda en äganderätt för kronan – och om detta i så fall gällde även fjälltrakterna – är omdebatterat. I ”Skattefjällsdomen” diskuterade Högsta domstolen skogsordningens betydelse för skattefjällen i Jämtland och fann då att frågan om äganderätten inte kunde anses ha blivit slutgiltigt löst genom skogsordningen utan att avgörande blev den fortsatta utvecklingen och den tolkning som skogsordningen fick (s. 200 i avgörandet). Efter en genomgång av rättsutvecklingen under de följande århundradena fann domstolen att staten vid tiden för 1886 års renbeteslag måste anses som ägare till skattefjällen, ytterst på grund av 1683 års skogsordning (s. 229).
55. Det finns inte anledning att här ta ställning till om 1683 års skogsordning och den därefter följande utvecklingen har haft samma betydelse för det nu aktuella området som för skattefjällen. Klart är emellertid att den etablerade uppfattningen mot slutet av 1800-talet var att obebyggda marker i Norrlands inland typiskt sett ägdes av staten, fastän denna uppfattning snarare synes ha grundat sig på Gustav Vasas brev än på 1683 års skogsordning.

De utgångspunkter som låg till grund för 1886 års lag

56. Ett av syftena med 1886 års renbeteslag var att lösa de konflikter som kunde uppkomma till följd av den fasta bebyggelsens utveckling i Norrlands inland (jfr p. 45). Lagens förarbeten – i synnerhet vissa remissyttranden i lagstiftningsärendet – ger ibland uttryck för en nedvärderande syn på samisk kultur och näring. Såväl propositionen som det utskottsutlåtande som upprättades vid riksdagsbehandlingen rymmer emellertid också en strävan att skydda samerna och rennäringen.
57. Några mer betydande förändringar av vad som ansågs vara gällande rätt synes inte ha varit åsyftade. I propositionen angavs att lagförslaget i många delar kunde karaktäriseras som en kodifiering och närmare bestämning av vad som redan tidigare hade föreskrivits genom olika stadganden eller vad som annars iakttogs av ”gammal sedvana” (se prop. 1886:2 s. 36).

58. Det är oklart vilka kunskaper om äldre förhållanden som hade inhämtats i lagstiftningsärendet. De beskrivningar av samernas förhållanden i äldre tider som lämnas i förarbetena är mycket allmänt hållna. Det saknas t.ex. närmare uppgifter om karaktären av de sedermera så omdiskuterade lappskattelanden (om dessa, se vidare p. 176). Det framgår emellertid att lagens upphovsmän hade uppfattningen att samerna hade funnits i de berörda områdena under mycket lång tid och hade en på sedvana grundad rätt att använda områdena för sina näringar. Av central betydelse är vad riksdagens Särskilda utskott uttalade med anledning av den lagda propositionen:

> ”Ty lappen eger verkligen en rätt att åberopa för utöfningen enligt urgammal sed af det näringsfång, hvaraf han lefver. Lappen var den som först tog de nordliga trakterna af vårt land i besittning. Innan den första nybyggaren fälde det första trädet i Norrlands skogar var lappen redan der. /……/ Men lappens besittningstagande var icke till sin natur sådant, att det i sig inneslöt alla de befogenheter, hvilka tillhöra eganderättens begrepp. Det sträckte sig icke till andra än dem, nomadlifvets inskränkta behof fordrade. Det afsåg endast jordens nyttjande dels till bete för renarne, under sommaren i fjelltrakterna och under vintern i skogslandet, dels till fyllande af de behof, hvilka voro en förutsättning för eller en följd af renbetets begagnande.”

59. Det är tydligt att lagstiftaren utgick från att områdena – i den utsträckning de inte redan hade avskilts som enskilda hemman – tillhörde staten. Särskilda utskottet uttalade sålunda, under hänvisning till Gustav Vasas brev från år 1542:

> ”Lappens rätt till jorden var för den skull allt ifrån begynnelsen till sin natur sådan, att den icke hindrade uppkomsten, så att säga, bredvid sig af eganderätt i kultursamhällets mening. Och en sådan eganderätt framträdde och utbredde sig med odlingen, samt omfattade till sist äfven de trakter, odlingen ej ännu tagit i anspråk, då för omkring 300 år sedan i vårt land började uttalas och tillämpas den grundsats, att ’sådana egor som obygda ligga höra Gud, konungen och Sveriges krona till’”

60. Staten har i detta mål gjort gällande att de områden där samerna bedrev jakt och fiske hade utgjort riksallmänningar, innan staten förvärvade äganderätten till dem, och att samernas rätt att jaga och fiska var en följd av att var och en hade rätt att jaga och fiska på sådana allmänningar. Det finns dock ingenting i utredningen som tyder på att detta synsätt hade någon betydelse vid tillkomsten av 1886 års renbeteslag. Lagens förarbeten innehåller inte heller några hänvisningar till vad som vid denna tid gällde om rätt till jakt och fiske på andra slag av allmänningar.

Några huvuddrag i 1886 års lag

61. Genom lagen förbehölls samerna (i lagen benämnda ”lappar”) rätten att bedriva renbete. Lagen innehöll ett flertal bestämmelser som reglerade de befogenheter som samerna hade. I 1 § fanns bestämmelser om var, och när, samer fick uppehålla sig med sina renar. Bestämmelserna, som gav samerna rätt att på renbetesområdet ”betjena sig af land och vatten till underhåll för sig och sina renar”, överensstämde väsentligen med nuvarande rätt men innehöll, till skillnad från 1 § rennäringslagen, ingen hänvisning till urminnes hävd. Andra rättigheter, som anknöt till renbetesrätten och som också reglerades i lagen, var rätten till skogsfång, jakt och fiske.
62. Enligt 5 § skulle – såvitt nu är av intresse – de områden i Norrbottens och Västerbottens läns lappmarker som särskilt bibehölls för samerna delas in i lappbyar. Lagen innehöll visserligen inte några närmare bestämmelser om lappbyarnas organisation men innebar ändå att ett delvis kollektivt system lades fast för de renskötande samerna.

[pp 63-80 uteslutna]

1971 års rennäringslag

81. Vid tillkomsten av 1971 års rennäringslag fick rättighetsfrågor ett förhållandevis begränsat utrymme. Till detta bidrog att vid denna tid pågick den rättegång som ledde fram till ”Skattefjällsdomen” och att man inte ville föregripa prövningen i det målet.
82. I propositionen behandlades, bl.a. mot bakgrund av remissynpunkter från Svenska Samernas Riksförbund (SSR), frågan om vem som borde ha hand om upplåtelser av jakt och fiske. Enligt SSR hade samerna en starkare rätt till marken än vad som framgick av 1928 års renbeteslag och denna rätt grundade sig på bl.a. urminnes hävd och en av svenska myndigheter erkänd, ständig och ärftlig besittningsrätt. SSR förordade därför att rätten att göra nyttjanderättsupplåtelser borde tillkomma samebyn. (Se prop. 1971:51 s. 60 och 67.) Departementschefen uttalade i denna del följande (s. 132).

> ”Enligt min mening saknas anledning att nu frångå de principer som ligger bakom bestämmelserna om nyttjanderättsupplåtelser. Även i fortsättningen bör alltså bestämmelserna om upplåtelser på dessa marker – som i första hand är avsedda för de renskötande samerna – endast gälla mindre omfattande nyttjanderättsupplåtelser som inte medför skada för renskötseln. För nyttjanderättsupplåtelser av större omfattning får man falla tillbaka på de bestämmelser om upphävande av rätt till renskötsel som jag nyss behandlat. /…../ SSR:s yrkande att samebyarna själva skall få svara för alla slag av nyttjanderättsupplåtelser i de trakter det här är fråga om kan jag av flera skäl inte biträda. Yrkandet synes delvis grunda sig på SSR:s uppfattning att samerna har en

starkare rätt till dessa marker än som framgår av renbeteslagen. Enligt de sakkunniga bör man vid frågans bedömande i första hand anlägga praktiska synpunkter. På vad sätt tillgodoses bäst de intressen som både samerna och övriga befolkningsgrupper numera har inom dessa vidsträckta områden? De sakkunniga anser det vara uppenbart att endast en statlig förvaltning kan komma ifråga för uppgiften. En samisk förvaltning torde i praktiken inte kunna utformas så att den innefattar tillräckliga garantier för att övriga befolkningsgruppers intressen blir tillgodosedda i skälig omfattning. Denna uppgift bör därför enligt de sakkunniga liksom f.n. handhas av en statlig myndighet. Jag finner inte skäl att föreslå ändring i det system som nu tillämpas."

83. Riksdagen instämde i denna bedömning. Samtidigt avslogs en motion om att möjligheten till nyttjanderättsupplåtelser skulle vara beroende av den berörda samebyns medgivande. (Se JoU 1971:37 s. 46 ff.)
84. Regleringen av rätten till jakt och fiske kom därför att utformas på väsentligen samma sätt som i 1928 års lag. Skyddet för samerna formulerades dock annorlunda. Dels uppställdes ett allmänt krav på att upplåtelsen kunde ske utan avsevärd olägenhet för renskötseln, dels tillades ett krav på att upplåtelsen var förenlig med god jaktvård och fiskevård och kunde ske utan besvärande intrång i samernas rätt att jaga och fiska (se 31 och 32 §§ rennäringslagen).
85. Rennäringslagens bestämmelser om upplåtelse av jakt och fiske har inte genomgått några materiella förändringar sedan lagens tillkomst. Däremot gjorde regeringen år 1986, i anslutning till tillkomsten av den nuvarande jaktlagen, vissa uttalanden om bestämmelsernas innebörd. I propositionen om jaktlag m.m. konstaterades att den jakträtt som tillkommer medlemmarna i en sameby ingår i den bruksrätt som renskötselrätten utgör. Det uttalades också att samerna inte har ensamrätt till jakten, att markägaren har den jakträtt som följer med äganderätten till marken och att lantbruksnämnden20 kan besluta om upplåtelse av markägarens jakträtt på kronomark ovanför odlingsgränsen. (Se prop. 1986/87:58 s. 45.) 20 Vid denna tid fattade lantbruksnämnden de beslut om upplåtelse som länsstyrelsen i dag fattar.
86. Samma synsätt som kom till uttryck i den nyssnämnda propositionen låg också till grund för de ändringar i upplåtelsesystemet som skedde genom förordningsändringar år 1993 (jfr prop. 1992/93:32 s. 132 f., se även p. 33).

Högsta domstolens bedömning av rennäringslagens innebörd

Inledning

87. Girjas sameby bedriver, genom sina medlemmar, renskötsel på det aktuella området. Därmed följer också att samebyn för medlemmarnas räkning kan göra gällande vissa rättigheter som enligt rennäringslagen följer med renskötselrätten.

88. Parterna är oense om vilka dessa rättigheter är. Enligt staten kan medlemmarna i samebyn, och därmed också samebyn, enbart göra gällande en jakt- och fiskeutövningsrätt. Enligt samebyn ska rennäringslagen tillämpas så att det är samebyn – och inte staten – som har rätt att förfoga över jakten eller fisket genom upplåtelser till utomstående.

Lagtexten

89. Regelverkets uppbyggnad – med ett uttryckligt förbud för samebyar och medlemmar i samebyar att upplåta jakt eller fiske och en befogenhet för länsstyrelsen att besluta om upplåtelser (31–34 §§ rennäringslagen) – innebär att samebyn och dess medlemmar inte har någon rätt att förfoga över jakten och fisket genom upplåtelser.
90. Ordalydelsen är klar. Den ger inte samebyn någon sådan upplåtelserätt som den har gjort gällande i målet.

Betydelsen av regeringsformens bestämmelse om det samiska folket och av folkrättsliga principer om urfolks rättigheter

91. En särskild fråga är om lagtexten kan ges en annan innebörd än den ordalydelsen anger genom en omtolkning som grundas på 1 kap. 2 § sjätte stycket regeringsformen eller på vissa folkrättsliga principer om urfolks rättigheter.
92. I den angivna bestämmelsen i regeringsformen föreskrivs att det samiska folkets och etniska, språkliga och religiösa minoriteters möjligheter att behålla och utveckla ett eget kultur- och samfundsliv ska främjas. Bestämmelsen ger uttryck för ett mål för samhällelig verksamhet men ger inte i sig upphov till några rättigheter för enskilda. Den kan ändå få viss materiell betydelse vid sådan rättstillämpning där det är fråga om att väga olika faktorer mot varandra. Samernas intresse av att kunna vidmakthålla sin kultur, däribland renskötseln, ska vid en sådan avvägning tillmätas särskild vikt. Det är framför allt i sådana avvägningssituationer som en bestämmelse av detta slag kan få betydelse.
93. Det som sägs i 1 kap. 2 § sjätte stycket regeringsformen avspeglar i viss mån folkrättsliga principer om tillvaratagandet av etniska minoriteters rättigheter. Principer av detta slag kommer till uttryck i bl.a. Europarådets ramkonvention den 1 februari 1995 om skydd för nationella minoriteter, särskilt artikel 5.1, FN:s konvention den 16 december 1966 om ekonomiska, sociala och kulturella rättigheter, särskilt artikel 1.2, FN:s konvention den 16 december 1966 om medborgerliga och politiska rättigheter, särskilt artikel 1.2, samt FN:s deklaration den 13 september 2007 om urfolks rättigheter, särskilt artikel 26.
94. När det gäller folkrättens tillämpning i nationell rätt bygger svensk rätt på den s.k. dualistiska principen. Det innebär att folkrättsliga regler av nu aktuellt slag inte har någon omedelbar effekt utan förutsätts tillämpas av domstolarna först sedan de har införlivats med nationell rätt genom lagstiftning. Det är samtidigt naturligt att folkrättsliga principer ges betydelse vid tolkningen av gällande rätt, även om något införlivande genom lagstiftning inte har skett.

95. Däremot kan varken 1 kap. 2 § sjätte stycket regeringsformen eller en tillämpning av folkrättsliga principer av nu aktuellt slag leda till att bestämmelserna i 31–34 §§ rennäringslagen ges en helt annan innebörd än den som lagtexten ger uttryck för.

Kan 31–34 §§ rennäringslagen åsidosättas av annan anledning?

96. En del förarbetsuttalanden, särskilt sådana som härrör från tillkomsten av 1886 års renbeteslag, kan emellertid förstås så att lagstiftaren har tilldelat länsstyrelsen rollen av legal ställföreträdare för samebyns medlemmar. Med denna tolkning skulle medlemmarna i samebyn vara de egentliga jakt- och fiskerättsinnehavarna men länsstyrelsen ha fått till uppgift att förvalta rättigheterna, eftersom samerna har ansetts sakna förmåga att sköta dem på egen hand. Om så är fallet, kan det ifrågasättas om lagens upplåtelsebestämmelser kan upprätthållas i dag. Det kan nämligen hävdas att bestämmelser med denna innebörd står i strid med reglerna om förbud mot diskriminering i 2 kap. 12 § regeringsformen och artikel 14 i Europakonventionen och att bestämmelserna som en följd av detta ska åsidosättas (jfr p. 119 ff.).
97. En central fråga i målet blir därför huruvida bestämmelserna i 31–34 §§ rennäringslagen ger uttryck för en statens bestämmanderätt över egna rättigheter eller en bestämmanderätt över samers rättigheter. Denna fråga behandlas i det följande.

Betydelsen av rättsläget före år 1886 för tolkningen av rennäringslagen

98. Rennäringslagens regler om jakt och fiske går tillbaka på tidigare renbeteslagar. Som redan har konstaterats var den första renbeteslagen, 1886 års lag, avsedd att utgöra en kodifiering av bl.a. ”gammal sedvana” (se p. 57). Det rättsläge som gällde vid tillkomsten av 1886 års lag är därför ett viktigt tolkningsdatum för att bestämma innebörden i senare lagstiftning.
99. I förarbetena till 1886 års lag konkretiseras emellertid inte vad som enligt lagstiftaren utgjorde dittills gällande rätt. Som redan har konstaterats är det oklart vilka kunskaper om äldre förhållanden som hade inhämtats i lagstiftningsärendet och beskrivningarna av samernas förhållanden i äldre tider är mycket allmänt hållna (se p. 58). Det är tydligt att lagstiftaren utgick från att renskötande samer sedan gammalt hade en rätt att utöva jakt och fiske. Förarbetena ger däremot inte några besked om vad som dittills hade gällt i fråga om rådigheten över jakt och fiske, särskilt ifråga om rätten att göra upplåtelser till andra.

100. I avsaknad av närmare uppgifter om lagstiftarens uppfattning om de historiska förhållandena ligger det nära till hands att försöka tolka de aktuella bestämmelsernas innebörd i överensstämmelse med vad som på annat sätt går att få fram om rättsläget vid tillkomsten av 1886 års lag, särskilt i fråga om gammal sedvana. En tillämpning av en sådan tolkningsmetod möter dock svårigheter, särskilt som lagens bestämmelser är generella och tolkningen följaktligen måste inriktas på att identifiera en sedvana som är gemensam för hela det område som upplåtelsebestämmelserna tar sikte på. Det kan ifrågasättas om detta är möjligt. Det gäller i synnerhet som det område där bestämmelserna är avsedda att tillämpas – renbetesfjällen i Jämtlands län samt områdena ovanför odlingsgränsen i Västerbottens och Norrbottens län – är mycket vidsträckt. Eftersom förhållandena inom olika delar av detta område vid slutet av 1800-talet skilde sig åt måste man räkna med att flera sedvanor kan ha gällt parallellt.

101. Bestämmelserna i rennäringslagen får därför tolkas utifrån lagens ordalydelse och förarbeten tillsammans med tidigare renbeteslagar och förarbeten, lästa i det sammanhang där lagarna tillkom.

En tillämpning av rennäringslagen grundad på lagtext och förarbeten

102. Frågan är alltså om regleringen i rennäringslagen, läst utifrån lagtext och förarbetena till lagen och tidigare renbeteslagar, bör tolkas så att den avser jakt- och fiskerättigheter som – enligt lagstiftarens synsätt – i grunden tillkommer samerna. En sådan tolkning får stöd bl.a. av att lagstiftaren ända sedan 1886 års lag har ansett att berörda samer ska ges tillfälle att yttra sig innan upplåtelse sker och att behållningen av upplåtelserna bör användas för samerna och det samiska samfundet. Också tillkomsten av odlingsgränsen, uppdragen i nära anslutning till 1886 års lag, och flera uttalanden i förarbetena till 1873 års avvittringsstadga (jfr p. 48) tyder på att lagstiftaren vid denna tid ansåg att samerna hade starka rättigheter till de områden som de traditionellt hade bebott.

103. Även de historiska förhållandena bakom 1886 års renbeteslag – så långt som de redovisas i lagstiftningsärendet – ger ett visst, om än begränsat, stöd för att lagstiftaren den gången utgick från att jakträtten och fiskerätten egentligen tillhörde samerna. Det gäller särskilt det förhållandet att, såsom flera gånger uttalades i förarbetena, samerna utövade jakt och fiske i enlighet med urgammal sedvana.

104. Det finns emellertid också omständigheter – utöver upplåtelsebestämmelsernas utformning – som talar i motsatt riktning.

105. En sådan omständighet är det synsätt i fråga om äganderätten till marken som framträder i förarbetena till 1886 års lag. Det finns ingenting som tyder på att

lagstiftaren uppfattade renbetesfjällen eller områdena ovanför odlingsgränsen som allmänningsmark i vilken samerna var delägare. I stället utgick lagstiftaren från att marken, i den mån den inte tillhörde enskilda hemman, utgjorde kronans egendom. En tillämpning av den huvudregel som redan vid denna tid gällde inom svensk jakt- och fiskelagstiftning medförde därmed att jakträtten och fiskerätten tillhörde kronan. Den då gällande jakt- och fiskelagstiftningen gav också tydligt uttryck för att jakträtten och fiskerätten på bl.a. kronoöverloppsmark utgjorde kronans egendom. Lagstiftningen innebar dessutom att staten disponerade över denna jakträtt och fiskerätt, bl.a. genom att låta envar jaga och, under vissa förutsättningar, fiska på sådan mark (jfr p. 63 och 64). Förarbetena till 1886 års lag ger inte uttryck för att lagstiftaren förutsåg att dessa bestämmelser skulle behöva ändras.

106. Till detta kommer att lagens allmänna utgångspunkt var att de rättigheter som lagen tillerkände samerna avsåg endast en rätt för dessa att själva använda sig av land och vatten. De rättigheter som reglerades innebar alltså inte någon befogenhet att råda över mark och vatten på annat sätt än vad renskötseln krävde eller lagen annars angav. I 1 § i 1886 års lag talas, såvitt gäller renbetesrätten, om en rätt att ”betjena sig af land och vatten till underhåll för sig och sina renar” och i 21 § sägs att samerna är berättigade ”att till jagt och fiske betjena sig af land och vatten”. Detta ligger väl i linje med vad Särskilda utskottet uttalade om att samernas befogenheter, såsom utskottet uppfattade dem, inte omfattade ”andra än dem, nomadlifvets inskränkta behof fordrade” (jfr p. 58).

107. Det förhållandet att lagstiftaren avsåg att behållningen av upplåtelserna skulle komma samerna och det samiska samfundet till del kan inte tillmätas någon avgörande vikt. Det kan lika väl vara ett uttryck för en strävan att stödja den samiska befolkningen.

108. Övervägande skäl talar därför för att lagstiftaren vid tillkomsten av 1886 års renbeteslag utgick från att renskötande samer visserligen av ålder hade rätt att utöva jakt och fiske på de aktuella områdena men att det var staten som hade rådigheten över jakten och fisket. Lagstiftarens synsätt var därmed att det var fråga om jakträtt och fiskerätt som i grunden tillkom staten.

109. I förarbetena till 1898 och 1928 års renbeteslagar görs inga uttalanden om hur lagstiftaren då såg på dessa frågor.

110. I olika statliga utredningsbetänkanden, avgivna under 1920-talet och följande decennier, förekommer det flera uttalanden som synes bygga på uppfattningen att jakträtten och fiskerätten ovanför odlingsgränsen i Lappland i grunden tillhörde de renskötande samerna.22 Uttalandena, som talar om eller ger uttryck för att samerna har en ensamrätt till jakt och fiske, är emellertid svårbedömda. Det gäller särskilt som de, med ett par undantag, inte förefaller i första hand handla om statens rätt utan om hur tredje mans rätt till jakt och fiske förhöll sig till samernas. Uttalandena klargör inte

heller den närmare karaktären av samernas rätt, t.ex. om denna var av civilrättsligt eller annat slag. De bidrar därför inte nämnvärt till förståelsen av lagstiftarens synsätt vid lagstiftningens tillkomst.

111. Av uttalandena framgår visserligen att det vid den tid då uttalandena gjordes fanns en utbredd uppfattning att statens rätt till jakt och fiske på de aktuella områdena var av annat och mer begränsat slag än den rätt som staten hade i fråga om statlig mark i allmänhet. Uttalandena föranledde emellertid inte några ändringar i de aktuella upplåtelsebestämmelserna och kan inte anses ha gett upphov till några ändringar av lagstiftningens innebörd.

112. Ett liknande uttalande gjordes av kronans företrädare i rättsfallet ”Killinge”. I det målet – där en fastighetsägare tvistade med kronan om rätten till jakt – hävdade kronans företrädare att rätten till jakt och fiske efter avvittringarnas genomförande tillkom samerna ensamma. Uttalandet är dock av samma skäl som gäller beträffande utredningsbetänkandena svårbedömt. Rättsfallet ger inte heller på annat sätt någon ledning i detta mål, eftersom Högsta domstolen inte hade skäl att uttala sig om samernas rätt i förhållande till staten.

113. Förarbetena till rennäringslagen ger inte uttryck för någon annan syn från lagstiftarens sida än den som framträder i förarbetena till 1886 års lag. Det som sägs i propositionen om samernas rätt till jakt och fiske är visserligen inte entydigt. De uttalanden om en ensamrätt för samerna som återspeglades i de nyss nämnda utredningsbetänkandena (jfr p. 110) har emellertid ingen motsvarighet i propositionen. Departementschefens uttalande med anledning av SSR:s synpunkter i ärendet (jfr p. 82) förefaller snarast bekräfta att lagstiftaren utgick från att de renskötande samerna hade enbart den jakt- och fiskeutövningsrätt som framgick av då gällande renbeteslag. Riksdagens beslut att avslå en motion om att upplåtelser skulle förutsätta berörd samebys samtycke synes vila på samma grundsyn.

114. Lagstiftaren får alltså vid tillkomsten av rennäringslagen anses ha intagit samma synsätt som tidigare, dvs. att bestämmelserna om upplåtelse av jakt och fiske avsåg rättigheter som i grunden tillhörde staten.

Betydelsen av 1 § andra stycket rennäringslagen

115. En särskild fråga är vilken betydelse det har att det numera, efter en år 1993 genomförd lagändring, i 1 § andra stycket rennäringslagen anges att renskötselrätten grundar sig på urminnes hävd. Lagändringen var närmast föranledd av de uttalanden som Högsta domstolen hade gjort i ”Skattefjällsdomen”. Domstolen hade där konstaterat – såvitt gäller de omtvistade skattefjällen i Jämtland – att samerna redan

före 1886 års lag hade rättigheter som avsåg renbete, jakt, fiske och visst skogsfång och att dessa från början hade vilat på urminnes hävd (s. 233 i avgörandet).

116. Syftet med lagändringen var bl.a. att klarlägga arten av samernas rättigheter. Konstaterandet av att renskötselrätten byggde på urminnes hävd – och inte på upplåtelse eller lagstiftning – ansågs också vara av betydelse för de renskötande samernas ställning och trygghet i sin näring. (Se prop. 1992/93:32 s. 90.)

117. Att renskötselrätten grundar sig på urminnes hävd medför att de rättigheter som renskötande samer tillerkänns i rennäringslagen inte utan vidare kan tas ifrån dem; rättigheterna skyddas enligt bestämmelserna om egendomsskydd i 2 kap. 15 § regeringsformen. Bestämmelsen i 1 § andra stycket rennäringslagen får därmed betydelse för rättigheternas beständighet. Den säger däremot ingenting om hur omfattande de rättigheter som ingår i renskötselrätten är. De ger således inte anledning att tolka innebörden i rennäringslagens bestämmelser om jakt och fiske på annat sätt än tidigare.

118. Frågan om Girjas sameby kan grunda en särskild rätt till jakt och fiske – mer långtgående än den som rennäringslagen ger – på sedvana eller urminnes hävd återkommer domstolen till (se p. 125 ff.).

Betydelsen av 2 kap. 12 § regeringsformen m.m.

119. Enligt 2 kap. 12 § regeringsformen får lag eller annan föreskrift inte innebära att någon missgynnas därför att han eller hon tillhör en minoritet med hänsyn till bl.a. etniskt ursprung. Samer utgör en sådan minoritet som avses i paragrafen. Av 11 kap. 14 § följer att en domstol, som finner att en föreskrift står i strid med en bestämmelse i grundlag eller annan överordnad författning, inte får tillämpa föreskriften.

120. Det står klart att den motivering som lämnades i 1883 års kommittéförslag till att upplåtelserna inte borde skötas av samer eller samebyar hade inslag som framstår som nedsättande (jfr p. 69). En bestämmelse kan emellertid inte anses diskriminerande i den mening som avses i 2 kap. 12 § regeringsformen enbart därför att den, när den tillkom, motiverades på ett sätt som i dag måste uppfattas som olämpligt. Avgörande måste i stället vara om medlemmarna i minoritetsgruppen genom bestämmelsen faktiskt kan komma att behandlas sämre än befolkningens flertal i en motsvarande situation.

121. Som har framgått (jfr p. 102–117) får rennäringslagen anses bygga på uppfattningen att jakträtten och fiskerätten i grunden tillkommer staten. Under sådana förhållanden innefattar regleringen i 31–34 §§ rennäringslagen inte ett sådant missgynnande som avses i 2 kap. 12 § regeringsformen.

122. Ett liknande diskrimineringsförbud finns i artikel 14 i Europakonventionen. Där sägs att åtnjutandet av de fri- och rättigheter som anges i konventionen ska säkerställas utan någon åtskillnad på grund av – såvitt nu är av intresse – tillhörighet till nationell minoritet. Någon diskriminering i strid med artikeln aktualiseras inte i målet.

Sammanfattande slutsats i denna del

123. Det som nu har sagts innebär att den reglering av rådigheten över jakt och fiske som finns i 31–34 §§ rennäringslagen – och som förbjuder samebyar eller medlemmar i samebyar att upplåta jakt eller fiske och som lämnar till länsstyrelsen att besluta om sådana upplåtelser – behandlar vad som enligt lagen utgör statens egna rättigheter. Det saknas förutsättningar att åsidosätta regleringen med stöd av regeringsformen eller Europakonventionen.

124. Samebyns yrkande om ensamrätt att upplåta jakt och fiske på området kan alltså inte bifallas på den i första hand angivna grunden.

Jakträtt och fiskerätt grundad på sedvanerätt eller urminnes hävd

Inledning

125. Girjas sameby har vidare gjort gällande att den – oavsett innebörden i rennäringslagen – har en i förhållande till staten exklusiv rätt att upplåta jakt och fiske, grundad på sedvana eller urminnes hävd. Enligt samebyn har de samer som vid var tid har levt och verkat på området upparbetat en jakträtt och en fiskerätt på området och dessa rättigheter har inbegripit en ensamrätt att upplåta jakten och fisket till andra. Upparbetandet av rättigheterna har skett genom att området har brukats långvarigt och kontinuerligt och utan protester. Rättigheterna har genom rennäringslagstiftningen övergått till samebyn. Staten har å sin sida bestritt att samerna har förvärvat rådighet över jakten och fisket genom sedvana eller urminnes hävd. Enligt staten kan de rättigheter som enskilda samer eventuellt har upparbetat i vart fall inte åberopas av samebyn.

126. Frågan är alltså om på området verksamma samer har förvärvat en på sedvana eller urminnes hävd grundad exklusiv jakträtt och fiskerätt. Om denna fråga besvaras jakande, blir nästa fråga om samebyn kan åberopa rättigheterna och därmed har rätt att upplåta jakt och fiske på området.

Sedvanan och dess betydelse

127. Begreppen sedvana och sedvanerätt har under olika tidsepoker och i olika länder getts varierande innebörd. Allmänt sett är sedvana en beteckning på ett handlingsmönster som följs av många. Rättsregler som har sitt ursprung i sedvana brukar betecknas som sedvanerätt. Sedvanerätten spelade tidigare en inte obetydlig roll i svensk rätt, framför allt som utfyllande rättskälla (se t.ex. de domarregler som brukar tillskrivas Olaus Petri). Allt eftersom författningsregleringen ökat har sedvanerätten som rättskälla minskat i betydelse. Det illustreras av att den hänvisning till ”landssed” som fanns i 1 kap. 11 § i den äldre rättegångsbalken inte har förts över till den nuvarande rättegångsbalken. (Jfr Christina Allard, Renskötselrätt i nordisk belysning, 2015, s. 169 ff.)

128. I dag tillmäts sedvanan huvudsakligen betydelse där det i lag hänvisas till sed, sedvana, sedvänja eller brukande ”av ålder”. Ett exempel på en sådan hänvisning finns i 3 § rennäringslagen enligt vilken vinterbetesområdets omfattning bestäms av var renskötseln bedrivs ”av ålder” (jfr ”Nordmalingdomen” NJA 2011 s. 109). Utan lagstöd torde förekomsten av en sedvana numera inte kunna åberopas som självständig grund för förvärv av nya rättigheter. En annan sak är att en existerande sedvana kan få betydelse när en domstol tillämpar en viss anknytande rättsregel eller när en prejudikatinstans antar nya rättsgrundsatser. (Jfr om sedvanan som rättskälla i nutida rätt, Stig Strömholm, Rätt, rättskällor och rättstillämpning, 5 uppl., 1996, s. 235 ff.)

129. Det bör emellertid – mot bakgrund av den vikt som sedvanan har tillmätts i äldre rätt – vara möjligt att utan särskilt lagstöd hävda rättigheter under påstående att dessa har etablerats i äldre tid genom den sedvana som då tillämpades. Det förutsätter dock att det går att klarlägga såväl den tidigare förekomsten av en viss sedvana som den rättsliga relevans som denna sedvana hade.

130. Som riksdagen flera gånger har uttalat utgör samerna ett urfolk (se t.ex. KrU 1976/77:43 s. 4). Enligt artikel 8.1 i ILO:s konvention nr 169 ska vid tillämpningen av nationell lagstiftning vederbörlig hänsyn tas till urfolks sedvänjor och sedvanerätt. Konventionen har inte ratificerats av Sverige men får i denna del anses ge uttryck för en allmän folkrättslig princip. En tillämpning av denna princip vid lösandet av tvister med koppling till markrättigheter som berör samer medför alltså att en samisk sedvana som har konstaterats ska beaktas.

131. Enligt artikel 26 i FN:s deklaration om urfolks rättigheter har ett urfolk rätt till de land, territorier och resurser som det traditionellt har ägt, besuttit eller på annat sätt använt eller förvärvat. Frågan behandlas också i FN:s konvention om medborgerliga och politiska rättigheter. Av artikel 27 följer att medlemmar av minoritetsgrupper har rätt att utöva sin kultur. Om det utgör en förutsättning för vidmakthållandet av kulturen, kan det därför vara nödvändigt att tillförsäkra dem fortsatt tillgång till mark som de traditionellt har brukat. I internationell praxis har sedvanerättsliga principer tillmätts särskild betydelse vid fastställandet av sådana markrättigheter. Även detta medför att

den sedvana som har tillämpats vid samernas utnyttjande av lappmarkerna måste beaktas.

132. Det som nu har sagts om den betydelse som de internationella dokumenten tillägger sedvanan kan väl förenas med tankarna bakom bestämmelsen i 1 kap. 2 § sjätte stycket regeringsformen (jfr p. 92).

133. Som redan nämnts har emellertid sedvanerätten tidigare haft betydelse främst som utfyllande rättskälla. I den mån det i äldre tider har funnits särskilda rättsinstitut som har reglerat en viss fråga är det därför naturligt att i första hand söka ledning i dessa. I svensk rätt har frågor om markrättigheter på grund av långvarigt brukande främst behandlats inom ramen för rättinstitutet urminnes hävd. Bedömningen av om samer genom långvarigt brukande har förvärvat rättigheter till mark bör därför utgå från förutsättningarna för urminnes hävd. Det är också det synsätt som lagstiftaren har antagit genom att i rennäringslagen uttala att lagens rättigheter grundar sig på urminnes hävd. En tillämpning av äldre sedvanerätt bör mot denna bakgrund aktualiseras först om principerna om urminnes hävd inte går att tillämpa på ett rimligt sätt.

134. Det bör samtidigt tilläggas att det knappast går att upprätthålla någon helt klar gräns mellan sedvanerätt och principerna om urminnes hävd. I båda fallen är den bakomliggande tanken att förhållanden som under lång tid har varit etablerade och respekterade inte ska rubbas. Även vid en tillämpning av principerna om urminnes hävd finns det anledning att ta hänsyn till den sedvanerätt som vid var tid har gällt, i den mån denna är känd. Ett sådant beaktande kan också, som redan har framgått, vara en förutsättning för att rättstillämpningen ska motsvara folkrättens krav.

Urminnes hävd

Allmänt om urminnes hävd

135. Rättsinstitutet urminnes hävd är numera avskaffat. Äldre rättigheter som har tillkommit genom urminnes hävd består emellertid fortfarande (se 6 § lagen, 1970:995, om införande av nya jordabalken, punkten 4 i övergångsbestämmelserna till jaktlagen och punkten 2 i övergångsbestämmelserna till fiskelagen). Vid bedömningen av om en rättighet har uppkommit genom urminnes hävd blir 15 kap. 1 § äldre jordabalken av betydelse. Där angavs:

> ”Det är urminnes hävd: där man någon fast egendom eller rättighet i så lång tid okvald och ohindrad besuttit, nyttjat och brukat haver, att ingen minnes, eller av sanna sago vet, huru hans förfäder, eller fångesmän först därtill komne äro.”

136. Denna bestämmelse härrör från tillkomsten av 1734 års lag. Begreppet urminnes hävd förekommer emellertid redan i Magnus Erikssons och Kristoffers landslagar, tillkomna på 1300-talet respektive 1400-talet.[1] Rättsinstitutet torde ha haft särskilt stor betydelse under 1600-talet.

137. Bestämmelserna om urminnes hävd var i första hand avsedda att tillämpas när tidigare uppodlad jord hade blivit öde och därefter på nytt tagen i bruk. Den som sist hävdade jorden kunde då göra gällande äganderätt till jorden framför tidigare innehavare. Avsikten synes däremot inte ha varit att urminnes hävd skulle kunna grunda rätt till tidigare obruten och oskiftad mark. I 15 kap. 3 § äldre jordabalken föreskrevs särskilt att urminnes hävd inte skulle gälla ”uti öppen skog och mark, byar emellan, utan rå och rör eller annan bolstada skillnad”. Vanligtvis blev urminnes hävd därför aktuell endast i fråga om mindre markområden.

138. I vilken utsträckning det gick att förvärva rätt till obruten och oskiftad mark reglerades varken i landslagarna eller i äldre jordabalken. Före landslagarnas tid hade det varit möjligt att bli ägare till sådan jord genom s.k. ockupation. En nybyggare kunde då förvärva äganderätt till jord som saknade tidigare innehavare genom att odla upp den och därigenom öka dess värde (”specifikation”).

139. Bestämmelserna om urminnes hävd ansågs länge inte kunna tillämpas i fråga om kronojord. 27 Denna uppfattning kom emellertid med tiden att frånfallas i rättspraxis (se NJA 1885 s. 357 och ”Stora Arten” NJA 1932 s. 314).

140. Kriterierna i 15 kap. 1 § äldre jordabalken för när urminnes hävd föreligger får, allmänt sett, anses vara vaga. Klart är dock att urminnes hävd förutsätter att någon under en längre tid har brukat och besuttit den fasta egendomen utan att detta har ifrågasatts av någon annan. I kravet på besittning har i rättspraxis ansetts ligga att objektet för hävden måste vara bestämt avgränsat, dock inte nödvändigtvis med fasta gränsmärken (jfr ”Stora Arten”). Brukandet förutsätts vidare ha varit kontinuerligt och av viss intensitet. Detta har dock inte ansetts utesluta att återkommande användning av mark för t.ex. bete har kunnat läggas till grund för urminnes hävd (jfr ”Slätholmen” NJA 1952 s. 199). Lagtexten preciserar inte hävdetidens längd men i litteraturen har det ansetts att den bör vara ca 90 år (jfr Östen Undén, Svensk sakrätt II, Fast egendom, 6 uppl., 1969, s. 46, jfr även ”Nordmalingdomen” p. 12).

[pp 141-160 uteslutna]

[1] Se Magnus Erikssons landslag, Jordabalken, flock 1: ”Ty lagligt fånget är rätt fånget, och allt olagligt fånget är såsom icke fånget, till dess att urminnes hävd kommer till”.

Frågor om bevisbörda, beviskrav och bevisvärdering

Bevisbörda

161. Vid tillämpningen av 15 kap. äldre jordabalken ansågs det att den som gjorde gällande urminnes hävd hade bevisbördan för sitt påstående. Det finns inte anledning att placera bevisbördan på ett principiellt annat sätt i en tvist av nu aktuellt slag. Samebyn bör alltså som utgångspunkt ha bevisbördan för de omständigheter som grundar urminnes hävd för samer på området. Däremot får staten anses ha bevisbördan för omständigheter som skulle kunna medföra ett upphörande av en rätt som har uppkommit genom urminnes hävd. Till detta kommer att den s.k. falska bevisbördan kan växla mellan parterna (se Per-Olof Ekelöf m.fl., Rättegång IV, 7 uppl., 2009 s. 87 f.).

Beviskrav

162. Målet gäller en talan som en sameby för mot staten. Samebyn representerar ett urfolk. Utgången är beroende av äldre förhållanden som till stora delar är svåra att utreda. Utredningssvårigheterna accentueras av att samernas historia länge inte fanns dokumenterad i några samiska skriftliga källor. Det är tydligt att staten genom historien har haft avsevärt större möjligheter att dokumentera äldre förhållanden. En viss bevislättnad är därför nödvändig för att en sameby ska ha rimliga möjligheter att tillvarata de rättigheter som kan vara knutna till av samer traditionellt brukade områden. (Jfr särskilt artikel 27 i FN:s deklaration om urfolks rättigheter, jfr även artikel 14.2 i ILO:s konvention nr 169 som ger uttryck för samma synsätt.)

163. De beviskrav som ska ställas på samebyn bör mot denna bakgrund anpassas till de särskilda omständigheter som föreligger i ett mål av detta slag. Det innebär bl.a. att det får godtas att vissa ofullständigheter i utredningen om förhållandena på det aktuella området under en viss tidsepok fylls ut genom rimliga antaganden, grundade främst på vad som är känt om förhållandena i andra delar av lappmarkerna eller under näraliggande tidsepoker. Det innebär vidare att det inte kan krävas att det genom utredningen preciseras vilka enskilda individer som har upparbetat rättigheter av det slag som det här är fråga om. Det kan inte heller krävas att utredningen preciserar hur i äldre tider upparbetade rättigheter har övergått till efterföljande generationer.

Frågor om bevisvärdering

164. I ”Skattefjällsdomen” har Högsta domstolen behandlat flera av de svårigheter som möter vid bevisvärderingen rörande frågor om samers rätt till mark. Vad som uttalats där (se särskilt s. 179 ff.) gäller även i detta mål. Av särskild betydelse är att den tillgängliga dokumentationen av äldre förhållanden huvudsakligen består av handlingar från domstolar och administrativa myndigheter. Det finns skäl att räkna

med att förekommande samiska sedvanor inte avspeglas i dessa handlingar eller att de återges på ett bristfälligt eller felaktigt sätt. Man måste också räkna med att i synnerhet material från administrativa myndigheter kan ha påverkats av en benägenhet hos dessa myndigheter att tolka vad som har uppfattats som ett oklart rättsläge till statens förmån, t.ex. för att tillgodose fiskala intressen. Handlingarna ger därför inte alltid en rättvisande bild av rättsutvecklingen, något som manar till försiktighet vid bedömningen.

165. En särskild svårighet är att den historiska utredning som särskilt tar sikte på det aktuella området är förhållandevis begränsad. Av det material som har presenterats i målet är det enbart en skrift – Peter Sköld, Samisk bosättning i Gällivare 1550–1750 (1992) – som innehåller mer än enstaka uppgifter om området. Annan utredning behandlar i första hand andra områden, däribland Kaisa Korpijaakko-Labba, Om samernas rättsliga ställning i Sverige-Finland (1989, svensk översättning 1994), Nils Arell, Rennomadismen i Torne lappmarker – markanvändning under kolonisationsepoken i fr.a. Enontekis socken (1977), Filip Hultblad, Övergång från nomadism till agrar bosättning i Jokkmokks socken (1968) och Nils-Johan Päiviö, Från skattemannarätt till nyttjanderätt (2011). Ytterligare annan litteratur avser helt eller delvis lappmarkerna i stort. Så är fallet med bl.a. Åke Holmbäck, Om lappskattelandsinstitutet och dess historiska utveckling (SOU 1922:10), Lennart Lundmark, Samernas skatteland (2006), Lennart Lundmark och Lars Rumar, Mark och rätt i Sameland (2008) samt det längre utlåtande av Matti Enbuske som staten har gett in i målet. Olika författare har också skilda tidsmässiga fokus.

166. Som har nämnts bör dock även material som i första hand tar sikte på andra områden och andra tidsperioder kunna tillmätas betydelse. Det är emellertid då nödvändigt att beakta de skillnader som kan finnas mellan olika områden, mellan olika grupper av samer och mellan olika tidsperioder. Exempelvis behöver vad som gäller om markanvändning och om samers sedvanor i utpräglade skogsregioner inte gälla i fråga om markanvändning och sedvanor i fjälltrakter. Av särskild betydelse är att det aktuella området tillhör de mest avlägsna delarna av Lappland, dit svensk maktutövning måste antas ha nått senare än på andra håll och där konkurrensen mellan samers och andra folkgruppers intressen sannolikt har varit mindre än i andra delar av Lappland.

167. Till det sagda kommer att det inom den forskning som under det senaste seklet har bedrivits om Lapplands historia finns betydande meningsskiljaktigheter om bl.a. vilka rättigheter samerna har förvärvat genom historien. Även detta ger anledning till försiktighet vid värderingen av det åberopade forskningsmaterialet.

Högsta domstolens bedömning av frågan om urminnes hävd i detta mål

Förhållandena på området fram till medeltidens slut

168. Det är uppenbart att det sedan mycket lång tid har funnits en samisk befolkning i Lappland. LÖs vittnesmål och i målet ingivna utlåtanden ger ett starkt stöd för att det redan i slutet av järnåldern vistades samer också på det i målet aktuella området. Utredningen medger emellertid inga närmare slutsatser om förhållandena på området före medeltidens slut, t.ex. om vilka normer om användningen av mark och vatten som gällde inom det samiska samfundet. Inte heller medger utredningen några slutsatser om huruvida det förekom andra folkgrupper på området.

169. Det är tydligt att den svenska kungamakten under senmedeltiden hade som ambition att utsträcka sitt inflytande till lappmarkerna. Det framstår emellertid som osäkert om svensk maktutövning nådde fram till det aktuella området före medeltidens slut. Ännu mindre går det att säga att svensk rätt faktiskt tillämpades där.

Rättsläget vid medeltidens slut

170. Utredningen ger alltså inte stöd för att svensk rätt tillämpades på området före medeltidens slut. Särskilt mot bakgrund av vad som är känt om rättstillämpningen i lappmarkerna under senare tidsepoker kan det antas att samerna under medeltiden använde sig av samisk sedvanerätt för att reglera sina förhållanden. För att sedvanerätt ska kunna tillmätas någon vikt måste dock dess innebörd klarläggas (se p. 129). Vad som närmare gällde enligt samisk sedvanerätt under medeltiden är emellertid oklart.

171. Det går därmed inte att säga om det före medeltidens slut hade utvecklats några rättigheter för enskilda samer eller samiska kollektiv som skulle kunna ha rättslig relevans i dag.

Förhållandena på området från medeltidens slut till mitten av 1700-talet

172. Mer konkreta uppgifter om de rättsliga förhållandena i Lappland föreligger först för tiden från mitten av 1500-talet, då Gustav Vasa införde ett system för direkt beskattning. Den maktutövning som detta föranledde – och som hanterades genom kungliga fogdar – berörde också det aktuella området.

173. När det gäller befolkningen i Lappland i stort bestod den i slutet av 1500-talet av allt att döma enbart av samer. Det finns ingen anledning att anta att det förhöll sig annorlunda på det aktuella området. Det står visserligen klart att Lappland också

besöktes av kustbönder och av s.k. birkarlar.[2] I vilken utsträckning dessa uppehöll sig så långt inne i landet som på området – och i vilken utsträckning detta i så fall skedde annat än tillfälligt – går inte att säga; de geografiska förhållandena talar närmast för att sådana besök var fåtaliga. Några nybyggare förekom över huvud taget inte på området under 1500-talet.

174. Kungamakten övertog från andra hälften av 1500-talet vissa rättsvårdande funktioner i Lappland och från första hälften av 1600-talet övergick delar av tidigare samisk rättskipning till svenska häradsrätter. I dessa förblev dock det samiska inflytandet betydande, eftersom häradsrättens nämnd helt eller delvis utgjordes av samer. Allt talar för att samisk sedvanerätt länge tillmättes stor betydelse i häradsrätternas rättskipning.

175. Det samiska samhället i Lappland var organiserat i samebyar (i äldre dokument benämnda ”lappbyar”). Utredningen i målet ger inga närmare besked om lappbyarnas inre organisation. Det har emellertid inom forskningen tagits för givet att det inom lappbyarna fanns funktioner för gemensamt beslutsfattande och gemensam rättskipning. Det måste antas att förhållandena var desamma i den lappby, som området under den nu aktuella perioden förefaller ha ingått i (Sirkas och efter år 1647 Kaitum).

176. Det förekom också en ytterligare uppdelning genom ordningen med s.k. lappskatteland. Av de lappskatteland som finns upptagna i 1695 års jordebok förefaller sju ha varit belägna på det i målet aktuella området. De förhållanden som förelåg i den relativt närbelägna samebyn Rounala (beskrivna av Korpijaakko-Labba, se p. 165) får antas ha gällt även här, dvs. marken var i stor utsträckning uppdelad mellan samefamiljer och man skilde, när det gäller t.ex. renbetesmarker och fiskevatten, på ”mitt och ditt”. Mellan lappskattelanden fanns allmänningar som, likt lappskattelanden, användes för renbete.

177. I målet har redovisats olika uppfattningar om huruvida den nu berörda uppdelningen hade rent samiskt ursprung eller om den tillkom först genom åtgärder från svenska fogdars eller domstolars sida. Den uppfattning som redovisas av Holmbäck i SOU 1922:10 (s. 27 f.), nämligen att indelningen gick tillbaka på samiska sedvänjor och således var ett uttryck för ett gammalt samiskt markanvändningssystem, framstår emellertid som övertygande.

178. Indelningen i lappskatteland kom så småningom att avspeglas i häradsrätternas protokoll och från mitten av 1600-talet var det, såvitt gäller lappmarkerna i stort, häradsrätterna som beslutade om att godkänna någon som innehavare av ett lappskatteland (”inrymning”). Det förekom också att häradsrätterna hanterade tvister

[2] Birkarlarna brukar vanligen beskrivas som ett slags handelsmän.

om nyttjande av lappskattelanden. Prövningen skedde under beaktande av samisk sedvänja. Den närmare innebörden av denna sedvänja är inte utredd i målet. Det står dock klart att ett anspråk på ett lappskatteland kunde grundas på t.ex. arv eller hävd men det finns också enstaka exempel på att häradsrätten tog hänsyn till den enskilde samens behov. Det finns ingenting som tyder på att frågor av detta slag hanterades annorlunda inom det aktuella området än i andra delar av lappmarkerna.

179. Såväl i parternas argumentation som inom den forskning som har presenterats i målet förekommer olika uppfattningar om huruvida lappskattelanden utgjorde skattejord eller kronojord.[3] Det är tydligt att häradsrätterna ibland tillämpade de rättsregler som gällde för skattejord även på lappskattelanden. Kronans företrädare förefaller ibland ha behandlat lappskattelanden som skattejord, ibland som kronojord. Innehavaren av ett lappskatteland förutsattes betala skatt. Det är omdebatterat om den skatt som togs ut utgjorde en jordskatt eller en personell skatt. Det är dock klart att skatten från år 1695 togs ut genom samebyarna och inte från de enskilda samerna. Den jordebok som upprättades det året tyder på att samer på området beskattades på samma sätt som samer i andra delar av lappmarkerna.

180. Från andra hälften av 1600-talet uppmuntrade kronan kolonisation av lappmarkerna genom anläggande av nybyggen. Det skedde bl.a. genom utfärdande av särskilda förordningar som reglerade villkoren för nybyggarna, särskilt 1673 och 1695 års lappmarksplakat.31 Kolonisationen tog fart först under 1700-talet och föranledde då en ytterligare nybyggarförordning, 1749 års lappmarksreglemente (jfr p. 65). På området kom dock endast två nybyggen att anläggas, Neitisuando (ca 1680) och Killingi (1725), båda belägna i områdets östra del.

[pp 181-202 uteslutna]

203. En sista fråga i denna del är vilken betydelse det har att kronans företrädare från och med andra hälften av 1600-talet återkommande gjorde gällande att lappmarkerna tillhörde kronan. Frågan får särskild betydelse mot bakgrund av att jakträtten och fiskerätten redan vid denna tid i princip kopplades till äganderätten till marken respektive stranden (låt vara att skattebönder i södra och mellersta Sverige länge saknade rätt till jakt på småvilt).

204. Det förhållandet att staten gjorde gällande att lappmarkerna utgjorde kronans egendom får emellertid anses sakna betydelse. Att staten framställde äganderättsanspråk kan inte i sig anses ha inneburit att staten protesterade på ett sätt

[3] Med skattejord avses jord som innehades med det slag av äganderätt som en skattebonde vid denna tid hade till sin jord (skattemannarätt). Kronojord utgjorde jord som ägdes av kronan. Skattejorden kännetecknades bl.a. av att jordinnehavet var förenat med skattskyldighet.

som skulle kunna hindra uppkomsten av en på urminnes hävd grundad jakträtt eller fiskerätt. När det särskilt gäller anspråken i 1683 års skogsordning (jfr p. 54) var dessa av obestämd karaktär och konkretiserades först genom en rättsutveckling som ännu inte var avslutad vid utgången av den nu aktuella perioden, dvs. vid mitten av 1700-talet. De anspråk som framställdes under 1600- och 1700-talen var inte heller inriktade på jakt och fiske.

205. Den samlade bedömningen måste bli att det i vart fall vid mitten av 1700-talet hade utvecklats en rätt för enskilda samer att råda över jakten respektive fisket på området. Rätten grundade sig på att samerna under lång tid, kontinuerligt och utan protester från vare sig kronan eller andra hade utövat jakt och fiske på området, att detta brukande hade varit det helt dominerande i förhållande till jakt- och fiskeutövning av andra, att brukandet hade varit förenat med upplåtelser av jakt och fiske och att samernas rätt att göra sådana upplåtelser inte hade ifrågasatts.

206. Kronan gav under denna period inte uttryck för några egna anspråk på att råda över jakten och fisket. Den rätt att råda över jakten och fisket som samerna hade upparbetat måste därför bedömas som en ensamrätt i förhållande till kronan.

207. Jakträtten och fiskerätten tillkom de enskilda samer som vid var tid nyttjade området. Det kan, som har framhållits, inte krävas att det i målet närmare klarläggs vilka dessa samer var (se p. 163).

208. I det följande behandlas frågan om rättigheterna påverkades av de förändrade förutsättningar som inträdde under perioden fram till ikraftträdandet av 1886 års renbeteslag.

Förhållandena från mitten av 1700-talet till år 1886

209. Från mitten av 1700-talet gjorde länsstyrelserna i ökande grad gällande att lappskattelanden utgjorde kronojord och från ca år 1800 kom denna uppfattning också att få fullt genomslag i häradsrätterna. Vid tiden för tillkomsten av 1886 års lag var, som redan har konstaterats, den etablerade uppfattningen att lappmarkerna tillhörde kronan.

210. Frågan om någon skulle godkännas som innehavare av ett lappskatteland (dvs. beslut om inrymningar, jfr p. 178) kom som en följd av detta att avgöras av länsstyrelserna i stället för av häradsrätterna. I Norrbottens län, där området är beläget, utvecklade länsstyrelsen en praxis som innebar att inrymningar gällde enbart för innehavarens livstid och att någon arvsrätt till lappskattelanden inte erkändes. Antalet lappskatteland kom sedan att minska och i slutet av 1800-talet förefaller det inte ha funnits några lappskatteland på området. Detta berodde av allt att döma inte bara på

länsstyrelsens agerande utan hade också andra orsaker. En sådan var att lappskattelanden var alltför små för den mer extensiva renskötsel med större förflyttningar som samerna successivt övergick till.

211. Under den nu aktuella perioden fortsatte kolonisationen av Lappland och länsstyrelserna kom så småningom att tillåta ytterligare nybyggen utan att inhämta berörda samers tillåtelse. Nybyggarna hade, genom 1749 års lappmarksreglemente, tillerkänts en uttrycklig rätt att jaga och fiska, låt vara att rätten att fiska bara gällde till husbehov och att rätten att utöva jakt var begränsad till ett område inom en halvmil från nybygget (se p. 188). För det aktuella området synes kolonisationen i och för sig ha haft begränsad betydelse, eftersom det inte tillkom några ytterligare byar efter år 1750. Man måste emellertid räkna med att antalet nybyggare ändå ökade.

212. Den nu angivna utvecklingen synes emellertid inte ha fått några påtagliga effekter för renskötseln, jakten eller fisket på området. Renskötseln fortsatte; i 1883 års kommittéförslag anges att det vid den tiden fanns sammanlagt 45 000 renar i samebyarna Norrkaitum[4] och Sörkaitum (s. 30). Av 1876 års jordebok framgår att samebyn fortsatte att betala skatt. Det får antas att när ordningen med lappskatteland upphörde så fortsatte samerna ändå att bruka mark och vatten på området, även om detta brukande till följd av förändringar av renskötseln i högre grad skedde gemensamt. Som vittnesförhöret med BS utvisar var jakten och fisket fortfarande viktiga för samerna på området.

213. Inte heller i fråga om denna period finns det några uppgifter om att kronan uppställde begränsningar i samernas rätt att jaga eller fiska. Det förekommer inte heller några uppgifter om att kronan utövade jakt eller fiske på vare sig området eller intilliggande områden. Materialet i målet innehåller inte heller något som tyder på att kronan gjorde några upplåtelser av rätt till jakt eller fiske.

Slutsatser om rättsutvecklingen från mitten av 1700-talet till år 1886

214. Frågan är då hur den nu angivna utvecklingen påverkade den rådighet över jakt och fiske på området som samer – enligt vad som tidigare har konstaterats (se p. 205 ff.) – hade vid mitten av 1700-talet.

215. För att redan etablerade rättigheter ska upphöra att gälla krävs antingen att rättighetsinnehavaren efterger sin rätt eller att rättigheten utsläcks genom lagstiftning eller expropriation. Såväl ett eftergivande som ett utsläckande måste vara tydligt och definitivt.

[4] Norrkaitum är en tidigare benämning på Girjas sameby.

216. Det finns ingenting i utredningen som tyder på att de samer som vistades på området eftergav rådigheten över jakten och fisket. De samer som var verksamma i samebyn fortsatte att bedriva renskötsel, jakt och fiske på området. Detta påverkades av allt att döma inte av att ordningen med lappskatteland upphörde.

217. Kronans agerande under 1700- och 1800-talen innebar i och för sig på flera sätt att samernas rådighet över området ifrågasattes. Ett exempel är att länsstyrelsen, under hänvisning till att jorden utgjorde kronojord, övertog ansvaret för besluten om inrymningar av lappskatteland från häradsrätterna. Det tillkom också nya författningar där rätten till jakt och fiske på oavvittrad mark och kronoallmänning reglerades på särskilt sätt (jfr p. 63 f.). Ingen av dessa åtgärder utgjorde dock ett sådant tydligt och definitivt ianspråktagande av samernas jakträtt eller fiskerätt som hade krävts för att de redan etablerade rättigheterna skulle upphöra.

218. Av det som nu har sagts följer att rätten att råda över jakten och fisket vid tiden för tillkomsten av 1886 års renbeteslag tillhörde enbart de samer som då verkade på området.

Kan Girjas sameby göra gällande de rättigheter som tidigare hade upparbetats av samer på området?

219. 1886 års lag innebar en väsentlig nyhet genom att de rättigheter som genom lagen knöts till renskötseln, däribland rätten att jaga och fiska, kom att gälla enbart renskötande samer (jfr p. 74). Detta uttrycktes visserligen inte i lagtexten men framgick av sammanhanget och tydliggjordes genom senare renbeteslagar. Det infördes också en obligatorisk indelning i lappbyar (senare benämnda samebyar). Genom de efterföljande renbeteslagarna fick samebyarna en fastare organisation och de tillerkändes slutligen, genom 1971 års rennäringslag, rättskapacitet med behörighet att företräda sina medlemmar. Effekten av lagstiftningen får anses vara att den rätt till renbete som före ikraftträdandet av 1886 års lag tillkom enskilda samer på området kom att övergå till medlemmarna i den sameby där området är beläget, dvs. Girjas sameby.

220. På motsvarande sätt får de jakt- och fiskerättigheter som samerna på området hade vid tillkomsten av 1886 års lag genom lagstiftningen anses ha övergått till medlemmarna i Girjas sameby. Visserligen är dessa rättigheter mer omfattande än den rätt att jaga och fiska som kommer till uttryck i 1886 års lag och följande lagar. Det finns emellertid inte anledning att i detta hänseende göra någon åtskillnad på den rätt att jaga och fiska som följer av rennäringslagen och den mer omfattande rätt avseende jakten och fisket som samerna i Girjas sameby kunde göra gällande.

221. Den jakträtt och fiskerätt som samerna på området hade vid tiden för tillkomsten av 1886 års lag får alltså anses ha övergått på medlemmarna i samebyn. När det gäller de befogenheter som ingår i jakträtten och fiskerätten kan medlemmarna själva utöva jakten respektive fisket. Befogenheten att upplåta jakt respektive fiske till andra kan de däremot – i enlighet med allmänna principer om förfogande över samfälld egendom – inte utöva på egen hand. Rätten att göra upplåtelser får i stället anses tillkomma den association som har tillskapats för att tillgodose medlemmarnas gemensamma intressen, dvs. samebyn.

Betydelsen av 31–34 §§ rennäringslagen i detta mål

222. Det är alltså i dag samebyn som för medlemmarnas räkning innehar rätten att upplåta jakt och fiske på området. Det innebär att staten inte innehar den jakträtt och fiskerätt som normalt följer med äganderätt till mark och vatten. Staten har förklarat att den, under sådana förhållanden, inte gör gällande att 31–34 §§ rennäringslagen utgör hinder mot att bifalla talan i målet.

223. Statens förklaring utgör en för domstolen bindande processhandling. Det finns därför inte anledning att i detta mål pröva betydelsen av 31–34 §§ rennäringslagen.

Sammanfattande slutsats i denna del

224. Högsta domstolen har i det föregående gjort bedömningen att det i vart fall vid mitten av 1700-talet hade utvecklats en i förhållande till kronan exklusiv rätt för samer på området att råda över jakten respektive fisket. Från mitten av 1700-talet och fram till tillkomsten av 1886 års renbeteslag försvagades samernas faktiska position genom olika statliga åtgärder. Ingen av dessa åtgärder var dock av det tydliga och definitiva slag som skulle ha kunnat utsläcka rätten att råda över jakten och fisket.

225. Den jakträtt och fiskerätt som samerna på området sålunda hade vid tiden för tillkomsten av 1886 års lag har genom den lagen och följande renbetes- och rennäringslagar övergått till medlemmarna i samebyn. I dag är det alltså samebyn som för medlemmarnas räkning innehar rätten att upplåta jakt och fiske på området.

226. Av det nu sagda följer *att* samebyn får upplåta rätt till jakt och fiske på området utan statens samtycke *och att* staten inte får göra sådana upplåtelser.

Högsta domstolens slutsatser i målet

227. Samebyn har i målet gjort gällande att den har en rätt att upplåta jakt och fiske på området och att denna rätt utgör en ensamrätt i förhållande till staten. Högsta domstolen har funnit att rennäringslagen inte ger någon sådan rätt (jfr p. 42 ff.) men att en motsvarande rätt – avseende det aktuella området – har etablerats genom de rättigheter som enskilda samer tidigare har förvärvat genom urminnes hävd (jfr p. 125 ff.).

228. Följaktligen ska samebyns förstahandsyrkande avseende rätten till upplåtelse på området bifallas. Området utgörs av sådan kronomark som är belägen ovanför odlingsgränsen och som står under statens omedelbara disposition. Det motsvarar därmed den del av samebyns nuvarande byområde som omfattas av 32 § rennäringslagen. Domslutet bör formuleras i enlighet med detta.

Rättegångskostnad

229. Vid denna utgång ska staten ersätta samebyn för rättegångskostnad även i Högsta domstolen. Om beloppet råder inte tvist.

I avgörandet har deltagit: justitieråden Anders Eka, Johnny Herre (skiljaktig), Agneta Bäcklund (skiljaktig), Ingemar Persson och Sten Andersson (referent) Föredragande justitiesekreterare: Maria Ulfsdotter Klang

SKILJAKTIG MENING

Justitieråden Johnny Herre och Agneta Bäcklund är skiljaktiga beträffande motiveringen och anför följande.

Vi ansluter oss till majoritetens domskäl t.o.m. punkten 97. Vi anser att domskälen därefter ska ha följande innehåll.

Inledande utgångspunkter

98. Samerna är ett urfolk i den mening som avses i exempelvis FN:s deklaration om urfolks rättigheter. Av folkrättsliga principer följer att urfolk typiskt sett har rätt att få sitt traditionella land definierat, avgränsat och erkänt samt skyddat från intrång.

99. Sedvanor har präglat samernas liv och de områden där de verkat. Samernas kultur – inbegripet hur samerna bedrev och organiserade renskötseln och annan verksamhet – har i äldre tid endast i mycket begränsad utsträckning nedtecknats av dem själva. Det

skiljer sig från vad som gällt för statens beslut och agerande i övrigt. Mycket av dokumentationen rörande relevanta omständigheter har alltså upprättats av staten. Vid prövning av frågor i en tvist som den aktuella beträffande rätten att utnyttja naturresurser i form av jakt och fiske finns det som utgångspunkt anledning att ta hänsyn till folkrättsliga principer och till den bristande jämvikt som råder mellan parterna.

100. En annan utgångspunkt är att lagstiftaren på olika sätt har haft problem med att passa in samernas rättigheter i rättssystemet i övrigt. Gängse begrepp och konstruktioner har ofta ansetts passa mindre väl när det varit fråga om att reglera samerättsliga frågor. Till detta kommer att lagstiftaren kan ha haft ofullständiga kunskaper om samiska förhållanden och att regleringen även i övrigt har haft och fortfarande har brister i fråga om stringens. Som exempel kan nämnas att det i 1886 års lag var oklart vilka områden som omfattades av regleringen i 22 § och bestämmelserna om statens rätt att upplåta jakt och fiske i vissa fall (jfr 31 § i 1898 års lag, jfr även Tomas Cramér och Gunnar Prawitz, Studier i renbeteslagstiftning, 1970, s. 21 ff.).

101. Det råder ingen tvekan om att samerna enligt ordalydelsen i 1886 års lag saknade och i nuvarande lag, 1971 års rennäringslag, saknar rätt att upplåta jakt och fiske till andra. Utformningen av lagtexten i 1886 års lag kan dock inte tas till intäkt för att lagstiftarens uppfattning var att samerna vid lagens tillkomst inte hade rätt att upplåta jakt och fiske på de för samerna avsatta områdena. Frågan är om upplåtelsebestämmelserna ger uttryck för statens bestämmande över egna rättigheter eller ett bestämmande över samernas rättigheter.

102. Statens argumentation i målet bygger på att staten som fastighetsägare har rätt att upplåta jakt och fiske på de aktuella områden som regleras i lagen och att det är den rätten som utövas genom regleringen i rennäringslagen. I 1886 års lagstiftningsärende gavs också uttryck för uppfattningen att staten var ägare till de aktuella markerna.

103. Vid tiden för tillkomsten av 1886 års lag kan dock inte sägas att äganderättsbegreppet entydigt hade samma innebörd som i dag, särskilt beträffande kopplingen mellan ägandet av mark och de rättigheter till jakt och fiske som förelåg. Att staten var ägare till mark betydde inte självklart att staten innehade alla de rättigheter som i dag tillkommer en fastighetsägare. Det sagda gör sig särskilt gällande i sådana områden som nu diskuteras, där samerna vistats under lång tid.

104. En ytterligare utgångspunkt som måste beaktas är att den som innehar ensamrätt till att jaga och fiska normalt också har rätt att upplåta jakt och fiske till andra och att den som saknar rätt att jaga eller fiska normalt saknar rätt att göra upplåtelser.

Tolkning av nuvarande reglering i ljuset av 1886 års lag och de förhållanden som rått dessförinnan

105. Rennäringslagens bestämmelser om jakt och fiske går tillbaka på tidigare renbeteslagar. 1886 års lag var avsedd att utgöra en kodifiering av bl.a. ”gammal sedvana”. Lagstiftaren ger uttryck för att sedvanan (”av ålder”) grundade rättigheter för samerna. I förarbetena ger lagstiftaren också uttryck för att samernas nyttjande levde upp till kraven på urminnes hävd. Det rättsläge som rådde vid tillkomsten av 1886 års lag, bl.a. beträffande vad som gällde i fråga om rådigheten över markerna, är därför ett tolkningsdatum för att bestämma innebörden i 1886 års lag och senare lagstiftning. Vid en tolkning av 1886 års lag måste också samernas och rennäringens förhållanden vid tiden för lagens tillkomst beaktas. Även den då gällande lagstiftningen om jakt och fiske har betydelse för bedömningen av regleringen.

Förhållanden vid tillkomsten av 1886 års lag

106. Det är uppenbart att det sedan mycket lång tid har funnits en samisk befolkning på de områden i Sverige som målet avser. Utredningen ger inte stöd för att svensk rätt tillämpades på samiska områden före medeltidens slut. Det kan antas att samerna under medeltiden använde sig av samisk sedvanerätt för att reglera sina förhållanden.

107. Från andra hälften av 1500-talet måste rättsläget där samerna verkade bedömas med utgångspunkt i då gällande svensk rätt (för Jämtland och Härjedalen först sedan dessa områden blev svenska år 1645). Kungamakten övertog rättsvårdande funktioner och från första hälften av 1600-talet övergick delar av tidigare samisk rättskipning till svenska häradsrätter. I dessa förblev dock det samiska inflytandet betydande, eftersom häradsrätternas nämnder helt eller delvis utgjordes av samer. Allt talar för att samisk sedvanerätt länge tillmättes stor betydelse i häradsrätternas rättsskipning.

108. Det samiska samhället var i stor utsträckning organiserat i samebyar (i äldre dokument benämnda ”lappbyar”). Indelningen gick tillbaka på samiska sedvänjor och var således ett uttryck för ett gammalt samiskt markanvändningssystem (jfr Åke Holmbäck, Om lappskattelandsinstitutet och dess historiska utveckling, SOU 1922:10, s. 27 f.).

109. Det förekom en ytterligare uppdelning genom en ordning med lappskatteland. De förhållanden som förelåg under den tiden i Rounala (jfr Kaisa Korpijaakko-Labba, Om samernas rättsliga ställning i Sverige-Finland, 1989, svensk översättning 1994) får antas ha gällt generellt. Marken var alltså i stor utsträckning uppdelad mellan samefamiljer och man skilde på "mitt och ditt" vad gäller t.ex. renbetesmarker, jaktmarker och fiskevatten.

110. Befogenheten att fiska ansågs vara en sådan egendomsrätt som kunde överlåtas, ärvas eller pantsättas; det måste antas att detsamma gällde i fråga om befogenheten att jaga. Den före år 1750 rådande uppfattningen var att den rätt att jaga eller fiska som enskilda samer hade typiskt sett utgjorde en ensamrätt och att det i denna ingick en rätt att bestämma om upplåtelser av jakten respektive fisket till andra.

111. Under 1800-talet inleddes slutförandet av avvittringarna (se p. 48). I samband därmed uttalades i förarbetena att det inte kom i fråga ”att genom lagstiftningsåtgärder frånhända Lapparne någon rätt, hvaraf de fortfarande äro i laglig besittning” (se prop. 1873:4 s. 13).

112. Från kronans sida uppställdes på ett generellt plan inte några begränsningar i fråga om samernas rätt att jaga eller fiska under perioden fram till år 1886. Det finns inget som talar för att myndigheterna över huvud taget ingrep mot den jakt- eller fiskeverksamhet som samer bedrev, vare sig genom talan vid domstol eller på annat vis. Tvärtom får kronan anses ha accepterat att samer bland annat upplät jakt och fiske till andra. När exempelvis frågor om jakt och fiske kom upp vid häradsrätterna, gällde det vanligen tvister mellan samer och nybyggare eller bönder eller tvister mellan samer.

113. Några tydliga exempel på jakt- eller fiskeutövning från kronans sida fram till 1886 års lag har inte presenterats i målet. Materialet innehåller inte heller några exempel på att kronan själv gjorde några privaträttsliga upplåtelser av jakt- eller fiskeutövningsrätt till andra. Till det kommer att utredningen inte ger stöd för att sådan jakt och sådant fiske eller privaträttsliga upplåtelser var befogenheter som staten ansåg sig ha på aktuella områden.

114. I 1808 års jaktstadga föreskrevs exempelvis att kronan hade jakträtten på kronoallmänningar. Det framgår dock av förarbetena till 1864 års jaktstadga att den bestämmelsen aldrig efterlevdes på oavvittrad mark eller kronoöverloppsmark i norra Sverige. De boende ansåg sig tvärtom ha rätt att jaga på sådan mark och de hade även efter 1808 års stadga fortsatt med sin jakt utan att detta påtalades av kronan. Det föreskrevs därför i 1864 års jaktstadga att jakten på sådan mark tills vidare skulle vara fri för varje svensk man. I princip motsvarande bestämmelser fanns i 1852 års fiskeristadga. Dessa förhållanden betecknades som undantag från kronans jakträtt eller undantag från den allmänna principen om strandägarens fiskerätt.

115. Statens agerande under 1700- och 1800-talen innebar i och för sig åtgärder som kunde förstås som ett ifrågasättande av att samernas hade all den rådighet som följer med en äganderätt som begreppet i dag får förstås. Ingen av dessa åtgärder utgjorde dock ett ianspråktagande av samernas jakträtt eller fiskerätt.

116. Den samlade utredning som presenterats i målet talar för att rätten på de aktuella områdena – dvs. områdena ovanför odlingsgränsen i Västerbottens och Norrbottens län samt renbetesfjällen i Jämtlands län – att råda över jakten och fisket vid tiden för tillkomsten av 1886 års renbeteslag faktiskt tillkom samerna. Det skulle innebära att samerna hade ensamrätten – och därmed den exklusiva rätten i förhållande till staten – till jakten och fisket, att de ensamma fick jaga eller fiska på markerna för husbehov och avsalu samt att de hade en rätt att upplåta jakt eller fiske till andra.

[pp 117-159 uteslutna]

Slutsatser

160. Det anförda kan sammanfattas på följande sätt.

• Vid tiden för tillkomsten av 1886 års lag hade samerna sannolikt ensamrätt att jaga och fiska på aktuella områden. Samerna hade också upplåtit jakt och fiske och mycket talar för att de även hade rätt att upplåta jakt och fiske på dessa marker.

• Inget talar för att staten hade rätt att jaga och fiska på aktuella marker när lagen antogs, vilket talar emot att staten skulle ha haft en rätt att upplåta jakt och fiske vid den tidpunkten.

• Regleringen i 1886 års lag syftade i stor utsträckning till en kodifiering av vad som tidigare hade gällt för samerna. Även om lagtexten är i viss mån oklar kan den tolkas som att det var samernas rätt att upplåta jakt och fiske som reglerades. Resonemangen i förarbetena till lagen talar för att samerna vid den tidpunkten ansågs ha upplåtelserätten och att bestämmelserna innebar att staten förfogade över samernas upplåtelserätt.

• Att så var fallet vinner också stöd i att detta skulle vara väl förenligt med gällande reglering om jakt och fiske på samfälld mark med krav på enighet mellan rättighetsinnehavarna för jakten och majoritetsbeslut för fisket. Lagstiftaren bedömde det emellertid – med hänvisning till att ”lappsamfund” var föga ägnade att förhandla till gemensamt beslut – vara mindre lämpligt att etablera en sådan ordning när det gäller upplåtelser av jakt och fiske på aktuella områden. I stället tog staten på sig den uppgiften.

• Härtill kommer att huvudregeln om att jakt- och fiskerätt följde med ägandet inte, såvitt framgår av vad som angavs i lagförarbetena, synes ha varit styrande vid utformningen av regleringen.

• Tolkningen att det var samernas rätt som disponerades genom statens upplåtelser får också stöd av senare uttalanden i bland annat statliga utredningar och av den position staten intog i rättsprocesser under 1900-talet.

161. Övervägande skäl talar därför för att lagstiftaren vid tillkomsten av 1886 års renbeteslag avsåg att reglera den jakträtt och fiskerätt som i grunden tillhörde samerna. Några väsentliga förändringar i lagstiftningen som påverkar denna tolkning har inte skett. Det talar för att det är samernas rätt som fortfarande regleras men som disponeras av staten på sätt som följer av regleringen i 31–34 §§ rennäringslagen.

Den rätt samerna hade att upplåta jakt och fiske har övergått till samebyarna

162. De jakt- och fiskerättigheter som samerna hade vid tillkomsten av 1886 års lag får genom lagstiftningen anses ha övergått till medlemmarna i samebyarna. När det gäller de befogenheter som ingår i jakträtten och fiskerätten kan medlemmarna själva utöva jakten respektive fisket. Befogenheten att upplåta jakt respektive fiske till andra kan medlemmarna däremot – i enlighet med allmänna principer om förfogande över samfälld egendom – inte utöva på egen hand. Rätten att göra upplåtelser får i stället anses tillkomma den association som har tillskapats för att tillgodose medlemmarnas gemensamma intressen, dvs. samebyn.

Diskrimineringsfrågan

163. Av det föregående kan den slutsatsen dras att statens förfogande över upplåtelserna ska betraktas som att staten hanterar samernas upplåtelserätt. Med det synsättet kan det, som anförts, ifrågasättas om lagens upplåtelsebestämmelser kan upprätthållas eller om bestämmelserna, med de skäl som uppbär dem, står i strid med reglerna om förbud mot diskriminering i 2 kap. 12 § regeringsformen och artikel 14 i Europakonventionen (jfr p. 96 med ytterligare hänvisningar) och att de som en följd av detta ska åsidosättas.

164. Det nu sagda innebär emellertid att staten inom det område som målet gäller inte innehar den jakträtt och fiskerätt och därmed inte den upplåtelserätt som normalt följer med äganderätten till mark och vatten. Staten har förklarat att den, under sådana förhållanden, inte gör gällande att regleringen i 31–34 §§ rennäringslagen ska tillämpas i målet med avseende på jakten och fisket. Statens förklaring utgör en för domstolen bindande processhandling. Den uttryckliga lagregleringen utgör alltså i detta mål inget hinder mot att bifalla talan i målet. Det finns därför inte anledning att i detta mål pröva om regleringen i sig ska åsidosättas till följd av att den är diskriminerande.

Slutsatser i målet

165. Samebyn har i målet gjort gällande att den har en rätt att upplåta jakt och fiske på området och att denna rätt utgör en ensamrätt i förhållande till staten. Rennäringslagen får – tillsammans med statens inställning rörande tillämpningen av 31–34 §§ rennäringslagen – anses ge samebyn en sådan rätt.

166. Följaktligen ska samebyns förstahandsyrkande bifallas.

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Med denna avvikande uppfattning i lagtolkningsfrågan ansluter vi oss till majoritetens skäl i punkterna 125–229 och anser alltså, i likhet med majoriteten, att samebyn också har en ensamrätt i förhållande till staten att upplåta jakt och fiske på området som är grundad på urminnes hävd.

HFD 2015 ref 16

Ett beslut om villkor om alkolås har undanröjts till följd av att körkortshavaren intagit narkotikaklassat läkemedel i enlighet med läkares ordination.

Lagrum:
5 kap. 19 § 2 och 23 § körkortslagen (1998:488)

Sedan A.J. gjort sig skyldig till rattfylleri 2008 och 2011 beslutade *Transportstyrelsen* den 19 april 2012, efter ansökan från A.J., att förena hans körkortsinnehav med villkor om alkolås. Under villkorstiden fick han ett höftimplantat inopererat. I samband med detta intog han under en veckas tid och i enlighet med läkares ordination smärtlindrande läkemedel. Läkemedlet var narkotikaklassat. Transportstyrelsen fick kännedom om medicineringen och undanröjde i beslut den 12 juni 2013 beslutet om villkor om alkolås med hänvisning till att A.J. brukat narkotika. Transportstyrelsen beslutade vidare att återkalla hans körkort och bestämde en spärrtid.

A.J. överklagade Transportstyrelsens beslut hos förvaltningsrätten och yrkade att beslutet skulle undanröjas. Han anförde bl.a. följande. Medicineringen hade stått utom hans kontroll och hade skett inom ramen för en medicinsk behandling. Han ifrågasatte det rimliga i hur man vid nedsövning i narkos i samband med operation förväntas ha kontroll över vilka preparat som tillförs kroppen. Vidare kan det knappast vara försvarbart ur etisk eller medicinsk aspekt att medvetet inte ordinera smärtlindring som avhjälper svår akut smärta. Om han haft kunskap om reglerna hade han självfallet upplyst ortopedkirurgen och annan narkospersonal om förutsättningarna. Med hänsyn till hans arbetssituation och resor vid kundbesök var det högst angeläget för honom att ha tillgång till bil.

Transportstyrelsen ansåg att överklagandet skulle avslås och anförde bl.a. följande. Transportstyrelsen har undanröjt A.J:s villkor om alkolås och återkallat hans körkort på grund av att han brukat narkotika och därmed inte längre uppfyller kraven på lämplighet för körkortsinnehav med villkor om alkolås. Under villkorstiden gäller att körkortshavaren ska avhålla sig från att bruka narkotika som avses i 8 § narkotikastrafflagen (1968:64), vilket även omfattar läkemedel enligt läkares ordination som är klassificerade som narkotika. Av förarbetena till körkortslagen framgår att ett villkorsbeslut ska undanröjas om körkortshavaren under villkorstiden inte avhåller sig från att bruka narkotika. Det framgår även att det i dessa fall inte görs någon särskild lämplighetsprövning. Eftersom någon lämplighetsprövning inte görs finner Transportstyrelsen att det inte finns utrymme för att göra åtskillnad mellan sådana situationer där körkortshavaren medvetet har brukat narkotikaklassade läkemedel, och situationer där körkortshavaren givits narkotikaklassade läkemedel utan egen vetskap. Transportstyrelsen upplyser om den viljeförklaring som A.J. skrivit under. Genom den visar

den enskilde att denne är villig att uppfylla kraven som gäller för körkortsinnehav med villkor om alkolås. Ett av de krav som framgår av viljeförklaringen är att man inte får använda narkotikaklassade läkemedel eller annan narkotika.

Efter Transportstyrelsens yttrande kontaktade A.J. anestesikliniken i Örebro och fick följande information om smärtlindring; ”under operationen och efterbehandlingen vid höftimplantatoperationer är det en absolut nödvändighet att ge narkotiska medel (opiater) för att uppnå den mest adekvata och optimala smärtlindringen”. Han har aldrig befattat sig med narkotiska medel och fann det märkligt att Transportstyrelsen ifrågasätter rätten till en adekvat smärtlindrande behandling.

Förvaltningsrätten i Karlstad (2013-09-04, ordförande Forsberg) yttrade: Av 5 kap. 23 § körkortslagen (1998:488) framgår att ett beslut om villkor om alkolås ska undanröjas om körkortshavaren under villkorstiden inte uppfyller de krav på lämplighet som anges i 19 § 2 och 3. Om beslutet undanröjs, ska körkortet återkallas. En spärrtid ska då bestämmas som motsvarar den återstående villkorstiden. – Lämplighet för villkor om alkolås förutsätter, enligt 5 kap. 19 § 2 körkortslagen att sökanden inte brukar narkotika som avses i 8 § narkotikastrafflagen. – Föreligger synnerliga skäl får, enligt 5 kap. 10 § körkortslagen, med avvikelse från denna lag återkallelse underlåtas eller spärrtid sättas ned om det kan ske utan fara för trafiksäkerheten. Underlåtes återkallelse får varning meddelas i stället. – I förarbetena till bestämmelserna om körkort med villkor om alkolås uttalas bl.a. följande. För att anses lämplig att inneha körkort med villkor om alkolås gäller ett absolut krav på att körkortshavaren avstår från att bruka ämnen som är klassade som narkotika (prop. 2010/11:26 s. 68). Ett beslut om körkortsinnehav med villkor om alkolås ska undanröjas om körkortshavaren bryter mot de särskilda krav som gäller för att få ett sådant villkor och han eller hon samtidigt bedöms vara olämplig för ett körkortsinnehav med villkor. Beslutet ska även undanröjas om körkortshavaren brukar narkotika. Om beslutet undanröjs ska körkortet återkallas (a. prop. s. 44–46). – Förvaltningsrättens bedömning – A.J. har i samband med sin ansökan om körkort med villkor om alkolås skrivit under en viljeförklaring. I och med det har A.J. skrivit under på att han under villkorstiden inte ska använda narkotikaklassade läkemedel eller annan narkotika. Det framgår också av beslutet i vilket A.J. beviljades körkort med villkor om alkolås att han inte får ta narkotikaklassade läkemedel under villkorstiden. Av detta beslut framgår också att om villkoren inte följs kan körkortet komma att återkallas slutligt. – A.J. har uppgivit att den läkarordinerade medicinering med Oxycontin, som skett under en vecka och i samband med hans höftoperation, har stått utom hans kontroll att påverka och får anses falla inom ramen för en akut och tillfällig medicinsk behandling. – Med anledning av att läkemedlet var ordinerat av läkare får medicineringen anses som berättigad att intas i samband med en operation samt att den skett under en mycket begränsad tid finner förvaltningsrätten att underlåtelse att återkalla körkortet kan ske utan fara för trafiksäkerheten. Synnerliga skäl får därför anses föreligga och mot denna bakgrund finner förvaltningsrätten att Transportstyrelsens beslut

ska upphävas. Överklagandet ska därför bifallas. – Förvaltningsrätten bifaller överklagandet och upphäver Transportstyrelsens beslut. Av detta följer att A.J:s körkort åter är förenat med villkor om alkolås. (Målet överlämnades till Transportstyrelsen för vidare handläggning.)

Transportstyrelsen överklagade förvaltningsrättens dom och yrkade att kammarrätten skulle upphäva domen och fastställa styrelsens beslut den 12 juni 2013 samt anförde följande. A.J. har under villkorstiden intagit narkotikaklassat läkemedel. I avsaknad av vägledande förarbeten och praxis har Transportstyrelsen tolkat begreppet ”avstår från att bruka” på så sätt att det omfattar allt intag av narkotika under villkorstiden, oavsett om det skett enligt läkares ordination och under en mycket kort period. Det finns inte förutsättningar för att med stöd av 5 kap. 10 § körkortslagen underlåta att undanröja beslutet om villkor om alkolås eftersom bestämmelsen avser återkallelse av körkort och nedsättning av spärrtid, inte beslut om villkor om alkolås.

A.J. ansåg att överklagandet skulle avslås och anförde följande. Transportstyrelsens beslut var felaktigt eftersom han var helt ovetande och saknade möjlighet att påverka intaget av det narkotiska smärtstillande medel som han ordinerades i samband med sin höftprotesoperation. Det finns inga konkreta bevis på att han intagit något narkotiskt medel. Beslutet strider mot mänskliga rättigheter.

Kammarrätten i Göteborg (2013-12-16, Ocklind, Ståhl, referent, Mundt) yttrade: A.J. har i samband med en operation ordinerats och intagit smärtstillande läkemedel som är narkotikaklassat. Den första frågan som kammarrätten ska ta ställning till är om det innebär att hans villkor om alkolås ska undanröjas. – Ett beslut om villkor om alkolås ska enligt 5 kap. 23 § körkortslagen undanröjas om körkortshavaren under villkorstiden inte uppfyller de krav på lämplighet som anges i 19 § 2. Enligt den bestämmelsen anses den som brukar narkotika som avses i 8 § narkotikastrafflagen inte lämplig. – Kravet på att avstå från att bruka ämnen som är klassade som narkotika är absolut (prop. 2010/11:26 s. 68). Det gäller således även narkotikaklassade läkemedel som ordinerats av läkare. – Eftersom bruk av narkotika automatiskt medför att kraven på lämplighet inte är uppfyllda, ska i sådana fall ingen lämplighetsprövning göras innan villkoret om alkolås undanröjs (a prop. s. 70). – De undantagsbestämmelser som finns i 5 kap. 9 och 10 §§ körkortslagen ger endast möjlighet att underlåta återkallelse eller sätta ned spärrtid. Det är därför inte möjligt att underlåta att undanröja villkor om alkolås med stöd av dessa bestämmelser. – Regleringen innebär således att A.J:s villkor om alkolås ska undanröjas om hans intag av det narkotikaklassade smärtstillande läkemedlet är att anse som ett bruk. – I förarbetena till körkortslagen diskuteras inte vad som avses med ett bruk. Med bruk enligt narkotikastrafflagen avses tillförsel av narkotika till människokroppen som faktisk handling (prop. 1987/88:71 s. 30). Kammarrätten anser inte att det finns skäl att ge begreppet en annan innebörd när det gäller bestämmelserna om alkolås. – Enligt intyg av läkare den 3 maj 2013 har A.J. använt läkemedlet postoperativt i en

vecka under februari 2013. Därmed måste han enligt kammarrättens mening anses ha brukat läkemedlet. Villkoret om alkolås ska därför undanröjas. – När ett beslut om villkor om alkolås undanröjs enligt 5 kap. 23 § körkortslagen ska enligt förarbetena ”körkortet i stället ovillkorligen återkallas” (prop. 2010/11:26 s. 70). Av 5 kap. 9 och 10 §§ körkortslagen följer dock enligt kammarrättens mening att det även i en sådan situation finns utrymme att göra undantag. Vid alkoholkoncentrationer under 0,5 promille i blodet eller 0,25 mg/liter i utandningsluften kan således varning meddelas i stället för återkallelse, om varning av särskilda skäl kan anses vara en tillräcklig åtgärd. Vidare kan återkallelse underlåtas eller spärrtiden sättas ned om det finns synnerliga skäl och det kan ske utan fara för trafiksäkerheten. Vid prövningen av möjligheten att medge undantag ska – på motsvarande sätt som vid återkallelse utan föregående villkor om alkolås – en helhetsbedömning göras av bl.a. omständigheterna kring rattfylleriet och körkortshavarens personliga förhållanden. Vid bedömningen av körkortshavarens personliga förhållanden bör hänsyn tas till hur körkorthavaren skött sig under villkorstiden. – Här aktuellt mål gäller ett rattfylleri med alkoholkoncentrationen minst 0,10 mg/liter i utandningsluften den 12 mars 2011. A.J. har dessutom den 2 oktober 2008 gjort sig skyldig till ett rattfylleri med minst 0,16 mg/liter i utandningsluften. I övrigt saknas uppgifter om förhållandena vid körningarna. Under augusti och september 2012 har tre utandningsprov i alkolåset blivit underkända pga. för hög alkoholkoncentration. Enligt ovannämnda läkarintyg har A.J. inte vid någon tidpunkt uppfyllt kriterierna för missbruk eller beroende. – Eftersom A.J. har gjort sig skyldig till rattfylleri vid två tillfällen inom loppet av två och ett halvt år kan varning enligt kammarrättens bedömning inte anses vara en tillräcklig åtgärd. Det har inte heller framkommit några synnerliga skäl för att sätta ned spärrtiden. – Sammanfattningsvis finner kammarrätten att Transportstyrelsen har haft fog för sitt beslut att undanröja villkoret om alkolås och återkalla körkortet. Överklagandet ska därför bifallas. – Kammarrätten upphäver förvaltningsrättens dom och fastställer Transportstyrelsens beslut den 12 juni 2013.

A.J. överklagade kammarrättens avgörande hos Högsta förvaltningsdomstolen och yrkade att domen skulle upphävas och förvaltningsrättens dom fastställas. Han anförde bl.a. följande. Han har fått en absolut nödvändig och adekvat smärtstillande behandling i samband med operationen. Han var bunden vid sjukbädden och utgjorde inte någon fara för trafiksäkerheten. Han har aldrig brukat eller över huvud taget befattat sig med narkotiska preparat. Det förefaller som att hans fall är unikt och att lagstiftaren har förbisett situationen med behandling med narkotikaklassade läkemedel vid svåra operationer.

Transportstyrelsen bestred bifall till överklagandet och anförde bl.a. följande. Vad A.J. har anfört kan allmänt sett inge tveksamheter om ingripandet är mer långtgående än vad som kan anses motiverat av de intressen som ligger bakom bestämmelserna om villkor om alkolås. Lagstiftningen medger dock inte någon skönsmässig bedömning.

Slutsatsen är därför att proportionalitetsprincipen inte ändrar riktigheten av det slut som kammarrätten har kommit till.

Under målets handläggning i Högsta förvaltningsdomstolen har Transportstyrelsen till regeringen lämnat förslag till ändringar i körkortslagen som innebär att det undantagsvis ska gå att förena ett tillfälligt läkarordinerat bruk av narkotikaklassat läkemedel med villkor om alkolås.

Högsta förvaltningsdomstolen (2015-03-27, Jermsten, Almgren, Saldén Enérus, Nymansson) yttrade:

Skälen för avgörandet

Vad målet gäller

Frågan i målet är om en körkortshavare som intagit narkotikaklassat läkemedel i enlighet med läkares ordination ska anses ha brukat narkotika och om ett beslut om villkor om alkolås därmed ska undanröjas.

Den rättsliga regleringen m.m.

År 1999 inleddes en försöksverksamhet med alkolås som reglerades i den numera upphävda lagen (1998:489) om försöksverksamhet med villkorlig körkortsåterkallelse. Körkortshavaren skulle under villkorstiden iaktta föreskrifter som meddelats med stöd av lagen. För det fall denne bröt mot föreskrifterna skulle den villkorliga återkallelsen undanröjas och frågan om körkortsingripande tas upp till förnyad prövning.

Vägverket meddelade föreskrifter till lagen. Genom en 2005 beslutad ändring av föreskrifterna (VVFS 2005:44) infördes regler om att bruk av andra psykoaktiva droger än alkohol, koffein och nikotin utgjorde hinder för deltagande i försöksverksamheten. Användande av narkotikaklassade läkemedel som fanns uppförda på vissa av Läkemedelsverkets förteckningar utgjorde inte hinder för deltagande. Det förutsatte dock att läkemedlen användes tillfälligt enligt läkares ordination och att användandet hade föranmälts till läkare som länsstyrelsen anvisat.

En särskild utredare lämnade 2008 förslag om att försökslagstiftningen skulle permanentas (SOU 2008:84). Så skedde genom att bestämmelser om alkolås togs in i körkortslagen.

Av 5 kap. 3 § 1 körkortslagen framgår bl.a. att ett körkort ska återkallas om körkortshavaren har gjort sig skyldig till rattfylleri enligt 4 § lagen (1951:649) om straff för vissa trafikbrott. Föreligger synnerliga skäl får enligt 5 kap. 10 § andra stycket körkortslagen återkallelse underlåtas om det kan ske utan fara för trafiksäkerheten. Underlåts återkallelse får varning meddelas i stället.

Enligt 5 kap. 17 § första stycket körkortslagen får det, i stället för körkortsåterkallelse, beslutas att körkortsinnehavet under viss tid (villkorstid) ska vara förenat med villkor om alkolås. Ett sådant beslut meddelas efter ansökan.

Av 5 kap. 23 § första stycket körkortslagen framgår att ett beslut om villkor om alkolås ska undanröjas om körkortshavaren under villkorstiden inte uppfyller de krav på lämplighet som anges i 19 § 2. Enligt sistnämnda bestämmelse förutsätter sådan lämplighet att sökanden inte brukar narkotika som avses i 8 § narkotikastrafflagen. Om beslutet undanröjs, ska körkortet enligt 5 kap. 23 § andra stycket körkortslagen återkallas.

I förarbetena anförde regeringen bl.a. följande. Förare som begår trafiknykterhetsbrott på grund av annat drogbruk än alkohol kan inte medges rätt att fortsättningsvis köra fordon med alkolås eftersom ett sådant inte kan avläsa bruk av andra droger än alkohol. Det gäller ett absolut krav på att körkortshavaren avstår från att bruka ämnen som klassats som narkotika. Vad gäller andra psykoaktiva substanser än alkohol och narkotika liksom läkemedel som inte är av psykoaktivt slag men som ändå bedöms kunna påverka förmågan att köra motordrivna fordon, finns inget krav på absolut avhållsamhet. Ett villkorsbeslut ska undanröjas om körkortshavaren under villkorstiden inte avhåller sig från att bruka narkotika. Om beslutet undanröjs ska körkortet ovillkorligen återkallas (prop. 2010/11:26 s. 32 f.).

Högsta förvaltningsdomstolens bedömning

Av utredningen i målet framgår att A.J. efter en höftoperation tillfälligt intagit ett narkotikaklassat läkemedel. Detta skedde i enlighet med läkares ordination och under tid då hans körkortsinnehav var förenat med villkor om alkolås.

Av 5 kap. 19 § 2 och 23 § första stycket körkortslagen följer att ett beslut om villkor om alkolås ska undanröjas om körkortshavaren under villkorstiden brukar narkotika som avses i 8 § narkotikastrafflagen.

A.J. har intagit ett sådant läkemedel som avses i 8 § narkotikastrafflagen. Frågan är då om han kan anses ha brukat narkotika i den mening som avses i 5 kap. 19 § 2 körkortslagen.

Enligt det utredningsförslag som låg till grund för regleringen i körkortslagen skulle körkortsinnehav villkorat av alkolås undanröjas om det föreligger annat drogmissbruk än alkohol. Regeringen ansåg dock att det måste tydliggöras i lagtexten att det ska vara fråga om droger och preparat som klassificerats som narkotika, dvs. läkemedel eller hälsofarliga varor som av regeringen förklarats vara narkotika enligt 8 § narkotikastrafflagen (prop. 2010/11:26 s. 32). Någon förklaring till varför begreppet bruk av narkotika togs in i lagtexten och vilken innebörd begreppet var avsett att ha gavs dock inte.

Vägledning för tolkning av begreppet bruk av narkotika finns i annan lagstiftning. Enligt 1 § första stycket 6 narkotikastrafflagen är innehav, bruk eller annan befattning med narkotika straffbart om det skett olovligen. Med bruk avses enligt förarbetena tillförsel av narkotika till människokroppen som faktisk handling (prop. 1987/88:71 s. 30).

Om en reglering inte ska omfatta konsumtion av narkotikaklassade läkemedel i enlighet med läkares ordination kan undantag för detta föreskrivas. Enligt 4 § andra stycket lagen om straff för vissa trafikbrott döms den för rattfylleri som för ett motordrivet fordon efter att ha intagit narkotika som avses i 8 § narkotikastrafflagen i så stor mängd att det under eller efter färden finns något narkotiskt ämne kvar i blodet. Detta gäller dock inte om narkotikan intagits i enlighet med läkares eller annan behörig receptutfärdares ordination. Något motsvarande undantag har som framgått inte tagits in i den aktuella regleringen i körkortslagen.

Mot denna bakgrund måste det av lagstiftaren valda begreppet bruk av narkotika i 5 kap. 19 § 2 körkortslagen anses innefatta all konsumtion av narkotika, således även tillfälligt intag av ett narkotikaklassat läkemedel i enlighet med läkares ordination.

A.J. har således brukat narkotika.

Såsom regelverket kring alkolås har utformats finns enligt Högsta förvaltningsdomstolens mening inget utrymme för att i en situation som den förevarande underlåta att undanröja ett beslut om villkor om alkolås för körkortsinnehav. Om ett sådant beslut undanröjs ska körkortet återkallas. Frågan om återkallelse kan således inte tas upp till förnyad prövning efter ett undanröjande. Överklagandet ska därför avslås.

Högsta förvaltningsdomstolens avgörande

Högsta förvaltningsdomstolen avslår överklagandet.

> Justitierådet *Bull* var av skiljaktig mening och ansåg att domen borde ha följande lydelse efter det stycke där det konstateras att A.J. brukat narkotika:
> Enligt de regler som gällde före den 1 januari 2012 fanns, under vissa förutsättningar, utrymme för att i ett fall som det förevarande underlåta att undanröja beslutet om villkor om alkolås. Som framgått medger 5 kap. 10 § körkortslagen, med avvikelse från lagens bestämmelser, att återkallelse underlåts eller spärrtid sätts ned om det finns synnerliga skäl och det kan ske utan fara för trafiksäkerheten. En motsvarande bestämmelse när det gäller undanröjande av villkor om alkolås saknas, trots att villkor om alkolås också är ett körkortsingripande enligt 1 §. – Såsom regelverket har utformats ska alltså villkor om alkolås undanröjas vid allt bruk av narkotika. Det synes gälla även i en situation som den här aktuella. Frågan är dock om ett sådant ingrepp är förenligt med proportionalitetsprincipen. – Proportionalitetsprincipen är en

allmän rättsprincip inom svensk rätt. Den kommer till uttryck i ett stort antal bestämmelser i lagstiftningen och i praxis från de högsta domstolarna. Enligt principen ställs krav på att en rimlig relation råder mellan mål och medel när det allmänna vidtar åtgärder mot enskilda. Kravet gäller även om det inte skulle vara uttryckligt lagstadgat (se SOU 2010:29 s. 172 ff. med angivna hänvisningar). – En prövning av ett ingrepps proportionalitet sker vanligen utifrån en bedömning om åtgärden är ägnad att tillgodose det avsedda ändamålet, om det finns mindre ingripande alternativ och om den fördel som det allmänna vinner står i rimlig proportion till den skada som ingreppet förorsakar den enskilde (se RÅ 1999 ref. 76). – Proportionalitetsprövningar är främst aktuella i fall där myndigheter har ett visst skönsmässigt handlingsutrymme enligt den författning som tillämpas. En fråga är då om en sådan prövning också kan göras i fall där reglernas utformning medför att utrymmet för bedömningar i enskilda fall är mer inskränkt. Att så är fallet när det gäller tillämpning av proportionalitetsprincipen i enlighet med EU-rätten och Europakonventionen står klart (se t.ex. RÅ 2009 ref. 83 och HFD 2013 ref. 42). Det finns inte anledning att anse att den förvaltningsrättsliga proportionalitetsprincipen har ett väsentligt annorlunda tillämpningsområde, även om den saknar den externa karaktär som i viss mån kännetecknar EU-rätten och konventionsrätten. Det ligger nämligen i en rättsprincips roll i en rättsordning att dess tillämpning inte alltid kan vara beroende av hur lagstiftningen på ett visst område utformats. Och även om lagstiftningens utformning skulle kunna begränsa de situationer där principen kan tillämpas så måste den i varje fall kunna beaktas när det gäller regler där det inte klart framgår att lagstiftaren avsett att en sådan bedömning ska vara utesluten. Av betydelse är också att även när lagstiftning är utformad så att den ger ett visst utrymme för bedömningar av denna karaktär så kan detta utrymme vara begränsat genom andra författningar. En författnings utformning kan således inte ensamt vara avgörande för om och hur proportionalitetsprincipen beaktas. Hänsyn måste också tas till lagstiftningens systematik. – Genom reglerna i 5 kap. 23, 19 och 10 §§ körkortslagen har bestämmelserna om undanröjande av villkor om alkolås vid bruk av narkotika kommit att utformas så att de synes sakna utrymme för bedömningar i enskilda fall av bruk av narkotika, även när det gäller ordinerade läkemedel. Detta skiljer sig som framgått ovan från vad som gällde före det att bestämmelserna om alkolås permanenterades 2012. Reglernas utformning avviker också från det förslag om en särskild lag som föregick de nu gällande reglerna, där utredaren föreslog att annat drogmissbruk än alkohol skulle medföra att en förare inte ansågs som lämplig att inneha körkort med villkor om alkolås (se SOU 2008:84 s. 90). Vidare är det så att trots att villkor om alkolås utgör ett körkortsingripande enligt 1 § har sanktionen inte tagits med i 10 § som enligt sin rubrik ska behandla underlåtande av körkortsingripande m.m. Av förarbetena framgår inte varför bestämmelserna fått den utformning de har i dessa avseenden. Mot denna bakgrund får anses att en proportionalitetsbedömning kan

göras av ett undanröjande av villkor om alkolås, även om de tillämpliga författningarna inte ger uttryckligt utrymme för en sådan bedömning. – Denna slutsats gäller även med beaktande av att villkor om alkolås kan anses som en förmån för den enskilde, eftersom åtgärder från det allmännas sida som innebär att förmåner upphör eller dras in utgör ett ingripande och därmed aktualiserar proportionalitetsprincipens krav. En annan sak är att en indragen förmån inte är en lika ingripande åtgärd som en mer renodlad tvångsåtgärd från det allmännas sida. – Av praxis framgår att ett underkännande av ett myndighetsingripande med stöd av proportionalitetsprincipen knappast kan komma ifråga i andra fall än där det råder ett klart missförhållande mellan det allmänna intresset av åtgärden och den belastning som åtgärden innebär för den enskilde (HFD 2012 ref. 12). – Bakom reglerna om körkortsingripande i 5 kap. körkortslagen står hänsyn till trafiksäkerhet och skyddet av människors liv och hälsa (se t.ex. prop. 1997/98:124 s. 39 ff. och prop. 1975/76:155 s. 69 f.). Återkallelse av körkort är att betrakta som huvudregel vid körkortsingripanden och reglerna om villkor om alkolås utgör ett undantag från denna huvudregel i fall där ingreppet mot den enskilde och dennes livsföring ansetts kunna begränsas utan att trafiksäkerheten hotas. Den enskilde underkastar sig tämligen långtgående villkor och kostnader mot att kunna behålla sitt körkort. Det huvudsakliga syftet med regelverket är att ge den enskilde incitament till ett nyktert levnadssätt och att därigenom bidra till trafiksäkerhet och minskade kostnader för samhället (prop. 2010/11:26 s. 20 och prop. 1997/98:124 s. 55). – Högsta förvaltningsdomstolen konstaterar att Transportstyrelsen i sin framställan till regeringen gjort bedömningen att trafiksäkerheten i fall som det här aktuella inte vinner på att villkor om alkolås undanröjs. Det finns ingen anledning för Högsta förvaltningsdomstolen att göra någon annan bedömning. Ingreppet ifråga kan således inte antas leda till det som är syftet med reglerna; att bidra till trafiksäkerheten. Samtidigt står det klart att A.J:s intresse av att kunna fortsätta inneha körkort med villkor om alkolås – särskilt med beaktande av den tid och de kostnader som investerats i detta – är tämligen starkt och att ett undanröjande leder till påtagliga negativa effekter för honom. Ett undanröjande av villkor om alkolås kan därmed inte anses vara förenligt med proportionalitetsprincipen. Överklagandet ska därför bifallas och förvaltningsrättens domslut fastställas.

Mål nr 226-14, föredragande Maria Norrman

Ref 10

I förvaltningsprocessen ska ett yrkande om ersättning för rättegångskostnader avvisas.

2 kap. 11 § andra stycket regeringsformen, artikel 6.1 i den europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna

Högsta förvaltningsdomstolen meddelade den 4 mars 2022 följande beslut (mål nr 6184-19).

Bakgrund

1. S.M. ansökte hos Skatteverket om att få byta efternamn. Ansökningen avslogs varpå S.M. överklagade till Förvaltningsrätten i Stockholm som avslog överklagandet. Kammarrätten i Stockholm biföll hennes överklagande dit, varefter Skatteverket överklagade till Högsta förvaltningsdomstolen.

2. S.M. bestred bifall till Skatteverkets överklagande och yrkade ersättning för rättegångskostnader (ombudskostnader).

3. Högsta förvaltningsdomstolen avslog Skatteverkets överklagande samt förordnade att frågan om rätt till ersättning för rättegångskostnader ska avgöras av Högsta förvaltningsdomstolen i dess helhet (HFD 2021 ref. 36).

Yrkanden m.m.

4. *S.M.* yrkar ersättning för rättegångskostnader med sammanlagt 60 250 kr och anför följande.

5. Hon har vunnit mot Skatteverket i frågan om byte av efternamn. De kostnader hon har haft för att tillvarata sin rätt har varit befogade med hänsyn till sakens beskaffenhet. Att då neka henne rätt till ersättning skulle strida mot hennes rätt till en rättvis rättegång. Högsta förvaltningsdomstolen ska därför med stöd av 2 kap. 11 § andra stycket regeringsformen, artikel 6.1 i den europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna, EKMR, eller artikel 47 i Europeiska unionens stadga om de grundläggande rättigheterna förplikta Skatteverket att ersätta henne för hennes rättegångskostnader.

6. Ett beslut om ersättning för rättegångskostnader måste fattas i förvaltningsmålet. Den möjlighet som enskilda har att begära skadestånd av staten för rättegångskostnader i förvaltningsmål är

inte tillräcklig för att hennes rätt till en rättvis rättegång ska respekteras.

7. Till stöd för sin talan åberopar hon Högsta domstolens avgöranden NJA 2015 s. 374, NJA 2018 s. 49, NJA 2020 s. 908 och NJA 2021 s. 235, Europadomstolens domar den 6 juli 2006 i målet Stankiewicz mot Polen, den 18 juni 2020 i målet Černius och Rinkevičius mot Litauen och den 22 juli 2021 i målet Zustović mot Kroatien samt EU-domstolens dom i målet Toma (C-205/15, EU:C:2016:499).

8. *Skatteverket* anser att S.M:s yrkande om ersättning för kostnader ska avvisas. Om Högsta förvaltningsdomstolen finner att yrkandet ska prövas bör det avslås.

Skälen för avgörandet

Frågan i målet

9. Frågan i målet är hur ett yrkande om ersättning för rättegångskostnader i ett mål i allmän förvaltningsdomstol ska hanteras.

Rättslig reglering m.m.

10. I 2 kap. 11 § andra stycket regeringsformen anges att en rättegång ska genomföras rättvist och inom skälig tid.

11. Av artikel 6.1 i EKMR framgår att var och en ska, vid prövningen av hans civila rättigheter och skyldigheter eller av en anklagelse mot honom för brott, vara berättigad till en rättvis och offentlig rättegång inom skälig tid och inför en oavhängig och opartisk domstol som upprättats enligt lag.

12. Enligt artikel 47 i Europeiska unionens stadga om de grundläggande rättigheterna ska var och en ha rätt att inom skälig tid få sin sak prövad i en rättvis rättegång och inför en oavhängig och opartisk domstol som har inrättats enligt lag. Av artikel 51.1 framgår att bestämmelserna i stadgan riktar sig till unionens institutioner, organ och byråer samt till medlemsstaterna endast när dessa tillämpar unionsrätten. I artikel 52.3 anges att i den mån stadgan omfattar rättigheter som motsvarar sådana som omfattas av EKMR ska de ha samma innebörd och räckvidd som i konventionen.

Högsta förvaltningsdomstolens bedömning

Ansvaret för rättegångskostnader i förvaltningsprocessen

13. De processuella regler som allmän förvaltningsdomstol ska tillämpa i förvaltningsmål finns huvudsakligen i förvaltningsprocesslagen (1971:291). Avseende mål i allmän domstol finns den

huvudsakliga processuella regleringen i rättegångsbalken och lagen (1996:242) om domstolsärenden (ärendelagen).

14. För mål som handläggs av allmän domstol enligt reglerna i rättegångsbalken gäller beträffande rättegångskostnader som utgångspunkt att tappande part ska ersätta vinnande parts kostnader. För vissa måltyper och i vissa situationer får rätten i stället förordna att vardera parten ska bära sina egna kostnader. Utförliga regler om hur rätten ska förordna om fördelningen av rättegångskostnaderna och hur de i övrigt ska hanteras av domstolen finns i 18 och 31 kap. rättegångsbalken.

15. Vid handläggningen av sådana rättsvårdsärenden som prövas av allmän domstol och som inte ska handläggas enligt rättegångsbalken är ärendelagen tillämplig. I 32 § anges att i ett ärende där enskilda är motparter till varandra får domstolen med tillämpning av reglerna i 18 kap. rättegångsbalken förplikta den ena parten eller dennes ställföreträdare, ombud eller biträde att ersätta den andra parten för dennes kostnader i ärendet. Någon motsvarande hänvisning till rättegångsbalken finns inte för den situationen att en enskild har det allmänna som motpart.

16. För förvaltningsprocessen finns inte – med undantag för de fall där enskild parts rättegångskostnader kan ersättas av det allmänna enligt 43 kap. skatteförfarandelagen (2011:1244) – några föreskrifter om ersättning för rättegångskostnader. Det får till följd att vardera parten får stå för sina egna kostnader, oavsett utgången i målet. Innebörden av denna s.k. kvittningsprincip är alltså att en vinnande part inte tillerkänns ersättning för rättegångskostnader, men också att en förlorande part inte löper någon risk att åläggas ersättningsskyldighet för motpartens kostnader.

17. Förvaltningsprocessens kvittningsprincip är inte en materiell regel i den meningen att allmän förvaltningsdomstol i sitt avgörande ska slå fast att vardera parten ska stå för sina kostnader. Ersättning för rättegångskostnader har tvärtom varit en fråga som det, i avsaknad av författningsstöd, inte har varit meningen att allmän förvaltningsdomstol ska ta ställning till. Till skillnad från vad som gäller för allmän domstol finns därmed inte heller ett regelverk för att hantera de principiella och praktiska frågor som uppkommer om sådana ersättningsanspråk ska prövas.

18. När en part har framställt ett yrkande om ersättning för rättegångskostnader har Högsta förvaltningsdomstolen avslagit eller avvisat yrkandet. Detta har regelmässigt motiverats med att det saknas laglig grund för att bevilja sådan ersättning i förvaltningsmål (se t.ex. HFD 2019 ref. 72 och HFD 2020 not. 47). Även i de fall då yrkandet har avslagits har detta således motiverats med avsaknaden av lagstöd och inte med att det av kvittningsprincipen följer att ersättning inte ska beviljas. Oavsett beslutsformulering har alltså någon materiell prövning av yrkandet i praktiken inte gjorts.

19. Att rättegångskostnader inte ersätts i förvaltningsprocessen har motiverats med att det är en vedertagen ordning att den enskilde får stå för sina kostnader i förvaltningsärenden. Vidare brukar påpekas att det är avgiftsfritt att föra talan i allmän förvaltningsdomstol, att processen som huvudregel är skriftlig och att det ställs låga processuella krav på parterna. Regelmässigt anges också att de allmänna förvaltningsdomstolarna har en utredningsskyldighet och att den enskildes motpart oftast är en myndighet som ska agera objektivt och därigenom bidra till den enskildes rättssäkerhet. Även rätten att i vissa mål ha ett offentligt biträde samt möjligheten att få rättshjälp har nämnts i sammanhanget. Det har också framhållits att ersättning för rättegångskostnader är en form av skadestånd och att det under vissa förutsättningar är möjligt att få sådana kostnader i ett förvaltningsmål ersatta genom skadestånd.

20. Det har aldrig funnits några bestämmelser i förvaltningsprocesslagen som föreskriver att en part ska ersätta en annan part för dennes kostnader i målet. Sådana regler har dock övervägts vid flera tillfällen (se t.ex. SOU 1964:27 s. 666 ff.). I början av 1970-talet uttalade emellertid regeringen att det inte borde införas någon generell regel om kostnadsersättning i förvaltningsärenden (prop. 1972:132 s. 195 f.). Justitieutskottet uttalade därefter vid flera tillfällen under 1980-talet att regeringen borde utreda möjligheten för enskilda att få ersättning för sina rättegångskostnader i förvaltningsmål (se t.ex. bet. 1984/85:JuU15 s. 53 och bet. 1988/89:JuU19 s. 23).

21. Domstolsutredningen, som tillsattes 1989, föreslog att en enskild skulle ha rätt till ersättning av det allmänna för sina kostnader i ett förvaltningsmål, om det med hänsyn till omständigheterna var oskäligt att den enskilde fick bära dem själv. En förutsättning för att det skulle vara oskäligt var att den enskilde hade vunnit en väsentlig framgång i målet (SOU 1991:106 del A s. 630 ff.). Domstolsutredningens förslag ledde inte till lagstiftning.

22. Frågan aktualiserades återigen vid tillkomsten av ärendelagen. Beträffande det förhållandet att förslaget till ärendelag saknade bestämmelser om fördelning av rättegångskostnader när en enskild part har det allmänna som motpart (jfr punkt 15) framgår följande av förarbetena. Frågan om en enskild part bör ha rätt att få ersättning för sina rättegångskostnader av det allmänna, när den enskilde har en myndighet som motpart och vinner framgång i processen, har en ojämförligt större betydelse för förvaltningsdomstolarnas mål än för domstolsärendena. Mycket talar för att svaret på frågan bör vara detsamma för de berörda målen och ärendena. Ett ställningstagande till frågan bör därför inte ske isolerat för domstolsärendenas del utan får övervägas i annat sammanhang (prop. 1995/96:115 s. 118).

23. Justitieutskottet uttalade att utskottet utgick från att regeringen skulle överväga rättegångskostnadsfrågorna i ärende-

processen respektive förvaltningsprocessen och att detta skulle ske inom en inte alltför avlägsen framtid (bet. 1995/96:JuU17 s. 10). Därefter har frågan om rättegångskostnader i förvaltningsprocessen inte aktualiserats i lagstiftningssammanhang på ett mer generellt plan, även om frågan har uppmärksammats beträffande mål om offentlig upphandling (SOU 2013:12 och SOU 2018:44 samt prop. 2021/22:120).

Praxis från Högsta domstolen, Europadomstolen och EU-domstolen

24. I rättsfallet NJA 2015 s. 374, som gällde ett ärende om utmätning där staten var motpart till en enskild, aktualiserades bestämmelsen i 32 § ärendelagen om fördelning av rättegångskostnader. Högsta domstolen uttalade att det under vissa förutsättningar skulle strida mot bestämmelsen i 2 kap. 11 § andra stycket regeringsformen om att en rättegång ska genomföras rättvist om den enskilde inte gavs rätt till ersättning av staten för sina rättegångskostnader i ett allmänt utmätningsmål. Domstolen framhöll att detta framstod särskilt tydligt när det är en tredje man som dras in i ett utmätningsförfarande och med framgång försvarar sin egendom mot exekutiva åtgärder som riktas mot gäldenären. Domstolen ansåg sig ha stöd för att justera det rådande rättsläget och fann att omständigheterna i det aktuella fallet var sådana att Skatteverket skulle förpliktas att utge ersättning för den enskildes rättegångskostnader.

25. Högsta domstolen har i senare avgöranden bekräftat de principer som följer av 2015 års avgörande (NJA 2020 s. 908 och NJA 2021 s. 235).

26. I NJA 2015 s. 374 tog Högsta domstolen sin utgångspunkt i Europadomstolens avgörande i målet Stankiewicz. Det rättsfallet gällde två makar som hade anlitat juridiskt ombud för att freda sin egendom i ett tvistemål som hade initierats av staten. Makarna vann en långdragen process i nationell domstol men fick inte ersättning för sina rättegångskostnader. Mot bakgrund av att staten givits en förmånlig ställning i processen när det gällde kostnadsansvar och med hänsyn till att tvisten var komplicerad och avsåg ett för makarna högt värde ansåg Europadomstolen att det inte hade varit obefogat för de enskilda parterna att anlita juridiskt ombud och att deras kostnader inte heller hade varit oskäliga. Under sådana förhållanden bedömde Europadomstolen att det var oförenligt med artikel 6.1 i EKMR att de enskilda parterna hade nekats ersättning för rättegångskostnader.

27. Därefter har Europadomstolen utvecklat sin praxis på detta område genom domen i målet Černius och Rinkevičius, som gällde förutsättningarna för att vinna framgång med ett skadeståndsanspråk som avsåg kostnader som hade uppkommit i ett tidigare

förvaltningsmål, och domen i målet Zustović, där den enskilde bedömdes ha haft fog för att anlita ombud för att tillvarata sin rätt i ett ansökningsärende om rätt till sjukpension.

28. EU-domstolen har beträffande tolkningen av artikel 47 i Europeiska unionens stadga om de grundläggande rättigheterna i avgörandet i målet Toma, som gällde skyldigheten att betala domstolsavgifter, hänvisat till Europadomstolens praxis och dess tolkning av artikel 6.1 i EKMR i domen i målet Stankiewicz (Toma, punkterna 40, 41 och 55).

29. Av ovan angivna rättsfall följer att det under vissa förutsättningar kan stå i strid med rätten till en rättvis rättegång enligt 2 kap. 11 § andra stycket regeringsformen och – om målet gäller civila rättigheter eller skyldigheter – artikel 6.1 i EKMR att en enskild som vinner ett mål mot det allmänna inte kan få ersättning för sina rättegångskostnader.

Hur ska ett yrkande om ersättning för rättegångskostnader i ett mål i allmän förvaltningsdomstol hanteras?

30. I förvaltningsprocessen har alltså hittills gällt att en enskild inte har kunnat få sina rättegångskostnader ersatta inom ramen för förvaltningsmålet. Lagstiftaren har inte, trots att frågan har aktualiserats vid ett flertal tillfällen, funnit skäl att ändra den förvaltningsprocessuella regleringen i detta avseende. Frågan är nu om det med hänsyn till rätten till en rättvis rättegång finns anledning att ändra på denna ordning.

31. Förvaltningsprocessen är utformad så att den regelmässigt uppfyller de krav som kan ställas för att en rättegång ska anses rättvis. Det kan emellertid inte uteslutasatt det undantagsvis kan uppkomma situationer där omständigheterna är sådana att det inte skulle vara förenligt med rätten till en rättvis rättegång om en enskild part inte kan få ersättning för befogade rättegångskostnader. Detta gäller i förhållande till såväl stadgandet om rättvis rättegång i 2 kap. 11 § andra stycket regeringsformen som artikel 6.1 i EKMR. Frågeställningen skulle även kunna aktualiseras i förhållande till artikel 47 i Europeiska unionens stadga om de grundläggande rättigheterna. Frågan är dock om rätten till en rättvis rättegång också innebär att ersättningen i dessa situationer måste dömas ut inom ramen för själva förvaltningsmålet.

32. Enligt den hittills gällande ordningen har den enskilde varit hänvisad till att begära kompensation för sina rättegångskostnader i förvaltningsmål genom reglerna om skadestånd (jfr NJA 2010 s. 112, NJA 2013 s. 762 och NJA 2018 s. 1127). Denna ordning innebär visserligen att den enskilde måste inleda ett särskilt förfarande för att få sina rättegångskostnader ersatta. Av Europadomstolens praxis framgår dock att en sådan ordning är förenlig med artikel 6.1 i EKMR (se t.ex. avgörandet i målet

Černius och Rinkevičius där rätten till en rättvis rättegång ansågs ha överträtts, inte för att det saknades en rätt att få ersättning för kostnader i det förvaltningsmål som klaganden hade vunnit utan för att det hade varit för svårt att i särskild ordning få ersättning för dessa kostnader i form av skadestånd). Bestämmelserna i 2 kap. 11 § andra stycket regeringsformen och artikel 47 i Europeiska unionens stadga om de grundläggande rättigheterna får anses ha samma innebörd. Rätten till en rättvis rättegång innebär således inte att ersättning för rättegångskostnader måste beviljas i själva förvaltningsmålet.

33. I den mån det ändå skulle bedömas som angeläget att skapa en möjlighet för förvaltningsdomstolarna att tillerkänna enskilda ersättning för rättegångskostnader väcks både principiella och praktiska frågor som kräver överväganden som det bör ankomma på lagstiftaren att göra. En sådan ordning bör därför inte – när rätten till en rättvis rättegång inte kräver det – införas genom rättspraxis.

34. Högsta förvaltningsdomstolen har i hittillsvarande praxis omväxlande avslagit och avvisat yrkanden om ersättning för rättegångskostnader (se punkt 18). Eftersom det inte ska göras någon materiell prövning av sådana yrkanden ska de fortsättningsvis avvisas.

Slutsats

35. Av det anförda följer att S.M:s yrkande om ersättning för rättegångskostnader ska avvisas.

Högsta förvaltningsdomstolens avgörande

Högsta förvaltningsdomstolen avvisar yrkandet om ersättning för rättegångskostnader.

I avgörandet deltog justitieråden *Jäderblom, Jermsten, Knutsson* (skiljaktig, tillägg), *Ståhl, Bull* (skiljaktig, tillägg), *Classon, Askersjö* (skiljaktig, tillägg), *Baran* (skiljaktig, tillägg), *Gäverth* (tillägg), *Svahn Starrsjö, von Essen, Rosén Andersson, Anderson* (skiljaktig, tillägg), *Jönsson* (skiljaktig, tillägg) och *Haggren.* Föredragande var justitiesekreterarna Birgitta Fors Almassidou och Helen Lidö.

Justitieråden *Knutsson, Bull, Askersjö, Baran, Anderson* och *Jönsson* var skiljaktiga och anförde följande.

1. S.M:s yrkande om ersättning för rättegångskostnader i underinstanserna har framställts först i Högsta förvaltningsdomstolen och ska därför avvisas på den grunden. När det gäller yrkandet om ersättning för kostnader i Högsta förvaltningsdomstolen gör vi följande överväganden.

2. Vi instämmer med majoriteten att det inte kan uteslutas att det undantagsvis kan uppkomma situationer där omständigheterna är sådana att det inte skulle vara förenligt med rätten till en rättvis rättegång enligt 2 kap. 11 § andra stycket regeringsformen och artikel 6.1 i EKMR om en enskild part inte kan få ersättning för befogade rättegångskostnader i ett förvaltningsmål (punkt 31, jfr även punkt 29). Majoriteten anser att ett ersättningsyrkande inte ska prövas i det mål som kostnaderna har uppkommit och yrkandet har framställts i utan att yrkandet ska avvisas av domstolen (punkt 34). Enligt majoriteten är den enskilde i stället hänvisad till att begära kompensation för kostnaderna genom reglerna om skadestånd (punkt 32).

3. För att ett yrkande ska avvisas krävs att det föreligger någon form av hinder mot prövning, t.ex. att domstolen saknar behörighet att pröva yrkandet. Om det inte finns något sådant hinder ska yrkandet upptas till prövning och antingen bifallas helt eller delvis eller avslås. Frågan är då om det finns något hinder för allmän förvaltningsdomstol att pröva ett yrkande om ersättning för rättegångskostnader.

4. I förvaltningsprocessen gäller sedan länge som huvudregel att vardera parten bär sina egna rättegångskostnader, oavsett utgången i målet (den s.k. kvittningsprincipen). Detta innebär att en part inte har rätt till ersättning för sina kostnader, men också att en part inte löper någon risk att åläggas ersättningsskyldighet för motpartens kostnader. Enda undantaget från kvittningsprincipen gäller skattemål i vilka en enskild enligt 43 kap. skatteförfarandelagen under vissa förutsättningar har rätt till skälig ersättning för sina kostnader.

5. Kvittningsprincipen är inte lagfäst i förvaltningsprocesslagen och det finns inte några regler om hur förvaltningsdomstolarna ska hantera framställda ersättningsyrkanden. Den omständigheten att området inte är författningsreglerat innebär dock inte i sig att domstolarna saknar behörighet att pröva sådana yrkanden eller att det finns något annat hinder mot att de prövas.

6. Under årens lopp har Högsta förvaltningsdomstolen också som regel prövat yrkanden om ersättning för rättegångskostnader och i enlighet med kvittningsprincipen avslagit dem (t.ex. HFD 2019 ref. 72, HFD 2017 ref. 46 I, RÅ 2010 ref. 47 I, RÅ 2009 ref. 65, RÅ 2006 ref. 89, RÅ 2004 ref. 17, HFD 2021 not. 23 och HFD 2019 not. 9). Det har även förekommit att sådana yrkanden har avvisats men då oftast med motiveringen att det saknas möjlighet att utge eller medge ersättning eller att yrkandet inte kan bifallas. I praktiken har det alltså även i dessa fall gjorts en materiell prövning av yrkandet (t.ex. HFD 2015 ref. 51, HFD 2020 not. 47 och HFD 2018 not. 37). Det har dock vid ett fåtal tillfällen hänt att yrkanden om ersättning för rättegångskostnader har avvisats med motiveringen att det saknas lagliga möjligheter att pröva eller besluta i frågor som rör sådana kostnader (t.ex. RÅ 2009 not. 190 och RÅ 2009 not. 202).

7. I skattemål kan ersättning för kostnader utgå i vissa fall, dock inte i mål om förhandsbesked om ärendet har initierats av den skattskyldige. Ett yrkande från den enskilde har trots det även i en sådan situation prövats och följdriktigt avslagits (t.ex. HFD 2020 ref. 49 och HFD 2019 not. 28). När domstolen samtidigt har tagit ställning till ett yrkande om ersättning

och ett om skadestånd har ersättningsyrkandet avslagits med motiveringen att det inte kan bifallas medan skadeståndsyrkandet har avvisats med motiveringen att det inte kan prövas (mål nr 606-17 med dom den 16 februari 2018 och RÅ 2003 not. 64).

8. Det kan konstateras att Högsta förvaltningsdomstolens praxis i frågan om hur ett ersättningsyrkande ska hanteras inte är helt enhetlig. I så gott som samtliga fall under den senaste tjugoårsperioden har dock Högsta förvaltningsdomstolen gjort en materiell prövning även om utgången i en handfull av dem har utmynnat i att yrkandet har avvisats och inte avslagits.

9. Majoritetens slutsats att det i praktiken inte har gjorts någon materiell prövning av yrkandet (punkt 18) är därmed inte korrekt. Slutsatsen baserar sig på att det saknas lagstöd för att bevilja ersättning för rättegångskostnader. Att det saknas lagstöd för en viss utgång (bifall) och utgången därmed blir en annan (avslag) innebär dock inte att någon prövning inte har gjorts. För övrigt finns det i vart fall sedan 2011, genom bestämmelsen i 2 kap. 11 § andra stycket regeringsformen om en rättvis rättegång, lagstöd för att bevilja ersättning för rättegångskostnader i förvaltningsmål.

10. Rätten till en rättvis rättegång är sedan 2011 grundlagsfäst och är även inskriven i EKMR och har därmed företräde framför kvittningsprincipen. Prövningen av ett ersättningsyrkande kan därmed inte längre göras uteslutande med tillämpning av kvittningsprincipen utan även rätten till en rättvis rättegång måste beaktas. Det får förutsättas att Högsta förvaltningsdomstolen i vart fall sedan 2015 – då Högsta domstolen bekräftade den innebörd av rätten till en rättvis rättegång som Högsta förvaltningsdomstolen genom detta avgörande slår fast även gäller i förvaltningsmål – har beaktat rätten till en rättvis rättegång vid sin prövning, även om frågan inte uttryckligen har berörts.

11. Något hinder för de allmänna förvaltningsdomstolarna att pröva ett yrkande om ersättning för rättegångskostnader finns således inte. Vår genomgång av Högsta förvaltningsdomstolens praxis visar också att domstolen regelmässigt prövar sådana yrkanden. Något skäl att ifrågasätta och ändra denna praxis har inte framkommit. S.M:s yrkande om ersättning för rättegångskostnader i Högsta förvaltningsdomstolen ska därmed prövas av domstolen och får inte avvisas.

12. Överröstade i denna fråga saknas det anledning för oss att gå in på frågan om under vilka förutsättningar som det kan bli aktuellt att vid prövningen göra avsteg från kvittningsprincipen eller om de förutsättningarna är uppfyllda i detta mål.

Justitieråden *Knutsson*, *Bull*, *Askersjö*, *Baran*, *Anderson* och *Jönsson* tillade följande.

1. Majoritetens påpekande i punkt 32 – att rätten till en rättvis rättegång i artikel 6.1 i EKMR kan tillgodoses genom nationella regler om skadestånd – är inte kontroversiellt utan den uppfattningen är väl etablerad genom Europadomstolens och Högsta domstolens praxis. Enligt majoriteten får bestämmelsen i 2 kap. 11 § andra stycket regeringsformen, och den i artikel 47 i Europeiska unionens stadga om de grundläggande rättigheterna, anses ha samma innebörd i detta avseende.

2. Majoriteten likställer alltså bestämmelsen i regeringsformen med motsvarande bestämmelse i EKMR, inte bara avseende dess sakliga innehåll (dvs. att en rätt till ersättning för kostnader kan finnas) utan också beträffande dess rättsverkan i ett enskilt fall (dvs. att den rätten kan tillgodoses genom reglerna om skadestånd). I det förstnämnda avseendet instämmer vi med majoriteten men i det sistnämnda anser vi att slutsatsen inte är förenlig med den ställning som grundlagsbestämmelser har i svensk rätt.

3. Genom att en rättsregel blir svensk lag får den helt andra verkningar än om den är en del av ett internationellt fördrag. Detta är skälet till de särskilda överväganden som alltid görs när konventionsregler inkorporeras i svensk rätt och var för övrigt en bärande tanke när Sverige inkorporerade EKMR genom lag, men inte fann skäl att ge den grundlagsstatus utan i stället reglerade dess ställning genom bestämmelsen i 2 kap. 19 § regeringsformen.

4. Att en domstol, som alternativ till att tillämpa en grundlagsbestämmelse, får hänvisa den enskilde till att väcka en skadeståndstalan mot det allmänna innebär ett helt nytt synsätt i frågan om vilken betydelse som grundlagen har vid rättstillämpningen i ett enskilt fall som prövas i domstol. Det kan noteras att Högsta domstolen inte i något av de avgöranden där rätten till en rättvis rättegång i regeringsformen ansetts innebära en rätt till ersättning för rättegångskostnader (se punkterna 24 och 25) övervägt att skadestånd skulle kunna vara ett alternativ. Inte heller i förarbetena till regeringsformen finns stöd för ett sådant synsätt. Tvärtom framhölls vid grundlagsreformen 2010, i anslutning till ändringen av bestämmelsen om lagprövning i 11 kap. 14 §, att det är av särskild betydelse att rättighetsreglerna i regeringsformen fullt ut får genomslag i rättstillämpningen (prop. 2009/10:80 s. 147). Att det som alternativ till att ge grundlagen sådant genomslag skulle vara godtagbart att hänvisa till möjligheten att få skadestånd nämns inte.

5. Särskilt efter 2010 års grundlagsreform står det klart att fri- och rättigheterna i 2 kap. regeringsformen inte riktar sig enbart till lagstiftaren. Rättigheterna har ett konkret innehåll och är möjliga för enskilda att genomdriva. Det har successivt skett en övergång till en mer rättighetsbaserad juridik och domstolarna behöver oftare ta ställning till lagstiftning och rättstillämpning utifrån ett rättighetsperspektiv (SOU 2020:44 s. 207 ff.). Att avvisa ett yrkande, som grundar sig på en rättighetsbestämmelse i regeringsformen, och i stället hänvisa den enskilde till att väcka en skadeståndstalan för att få sitt rättighetsskydd tillgodosett går stick i stäv med denna utveckling och rimmar illa med rättighetsbestämmelsernas ställning i svensk rätt.

6. Det bör framhållas att vad som nu sagts inte gäller i den situationen där det finns lagstiftning som kompletterar en rättighetsbestämmelse i regeringsformen och ger den ett konkret innehåll. Det är t.ex. oproblematiskt i förhållande till bestämmelsen om en rättvis rättegång att ett överklagande avvisas i enlighet med regler om domstols behörighet, om talerätt eller om överklagandetider. Skadeståndslagen är dock – av lätt insedda skäl – inte en sådan lag som avser att fylla ut regeringsformens bestämmelse om en rättvis rättegång. I avsaknad av kompletterande

lagstiftning som konkret anger vad rätten till en rättvis rättegång innebär ska den bestämmelsen därmed tillämpas.

7. Oavsett vilken verkan som regeringsformens bestämmelse om en rättvis rättegång har i ett enskilt fall finns ytterligare invändningar mot majoritetens hänvisning till skadeståndsreglerna. Att gå skadeståndsvägen för att få kompensation för sina rättegångskostnader är nämligen i de flesta fall inte något realistiskt alternativ för den enskilde.

8. Regeringsformens bestämmelse om en rättvis rättegång i 2 kap. 11 § andra stycket har ett vidare tillämpningsområde än dess motsvarighet i artikel 6.1 i EKMR. Den förra omfattar alla rättegångar i Sverige till skillnad från den senare som rör civila rättigheter och skyldigheter samt anklagelser för brott. Huvudregeln i 3 kap. 2 § skadeståndslagen är att det krävs att det allmänna har gjort sig skyldig till fel eller försummelse vid myndighetsutövning för att skadestånd ska kunna dömas ut. Om det har skett en överträdelse av en rättighet enligt EKMR kan skadestånd enligt 4 § utgå utan krav på fel eller försummelse.

9. För att skadestånd ska kunna utgå enligt huvudregeln måste alltså allmän domstol i en skadeståndsprocess komma fram till att förvaltningsdomstolen har gjort sig skyldig till fel eller försummelse vid myndighetsutövning vilket torde kräva att domstolens avgörande baseras på en klart felaktig rättstillämpning. Enbart den omständigheten att domstolen inte har gjort sig skyldig till fel eller försummelse vid myndighetsutövning är dock ingen garanti för att den enskilde har fått en rättvis rättegång.

10. En begränsning i lag eller i rättstillämpningen av en absolut fri- eller rättighet i regeringsformen innebär sannolikt en överträdelse av denna vilket i sin tur kan hävdas utgöra fel eller försummelse vid myndighetsutövning. Skadestånd kan då dömas ut med stöd av 3 kap. 2 § skadeståndslagen (se SOU 2020:44 s. 223 och 232). Rätten till en rättvis rättegång i 2 kap. 11 § andra stycket regeringsformen är en absolut rättighet och en förvaltningsdomstols beslut att avvisa ett yrkande om ersättning för rättegångskostnader kan därmed av allmän domstol komma att betraktas som en sådan överträdelse av regeringsformen som gör att skadestånd kan dömas ut med stöd av 3 kap. 2 § skadeståndslagen. Om avvisningsbeslutet utgör en överträdelse av EKMR kan skadestånd dömas ut med stöd av 4 §. Den enskilde får i dessa fall visserligen kompensation för sina rättegångskostnader av domstolen men det är naturligtvis högst olyckligt om grunden för skadeståndet konstateras vara att förvaltningsdomstolen har gjort sig skyldig till en överträdelse av regeringsformen eller EKMR.

11. Om ett avvisningsbeslut inte anses utgöra en överträdelse av regeringsformen eller EKMR är utsikterna till framgång med en skadeståndstalan antagligen högst begränsade. Detsamma gäller om den enskilde rättar sig efter avgörandet i detta mål och avstår från att framställa ett yrkande om ersättning för rättegångskostnader i förvaltningsmålet med följd att förvaltningsdomstolen inte behöver fatta något avvisningsbeslut.

12. När det gäller en talan om skadestånd med anledning av ett beslut av Högsta förvaltningsdomstolen föreligger vidare normalt rättegångshinder enligt 3 kap. 7 § skadeståndslagen. En sådan talan kan alltså över

huvud taget inte prövas i allmän domstol. Även om detta i praktiken torde beröra endast ett fåtal fall är det ytterligare en faktor som gör hänvisningen till skadeståndsreglerna som ett sätt att leva upp till regeringsformens bestämmelse om en rättvis rättegång svårsmält.

13. Om majoritetens tanke om skadestånd som ett acceptabelt alternativ till ersättning för rättegångskostnader ska fungera krävs att allmän domstol är beredd att bortse från regleringen i 3 kap. 2 § skadeståndslagen och döma ut skadestånd med stöd av regeringsformen. Så har skett i vissa speciella fall tidigare (NJA 2014 s. 323, NJA 2014 s. 332 och NJA 2018 s. 103), men det är högst osäkert om även den nu aktuella situationen kan hanteras på det sättet och det är för övrigt ingen lösning som vi kan ställa oss bakom.

14. Majoriteten stöder sin slutsats om skadestånd som alternativ till ersättning för rättegångskostnader på bl.a. Europadomstolens dom i Černius och Rinkevičius (punkt 32). Som majoriteten konstaterar ansågs i det målet rätten till en rättvis rättegång ha överträtts, inte för att det saknades en rätt för den enskilde att få ersättning för sina rättegångskostnader i det mål som denne hade vunnit utan för att det hade varit för svårt att få dessa kostnader ersatta genom skadestånd. Majoritetens modell för hur ersättningsanspråk i förvaltningsmål ska hanteras kan därmed paradoxalt nog stå i strid med rätten till en rättvis rättegång i 2 kap. 11 § andra stycket regeringsformen och artikel 6.1 i EKMR.

15. Sammantaget leder majoritetens modell för hur ett yrkande om ersättning för rättegångskostnader i ett förvaltningsmål ska hanteras till att en enskild tvingas föra dubbla processer – först en i sakfrågan och därefter en i ersättningsfrågan – innan det står klart om kravet på en rättvis rättegång i förvaltningsmålet är uppfyllt. Till detta kommer att den enskilde i en skadeståndsprocess riskerar att behöva stå för motpartens rättegångskostnader. Det är ett både omständligt och resurskrävande samt långt ifrån heltäckande system som majoriteten anvisar och det riskerar att allvarligt försvåra för den enskilde att ta till vara sin rätt i ersättningsfrågan. Systemet snarare motverkar än främjar rätten till en rättvis rättegång.

Justitierådet *Gäverth* tillade följande.

1. Som framgår av beslutet har det aldrig funnits regler som ger en part rätt till ersättning för kostnader i förvaltningsmål, bortsett från bestämmelserna om ersättning i vissa fall i mål rörande bl.a. skatt (punkt 16). Under årens lopp har vid ett flertal tillfällen frågan väckts om att införa regler som kan ge enskild part rätt till ersättning för rättegångskostnader i förvaltningsmål, dock utan att lagstiftaren infört sådana bestämmelser (se punkterna 20–23).

2. Vid 2010 års grundlagsreform, när formuleringen om att en rättegång ska genomföras rättvist och inom skälig tid infördes i 2 kap. 11 § andra stycket regeringsformen, fördes ingen diskussion i förarbetena om att det gjorda tillägget, som utgör en grundläggande bestämmelse om rättssäkerhet, var avsett att i vissa fall kunna medföra rätt till ersättning till enskild part för dennes kostnader i t.ex. förvaltningsmål. Avsaknaden av

sådana uttalanden får snarare tolkas som att lagstiftaren inte avsåg att i detta avseende ändra den gällande ordningen.

3. Det sagda innebär emellertid inte att rättsläget numera inte skulle kunna ha förskjutits något på så sätt att det kan finnas situationer där upprätthållandet av principen om rätten till en rättvis rättegång förutsätter att en enskild part får ersättning för befogade rättegångskostnader i ett förvaltningsmål (se punkt 31 och jfr de avgöranden som redovisas i punkterna 24–27).

4. Om och när en sådan situation anses föreligga, uppkommer frågan under vilka förutsättningar ersättning kan utgå. I de anförda avgörandena har den enskilde fått bifall till sin talan. Vad det innebär att vinna ett mål är dock inte alltid givet. Den frågan måste besvaras bl.a. utifrån måltypen (jfr t.ex. mål om rättsprövning eller laglighetsprövning), men också utifrån hur talan är utformad. Två snarlika utgångar kan i detta avseende uppfattas olika beroende på hur respektive talan har utformats.

5. I de åberopade avgörandena synes det vidare ha haft betydelse för rätten till ersättning att den bakomliggande frågan varit av stor vikt för den enskilde, något som också kan vara svårt att ta ställning till i ett enskilt fall, då detta inte sällan är fråga om en rent subjektiv bedömning.

6. En annan fråga är om det alls ska vara nödvändigt att den enskilde helt eller delvis har fått bifall till sin talan för att ersättning ska kunna utgå. Åberopad praxis kan tala för ett sådant synsätt. Om den enskilde behöver juridisk hjälp för att kunna föra sin talan på ett fullgott sätt, påverkas inte det behovet av huruvida den enskilde vinner framgång eller inte med sin talan. I annat fall är det ju bara den som har ekonomiska möjligheter som kan föra sin talan med hjälp av ett kvalificerat ombud trots en osäker utgång, medan den mindre bemedlade kan tvingas avstå från att anlita juridisk hjälp och kanske just därför inte vinner bifall. Upprätthållande av rätten till en rättvis rättegång kan enligt min mening rimligen inte vara avhängig utgången av densamma. Detta är således också en fråga att ta ställning till.

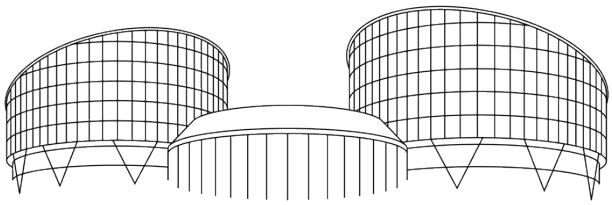
7. Om rätten i ett förvaltningsmål skulle komma fram till att en enskild part ska ersättas av motparten för befogade rättegångskostnader saknas närmare regler för hur detta ska ske. I det fall staten är motpart medför antagligen inte avsaknaden av sådana regler att det skulle vara helt omöjligt att lösa detta inom ramen för processen. Saken ligger emellertid annorlunda till när den enskildes motpart är ett privaträttsligt subjekt, som t.ex. en arbetslöshetskassa eller ett annat enskilt organ (jfr HFD 2019 ref. 43). Frågan är då med vilket stöd domstolen skulle kunna ålägga ett sådant subjekt betalningsskyldighet för motpartens rättegångskostnader och likaså hur ett sådant beslut ska kunna verkställas.

8. I vissa förvaltningsmål kan två enskilda parter stå emot varandra samtidigt som det finns en beslutande myndighet som också har en partsställning i målet. Så är fallet när det gäller vissa tvistlösningsmål enligt lagen (2003:389) om elektronisk kommunikation. Motsvarande partsställning kan också uppkomma i mål enligt upphandlingslag-stiftningen. I dessa fall har frågan om ersättning för rättegångskostnader en ytterligare och komplicerande dimension (vad gäller upphandlingsmål, jfr SOU 2013:12 och SOU 2018:44 samt prop. 2021/22:120).

9. Det finns fler frågor – både sådana som kan förutses och sådana som i nuläget är svåra att förutse eller överblicka – som ett eventuellt beslut om att en enskild part har rätt till ersättning för rättegångskostnader i ett förvaltningsmål väcker.

10. Mot den ovan angivna bakgrunden är det enligt min mening inte lämpligt att en allmän förvaltningsdomstol i ett mål tillerkänner en enskild part ersättning för rättegångskostnader och därigenom bryter mot ett etablerat rättsläge som alltid har gällt och som alla aktörer har inrättat sig efter och som dessutom lagstiftaren inte funnit anledning till att ändra.

11. För att kunna hantera de få fall där ett upprätthållande av rätten till en rättvis rättegång i ett förvaltningsmål förutsätter att en enskild part beviljas ersättning för befogade rättegångskostnader bör, enligt min mening, i första hand bestämmelserna i rättshjälpslagen (1996:1619) tillämpas. Med hänsyn till de begränsningar som finns i rättshjälpslagen för att bevilja någon rättshjälp, är nämnda regelverk inte särskilt väl anpassat för att ta hand om situationer av nu aktuellt slag, även om det kan finnas utrymme för en generösare tillämpning inom de ramar som lagen ställer upp. För att rättshjälpslagen på ett adekvat sätt ska kunna ta hand om de situationer där rätten till en rättvis rättegång förutsätter att den enskilde inte själv behöver stå för sina rättegångskostnader fordras en översyn av rättshjälpslagen. I avvaktan på att så eventuellt sker återstår enligt min mening endast en tillämpning av bestämmelserna i 3 kap. 2 och 4 §§ skadeståndslagen, även om denna möjlighet i praktiken innebär en hel del svårigheter för den enskilde.



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

GRAND CHAMBER

CASE OF AXEL SPRINGER AG v. GERMANY

(Application no. 39954/08)

JUDGMENT

STRASBOURG

7 February 2012

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

In the case of Axel Springer AG v. Germany,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President,*
Jean-Paul Costa,
Françoise Tulkens,
Josep Casadevall,
Lech Garlicki,
Peer Lorenzen,
Karel Jungwiert,
Renate Jaeger,
David Thór Björgvinsson,
Ján Šikuta,
Mark Villiger,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Nona Tsotsoria,
Zdravka Kalaydjieva,
Mihai Poalelungi,
Kristina Pardalos, *judges,*

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 13 October 2010 and on 7 December 2011,

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

PROCEDURE

1. The case originated in an application (no. 39954/08) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a public limited company incorporated under German law, Axel Springer AG ("the applicant company"), on 18 August 2008.

2. Relying on Article 10, the applicant company complained about the injunction imposed on it against reporting on the arrest and conviction of a well-known actor for a drug-related offence.

3. The application was initially allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court – "the Rules"). On 13 November 2008 a Chamber of that Section decided to give notice of the application to the Government. By virtue of Article 29 § 3 of the Convention, as worded at the relevant time, it also decided that the

admissibility and merits of the case should be considered together. On 30 March 2010 the Chamber, composed of the following judges: Peer Lorenzen, *President*, Renate Jaeger, Karel Jungwiert, Rait Maruste, Mark Villiger, Mirjana Lazarova Trajkovska and Zdravka Kalaydjieva, and also Claudia Westerdiek, *Section Registrar*, after deciding to join the present application to the applications *Von Hannover v. Germany* (nos. 40660/08 and 60641/08) concerning the refusal by the German courts to grant an injunction against any further publication of two photos, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

4. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 2 and 3 of the Convention (now Article 26 §§ 4 and 5) and Rule 24 of the Rules of Court. On 3 November 2011 Jean-Paul Costa's term as President of the Court came to an end. Nicolas Bratza succeeded him in that capacity and took over the presidency of the Grand Chamber in the present case (Rule 9 § 2). Jean-Paul Costa continued to sit following the expiry of his term of office, in accordance with Article 23 § 3 of the Convention and Rule 24 § 4. At the final deliberations, Lech Garlicki and Nona Tsotsoria, substitute judges, replaced Rait Maruste and Christos Rozakis, who were unable to take part in the further consideration of the case (Rule 24 § 3).

5. The President of the Grand Chamber decided to maintain the application of Article 29 § 3 of the Convention before the Grand Chamber with a view to a joint examination of the admissibility and merits of the applications. He also decided that the proceedings in the present case should be conducted simultaneously with those in the *Von Hannover* cases cited above (Rule 42 § 2).

6. The applicant company and the Government each filed written observations on the admissibility and merits of the case. The Government filed written observations on the applicant company's observations.

7. In addition, third-party comments were received from the following non-governmental organisations: Media Lawyers Association, Media Legal Defence Initiative, International Press Institute and World Association of Newspapers and News Publishers, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The parties were given the opportunity to reply to those comments (Rule 44 § 5).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 13 October 2010 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mrs A. WITTLING-VOGEL, Federal Ministry of Justice, *Agent*,
Mr C. WALTER, Professor of Public Law, *Counsel*,
Mrs A. VON UNGERN-STERNBERG, Assistant,
Mr R. SOMMERLATTE, Federal Office for Culture,
Mr A. MAATSCH, Judge of the Hamburg Regional Court, *Advisers*;

(b) *for the applicant company*
Mr U. BÖRGER, Lawyer, *Counsel*,
Mrs K. HESSE, Lawyer, *Adviser*.

The Court heard addresses, and answers to questions from judges, from Mr Walter and Mr Börger.

After being invited by the Court to provide additional information concerning the holding of a press conference by the Munich public prosecutor's office following the arrest of the actor X, the parties subsequently submitted a certain number of documents in that connection.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is a public limited company whose registered office is in Hamburg. It publishes the *Bild*, a daily newspaper with a large circulation. The present case concerns the publication by the newspaper of two articles about X, a well-known television actor. Between May 1998 and November 2003 X had played the part of Police Superintendent Y, the hero of a television series broadcast on a private television channel in the evenings, until 2005. By October 2004, 103 episodes had been broadcast, the last 54 of which had starred X in the role of Police Superintendent Y. The average audience rating was 18% (between 3 and 4,700,000 viewers per episode).

10. On 14 June 2003 the applicant company revealed that X had been convicted of unlawful possession of drugs. After receiving a warning from X, it undertook, on pain of an agreed penalty, to refrain from publishing information according to which four grams of cocaine had been found at X's home that he had had sent to him by post from Brazil and for which he had been given a prison sentence, suspended for five months, and fined 5,000 euros (EUR).

A. X's arrest

11. At approximately 11 p.m. on 23 September 2004 X was arrested at the Munich beer festival (*Oktoberfest*) for possession of cocaine. In a sworn statement (*eidesstattliche Versicherung*) a journalist from the applicant company declared that she had asked the police present at the scene whether X had been arrested and, if so, on what grounds. The police had confirmed that X had been arrested in the Käfer tent in possession of cocaine, without giving any further details.

12. According to that statement, the journalist had then contacted the public prosecutor, W., from the public prosecutor's office of Munich Regional Court I, in charge of relations with the press, and had asked him for information. W. had confirmed that X had been arrested in the Käfer tent in possession of cocaine. According to W., plain-clothes police officers had arrested X because they had seen him making a suspicious movement with his hand when coming out of the toilets. The officers had searched him, and, having found him to be in possession of an envelope containing 0.23 grams of cocaine, had arrested him. According to W., the arrest had taken place at approximately 11 p.m. on 23 September and a criminal complaint was currently being investigated.

B. The articles in issue

1. The first article

13. In its 29 September 2004 edition, the applicant company's daily newspaper, the *Bild*, published the following headline in large type on its front page:

> "Cocaine! Superintendent Y caught at the Munich beer festival."

The article, which was printed in small type, read as follows:

> "He came out of the gents tapping his nose suspiciously and was arrested! At the beer festival the police caught X (... years old, Superintendent Y on television), in possession of a small envelope of cocaine. See page 12 for the details."

The following headline appeared on page twelve of the daily:

> "TV star X caught in possession of cocaine. A bretzel (*Brezn*), a beer mug [containing a litre of beer – *Maß*] and a line of coke (*Koks*)."

The article, printed in small type, read as follows:

> "Thursday night, 11 p.m. At the beer festival there was drinking, partying, swaying arm in arm. And sniffing.... In the celebrities' tent the TV star X (... years old, whose real name is ...) came out of the gents tapping his nose and attracting the attention of police officers. They searched the star actor from the TV series Y (of which, by June,

there had been more than 60 episodes in five years). COCAINE! X had a packet on him containing 0.23 grams of coke, and was arrested. Public prosecutor W. from Munich told the *Bild*: "He was making suspicious movements with his hand, tapping his nose with his fingers. This of course attracted the attention of our officers. An investigation is under way. Only a small quantity of cocaine is involved though. W. : "Right in the middle of the festival grounds (*Wiesn*) – it might have been snuff tobacco, but our men have a flair for this sort of thing...". X had already had a run-in with the law for possession of drugs. In July 2000 the Superintendent from the TV series had been given a five-month suspended prison sentence and two years' probation and fined EUR 5,000. He was accused of illegally importing drugs. On a trip to Brazil X had arranged for four grams of cocaine to be sent to his address in Munich. His probation period ended two years ago. The quantity of the drug found in the tent ... is negligible. What can the actor expect? According to a legal expert questioned by *Bild*: "Even if the probation period is over the previous conviction is recent. X may get an unsuspended prison sentence – up to six months". Why prison? "X has apparently not been sufficiently daunted by the suspended prison sentence". The actor has probably had to submit to a forensic head hair examination. Each centimetre of hair will enable the expert to determine whether and how much cocaine was taken. Yesterday X refused to comment. P.S: "In every toilet cubicle in the tent ... there are signs saying: "The use of drugs is liable to prosecution!"

The article was accompanied by three photos of X, one on the first page and the other two on page twelve.

14. On the same day, during the morning, press agencies and other newspapers and magazines reported on X's arrest, referring in part to the article published in the *Bild*. That day the prosecutor W. confirmed the facts reported in the *Bild* to other written media and television channels, two of which ("RTL" and "pro7") broadcast the same reports that evening. During one of the broadcasts the prosecutor W. made the following statement:

"The police officers saw X making a suspicious movement with his hand while coming out of the men's toilets and concluded that he had taken something. They searched him and found an envelope containing 0.213 grams of cocaine. He had already been convicted of importing drugs and given a suspended prison sentence. He is not a first offender (*Ersttäter*). He should have known that he should not touch drugs. He can now expect a further prison sentence, even if the quantity found on him is insignificant."

2. The second article

15. In its 7 July 2005 edition the *Bild* printed the following headline on its inside pages: "TV series Superintendent X confesses in court to having taken cocaine. He is fined 18,000 euros!"

The article read as follows:

"Munich – On TV he plays a superintendent who puts criminals behind bars. Yesterday, it was the turn of the actor X (... years old, ...) to be hauled up in front of the court and confess! X, who had to explain himself to the Munich District Court [*Amtsgericht*] on charges of "unlawful possession of drugs", has confessed to taking drugs! X's counsel ... stated: "We fully acknowledge the offence with which we have been charged in the indictment". X confessed to the court: "I have occasionally smoked cannabis and taken cocaine from time to time. This has not made me happy. It

had not turned into a habit but is just something that I have done from time to time". Question from the court ...: "Are you currently taking drugs?" Reply from X: "No, I smoke cigarettes." The sentence: a fine of EUR 18,000. The court: "The accused's full confession has counted in his favour." On TV X continues investigating on the side of law and order. In Vienna he is in front of the cameras for the television series ... which should be starting on the second channel in the autumn."

The article was accompanied by a photo of X.

C. The proceedings in the German courts

16. Immediately after the articles appeared, X. instituted proceedings against the applicant company in the Hamburg Regional Court. The applicant company attached to its initial reply the statement by its journalist (see paragraphs 11 and 12 above) and numerous press articles about X, including a number of interviews given by him, to *Bunte* magazine among others, together with photos of him.

1. The first set of proceedings

(a) The injunction proceedings

17. On 30 September 2004 the Hamburg Regional Court imposed an injunction on publication of the article, following a request lodged by X on 29 September 2004. In a judgment of 12 November 2004 it confirmed the injunction. That judgment was upheld by the Court of Appeal on 28 June 2005.

On 6 October 2004 the Regional Court also imposed an injunction on publication of the photos illustrating the article. It confirmed that decision in a judgment of 12 November 2004. The applicant company did not challenge that judgment, which became final.

(b) The main proceedings

(i) Judgment of the Regional Court

18. On 11 November 2005 the Hamburg Regional Court prohibited any further publication of almost the entire first article, on pain of an agreed penalty, under Articles 823 § 1 and 1004 § 1 (by analogy) of the Civil Code (see paragraph 47 below), read in the light of the right to protection of personality rights (*Allgemeines Persönlichkeitsrecht*). It ordered the applicant company to pay EUR 5,000 as a penalty under the agreement and to reimburse the procedural expenses (EUR 811.88, plus statutory interest accrued from 4 November 2004).

19. According to the Regional Court, the article in question, which mentioned X's name and was accompanied by photos of him, amounted to a serious interference with his right to the protection of his personality rights;

the disclosure of his criminal conduct had, so to speak, resulted in his being pilloried and discredited in the eyes of the public. The court found that, despite those negative effects, reporting of that kind would nonetheless have been lawful in the event of serious crimes that were part of contemporary society and on which the press was entitled to report. Any interference with a criminal's private sphere was limited, however, by the proportionality principle, which involved a balancing exercise between the competing interests. The court held that in the present case the right to protection of X's personality rights prevailed over the public's interest in being informed, even if the truth of the facts related by the daily had not been disputed. Neither the nature of the crime committed, nor the person of X, nor any other circumstances justified publication of the article at issue.

20. The court observed that whilst a drugs-related offence was not a petty crime, particularly as in the present case it had been cocaine, which was a hard drug, X had been in possession of only a small quantity of that drug and had not been accused of drug trafficking. The type of offence involved was of medium, or even minor, seriousness, was a very common one and there was no particular public interest in knowing about it. The court added that, unlike serious crimes (such as spectacular robberies, or murders), there were no particular circumstances distinguishing the offence in question from ordinary crimes, even if there was an assumption that drug abuse was more widespread amongst key figures from the arts world and the media than in other circles. Furthermore, the way in which the report had been made by the applicant company confirmed that the offence itself was not an important one. The report had focussed more on X's person than on the offence, which would probably never have been reported in the press if it had been committed by a person unknown to the public. Similarly, the court pointed out, whilst X's previous conviction for a similar offence was such as to increase the public's interest, it was his only previous conviction and, moreover, dated back several years.

21. The court also found that publication of the articles in question was not justified by the person of X. The public did admittedly show an interest in Police Superintendent Y, a character in a relatively popular television series, but not in the actual person of the actor playing the part. There was nothing to suggest that X attracted the attention of the public on account of his performance as an actor or other activities bringing him within a circle of persons about whom the public had a need for regular information. The interest in X did not, in any event, go beyond the interest habitually manifested by the public in leading actors in German television series.

22. The court observed that the applicant company had published many articles about X over a period of six years and particularly over the last three years. The vast majority of these publications had, however, merely mentioned X's name – often without a photo – among the names of celebrities invited to various events. Whilst it was undisputed that X had

taken part in over 200 national and international cinematographic and televised productions, that did not convey much of an idea of his public importance. Indeed, actors could have starred in hundreds of television series and still remain little known to the public. There was no evidence that X had made a name for himself on account of any particular performance or that he had occupied a prominent position in society which had brought him into the public eye.

23. X had, to an extent, sought to attract the public's attention by giving interviews to certain magazines between 2000 and 2003. He therefore had to be more tolerant towards reports published about him than other well-known figures who avoided the limelight. According to the court, X had not, however, courted the public to a degree that he could be considered to have implicitly waived his right to the protection of his personality rights.

24. The Regional Court conceded that the fact that the actor had broken the law whereas on television he played the role of a superintendent entrusted with crime prevention was more entertaining for the public than if the actor had played any other kind of role. However, that contrast between the television role and the personal lifestyle of the actor did not mean that the public confused the latter with the fictional character. The actor merely donned the persona of a superintendent, just as he could don that of any other character, without thereby adopting the conduct of the character in question in his daily life. The fact that an actor did not adopt the lifestyle of the character he played could not in any way be regarded as an extraordinary event worthy of being reported. In the court's view, viewers could distinguish between the actor and his role, even where the actor was well known essentially for playing one particular character.

25. The Regional Court found, further, that X had not sought to portray himself as an emblem of moral virtue; neither had he adopted a stand on matters relating to drug abuse. The interviews reported by the applicant company contained no comment by X on the subject. In issue no. 48/2003 of the magazine *Bunte*, X had stated, in passing, that he did not have any alcohol in the house and that he had become a big tea connaisseur. In the court's view, the fact that X had briefly remarked on his previous conviction in two interviews with magazines in 2000 and 2001 did not mean that he had portrayed himself as an advocate or critic of the fight against drugs or as an expert in the field. That subject had been only marginally covered in the interview, which had mainly concerned the actor's professional prospects and his difficulties in his relationships.

26. Observing that when balancing the competing interests, the decisive criteria were how well known X was and the seriousness of the offence with which he was charged, the Regional Court found that the case concerned an actor who was not exceptionally well known and was accused of an offence which, while not insignificant, was not particularly spectacular and could be regarded as fairly common in the entertainment world. The public did not

therefore have a great interest in being informed of an event that was actually fairly anodyne, whereas the information published amounted to a serious (*gravierend*) interference with X's right to the protection of his personality rights.

27. The Regional Court found, lastly, that the applicant company was not justified in arguing that the publication of the article was lawful because it pursued legitimate interests. Admittedly, the press officer from the public prosecutor's office at the Munich Regional Court I had informed a large number of media reporters of the offence with which X had been charged and had disclosed his identity to them; nor was there any doubt that the public prosecutor's office could be regarded as a "privileged source" (*privilegierte Quelle*) of information that did not, as a general rule, require verification as to the truth of its content. Moreover, three press agencies had disclosed similar details. However, even assuming that it had received all the information before publishing the article in question, the applicant company could only conclude that the published information was true and was not thereby absolved from the requirement to check whether its publication was justified in terms of X's right to protection of his personality rights. In the court's opinion, the question of the veracity of information issued by a public authority had to be distinguished from that of the lawfulness of the subsequent publication of that information by the press.

28. The court found that it could be presumed that institutions providing a public service, and in particular the public prosecutor's office and the police, made every effort, in accordance with the principle of neutrality, not to issue information unless the public interest in doing so had been carefully weighed against that of the persons concerned. However, such institutions were not necessarily in a better position than a publisher to weigh the conflicting interests at stake regarding the dissemination of the information through the media.

29. In the instant case the applicant company was actually better placed than a member of the Munich public prosecutor's office to judge the degree to which X was known and the question regarding whether the public had an interest in learning of his arrest. On that point the court considered that account also had to be taken of the context in which the information was published: the public services were not in a position to anticipate every possible form of dissemination of factual information in any foreseeable context or to foresee whether a report mentioning the person's name was justified or not. Accordingly, publishers could not generally consider that the disclosure of a person's identity by a privileged source would make any kind of report on the person concerned legal, without having first balanced the interests at stake.

30. The Regional Court pointed out that there were situations in which there may be doubts regarding the assessment by the public authorities. Accordingly, in the case of X, the question arose as to whether it was appropriate for the public prosecutor's office to have expressed an opinion on the sentence that X could expect to receive when the criminal investigation had only just started. The court concluded that the applicant company could not argue that it had relied on the disclosure of X's name by the public prosecutor's office.

(ii) Judgment of the Court of Appeal

31. On 21 March 2006 the Court of Appeal dismissed an appeal by the applicant company, but reduced the amount of the agreed penalty to EUR 1,000. It upheld the conclusions of the Regional Court, pointing out that the disclosure of a suspect's name when reporting on an offence constituted, as a general rule, a serious infringement of the right to the protection of personality rights, even if it was a drug offence of medium or minor seriousness. In X's case the fact of informing the public that he had taken cocaine could adversely affect his future prospects of securing acting roles and, in particular, of obtaining a role in an advertisement or in television series aimed at a young audience.

32. The Court of Appeal reiterated the relevant criteria when balancing the rights of the press against the right to protection of personality rights, as established by the Federal Court of Justice (see paragraph 48 below). It confirmed that the nature of the offence and the exact circumstances in which it had been committed made it an everyday offence and would not have aroused any interest if the perpetrator had been little known. In the court's opinion, the possession and consumption of low quantities of drugs did not have adverse effects on third parties or on the general public. As X had not taken cocaine in the tent in front of everyone, his conduct did not imperil a young audience that might be likely to imitate him on account of his being a well-known television star.

33. The Court of Appeal acknowledged that the public had a particular interest in being informed and entertained because X was a well-known figure and had played the part of a police superintendent over a long period of time (*längerer Zeitraum*). However, even if X played that role, this did not mean that he had himself necessarily become an idol or role model as a law-enforcement officer, which could have increased the public's interest in the question whether in his private life he actually behaved like his character. It was clear that the actor X could not be identified with the fictitious character of Superintendent Y that he played. The fact that X had his fan clubs and had made public appearances as the actor who played the part of Superintendent Y did not alter that finding. It could well be that X's appearance, his manner of presenting himself, and the relaxed attitude portrayed in his films appealed to others, particularly a young audience.

That did not mean, though, that others saw in him a moral role model whose image should be corrected by the newspaper report in question.

34. The publications submitted by the applicant company were indeed evidence that X was hugely popular, but did not support the contention that he had used confessions about his private life to attract the public's attention. Nor was the newspaper report justifiable on the ground that X had been arrested in public, in a tent, because the drug had actually been consumed in the men's toilets, that is, in a place that fell within the protected private sphere, and out of public view. Lastly, even if it were to be established that X's arrest was a matter of substantial public interest, the same could not be said of the description and characterisation of the offence committed out of public view.

35. Lastly, while upholding the conclusions of the Regional Court regarding the role of the Munich public prosecutor's office, the Court of Appeal stated that the applicant company's liability did not extend beyond minor negligence given that the information disclosed by the public prosecutor's office had led it to believe that the report was lawful. The illegal disclosure by the public prosecutor's office did not, however, make publication by the applicant company legal. The Court of Appeal accordingly reduced the agreed penalty to EUR 1,000. It refused leave to appeal on points of law because its judgment did not conflict with the case-law of the Federal Court of Justice.

(iii) The decisions of the Federal Court of Justice

36. On 7 November 2006 the Federal Court of Justice refused the applicant company leave to appeal on points of law on the ground that the case did not raise a question of fundamental importance and was not necessary for the development of the law or to guarantee uniformity of the case-law.

37. On 11 December 2006 the Federal Court of Justice dismissed an appeal lodged by the applicant company claiming that it had not had a sufficient opportunity to make submissions (*Anhörungsrüge*). It stated that when balancing the public's interest in being informed about public criminal proceedings against an interference with the defendant's private sphere, the Court of Appeal had taken into account the circumstances of the case and had reached its decision in accordance with the criteria established in its case-law. There was no evidence that the relevant criteria for the balancing exercise had been disregarded. The Federal Court of Justice stated that the fact that the civil courts had found against the applicant company did not permit the latter to lodge an appeal on points of law and did not amount to a violation of the right to be heard.

2. The second set of proceedings

(a) The injunction proceedings

38. On 15 August 2005 the Hamburg Regional Court granted an application by X for an injunction against any further publication of the second article.

(b) The main proceedings

(i) Judgment of the Regional Court

39. By a judgment of 5 May 2006, the Regional Court granted X's application in the main proceedings, ordered the applicant company to refrain from any further publication of the second article on pain of penalty and ordered it to pay EUR 449.96 in costs, plus statutory interest accrued from 22 September 2005. It based its decision on essentially the same grounds as those set out in its judgment of 11 November 2005 (see paragraphs 18-30 above). It stated that the case in question had to be distinguished from the one that had been the subject of the judgment of the Federal Court of Justice of 15 November 2005 (see paragraph 48 below) in that the person concerned in that case, Prince Ernst August von Hannover, was much more widely known than X, so the press had been entitled to report on the substantial penalty imposed in that case.

(ii) Judgment of the Court of Appeal

40. On 12 September 2006 the Hamburg Court of Appeal dismissed an appeal by the applicant company on essentially the same grounds as those given in its judgment of 21 March 2006 (see paragraphs 31-35 above). On the subject of the relevant criteria for weighing the conflicting interests, it stated that, according to the judgment of the Federal Constitutional Court of 13 June 2006 (see paragraph 49 below), the fact that a person was a prominent figure or one known to the public was not a sufficient factor in itself to justify the existence of an interest on the part of the public in being informed of his or her conduct. In the present case, the public's interest in being informed and entertained, which derived from the fact that X was a well-known figure and starred as a superintendent in a television series, was insufficient to justify the interference with his right to decide for himself which information he was willing to disclose (*informationelle Selbstbestimmung*).

41. The applicant company's reliance on the high audience rating of the television series Y. did not, in the Court of Appeal's opinion, prove that X. had served as a role model or a counter model. If a role model existed for millions of viewers, the role model in question was the character of the

superintendent. The Court of Appeal reiterated that the fact that X. had been arrested in a public place did not make the newspaper article lawful because the offence itself had been committed out of public view, in the men's toilets. The suspicious movement that X had made with his hand had admittedly attracted the attention of the police at the scene, but it had not been established that other persons present in the tent had noticed that X had taken cocaine.

42. The Court of Appeal added that whilst the fact that the "quality press" had reported the case might indicate that there was a not insignificant (*nicht geringes*) interest in reporting it, that was not a basis on which to conclude that the interference with X's right to the protection of his personality rights had been lawful.

43. The Court of Appeal refused the applicant company leave to appeal on points of law on the ground that its judgment did not conflict with the case-law of the Federal Court of Justice, in particular the latter's judgment of 15 November 2005 (see paragraph 48 below).

(iii) Decisions of the Federal Court of Justice

44. On 17 April 2007 the Federal Court of Justice refused the applicant company leave to appeal on points of law on the ground that the case did not raise a question of fundamental importance and was not necessary for the development of the law or to guarantee uniformity of the case-law. On 12 June 2007 it dismissed an appeal lodged by the applicant company claiming that it had not had a sufficient opportunity to make submissions.

3. Decision of the Federal Constitutional Court

45. On 5 March 2008 a three-judge panel of the Federal Constitutional Court declined to entertain constitutional appeals lodged by the applicant company against the court decisions delivered in the first and second sets of proceedings. It stated that it was not giving reasons for its decision.

4. Other judicial decisions concerning the applicant company

46. On 12 September 2006 and 29 January 2008 the Hamburg Regional Court ordered the applicant company to pay X two penalty payments of EUR 5,000, each one for having breached the order of 15 August 2005 (see paragraph 38 above). The court criticised the applicant company for, *inter alia*, publishing in the 7 July 2006 edition of the daily newspaper *Die Welt* and on the newspaper's internet page (welt.de) on 22 March 2007 the following statement by one of its editors:

> "Accordingly, we had no right whatsoever to report on the trial of the popular actor X for possession of cocaine, even though he was a very well-known recidivist and the offence was committed at the beer festival in Munich."

II. RELEVANT DOMESTIC LAW AND PRACTICE AND EUROPEAN TEXTS

A. Domestic law and practice

1. The Civil Code

47. Article 823 § 1 of the Civil Code (*Bürgerliches Gestezbuch*) provides that anyone who, intentionally or negligently, unlawfully infringes another's right to life, physical integrity, health, freedom, property or other similar right, shall be liable to make compensation for the resulting damage.

In accordance with Article 1004 § 1, where another's property is damaged otherwise than by removal or illegal retention the owner may require the perpetrator to cease the interference. If there are reasonable fears that further damage will be inflicted, the owner may seek an injunction.

2. Relevant case-law

48. In its judgment of 15 November 2005 (no. Vi ZR 286/04) the Federal Court of Justice reiterated its established case-law according to which the decisive criteria for evaluating the lawfulness of a news report mentioning the name of the person concerned were the nature of the offence and the person of the suspect. The facts of the case were a fine and a prohibition on driving imposed by the French courts for speeding on a motorway (211 instead of 130 km per hour) on a person known to the public. The Federal Court of Justice found, firstly, that the speed limit had been exceeded to such an extent that it could be regarded as an expression of extreme contempt for the highway regulations, and, secondly, that the offence had put other motorists at considerable risk. Moreover, both the manner in which the person concerned had behaved in public in the past and his origins and the fact that he was the husband of a very well-known individual meant that the interest of the press in publishing a news report prevailed over the right to protection of the personality rights of the person concerned. The Federal Court of Justice pointed out that the Court's judgment in the case of *Von Hannover v. Germany* of 24 June 2004 (no. 59320/00, ECHR 2004-VI) allowed of no other conclusion. The articles (and photos) in that case had concerned only scenes from Caroline von Hannover's daily life, and had aimed merely to satisfy the curiosity of a particular readership regarding her private life.

49. In a decision of 13 June 2006 (no. 1 BvR 565/06), a three-judge panel of the Federal Constitutional Court decided not to entertain a constitutional appeal lodged against the judgment of the Federal Court of Justice and upheld the latter's findings.

B. Texts adopted by the Council of Europe

1. Recommendation Rec(2003)13 of the Committee of Ministers

50. The relevant passages of Recommendation (Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings, adopted on 10 July 2003 at the 848th meeting of the Ministers' Deputies, read as follows:-

"...

Recalling that the media have the right to inform the public due to the right of the public to receive information, including information on matters of public concern, under Article 10 of the Convention, and that they have a professional duty to do so;

Recalling that the rights to presumption of innocence, to a fair trial and to respect for private and family life under Articles 6 and 8 of the Convention constitute fundamental requirements which must be respected in any democratic society;

Stressing the importance of media reporting in informing the public on criminal proceedings, making the deterrent function of criminal law visible as well as in ensuring public scrutiny of the functioning of the criminal justice system;

Considering the possibly conflicting interests protected by Articles 6, 8 and 10 of the Convention and the necessity to balance these rights in view of the facts of every individual case, with due regard to the supervisory role of the European Court of Human Rights in ensuring the observance of the commitments under the Convention;

...

Recommends, while acknowledging the diversity of national legal systems concerning criminal procedure, that the governments of member states:

1. take or reinforce, as the case may be, all measures which they consider necessary with a view to the implementation of the principles appended to this recommendation, within the limits of their respective constitutional provisions,

...

Appendix to Recommendation Rec(2003)13

Principles concerning the provision of information through the media in relation to criminal proceedings

Principle 1 - Information of the public via the media

The public must be able to receive information about the activities of judicial authorities and police services through the media. Therefore, journalists must be able to freely report and comment on the functioning of the criminal justice system, subject only to the limitations provided for under the following principles.

Principle 2 - Presumption of innocence

Respect for the principle of the presumption of innocence is an integral part of the right to a fair trial.

Accordingly, opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused.

Principle 3 - Accuracy of information

Judicial authorities and police services should provide to the media only verified information or information which is based on reasonable assumptions. In the latter case, this should be clearly indicated to the media.

Principle 4 - Access to information

When journalists have lawfully obtained information in the context of on-going criminal proceedings from judicial authorities or police services, those authorities and services should make available such information, without discrimination, to all journalists who make or have made the same request.

(...)

Principle 8 - Protection of privacy in the context of on-going criminal proceedings

The provision of information about suspects, accused or convicted persons or other parties to criminal proceedings should respect their right to protection of privacy in accordance with Article 8 of the Convention. Particular protection should be given to parties who are minors or other vulnerable persons, as well as to victims, to witnesses and to the families of suspects, accused and convicted. In all cases, particular consideration should be given to the harmful effect which the disclosure of information enabling their identification may have on the persons referred to in this Principle."

2. Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy

51. The relevant passages of this resolution, adopted by the Parliamentary Assembly on 26 June 1998, read as follows:-

"...

6. The Assembly is aware that personal privacy is often invaded, even in countries with specific legislation to protect it, as people's private lives have become a highly lucrative commodity for certain sectors of the media. The victims are essentially public figures, since details of their private lives serve as a stimulus to sales. At the same time, public figures must recognise that the special position they occupy in society - in many cases by choice - automatically entails increased pressure on their privacy.

7. Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.

8. It is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Article 10 of the European Convention on Human Rights, that the media invade people's privacy, claiming that their readers are entitled to know everything about public figures.

9. Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.

10. It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed by the European Convention on Human Rights: the right to respect for one's private life and the right to freedom of expression.

11. The Assembly reaffirms the importance of every person's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.

12. However, the Assembly points out that the right to privacy afforded by Article 8 of the European Convention on Human Rights should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media.

13. The Assembly believes that, since all member states have now ratified the European Convention on Human Rights, and since many systems of national legislation comprise provisions guaranteeing this protection, there is no need to propose that a new convention guaranteeing the right to privacy should be adopted. ..."

THE LAW

I. DISJOINDER OF THE APPLICATION

52. The Court notes that before relinquishing jurisdiction in favour of the Grand Chamber the Chamber had joined the present application to the applications in *Von Hannover v. Germany* (nos. 40660/08 and 60641/08) – see paragraph 3 above). Having regard, however, to the nature of the facts and the substantive issues raised in those cases, the Grand Chamber considers it appropriate to disjoin applications nos. 40660/08 and 60641/08 from the present application.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

53. The applicant company complained about the injunction imposed on it against reporting on the arrest and conviction of X. It relied on Article 10 of the Convention, the relevant parts of which read as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ... or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

54. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 a) of the Convention. It notes further that no other ground for declaring it inadmissible has been established and that it must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

55. The Government acknowledged that the impugned court decisions amounted to an interference with the applicant company's right to freedom of expression. However, the interference was prescribed by law and pursued an aim recognised as legitimate by the Court, namely, the protection of the private sphere (*News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, § 44, ECHR 2000-I). The question at issue between the parties in the present case was whether the interference had been proportionate, and in particular whether the balancing exercise undertaken by the national courts of the applicant company's right to freedom of expression against X's right to respect for his private life was in conformity with the criteria established by the Court's case-law. In that connection regard had to be had to the role of the person concerned, the purpose of the publication and the severity of the sanction imposed on the press.

56. The Government referred to the national courts' finding that, unlike Superintendent Y, X was not well known to the public and accordingly could not be regarded as a public figure. In its judgment concerning the second article, the Regional Court had, moreover, differentiated X from Prince Ernst August von Hannover (see paragraph 39 above). The press interviews given by X had not been sufficient in themselves to increase the public's interest in his person. In the Government's submission, the task of assessing how well a person was known to the public should fall to the domestic courts. That was particularly true in borderline cases, which required an assessment of the facts and of social situations that the Court could not undertake in respect of each and every potential public figure in 47 States.

57. With regard to the subject matter of media reports, the Government acknowledged that where the press reported on the commission of an offence it was generally playing its role as "public watchdog", in particular where criminal proceedings were concerned. There was a greater public interest in this case than when the press merely reported details of the private life of an individual. In the present case, however, the public had no interest in being informed about the offence committed by X, whom they could not have dissociated from the person of the defendant. The present case had not called into question the workings of the justice system, like the case of *Obukhova v. Russia* (no. 34736/03, 8 January 2009), but had concerned only a minor drugs-related offence committed by a relatively well-known actor.

58. The task of assessing the seriousness of the offence should fall within the margin of appreciation of the national authorities. In the instant case the courts considered that the offence was of medium, or even minor, seriousness. The Government pointed out that the amount of the fine was relatively high on account of X's income. The criminal courts had fixed the amount at 90 day-fines, so the offence did not appear in X's certificate of good conduct (destined for employers) or in his criminal record.

59. The Government disputed the applicant company's allegation that the Munich prosecutor had held a press conference and published a press release about X's arrest prior to publication of the first article (see paragraph 69 below).

60. As regards the nature of the penalty imposed on the applicant company, the Government observed that the latter had merely been prevented from publishing the content of the articles in question and had been ordered to reimburse modest legal costs. The applicant company had neither been convicted under criminal law nor ordered to pay damages, unlike publishers in other cases who had been given a custodial sentence; nor had it been prevented from carrying on the profession of journalist or faced an order for the seizure of all copies of the particular edition of a newspaper or an order to pay hefty damages (*Cumpănă and Mazăre*

v. Romania [GC], no. 33348/96, § 112, ECHR 2004-XI; *Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria*, no. 58547/00, § 41, 27 October 2005; and *Flinkkilä and Others v. Finland*, no. 25576/04, § 89, 6 April 2010). The Government added that the German courts had not, moreover, imposed a blanket ban on all reporting of X's arrest and trial; the problem had been that the applicant company had failed to maintain the anonymity of the actor at the time of his arrest and prior to the trial.

61. The Government highlighted the margin of appreciation enjoyed by the State in the present case. That margin depended on the nature of the activities in question and the aim pursued by the restrictions. In its recent case-law, the Court had moreover left the State a broad margin of appreciation in cases concerning Article 8 of the Convention. (*Armonienė v. Lithuania*, no. 36919/02, § 38, 25 November 2008, and *A. v. Norway*, no. 28070/06, § 66, 9 April 2009). Generally speaking, the margin enjoyed by the States was broader where there was no European consensus. In the Government's submission, whilst there was admittedly a trend towards harmonisation of the legal systems in Europe, differences nevertheless remained, as evidenced by the failure of the negotiations for the adoption of a regulation of the European Union on conflict-of-law rules regarding non-contractual obligations (Regulation EC No. 864/2007 of 11 July 2007 – Rome II Regulation). The margin of appreciation was also broad where the national authorities had to strike a balance between competing private and public interests or Convention rights (*Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I, and *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78 ECHR 2007-XIII). Moreover, the case-law of the Court of Justice of the European Union apparently took the same approach (cases of *Omega* of 14 October 2004, C-36/02, and *Schmidberger* of 12 June 2003, C-112/00).

62. The Government argued that the special nature of certain cases, such as the present one, in which the domestic courts were required to balance the rights and interests of two or more private individuals lay in the fact that the proceedings before the Court were in fact a continuation of the original legal action, with each party to the domestic proceedings potentially able to apply to the Court. It was precisely for that reason that one result alone of the balancing exercise of the competing interests was insufficient, and that there should be a "corridor" of solutions within the confines of which the national courts should be allowed to give decisions in conformity with the Convention. Failing that, the Court would have to take the decision on every case itself, which could hardly be its role.

63. The Government stated that there had been slightly less of a tendency to do this at domestic level because the Federal Constitutional Court granted the ordinary courts a margin of appreciation in that respect and refrained from carrying out its own balancing exercise in their stead. That could, moreover, explain the absence of reasons given for the decision

of the Federal Constitutional Court in the present case. The tendency, at national level, to reduce the scope of review by a constitutional court should apply *a fortiori* to the European Court of Human Rights, which had the task of examining the outcome of balancing exercises carried out by the courts in 47 Contracting States, whose legal systems were still very heterogeneous.

64. In the Government's submission, the Court should intervene only where the domestic courts had not taken account of certain specific circumstances when undertaking the balancing exercise or where the result of that exercise was patently disproportionate (*Cumpănă and Mazăre*, cited above, §§ 111-120). That conclusion was confirmed, moreover, by Article 53 of the Convention: where the relationship between State and citizen was concerned, a gain of freedom for the individual concerned involved only a loss of competence for the State, whereas in the relationship between two citizens the fact of attaching more weight to the right of one of the persons concerned restricted the right of the others, which was forbidden under Article 53 of the Convention.

(b) The applicant company

65. The applicant company maintained that at the material time X was a well-known actor who played the main role in a television crime series that was extremely popular, especially among young male adults; X had, moreover, been voted second most popular actor in 2002. He was not therefore just an ordinary individual who did not attract media attention, as had been so in other cases decided by the Court (see, *inter alia*, *Sciacca v. Italy*, no. 50774/99, ECHR 2005-I; *Toma v. Romania*, no. 42716/02, 24 February 2009; and *Egeland and Hanseid v. Norway*, no. 34438/04, 16 April 2009).

66. In the applicant company's submission, the commission of a criminal offence was, by its very nature, never a purely private matter. Furthermore, in the present case X was a repeat offender as he had already been given a five-month suspended prison sentence in July 2000 and fined EUR 5,000 for possession of drugs.

67. The public's interest in being informed prevailed over X's right to respect for his private life. X had – of his own initiative – courted public attention, had a market value corresponding to his high profile, had willingly allowed photos to be taken of himself on public occasions and had given press interviews revealing aspects of his private life, including his drug consumption. As a role model and having himself entered the public arena, X should have accepted that he would attract the public's attention, in particular if he committed a criminal offence. The applicant company argued that anyone who used the media for self-promotion should expect their conduct to be truthfully reported on by the media. This was

particularly true in X's case because, following his first conviction for possession of drugs, he had asserted that he had given up taking drugs. He had accordingly waived his right to privacy.

68. The applicant company stated, further, that the truth of the facts reported in the articles in question was not disputed (citing, conversely, *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, ECHR 2004-XI). The information given had, moreover, not affected the conduct of the preliminary investigation or the trial (citing, conversely, *Tourancheau and July v. France*, no. 53886/00, 24 November 2005); it had included details not only about X's private life, but also serious factual information about criminal law and the consequences of drug taking. The present case was thus distinguishable from the case of *Von Hannover* (cited above), especially as, unlike X, the applicant in that case had always sought to protect her private life.

69. The applicant company reiterated that it had reported on X's arrest after the prosecution authorities had disclosed the facts and the identity of the person arrested. In its submissions at the hearing, particularly in reply to the judges' questions, it had stated that prior to publication of the articles the Munich public prosecutor's office had held a press conference – in the presence of television cameras – during which it had provided detailed information. The public prosecutor's office had also published a long press release on the subject. Accordingly, the applicant company had published only information that had already been made public. It would be demotivating for journalists not to be able to publish such information. Attending a press conference would be a complete waste of time.

70. In conclusion, the applicant company submitted that the press should not be reduced to reporting only on political figures. Since prominent persons were able to establish a certain image of themselves by seeking the attention of the media, the latter should be permitted to correct that image when it no longer corresponded to the reality. It was not a question of asserting the primacy of the freedom of expression over the right to respect for private life. Freedom of expression should, however, prevail where the person concerned enjoyed a more than regional degree of prominence and had freely engaged in his or her self-promotion.

2. Third parties' observations

(a) Media Lawyers Association

71. The third-party association submitted that the right to reputation was not protected by the Convention. Publication of a defamatory article about a person did not, of itself, amount to an interference with the exercise of the rights guaranteed under Article 8. When balancing the rights under Articles 8 and 10 of the Convention wide and strong protection should be given to the right of the media to report on all matters of public interest and

in particular to inform the public about judicial proceedings. The third-party association observed that the inclusion of a person's name or other identifying detail played an important part in fulfilling the task of informing the public.

72. According to a United Kingdom Supreme Court ruling, if the names of the parties were not revealed when reporting on court proceedings the report would be disembodied, readers would be less interested and editors would give the report lower priority. The Media Lawyers Association also stressed the importance of preserving a wide editorial discretion and the principle of open justice to which the media contributed an essential element, adding that there should be no incursion into that principle except where strictly necessary such as protecting a defendant or witness by anonymity. Other than in those circumstances, there should be no restriction on the right of the media to publish reports on court proceedings including photographs.

(b) Joint submissions by the Media Legal Defence Initiative, International Press Institute and World Association of Newspapers and News Publishers

73. The three third-party associations submitted that a broad trend could be observed across the Contracting States towards the assimilation by the national courts of the principles and standards articulated by the Court relating to the balancing of the rights under Article 8 against those under Article 10 of the Convention, even if the individual weight given to a particular factor might vary from one State to another. They invited the Court to grant a broad margin of appreciation to the Contracting States, submitting that such was the thrust of Article 53 of the Convention. They referred to the Court's judgment in the case of *Chassagnou and Others v. France* ([GC], nos. 25088/94, 28331/95 and 28443/95, § 113, ECHR 1999-III), submitting that the Court had indicated that it would allow Contracting States a wide margin of appreciation in situations of competing interests.

74. The Contracting States were likewise generally granted a wider margin in respect of positive obligations in relationships between private parties or other areas in which opinions within a democratic society might reasonably differ significantly (*Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I). The Court had, moreover, already allowed the Contracting States a broad margin of appreciation in a case concerning a balancing exercise in respect of rights under Articles 8 and 10 of the Convention (*A. v. Norway*, cited above, § 66). Its role was precisely to confirm that the Contracting States had put in place a mechanism for the determination of a fair balance and whether particular factors taken into account by the national courts in striking such a balance were consistent with the Convention and its case-law. It should only intervene where the domestic courts had considered irrelevant factors to be significant or where the

conclusions reached by the domestic courts were clearly arbitrary or summarily dismissive of the privacy or reputational interests at stake. Otherwise, it ran the risk of becoming a court of appeal for such cases.

3. The Court's assessment

75. The parties agreed that the judicial decisions given in the present case constituted an interference with the applicant company's right to freedom of expression as guaranteed by Article 10 of the Convention.

76. Such interference contravenes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10. It therefore falls to be determined whether the interference was "prescribed by law", had an aim or aims that is or are legitimate under Article 10 § 2 and was "necessary in a democratic society" for the aforesaid aim or aims.

77. It is common ground between the parties that the interference was prescribed by Articles 823 § 1 and 1004 § 1 of the Civil Code (see paragraphs 18 and 47 above), read in the light of the right to protection of personality rights. They also agree that it pursued a legitimate aim – namely, the protection of the reputation or rights of others – within the meaning of Article 10 § 2 of the Convention, which, according to the Court's case-law (*Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI, and *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007), can encompass the right to respect for private life within the meaning of Article 8. The parties disagree, however, as to whether the interference was "necessary in a democratic society".

(a) General principles

(i) Freedom of expression

78. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among other authorities, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; *Editions Plon v. France*, no. 58148/00, § 42, ECHR 2004-IV; and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV).

79. The Court has also repeatedly emphasised the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, §§ 59 and 62, ECHR 1999-III, and *Pedersen and Baadsgaard*, cited above, § 71).

80. This duty extends to the reporting and commenting on court proceedings which, provided that they do not overstep the bounds set out above, contribute to their publicity and are thus consonant with the requirement under Article 6 § 1 of the Convention that hearings be public. It is inconceivable that there can be no prior or contemporaneous discussion of the subject matter of trials, be it in specialised journals, in the general press or amongst the public at large. Not only do the media have the task of imparting such information and ideas; the public also has a right to receive them (see *News Verlags GmbH & Co. KG v. Austria*, no. 31457/96, § 56, ECHR 2000-I; *Dupuis and Others v. France*, no. 1914/02 § 35, ECHR 2007-VII; and *Campos Dâmaso v. Portugal*, no. 17107/05, § 31, 24 April 2008).

81. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Pedersen and Baadsgaard,* cited above, § 71). Furthermore, it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted in a particular case (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298, and *Eerikäinen and Others v. Finland*, no. 3514/02, § 65, 10 February 2009).

(ii) Limits on the freedom of expression

82. However, Article 10 § 2 of the Convention states that freedom of expression carries with it "duties and responsibilities", which also apply to the media even with respect to matters of serious public concern. These duties and responsibilities are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the "rights of others". Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable

with respect to the allegations (see *Pedersen and Baadsgaard*, cited above, § 78, and *Tønsbergs Blad A.S. and Haukom v. Norway*, no. 510/04, § 89, ECHR 2007-III).

83. The Court reiterates that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life (see *Chauvy and Others*, cited above, § 70; *Pfeifer,* cited above, § 35; and *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 40, 21 September 2010). The concept of "private life" is a broad term not susceptible to exhaustive definition, which covers the physical and psychological integrity of a person and can therefore embrace multiple aspects of a person's identity, such as gender identification and sexual orientation, name or elements relating to a person's right to their image (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008-...). It covers personal information which individuals can legitimately expect should not be published without their consent (see *Flinkkilä and Others*, cited above, § 75, and *Saaristo and Others v. Finland*, no. 184/06, § 61, 12 October 2010).

In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *A. v. Norway*, cited above, § 64). The Court has held, moreover, that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence (see *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 49, ECHR 2004-VIII).

84. When examining the necessity of an interference in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8 (see *Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, 14 June 2007, and *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011).

(iii) Margin of appreciation

85. The Court reiterates that, under Article 10 of the Convention, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of expression guaranteed under that provision is necessary (see *Tammer v. Estonia*, no. 41205/98, § 60, ECHR 2001-I, and *Pedersen and Baadsgaard,* cited above, § 68).

86. However, this margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court (see *Karhuvaara and Iltalehti v. Finland*, no. 53678/00, § 38, ECHR 2004-X, and *Flinkkilä and Others*, cited above, § 70). In exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on (see *Petrenco v. Moldova*, no. 20928/05, § 54, 30 March 2010; *Polanco Torres and Movilla Polanco*, cited above, § 41; and *Petrov v. Bulgaria* (dec.), no. 27103/04, 2 November 2010).

87. In cases such as the present one the Court considers that the outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher who has published the offending article or under Article 8 of the Convention by the person who was the subject of that article. Indeed, as a matter of principle these rights deserve equal respect (see *Hachette Filipacchi Associés* (*ICI PARIS*) *v. France*, no. 12268/03, § 41, 23 July 2009; *Timciuc v. Romania* (dec.), no. 28999/03, § 144, 12 October 2010; and *Mosley v. the United Kingdom*, no. 48009/08, § 111, 10 May 2011; see also point 11 of the Resolution of the Parliamentary Assembly – paragraph 51 above). Accordingly, the margin of appreciation should in principle be the same in both cases.

88. Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *MGN Limited*, cited above, §§ 150 and 155, and *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 57, 12 September 2011).

(iv) Criteria relevant for the balancing exercise

89. Where the right to freedom of expression is being balanced against the right to respect for private life, the criteria laid down in the case-law that are relevant to the present case are set out below.

(α) Contribution to a debate of general interest

90. An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest (see *Von Hannover*, cited above, § 60; *Leempoel & S.A. ED. Ciné Revue v. Belgium*, no. 64772/01, § 68, 9 November 2006; and *Standard Verlags GmbH v. Austria (no. 2)*, no. 21277/05 § 46, 4 June 2009). The definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court nevertheless considers it useful to point out that it has recognised the

existence of such an interest not only where the publication concerned political issues or crimes (see *White v. Sweden*, no. 42435/02, § 29, 19 September 2006; *Egeland and Hanseid*, cited above, § 58; and *Leempoel & S.A. ED. Ciné Revue*, cited above, § 72), but also where it concerned sporting issues or performing artists (see *Nikowitz and Verlagsgruppe News GmbH v. Austria*, no. 5266/03, § 25, 22 February 2007; *Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal*, nos. 11182/03 and 11319/03, § 28, 26 April 2007; and *Sapan v. Turkey*, no. 44102/04, § 34, 8 June 2010). However, the rumoured marital difficulties of a president of the Republic or the financial difficulties of a famous singer were not deemed to be matters of general interest (see *Standard Verlags GmbH*, cited above, § 52, and *Hachette Filipacchi Associés* (*ICI PARIS*), cited above, § 43).

(β) How well known is the person concerned and what is the subject of the report?

91. The role or function of the person concerned and the nature of the activities that are the subject of the report and/or photo constitute another important criterion, related to the preceding one. In that connection a distinction has to be made between private individuals and persons acting in a public context, as political figures or public figures. Accordingly, whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures (see *Minelli v. Switzerland* (dec.), no. 14991/02, 14 June 2005, and *Petrenco,* cited above, § 55). A fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions (see *Von Hannover*, cited above, § 63, and *Standard Verlags GmbH*, cited above, § 47).

Whilst in the former case the press exercises its role of "public watchdog" in a democracy by imparting information and ideas on matters of public interest, that role appears less important in the latter case. Similarly, although in certain special circumstances the public's right to be informed can even extend to aspects of the private life of public figures, particularly where politicians are concerned, this will not be the case – even where the persons concerned are quite well known to the public – where the published photos and accompanying commentaries relate exclusively to details of the person's private life and have the sole aim of satisfying the curiosity of a particular readership in that respect (see *Von Hannover*, cited above, § 65 with the references cited therein, and *Standard Verlags GmbH*, cited above, § 53; see also point 8 of the Resolution of the Parliamentary Assembly –

paragraph 51 above). In the latter case, freedom of expression calls for a narrower interpretation (see *Von Hannover*, cited above, § 66; *Hachette Filipacchi Associés* (*ICI PARIS*), cited above, § 40; and *MGN Limited*, cited above, § 143).

(γ) Prior conduct of the person concerned

92. The conduct of the person concerned prior to publication of the report or the fact that the photo and the related information have already appeared in an earlier publication are also factors to be taken into consideration (see *Hachette Filipacchi Associés* (*ICI PARIS*), cited above, §§ 52 and 53, and *Sapan*, cited above, § 34). However, the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving the party concerned of all protection against publication of the report or photo at issue (see *Egeland and Hanseid*, cited above, § 62).

(δ) Method of obtaining the information and its veracity

93. The way in which the information was obtained and its veracity are also important factors. Indeed, the Court has held that the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism (see, for example, *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I; *Pedersen and Baadsgaard*, cited above, § 78; and *Stoll v. Switzerland* [GC], no. 69698/01, § 103, ECHR 2007-V).

(ε) Content, form and consequences of the publication

94. The way in which the photo or report are published and the manner in which the person concerned is represented in the photo or report may also be factors to be taken into consideration (see *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. v. Austria (no. 3)*, nos. 66298/01 and 15653/02, § 47, 13 December 2005; *Reklos and Davourlis v. Greece*, no. 1234/05, § 42, 15 January 2009; and *Jokitaipale and Others v. Finland*, no. 43349/05, § 68, 6 April 2010). The extent to which the report and photo have been disseminated may also be an important factor, depending on whether the newspaper is a national or local one, and has a large or a limited circulation (see *Karhuvaara and Iltalehti*, cited above, § 47, and *Gurgenidze v. Georgia*, no. 71678/01, § 55, 17 October 2006).

(ζ) Severity of the sanction imposed

95. Lastly, the nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of an interference with the exercise of the freedom of expression (see *Pedersen and Baadsgaard*, cited above, § 93, and *Jokitaipale and Others*, cited above, § 77).

(b) Application to the present case

(i) Contribution to a debate of general interest

96. The Court notes that the articles in question concern the arrest and conviction of the actor X, that is, public judicial facts that may be considered to present a degree of general interest. The public do, in principle, have an interest in being informed – and in being able to inform themselves – about criminal proceedings, whilst strictly observing the presumption of innocence (see *News Verlags GmbH & Co. KG,* cited above, § 56; *Dupuis and Others*, cited above, § 37; and *Campos Dâmaso*, cited above, § 32; see also Recommendation Rec(2003)13 of the Committee of Ministers and in particular principles nos. 1 and 2 appended thereto – paragraph 50 above). That interest will vary in degree, however, as it may evolve during the course of the proceedings – from the time of the arrest – according to a number of different factors, such as the degree to which the person concerned is known, the circumstances of the case and any further developments arising during the proceedings.

(ii) How well known is the person concerned and what is the subject of the report?

97. The Court notes the substantially different conclusions reached by the national courts in assessing how well known X was. In the Regional Court's opinion, X was not a figure at the centre of public attention and had not courted the public to a degree that he could be considered to have waived his right to the protection of his personality rights, despite being a well-known actor and frequently appearing on television (see paragraph 23 above). The Court of Appeal, however, found that X was a well-known and very popular figure and had played the part of a police superintendent over a long period of time without himself having become a model law-enforcement officer, which would have justified the public's interest in the question whether in his private life he actually behaved like his character (see paragraphs 33 and 34 above).

98. The Court considers that it is, in principle, primarily for the domestic courts to assess how well known a person is, especially where that person is mainly known at national level. It notes in the present case that at the material time X was the main actor in a very popular detective series, in

which he played the main character, Superintendent Y. The actor's popularity was mainly due to that television series, of which, when the first article appeared, 103 episodes had been broadcast, the last 54 of which had starred X in the role of Superintendent Y. Accordingly, he was not, as the Regional Court appeared to suggest, a minor actor whose renown, despite a large number of appearances in films (more than 200 – see paragraph 22 above), remained limited. It should also be noted in that connection that the Court of Appeal referred not only to the existence of X's fan clubs, but also to the fact that his admirers could have been encouraged to imitate him by taking drugs, if the offence had not been committed out of public view (see paragraph 32 above).

99. Furthermore, whilst it can be said that the public does generally make a distinction between an actor and the character he or she plays, there may nonetheless be a close link between the popularity of the actor in question and his or her character where, as in the instant case, the actor is mainly known for that particular role. In the case of X, that role was, moreover, that of a police superintendent, whose mission was law enforcement and crime prevention. That fact was such as to increase the public's interest in being informed of X's arrest for a criminal offence. Having regard to those factors and to the terms employed by the domestic courts in assessing the degree to which X was known to the public, the Court considers that he was sufficiently well known to qualify as a public figure. That consideration thus reinforces the public's interest in being informed of X's arrest and of the criminal proceedings against him.

100. With regard to the subject of the articles, the domestic courts found that the offence committed by X was not a petty offence as cocaine was a hard drug. The offence was nevertheless of medium, or even minor, seriousness, owing both to the small quantity of drugs in X's possession – which, moreover, were for his own personal consumption – and to the high number of offences of that type and related criminal proceedings. The domestic courts did not attach much importance to the fact that X had already been convicted of a similar offence, pointing out that this had been his only previous offence and, moreover, had been committed some years previously. They concluded that the applicant company's interest in publishing the articles in question was solely due to the fact that X had committed an offence which, if it had been committed by a person unknown to the public, would probably never have been reported on (see paragraph 20 above).

The Court can broadly agree with that assessment. It would observe, however, that X was arrested in public, in a tent at the beer festival in Munich. In the Court of Appeal's opinion, that fact was a matter of important public interest in this case, even if that interest did not extend to the description and characterisation of the offence in question as it had been committed out of public view.

(iii) X's conduct prior to publication of the impugned articles

101. Another factor is X's prior conduct *vis-à-vis* the media. He had himself revealed details about his private life in a number of interviews (see paragraph 25 above). In the Court's view, he had therefore actively sought the limelight, so that, having regard to the degree to which he was known to the public, his "legitimate expectation" that his private life would be effectively protected was henceforth reduced (see, *mutatis mutandis*, *Hachette Filipacchi Associés* (*ICI PARIS*), cited above, § 53, and, by converse implication, *Eerikäinen and Others*, cited above, § 66).

(iv) Method of obtaining the information and its veracity

102. With regard to the method of obtaining the published information, the applicant company submitted that it had reported on X's arrest only after the disclosure, by the prosecuting authorities, of the facts and of the identity of the accused. It also asserted that all the information that it had published had already been made public, particularly during a press conference and in a press release issued by the public prosecutor's office (see paragraph 69 above). The Government denied that any such press conference had been held by the public prosecutor's office and submitted that it was not until after the applicant company had published the first article that the prosecutor W. had confirmed to other media the facts related by the applicant company.

103. The Court observes that it cannot be determined from the documents in its possession whether or not the applicant company's assertions that a press conference had been held and a press release issued prior to publication of the first article are substantiated. On the contrary, following a question put by the Court at the hearing the assertions in question turned out to be unfounded. The Court finds the attitude of the applicant company regrettable in this respect.

104. It can be seen, however, from the court decisions delivered in the present case and the observations of the parties to the domestic proceedings that this point was not dealt with before the domestic courts. For the purposes of examination of the present case, the Court will merely observe that the applicant company attached to all its replies in the various domestic proceedings a statement by one of its journalists as to how the information published on 29 September 2004 had been obtained (see paragraphs 11 and 12 above) and that the Government have not contested the truth of that statement. Consequently, whilst the applicant company is not justified in claiming that it had merely published information made public at a press conference held by the Munich public prosecutor's office, the fact remains that the confirmation of the published information, and in particular X's identity, emanated from the police and the prosecutor W., who was, moreover, press officer for the Munich public prosecutor's office at the time.

105. Consequently, as the first article was based on information provided by the press officer at the Munich public prosecutor's office, it had a sufficient factual basis (see *Bladet Tromsø and Stensaas*, cited above, § 72; *Eerikäinen and Others*, cited above, § 64; and *Pipi v. Turkey* (dec.), no. 4020/03, 15 May 2009). The truth of the information related in both articles was, moreover, not in dispute between the parties to the domestic proceedings, and neither is it in dispute between the parties to the proceedings before the Court (see *Karhuvaara and Iltalehti,* cited above, § 44).

106. However, in the opinion of the domestic courts examining the case, the fact that the information had emanated from the Munich public prosecutor's office merely meant that the applicant company could rely on its veracity; it did not dispense it from the duty to balance its interest in publishing the information against X's right to respect for his private life. They found that that balancing exercise could only be undertaken by the press because a public authority was not in a position to know how or in what form the information would be published (see paragraphs 27-30 above).

107. In the Court's opinion, there is nothing to suggest that such a balancing exercise was not undertaken. The fact is, however, that having regard to the nature of the offence committed by X, the degree to which X is well known to the public, the circumstances of his arrest and the veracity of the information in question, the applicant company – having obtained confirmation of that information from the prosecuting authorities themselves – did not have sufficiently strong grounds for believing that it should preserve X's anonymity. In that context, it should also be pointed out that all the information revealed by the applicant company on the day on which the first article appeared was confirmed by the prosecutor W. to other magazines and to television channels. Likewise, when the second article appeared, the facts leading to X's conviction were already known to the public (see, *mutatis mutandis*, *Aleksey Ovchinnikov v. Russia*, no. 24061/04, § 49, 16 December 2010). Moreover, the Court of Appeal itself considered that the applicant company's liability did not extend beyond minor negligence given that the information disclosed by the public prosecutor's office had led it to believe that the report was lawful (see paragraph 35 above). In the Court's view, it has not therefore been shown that the applicant company acted in bad faith when publishing the articles in question.

(v) Content, form and consequences of the impugned articles

108. The Court observes that the first article merely related X's arrest, the information obtained from W. and the legal assessment of the seriousness of the offence by a legal expert (see paragraph 13 above). The second article only reported the sentence imposed by the court at the end of

a public hearing and after X had confessed (see paragraph 15 above). The articles did not therefore reveal details about X's private life, but mainly concerned the circumstances of and events following his arrest (see *Flinkkilä and Others*, cited above, § 84, and *Jokitaipale and Others*, cited above, § 72). They contained no disparaging expression or unsubstantiated allegation (see the case-law cited in paragraph 82 above). The fact that the first article contained certain expressions which, to all intents and purposes, were designed to attract the public's attention cannot in itself raise an issue under the Court's case-law (see *Flinkkilä and Others*, cited above, § 74, and *Pipi*, above-cited decision).

The Court notes, moreover, that the Regional Court imposed an injunction on publication of the photos accompanying the impugned articles and that the applicant company did not challenge that injunction. It therefore considers that the form of the articles in question did not constitute a ground for banning their publication. Furthermore, the Government did not show that publication of the articles had resulted in serious consequences for X.

(vi) Severity of the sanction imposed on the applicant company

109. Regarding, lastly, the severity of the sanctions imposed on the applicant company, the Court considers that, although these were lenient, they were capable of having a chilling effect on the applicant company. In any event, they were not justified in the light of the factors set out above.

(c) Conclusion

110. In conclusion, the grounds advanced by the respondent State, although relevant, are not sufficient to establish that the interference complained of was necessary in a democratic society. Despite the margin of appreciation enjoyed by the Contracting States, the Court considers that there is no reasonable relationship of proportionality between, on the one hand, the restrictions imposed by the national courts on the applicant company's right to freedom of expression and, on the other hand, the legitimate aim pursued.

111. Accordingly, there has been a violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

112. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

113. The applicant company claimed EUR 27,734.28 in respect of pecuniary damage, corresponding to the three penalties that it had had to pay X (EUR 11,000 – see paragraphs 31 and 46 above), and X's legal costs (EUR 1,261.84 – paragraphs 18 and 40 above) and lawyers' fees (EUR 15,472.44) which it had had to reimburse. It referred, on the latter point, to the case of *Verlagsgruppe News GmbH v. Austria (no. 2)*, (no. 10520/02, § 46, 14 December 2006).

114. The Government did not comment in that connection.

115. The Court finds that there is a sufficient causal link between the violation found and the amounts claimed, except those corresponding to the two penalty payments of EUR 5,000. Accordingly, it awards EUR 17,734.28 under this head.

B. Costs and expenses

116. The applicant company sought EUR 32,522.80 in respect of costs and expenses. That sum included court costs (EUR 6,610) and lawyers' fees for the proceedings before the civil courts (EUR 13,972.50), the Federal Constitutional Court (EUR 5,000) and the Court (EUR 5,000), plus translation costs for the proceedings before the Court (EUR 1,941.30). The applicant company specified that although it had agreed on a higher amount of fees with its lawyers, it was claiming only the amounts provided for in the statutory fee scales. With regard to the amounts claimed for lodging the appeal with the Federal Constitutional Court and the application before the Court, the applicant company left the matter to the Court's discretion, whilst specifying that it sought at least EUR 5,000 in respect of each set of proceedings.

117. The Government noted that the applicant company limited its claims for lawyers' fees to the amounts set out in the scales applicable in Germany, which was not open to criticism. They contested the amounts claimed for the proceedings before the Federal Constitutional Court and before the Court, however, for lack of particulars. They indicated that where the Federal Constitutional Court declined to entertain a constitutional appeal, it generally fixed the value of the subject matter of the case at EUR 4,000. The corresponding lawyers' fees would in that case amount to EUR 500 inclusive of tax.

118. The Court finds the sums claimed to be reasonable and, accordingly, awards those sums.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Disjoins,* unanimously, the applications in the case of *Von Hannover v. Germany* (nos. 40660/08 and 60641/08) from the present application;

2. *Declares*, unanimously, the application admissible;

3. *Holds*, by twelve votes to five, that there has been a violation of Article 10 of the Convention;

4. *Holds*, by twelve votes to five,
   (a) that the respondent State is to pay the applicant company, within three months, the following amounts:
      (i) EUR 17,734.28 (seventeen thousand seven hundred and thirty-four euros and twenty-eight centimes), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 32,522.80 (thirty-two thousand five hundred and twenty-two euros and eighty centimes), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant company's claim in respect of just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 February 2012.

Michael O'Boyle
Deputy Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge López Guerra joined by Judges Jungwiert, Jaeger, Villiger and Poalelungi is annexed to this judgment.

N.B.
M.O'B.

DISSENTING OPINION OF JUDGE LÓPEZ GUERRA JOINED BY JUDGES JUNGWIERT, JAEGER, VILLIGER AND POALELUNGI

I do not agree with the finding by the Grand Chamber of a violation of Article 10 of the Convention. In my opinion, in the present case the Grand Chamber had no grounds for concluding that the domestic courts did not duly protect the applicant company's right to freedom of expression.

I certainly agree with the Grand Chamber's determination of the facts of the case. It correctly established that there had been an interference with the applicant company's right to freedom of expression as recognised in Article 10 of the Convention (in this case, the right to publish certain information) as a result of court sanctions imposed on it for publishing two press articles concerning the arrest and sentencing of a third person. I also agree with the Grand Chamber that the sanctions were provided for by law and pursued a legitimate end, namely, respect for the rights of others, in this case the right to privacy (including the right to respect for one's reputation) as recognised in Article 8 of the Convention. I also agree with the Grand Chamber's assertion (see paragraph 76 of the judgment) that the Court's task was to determine whether those sanctions were necessary in a democratic society pursuant to the terms of Article 10 § 2 of the Convention. Also, as indicated in subsequent paragraphs of the Grand Chamber judgment, in order to answer this question this Court had to decide whether the domestic courts had adequately weighed the conflicting rights and interests, namely, the right to freedom of expression versus the right to privacy.

My difference of opinion with the Grand Chamber judgment derives from its further reasoning. According to our consolidated case-law as cited in this judgment (see *Petrenco v. Moldova*, no. 20928/05, § 54, 30 March 2010; *Petrov v. Bulgaria* (dec.), no. 27103/04, 2 November 2010; and *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 40, 21 September 2010), it is not the task of this Court to assume the role of the competent national courts in determining the merits of the case, but rather to review the decisions those courts render in the exercise of their powers of appreciation. Concerning compliance with Article 10 of the Convention, the domestic courts have a certain margin of appreciation (see *Von Hannover v. Germany*, no. 59320/00, § 57, ECHR 2004-VI, and *Lappalainen v. Finland* (dec.), no. 22175/06, 20 January 2009) although, as the Grand Chamber underscores in the present judgment (see paragraph 86) their decisions are subject to the scrutiny of this Court. In that regard, this Court has established a series of criteria which must be followed when assessing how the domestic courts have balanced conflicting rights, including, *inter alia*, the published information's contribution to a debate of general interest, the previous behavior and degree of notoriety of the person affected, the

content and veracity of the information, and the nature of the sanctions and penalties imposed. In balancing the conflicting rights in the cases brought before them, national authorities (in this case, the national courts) must apply these criteria in reaching their decision, whilst appraising, with the benefit of direct examination, the facts and circumstances of the case when applying their domestic law.

In order to exercise this Court's powers of review without becoming a fourth instance, our task in guaranteeing respect for Convention rights in this type of case is essentially to verify whether the domestic courts have duly balanced the conflicting rights and have taken into account the relevant criteria established in our case-law without any manifest error or omission of any important factor. Where these prerequisites have been met, that is, the domestic courts have expressly weighed the conflicting rights and interests and applied the pertinent criteria established in our above-cited case-law, an additional assessment of the competing interests by this Court, examining anew the facts and circumstances of the case, is tantamount to acting as a fourth instance (or, as now, a fifth instance).

In the present case the domestic courts (mainly the Hamburg Regional Court and the Court of Appeal) certainly performed the required balancing exercise. Concerning each of the published articles, on two consecutive occasions those courts assessed the competing interests derived from freedom of expression and the safeguard of privacy. In extensive reasoning they explained their final judgments and their reasons for giving more weight to the protection of the right to privacy and reputation. These judgments exhaustively examined the different aspects and circumstances of the question, including the relevance of the matter for the public interest, the degree of notoriety of the person affected, the nature of the crime of which he was suspected and subsequently accused and sentenced, and the severity of the sanction imposed on the applicant company. Furthermore – albeit indirectly – the domestic Court of Appeal consciously applied our Court's criteria by using as a point of reference the judgment of the Federal Court of Justice of 15 November 2005, a judgment which expressly cited and applied the criteria established in our *Von Hannover v. Germany* judgment of 24 June 2004.

There is certainly a possibility that domestic courts may apply the relevant criteria in a manifestly unreasonable way or may fail to duly assess the presence of some important factor. But in this case the judgments of both the Hamburg Regional Court and the Court of Appeal demonstrate that both domestic courts carefully weighed all the relevant facts of the case, with the advantage of their knowledge and their continuous contact with the social and cultural reality of their country, in a way which cannot be considered arbitrary, careless or manifestly unreasonable.

In view of the above, none of the grounds which would justify a review by this Court of the judgments of the domestic courts are present in this case. The domestic courts did not fail to balance the conflicting interests or to apply the relevant criteria in doing so. They made no manifest error of appreciation; nor did they fail to consider all the relevant factors. Nevertheless, on this occasion and instead of concentrating its assessment on whether the domestic courts applied the above-mentioned criteria effectively, the Grand Chamber has chosen to re-examine the same facts that were brought before the national courts. And this was done in spite of the national courts having extensively assessed the circumstances of the case in a way that was not manifestly unreasonable, and with the added benefit of their direct examination of the context in which the events occurred. Analysing the same facts and using the same criteria and same balancing approach as the domestic courts, the Grand Chamber came to a different conclusion, giving more weight to the protection of the right to freedom of expression than to the protection of the right to privacy. But that is precisely what the case-law of this Court has established is not our task, that is, to set ourselves up as a fourth instance to repeat anew assessments duly performed by the domestic courts.



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

COURT (PLENARY)

CASE OF HANDYSIDE v. THE UNITED KINGDOM

(Application no. 5493/72)

JUDGMENT

STRASBOURG

7 December 1976

In the Handyside case,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. G. BALLADORE PALLIERI, *President*,
Mr. H. MOSLER,
Mr. M. ZEKIA,
Mr. G. WIARDA,
Mrs. H. PEDERSEN,
Mr. THÓR VILHJÁLMSSON,
Mr. S. PETRÉN,
Mr. R. RYSSDAL,
Mr. A. BOZER,
Mr. W. GANSHOF VAN DER MEERSCH,
Sir Gerald FITZMAURICE,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. H. DELVAUX,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 8 and 9 June and from 2 to 4 November 1976,

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

PROCEDURE

1. The Handyside case was referred to the Court by the European Commission of Human Rights (hereinafter referred to as "the Commission"). The case originated in an application against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission on 13 April 1972 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") by a United Kingdom citizen, Mr. Richard Handyside.

2. The Commission's request, to which was attached the report provided for under Article 31 (art. 31) of the Convention, was lodged with the registry of the Court on 12 January 1976, within the period of three months laid down by Articles 32 para. 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration made by the United Kingdom recognising the compulsory jurisdiction of the

Court (Article 46) (art. 46). The purpose of the Commission's request is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Article 10 of the Convention and Article 1 of the Protocol (art. 10, P1-1) of 20 March 1952 (hereinafter referred to as "Protocol No. 1").

3. On 20 January 1976, the President of the Court drew by lot, in the presence of the Registrar, the names of five of the seven judges called upon to sit as members of the Chamber; Sir Gerald Fitzmaurice, the elected judge of British nationality, and Mr. G. Balladore Pallieri, the President of the Court, were ex officio members under Article 43 (art. 43) of the Convention and Rule 21 para. 3 (b) of the Rules of Court respectively. The five judges thus designated were Mr. H. Mosler, Mr. M. Zekia, Mr. G. Wiarda, Mrs. H. Pedersen and Mr. S. Petrén (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

Mr. Balladore Pallieri assumed the office of President of the Chamber in accordance with Rule 21 para. 5.

4. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Government of the United Kingdom (hereinafter called "the Government") and the delegates of the Commission regarding the procedure to be followed; having regard to their concurring statements, the President decided by an Order of 6 February 1976 that it was not necessary at that stage for memorials to be filed. He also instructed the Registrar to invite the Commission to produce certain documents and these were received at the registry on 11 February.

5. On 29 April 1976, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court, "considering that the case raise[d] serious questions affecting the interpretation of the Convention ...".

6. On the same day, the Court held a preparatory meeting to consider the oral stage of the procedure. At this meeting it compiled a list of questions which it sent to the Commission and to the Government, requesting them to supply the required information in the course of their addresses.

7. After consulting, through the Registrar, the Agent of the Government and the delegates of the Commission, the President decided by an Order of 3 May 1976 that the oral hearings should open on 5 June.

8. The oral hearings were held in public at the Human Rights Building, Strasbourg, on 5 and 7 June 1976.

There appeared before the Court:

- for the Government:

Mr. P. FIFOOT, Legal Counsellor,
Foreign and Commonwealth Office, Barrister-at-Law,
Agent and *Counsel*,

Mr. G. SLYNN, Q.C., Recorder of Hereford,
Mr. N. BRATZA, Barrister-at-Law, *Counsel*,

Mr. A.H. HAMMOND, Assistant Legal Adviser, Home Office,
Mr. J.C. DAVEY, Principal, Home Office, *Advisers*;

- for the Commission:
Mr. G. SPERDUTI, *Principal Delegate*,
Mr. S. TRECHSEL, *Delegate*,
Mr. C. THORNBERRY, who had represented the applicant before the Commission, assisting the Delegates under Rule 29 para. 1, second sentence.

The Court heard the addresses and submissions of Mr. Fifoot and Mr. Slynn for the Government and of Mr. Sperduti, Mr. Trechsel and Mr. Thornberry for the Commission, as well as their replies to the questions put by the Court and several judges.

AS TO THE FACTS

Historical

9. The applicant, Mr. Richard Handyside, is proprietor of the publishing firm "Stage 1" in London which he opened in 1968. He has published, among other books, The Little Red Schoolbook (hereinafter called "the Schoolbook"), the original edition of which was the subject of the present case and a revised edition of which appeared on 15 November 1971.

10. The applicant's firm had previously published Socialism and Man in Cuba, by Che Guevara, Major Speeches, by Fidel Castro, and Revolution in Guinea, by Amilcar Cabral. Since 1971 four further titles have appeared, namely Revolution in the Congo, by Eldridge Cleaver, a book of writings from the Women's Liberation Movement called Body Politic, China's Socialist Revolution, by John and Elsie Collier, and The Fine Tubes Strike, by Tony Beck.

11. The British rights of the Schoolbook, written by Søren Hansen and Jesper Jensen, two Danish authors, had been purchased by the applicant in September 1970. The book had first been published in Denmark in 1969 and subsequently, after translation and with certain adaptations, in Belgium, Finland, France, the Federal Republic of Germany, Greece, Iceland, Italy, the Netherlands, Norway, Sweden and Switzerland as well as several non-European countries. Furthermore it circulated freely in Austria and Luxembourg.

12. After having arranged for the translation of the book into English the applicant prepared an edition for the United Kingdom with the help of a group of children and teachers. He had previously consulted a variety of people about the value of the book and intended publication in the United Kingdom on 1 April 1971. As soon as printing was completed he sent out several hundred review copies of the book, together with a press release, to

a selection of publications from national and local newspapers to educational and medical journals. He also placed advertisements for the book in various publications including The Bookseller, The Times Educational and Literary Supplements and Teachers World.

13. On 22 March 1971, the Daily Mirror published an account of the book's contents, and other accounts appeared in The Sunday Times and the Sunday Telegraph on 28 March. Further reports were carried by the Daily Telegraph on 29 and 30 March; they also indicated that representations would be made to the Director of Public Prosecutions demanding that action should be taken against the publication of the book. The Schoolbook was also the subject of further extensive press comment, some favourable and some not, immediately after and around the time of the seizure referred to below.

14. After receipt of a number of complaints, on 30 March 1971 the Director of Public Prosecutions asked the Metropolitan Police to undertake enquiries. As a result of these, on 31 March 1971, a successful application was made for a warrant under section 3 of the Obscene Publications Acts 1959/1964 to search the premises occupied by Stage 1 in London. The warrant was issued in the applicant's absence but in accordance with the procedure laid down by English law and a copy of the Schoolbook was before the judicial authority which issued the warrant. It was executed on the same day and 1,069 copies of the book were provisionally seized together with leaflets, posters, showcards and correspondence relating to its publication and sale.

15. Acting on the advice of his lawyers the applicant continued distributing copies of the book in the subsequent days. After the Director of Public Prosecutions had received information that further copies had been taken to Stage 1's premises after the search, further successful applications were made on 1 April 1971 (in conditions similar to those described above) to search again those premises and also the premises of the printers of the book. Later that day altogether 139 copies of the book were seized at Stage 1's premises and, at the printer's, 20 spoiled copies of the book, together with correspondence relating to it and the matrix with which the book was printed. About 18,800 copies of a total print of 20,000 copies were missed and subsequently sold, for example, to schools which had placed orders.

16. On 8 April 1971, a Magistrates' Court issued, under section 2 (1) of the Obscene Publications Act 1959, as amended by section 1 (1) of the Obscene Publications Act 1964, two summonses against the applicant for the following offences:

(a) on 31 March 1971 having in his possession 1,069 obscene books entitled "The Little Red Schoolbook" for publication for gain;

(b) on 1 April 1971, having in his possession 139 obscene books entitled "The Little Red Schoolbook" for publication for gain.

The summonses were served on the applicant on the same day. He thereupon ceased distribution of the book and advised bookshops accordingly but, by that time, some 17,000 copies were already in circulation.

17. The summonses were answerable on 28 May 1971 at Clerkenwell Magistrates' Court but, on the application of the Director of Public Prosecutions, the case was adjourned until 29 June. On that day the applicant appeared at Lambeth Magistrates' Court to which the case had been transferred, having consented to the case being heard and determined in summary proceedings by a magistrate rather than by a judge and a jury on indictment. He claims that this choice was dictated by his financial plight and the need to avoid the delays inherent in the indictment procedure although this is questioned by the Government. Having been granted legal aid, he was represented by counsel. On 1 July 1971, after witnesses had been called for both prosecution and defence, the applicant was found guilty of both offences and fined £25 on each summons and ordered to pay £110 costs. At the same time the court made a forfeiture order for the destruction of the books by the police.

18. On 10 July 1971 notices of appeal against both convictions were received by the Metropolitan Police from the applicant's solicitors. The grounds stated were "that the magistrate's decision was wrong and against the weight of the evidence". The appeal was heard before the Inner London Quarter Sessions on 20, 21, 22, 25 and 26 October 1971. At this hearing witnesses gave evidence on behalf of the prosecution and on behalf of the applicant. Judgment was delivered on 29 October 1971: the decision at first instance was upheld and the applicant was ordered to pay another £854 costs. The material seized as described above was then destroyed.

The applicant did not exercise his right of making a further appeal to the Court of Appeal since he did not dispute that the judgment of 29 October 1971 had correctly applied English law.

19. Whilst the Schoolbook was not the subject of proceedings in Northern Ireland, the Channel Islands or the Isle of Man, the same was not true of Scotland.

Indeed a Glasgow bookseller was charged under a local Act. However he was acquitted on 9 February 1972 by a stipendiary magistrate who considered that the book was not indecent or obscene within the meaning of that Act. It does not appear from the file whether the case concerned the original or the revised edition.

Further, a complaint was brought under Scottish law against Stage 1 in respect of the revised edition. It was dismissed on 8 December 1972 by an Edinburgh court solely on the ground that the accused could not have the necessary mens rea. In January 1973 the Procurator Fiscal announced that he would not appeal against this decision; he also did not avail himself of his right to initiate criminal proceedings against Mr. Handyside personally.

The Schoolbook

20. The original English language edition of the book, priced at thirty pence a copy, had altogether 208 pages. It contained an introduction headed "All grown-ups are paper tigers", an "Introduction to the British edition", and chapters on the following subjects: Education, Learning, Teachers, Pupils and The System. The chapter on Pupils contained a twenty-six page section concerning "Sex" which included the following sub-sections: Masturbation, Orgasm, Intercourse and petting, Contraceptives, Wet dreams, Menstruation, Child-molesters or "dirty old men", Pornography, Impotence, Homosexuality, Normal and abnormal, Find out more, Venereal diseases, Abortion, Legal and illegal abortion, Remember, Methods of abortion, Addresses for help and advice on sexual matters. The Introduction stated: "This book is meant to be a reference book. The idea is not to read it straight through, but to use the list of contents to find and read about the things you're interested in or want to know more about. Even if you're at a particularly progressive school you should find a lot of ideas in the book for improving things."

21. The applicant had planned the distribution of the book through the ordinary book-selling channels although it was said at the appeal hearing to have been accepted that the work was intended for, and intended to be made available to, school-children of the age of twelve and upwards.

22. Pending the appeal hearing, the applicant consulted his legal advisers concerning a revision of the Schoolbook to avoid further prosecutions; apparently he tried to consult the Director of Public Prosecutions as well, but in vain. It was decided to eliminate or re-write the offending lines which had been attacked before the Magistrates' Court by the prosecution but to do so necessitated, in some cases, re-writing substantially more than these criticised sentences. There were other alterations made to the text by way of general improvement, for example in response to comments and suggestions from readers and the updating of changed data (addresses, etc.).

23. The revised edition was published on 15 November 1971. After consulting the Attorney General, the Director of Public Prosecutions announced on 6 December 1971 that the new edition would not be the subject of a prosecution. This publication took place after the Quarter Sessions judgment but the revision of the Schoolbook had been completed, and the printing of the new version was in train, well before.

Domestic law

24. The action against the Schoolbook was based on the Obscene Publications Act 1959, as amended by the Obscene Publications Act 1964 (hereinafter called "the 1959/1964 Acts").

25. The relevant extracts from the 1959/1964 Acts, read together, are as follows:

Section 1

"(1) For the purposes of this act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) In this Act 'article' means any description of article containing

or embodying matter to be read or looked at or both, any sound record,

and any film or other record of a picture or pictures.

..."

Section 2

"(1) Subject as hereinafter provided, any person who, whether for gain or not, publishes an obscene article or who has an obscene article for publication for gain (whether gain to himself or gain to another) shall be liable -

(a) on summary conviction to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding six months;

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding three years or both.

... A person shall be deemed to have an article for publication for gain if with a view to such publication he has the article in his ownership, possession or control.

...

(4) A person publishing an article shall not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offence that the matter is obscene.

..."

Section 3

"(1) If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting that, in any premises ... specified in the information, obscene articles are, or are from time to time, kept for publication for gain, the justice may issue a warrant ... empowering any constable to enter (if need be by force) and search the premises ... within fourteen days from the date of the warrant, and to seize and remove any articles found therein ... which the constable has reason to believe to be obscene articles and to be kept for publication for gain.

(2) A warrant under the foregoing subsection shall, if any obscene articles are seized under the warrant, also empower the seizure and removal of any documents found in the premises ... which relate to a trade or business carried on at the premises ...

(3) Any articles seized ... shall be brought before a justice of the peace ... who ... may thereupon issue a summons to the occupier of the premises ... to appear ... before a magistrates' court ... to show cause why the articles or any of them should not be forfeited; and if the court is satisfied, as respects any of the articles, that at the time when they were seized they were obscene articles kept for publication for gain, the court shall order those articles to be forfeited.

...

(4) In addition to the person summoned, any other person being the owner, author or maker of any of the articles brought before the court, or any other person through whose hands they had passed before being seized, shall be entitled to appear before the court ... to show cause why they should not be forfeited.

(5) Where an order is made under this section for the forfeiture of any articles, any person who appeared, or was entitled to appear, to show cause against the making of the order may appeal to quarter sessions; and no such order shall take effect until the expiration of fourteen days after the day on which the order is made, or, if before the expiration thereof notice of appeal is duly given or application is made for the statement of a case for the opinion of the High Court, until the final determination or abandonment of the proceedings on the appeal or case.

...

(7) For the purposes of this section the question whether an article is obscene shall be determined on the assumption that copies of it would be published in any manner likely having regard to the circumstances in which it was found, but in no other manner.

...

... Where articles are seized under section 3 ... and a person is convicted under section 2 ... of having them for publication for gain, the court on his conviction shall order the forfeiture of those articles.

Provided that an order made by virtue of this subsection (including an order so made on appeal) shall not take effect until the expiration of the ordinary time within which an appeal in the matter of the proceedings in which the order was made may be instituted or, where such an appeal is duly instituted, until the appeal is finally decided or abandoned;

..."

Section 4

"(1) A person shall not be convicted of an offence against section 2 of this Act and an order for forfeiture shall not be made under the foregoing section if it is proved that publication of the article in question is justified as being for the public good on the

ground that it is in the interests of science, literature, art of learning, or of other objects of general concern.

(2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or to negative the said ground."

Section 5

"...

(3) This Act shall not extend to Scotland or to Northern Ireland."

26. At the time of the events under review, the authorities frequently adopted a non-contentious procedure ("disclaimer/caution procedure") rather than instituting, as in this case, criminal proceedings. However it could only be used when the individual admitted that the article was obscene and consented to its destruction. The procedure constituted no more than a matter of practice and was abandoned in 1973 following criticisms expressed in a judicial decision.

The judgment of the Inner London Quarter Sessions

27. At the appeal hearing two principal issues were examined by the court, namely, first, whether or not the Crown had proved beyond reasonable doubt that the Schoolbook was an obscene article within the meaning of the 1959/1964 Acts; and secondly, if so, whether or not the applicant had established the defence under section 4 of the 1959/1964 Acts to the effect that he had shown, on a balance of probabilities, that publication of the book was justified as being for the public good.

28. The court first dealt with the issue of obscenity. Following a decision in another case the court noted that it had to be satisfied that the persons who it was alleged were likely to read the article would constitute a significant proportion. It also accepted the meaning of the words "deprave and corrupt" as it had been explained in that other case and about which there had been no dispute between the parties.

29. Following further previous case-law, the court had decided that expert evidence should be admitted on the question of whether the Schoolbook was obscene. Such evidence, though not normally admissible for this purpose but only in connection with the defence under section 4 of the 1959/1964 Acts, could be heard in the present case which was concerned with the effect of the article upon children.

The court had therefore heard seven witnesses on behalf of the prosecution and nine on behalf of the applicant, being experts in various fields, in particular those of psychiatry and teaching; the views they had expressed were very different. After they had been heard, the applicant had argued that, when one had the sincere opinion of many highly-qualified experts against the prosecution's case, it was impossible to say that the

tendency to deprave and corrupt had been established with certainty. The court was unable to accept this submission: in its judgment of 29 October 1971 it pointed out that there was an almost infinite variation in the relevant background of the children who would be in one way or another affected by the book, so that it was difficult to speak of "true facts" in this case. The views of the applicant's witnesses had been those approaching the extreme of one wing of the more broadly varied outlook on the education and upbringing of children, whereas the evidence given on behalf of the prosecution tended to cover the views of those who, although clearly tending in the opposite direction, were less radical. Particularly, when looking at the evidence on behalf of the applicant, the court had been driven to the conclusion that most of the witnesses were so uncritical of the book looked at as a whole, and so unrestrained in their praise of it, as to make them at times less convincing than otherwise they might have been. In summary the court considered that a good deal of the witnesses had been so single-minded in an extreme point of view as to forfeit in a large measure the power to judge with that degree of responsibility which makes the evidence of any great value on a matter of this sort.

30. Concerning the Schoolbook itself, the court first stressed that it was intended for children passing through a highly critical stage of their development. At such a time a very high degree of responsibility ought to be exercised by the courts. In the present case, they had before them, as something said to be a perfectly responsible adult opinion, a work of an extreme kind, unrelieved by any indication that there were any alternative views; this was something which detracted from the opportunity for children to form a balanced view on some of the very strong advice given therein.

31. The court then briefly examined the background. For example, looking at the book as a whole, marriage was very largely ignored. Mixing a very one-sided opinion with fact and purporting to be a book of reference, it would tend to undermine, for a very considerable proportion of children, many of the influences, such as those of parents, the Churches and youth organisations, which might otherwise provide the restraint and sense of responsibility for oneself which found inadequate expression in the book.

The court reached the conclusion that, on the whole, and quite clearly through the mind of the child, the Schoolbook was inimical to good teacher/child relationships; in particular, there were numerous passages that it found to be subversive, not only to the authority but to the influence of the trust between children and teachers.

32. Passing to the tendency to deprave and corrupt, the court considered the atmosphere of the book looked at as a whole, noting that the sense of some responsibility for the community as well as to oneself, if not wholly absent, was completely subordinated to the development of the expression of itself by the child. As indications of what it considered to result in a

tendency to deprave and corrupt, the court quoted or referred to the following:

A. Passage headed "Be yourself" (p. 77):

> "Maybe you smoke pot or go to bed with your boyfriend or girlfriend - and don't tell your parents or teachers, either because you don't dare to or just because you want to keep it secret.
>
> Don't feel ashamed or guilty about doing things you really want to do and think are right just because your parents or teachers might disapprove. A lot of these things will be more important to you later in life than the things that are 'approved of'."

The objectionable point was that there was no reference there to the illegality of smoking pot which was only to be found many pages further on in an entirely different part of the book. Similarly there was no specific mention at all in the book of the illegality of sexual intercourse by a boy who has attained the age of fourteen and a girl who has not yet attained sixteen. It had to be remembered that the Schoolbook was indicated as a work of reference and that one looked up the part which one wanted rather than read it as a whole book.

B. The passage (pp. 97-98) headed "Intercourse and petting" under the main heading "Sex": to lay this before children as young as many of those who the court considered would read the book, without any injunction about restraint or unwisdom, was to produce a tendency to deprave and corrupt.

C. The passage - (pp. 103 to 105) - under the heading of "Pornography" and particularly the following:

> "Porn is a harmless pleasure if it isn't taken seriously and believed to be real life. Anybody who mistakes it for reality will be greatly disappointed.
>
> But it's quite possible that you may get some good ideas from it and you may find something which looks interesting and that you haven't tried before."

Unfortunately, the sane and sensible first paragraph quoted above was immediately followed by a passage suggesting to children that in pornography they might find some good ideas which they might adopt. This was to raise the real likelihood that a substantial number of children would feel it incumbent upon them to look for and practise such things. Moreover, just on the previous page there was the following passage: "But there are other kinds - for example pictures of intercourse with animals or pictures of

people hurting each other in various ways. Pornographic stories describe the same sort of thing." The court considered that, although it was improbable that young people would be likely to commit sexual offences with animals as a result of this, the possibility that they should practise some other forms of cruelty to one another, for sexual satisfaction, was a real likelihood in the case of a significant number of children if this got into the hands of children at a disturbed, unsettled and sexually excited stage of their lives. Such acts might very well be criminal offences just like smoking pot and sexual intercourse between a boy of at least fourteen and a girl not yet sixteen. The expression "to deprave and corrupt" must include the admission of or the encouragement to commit criminal offences of that kind.

33. The court concluded "in the light of the whole of the book that this book or this article on sex or this section or chapter on pupils, whichever one chooses as an article, looked at as a whole does tend to deprave and corrupt a significant number, significant proportion, of the children likely to read it". Such children would, it was satisfied, include a very substantial number aged under sixteen.

34. The court finally dealt with the issue of the defence under section 4 of the 1959/1964 Acts. It stated that no doubt there were many features about the book which, taken by themselves, were good. The unfortunate thing was that so frequently the good was intermixed with things that were bad and detracted from it.

For example, much of the information about contraceptives (pp. 98-102) was very relevant and desirable which should be laid before very many children who might not otherwise readily have access to it. But it was damaged by the suggestion, backed by the recommendation to take direct action if the school authorities would not give way that every school should have at least one contraceptive vending machine (p. 101).

Similarly, the treatment of the subject of homosexuality (pp. 105-107) was a factual, very compassionate, understanding and valuable statement. But again, no matter how good one assessed the value of this section, it was hopelessly damning by its setting and context, and the fact that it, only, contained any suggestion of a stable relationship in relation to sex and that marriage received no such treatment at all. Moreover, there was a very real danger that this passage would create in the minds of children a conclusion that that kind of relationship was something permanent.

Again, there were passages with regard to venereal diseases (pp. 110-111), contraception (pp. 98-102) and abortion (pp. 111-116), containing dispassionately and sensibly, and on the whole completely accurately, a great deal of advice which ought not to be denied to young children. However, on the balance of probabilities, these matters could not outweigh what the court was convinced had a tendency to deprave and corrupt. The court asked itself whether, granted the degree of indecency which it found, the good likely to result from the Schoolbook was such that it ought,

nevertheless, to be published in the public interest; it regretfully came to the conclusion that the burden on the appellant to show that "publication of the article in question is justified as being for the public good" had not been discharged.

Further details concerning the revised edition

35. The passages from the original edition of the Schoolbook whose "extreme" tone or "subversive" aspects had been emphasised by the judgment of 29 October 1971 (paragraphs 30 and 31 above) are repeated either with no, or with no important, changes in the revised edition which was prepared before that date but published on 15 November 1971 (paragraphs 22-23 above).

Of the passages cited by Quarter Sessions as striking examples of the tendency to deprave and corrupt (paragraph 32 above), one was not altered (p. 77, "Be yourself"). On the other hand, the others were fairly extensively softened (pp. 97-98, "Intercourse and petting", and pp. 103-105, "Pornography") and on page 95 of the work there is now a mention of the illegality of sexual intercourse with a girl under sixteen.

Furthermore, the revised edition no longer has any reference to the installation in schools of contraceptive vending machines and points out, on page 106, that homosexual tendencies are often temporary.

PROCEEDINGS BEFORE THE COMMISSION

36. In his application, lodged with the Commission on 13 April 1972, Mr. Handyside complained that the action in the United Kingdom against himself and the Schoolbook was in breach of his right to freedom of thought, conscience and belief under Article 9 (art. 9) of the Convention, his right to freedom of expression under Article 10 (art. 10) of the Convention and his right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1 (P1-1). He also maintained that, contrary to Article 14 (art. 14) of the Convention, the United Kingdom had failed to secure to him the above rights without discrimination on the ground of political or other opinion; that the proceedings brought against him had been contrary to Article 7 (art. 7) of the Convention; and finally that the respondent Government were also in breach of Articles 1 and 13 (art. 1, art. 13) of the Convention. He also itemised the losses he had incurred as a result of the action in question, which included £14,184 in quantified damages and further unquantified items.

37. In its decision of 4 April 1974, the Commission accepted the application insofar as it concerned allegations under Article 10 of the Convention and Article 1 of Protocol No. 1 (art. 10, P1-1), but declared it inadmissible insofar as it concerned Articles 1, 7, 9, 13 and 14 (art. 1, art. 7,

art. 9, art. 13, art. 14) of the Convention. It decided on the same date to consider, ex officio, any issue which might arise from the circumstances of the case under Articles 17 and 18 (art. 17, art. 18) of the Convention and notified the parties of this a few days later.

38. In its report of 30 September 1975, the Commission expressed the opinion:

- by eight votes to five, with one abstention, that there had been no violation of Article 10 (art. 10) of the Convention;
- that neither the provisional seizure (eleven votes) nor the forfeiture and destruction of the Schoolbook (nine votes to four, with one abstention) had violated Article 1 of Protocol No. 1 (P1-1);
- by twelve votes in favour, with two abstentions, that further discussion under Article 17 (art. 17) of the Convention was unnecessary;
- unanimously, that no breach of Article 18 (art. 18) of the Convention had been established.

The report contains various separate opinions.

FINAL SUBMISSIONS MADE TO THE COURT

39. The following final submissions were made to the Court at the oral hearing on 7 June 1976:

- for the Commission:

> "May it please the Court to say and to judge
>
> (1) whether, in consequence of the legal proceedings instituted in the United Kingdom against the applicant as publisher of The Little Red Schoolbook, proceedings which led to the seizure and confiscation of that publication and the sentencing of the applicant to payment of a fine and costs, there was or was not a violation of the Convention, in particular of Article 10 and of Article 1 of Protocol No. 1 (art. 10, P1-1);
>
> (2) if so, whether the applicant should be afforded just satisfaction in accordance with Article 50 (art. 50) of the Convention, of a nature and amount to be determined by the Court."

- for the Government:

> "... the United Kingdom Government have noted the submissions made by the delegates, and as to the first of them we would ask the Court to say that in this matter there was no violation.
>
> As to the second matter ..., I think I should say this that this Court has not been addressed at this stage on any matter with regard to satisfaction and it is wholly premature for that issue to be one that is to be considered by the Court at this stage. If it is to be considered - if our submission is right on the first issue, it will not be -, then there is an occasion for further argument on that matter."

40. In reply to an observation by the Agent of the Government, the Commission's principal delegate stated that, when using the words "in particular", he had meant to indicate the two Articles which were to be taken into consideration by the Court.

AS TO THE LAW

41. On 4 April 1974, following a hearing in the presence of the parties on both merits and admissibility, the Commission accepted the application insofar as it concerned Article 10 of the Convention and Article 1 of Protocol No. 1 (art. 10, P1-1), but declared it inadmissible to the extent that Mr. Handyside invoked Articles 1, 7, 9, 13 and 14 (art. 1, art. 7, art. 9, art. 13, art. 14) of the Convention. A few days later, the Commission advised the parties that it would take into consideration Articles 17 and 18 (art. 17, art. 18) as well. However, in its report of 30 September 1975 (paragraphs 170 and 176), it expressed the opinion, in agreement with the applicant and the Government (paragraphs 92 and 128), that Article 17 (art. 17) is of no application in this case.

In reply to a question from the Court, the delegates of the Commission specified that the allegations not retained on 4 April 1974 (Articles 1, 7, 9, 13 and 14 of the Convention) (art. 1, art. 7, art. 9, art. 13, art. 14) related to the same facts as did those based on Article 10 of the Convention and Article 1 of Protocol No. 1 (art. 10, P1-1). They were accordingly not separate complaints but mere legal submissions or arguments that had been put forward along with others. However, the provisions of the Convention and of the Protocol form a whole; once a case is duly referred to it, the Court may take cognisance of every question of law arising in the course of the proceedings and concerning facts submitted to its examination by a Contracting State or by the Commission. Master of the characterisation to be given in law to these facts, the Court is empowered to examine them, if it deems it necessary and if need be ex officio, in the light of the Convention and the Protocol as a whole (see, inter alia, the judgment of 23 July 1968 on the merits of the "Belgian Linguistic" case, Series A no. 6, p. 30, para. 1, and the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 29, para. 49).

The Court, bearing in mind Mr. Handyside's original application as well as certain statements made before the Court (see, inter alia, paragraphs 52 and 56 below), finds that it should have regard to Article 14 (art. 14) of the Convention in addition to Articles 10 and 18 and Article 1 of Protocol No. 1 (art. 10, art. 18, P1-1). It shares the opinion of the Commission that Articles 1, 7, 9, 13 and 17 (art. 1, art. 7, art. 9, art. 13, art. 17) are not relevant in this case.

I. ON THE ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

42. The applicant claims to be the victim of a violation of Article 10 (art. 10) of the Convention which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

43. The various measures challenged - the applicant's criminal conviction, the seizure and subsequent forfeiture and destruction of the matrix and of hundreds of copies of the Schoolbook - were without any doubt, and the Government did not deny it, "interferences by public authority" in the exercise of his freedom of expression which is guaranteed by paragraph 1 (art. 10-1) of the text cited above. Such interferences entail a "violation" of Article 10 if they do not fall within one of the exceptions provided for in paragraph 2 (art. 10-2), which is accordingly of decisive importance in this case.

44. If the "restrictions" and "penalties" complained of by Mr. Handyside are not to infringe Article 10 (art. 10), they must, according to paragraph 2 (art. 10-2), in the first place have been "prescribed by law". The Court finds that this was the case. In the United Kingdom legal system, the basis in law for the measures in question was the 1959/1964 Acts (paragraphs 14-18, 24-25 and 27-34 above). Besides, this was not contested by the applicant who further admitted that the competent authorities had correctly applied those Acts.

45. Having thus ascertained that the interferences complained of satisfied the first of the conditions in paragraph 2 of Article 10 (art. 10-2), the Court then investigated whether they also complied with the others. According to the Government and the majority of the Commission, the interferences were "necessary in a democratic society", "for the protection of ... morals".

46. Sharing the view of the Government and the unanimous opinion of the Commission, the Court first finds that the 1959/1964 Acts have an aim that is legitimate under Article 10 para. 2 (art. 10-2), namely, the protection of morals in a democratic society. Only this latter purpose is relevant in this case since the object of the said Acts - to wage war on "obscene"

publications, defined by their tendency to "deprave and corrupt" - is linked far more closely to the protection of morals than to any of the further purposes permitted by Article 10 para. 2 (art. 10-2).

47. The Court must also investigate whether the protection of morals in a democratic society necessitated the various measures taken against the applicant and the Schoolbook under the 1959/1964 Acts. Mr. Handyside does not restrict himself to criticising these Acts as such: he also makes - from the viewpoint of the Convention and not of English law - several complaints concerning their application in his case.

The Commission's report and the subsequent hearings before the Court in June 1976 brought to light clear-cut differences of opinion on a crucial problem, namely, how to determine whether the actual "restrictions" and "penalties" complained of by the applicant were "necessary in a democratic society", "for the protection of morals". According to the Government and the majority of the Commission, the Court has only to ensure that the English courts acted reasonably, in good faith and within the limits of the margin of appreciation left to the Contracting States by Article 10 para. 2 (art. 10-2). On the other hand, the minority of the Commission sees the Court's task as being not to review the Inner London Quarter Sessions judgment but to examine the Schoolbook directly in the light of the Convention and of nothing but the Convention.

48. The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (judgment of 23 July 1968 on the merits of the "Belgian Linguistic" case, Series A no. 6, p. 35, para. 10 in fine). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26) (art. 26).

These observations apply, notably, to Article 10 para. 2 (art. 10-2). In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. The Court notes at this juncture that, whilst the adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), is not synonymous with "indispensable" (cf., in Articles 2 para. 2 (art. 2-2) and 6 para. 1 (art. 6-1), the words "absolutely necessary" and "strictly

necessary" and, in Article 15 para. 1 (art. 15-1), the phrase "to the extent strictly required by the exigencies of the situation"), neither has it the flexibility of such expressions as "admissible", "ordinary" (cf. Article 4 para. 3) (art. 4-3), "useful" (cf. the French text of the first paragraph of Article 1 of Protocol No. 1) (P1-1), "reasonable" (cf. Articles 5 para. 3 and 6 para. 1) (art. 5-3, art. 6-1) or "desirable". Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.

Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force (Engel and others judgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100; cf., for Article 8 para. 2 (art. 8-2), De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 45-46, para. 93, and the Golder judgment of 21 February 1975, Series A no. 18, pp. 21-22, para. 45).

49. Nevertheless, Article 10 para. 2 (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court. In this respect, the Court refers to Article 50 (art. 50) of the Convention ("decision or ... measure taken by a legal authority or any other authority") as well as to its own case-law (Engel and others judgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100).

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.

From another standpoint, whoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his

situation and the technical means he uses. The Court cannot overlook such a person's "duties" and "responsibilities" when it enquires, as in this case, whether "restrictions" or "penalties" were conducive to the "protection of morals" which made them "necessary" in a "democratic society".

50. It follows from this that it is in no way the Court's task to take the place of the competent national courts but rather to review under Article 10 (art. 10) the decisions they delivered in the exercise of their power of appreciation.

However, the Court's supervision would generally prove illusory if it did no more than examine these decisions in isolation; it must view them in the light of the case as a whole, including the publication in question and the arguments and evidence adduced by the applicant in the domestic legal system and then at the international level. The Court must decide, on the basis of the different data available to it, whether the reasons given by the national authorities to justify the actual measures of "interference" they take are relevant and sufficient under Article 10 para. 2 (art. 10-2) (cf., for Article 5 para. 3 (art. 5-3), the Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 24-25, para. 12, the Neumeister judgment of 27 June 1968, Series A no. 8, p. 37, para. 5, the Stögmüller judgment of 10 November 1969, Series A no. 9, p. 39, para. 3, the Matznetter judgment of 10 November 1969, Series A no. 10, p. 31, para. 3, and the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 42, para. 104).

51. Following the method set out above, the Court scrutinized under Article 10 para. 2 (art. 10-2) the individual decisions complained of, in particular, the judgment of the Inner London Quarter Sessions.

The said judgment is summarised in paragraphs 27-34 above. The Court reviewed it in the light of the case as a whole; in addition to the pleadings before the Court and the Commission's report, the memorials and oral explanations presented to the Commission between June 1973 and August 1974 and the transcript of the proceedings before the Quarter Sessions were, inter alia, taken into consideration.

52. The Court attaches particular importance to a factor to which the judgment of 29 October 1971 did not fail to draw attention, that is, the intended readership of the Schoolbook. It was aimed above all at children and adolescents aged from twelve to eighteen. Being direct, factual and reduced to essentials in style, it was easily within the comprehension of even the youngest of such readers. The applicant had made it clear that he planned a widespread circulation. He had sent the book, with a press release, to numerous daily papers and periodicals for review or for advertising purposes. What is more, he had set a modest sale price (thirty pence), arranged for a reprint of 50,000 copies shortly after the first impression of 20,000 and chosen a title suggesting that the work was some kind of handbook for use in schools.

Basically the book contained purely factual information that was generally correct and often useful, as the Quarter Sessions recognised. However, it also included, above all in the section on sex and in the passage headed "Be yourself" in the chapter on pupils (paragraph 32 above), sentences or paragraphs that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences. In these circumstances, despite the variety and the constant evolution in the United Kingdom of views on ethics and education, the competent English judges were entitled, in the exercise of their discretion, to think at the relevant time that the Schoolbook would have pernicious effects on the morals of many of the children and adolescents who would read it.

However, the applicant maintained, in substance, that the demands of the "protection of morals" or, to use the wording of the 1959/1964 Acts, of the war against publications likely to "deprave and corrupt", were but a pretext in his case. The truth of the matter, he alleged, was that an attempt had been made to muzzle a small-scale publisher whose political leanings met with the disapproval of a fragment of public opinion. Proceedings were set in motion, said he, in an atmosphere little short of "hysteria", stirred up and kept alive by ultra-conservative elements. The accent in the judgment of 29 October 1971 on the anti-authoritarian aspects of the Schoolbook (paragraph 31 above) showed, according to the applicant, exactly what lay behind the case.

The information supplied by Mr. Handyside seems, in fact, to show that letters from members of the public, articles in the press and action by Members of Parliament were not without some influence in the decision to seize the Schoolbook and to take criminal proceedings against its publisher. However, the Government drew attention to the fact that such initiatives could well have been explained not by some dark plot but by the genuine emotion felt by citizens faithful to traditional moral values when, towards the end of March 1971, they read in certain newspapers extracts from the book which was due to appear on 1 April. The Government also emphasised that the proceedings ended several months after the "campaign" denounced by the applicant and that he did not claim that it had continued in the intervening period. From this the Government concluded that the "campaign" in no way impaired dispassionate deliberation at the Quarter Sessions.

For its part the Court finds that the anti-authoritarian aspects of the Schoolbook as such were not held in the judgment of 29 October 1971 to fall foul of the 1959/1964 Acts. Those aspects were taken into account only insofar as the appeal court considered that, by undermining the moderating influence of parents, teachers, the Churches and youth organisations, they aggravated the tendency to "deprave and corrupt" which in its opinion

resulted from other parts of the work. It should be added that the revised edition was allowed to circulate freely by the British authorities despite the fact that the anti-authoritarian passages again appeared there in full and even, in some cases, in stronger terms (paragraph 35 above). As the Government noted, this is hard to reconcile with the theory of a political intrigue.

The Court thus allows that the fundamental aim of the judgment of 29 October 1971, applying the 1959/1964 Acts, was the protection of the morals of the young, a legitimate purpose under Article 10 para. 2 (art. 10-2). Consequently, the seizures effected on 31 March and 1 April 1971, pending the outcome of the proceedings that were about to open, also had this aim.

53. It remains to examine the "necessity" of the measures in dispute, beginning with the said seizures.

If the applicant is right, their object should have been at the most one or a few copies of the book to be used as exhibits in the criminal proceedings. The Court does not share this view since the police had good reasons for trying to lay their hands on all the stock as a temporary means of protecting the young against a danger to morals on whose existence it was for the trial court to decide. The legislation of many Contracting States provides for a seizure analogous to that envisaged by section 3 of the English 1959/1964 Acts.

54. A series of arguments which merit reflection was advanced by the applicant and the minority of the Commission concerning the "necessity" of the sentence and the forfeiture at issue.

Firstly, they drew attention to the fact that the original edition of the Schoolbook was the object of no proceedings in Northern Ireland, the Isle of Man and the Channel Islands and of no conviction in Scotland and that, even in England and Wales, thousands of copies circulated without impediment despite the judgment of 29 October 1971.

The Court recalls that section 5 (3) of the 1959/1964 Acts provides that they shall not extend to Scotland or to Northern Ireland (paragraph 25 in fine above). Above all, it must not be forgotten that the Convention, as is shown especially by its Article 60 (art. 60), never puts the various organs of the Contracting States under an obligation to limit the rights and freedoms it guarantees. In particular, in no case does Article 10 para. 2 (art. 10-2) compel them to impose "restrictions" or "penalties" in the field of freedom of expression; it in no way prevents them from not availing themselves of the expedients it provides for them (cf. the words "may be subject"). The competent authorities in Northern Ireland, the Isle of Man and the Channel Islands may, in the light of local conditions, have had plausible reasons for not taking action against the book and its publisher, as may the Scottish Procurator Fiscal for not summonsing Mr. Handyside to appear in person in Edinburgh after the dismissal of the complaint under Scottish law against

Stage 1 in respect of the revised edition (paragraph 19 above). Their failure to act – into which the Court does not have to enquire and which did not prevent the measures taken in England from leading to revision of the Schoolbook - does not prove that the judgment of 29 October 1971 was not a response to a real necessity, bearing in mind the national authorities' margin of appreciation.

These remarks also apply, mutatis mutandis, to the circulation of many copies in England and Wales.

55. The applicant and the minority of the Commission also stressed that the revised edition, albeit little different in their view from the first, was not the object of proceedings in England and Wales.

The Government charged them with minimising the extent of the changes made to the original text of the Schoolbook: although the changes were made between the conviction at first instance on 1 July 1971 and the appeal judgment of 29 October 1971, they were said to relate to the main passages cited by the Quarter Sessions as showing particularly clearly a tendency to "deprave and corrupt". The Government claimed that the Director of Public Prosecutions must have taken the view that the changes dispensed him from invoking the 1959/1964 Acts again.

In the Court's view, the absence of proceedings against the revised edition, which differed fairly extensively from the original edition on the points at issue (paragraphs 22-23 and 35 above), rather suggests that the competent authorities wished to limit themselves to what was strictly necessary, an attitude in conformity with Article 10 (art. 10) of the Convention.

56. The treatment meted out to the Schoolbook and its publisher in 1971 was, according to the applicant and the minority of the Commission, all the less "necessary" in that a host of publications dedicated to hard core pornography and devoid of intellectual or artistic merit allegedly profit by an extreme degree of tolerance in the United Kingdom. They are exposed to the gaze of passers-by and especially of young people and are said generally to enjoy complete impunity, the rare criminal prosecutions launched against them proving, it was asserted, more often than not abortive due to the great liberalism shown by juries. The same was claimed to apply to sex shops and much public entertainment.

The Government countered this by the remark, supported by figures, that the Director of Public Prosecutions does not remain inactive nor does the police, despite the scanty manpower resources of the squad specialising in this field. Moreover, they claim that, in addition to proceedings properly so called, seizures were frequently made at the relevant time under the "disclaimer/caution procedure" (paragraph 26 above).

In principle it is not the Court's function to compare different decisions taken, even in apparently similar circumstances, by prosecuting authorities and courts; and it must, just like the respondent Government, respect the

independence of the courts. Furthermore and above all, the Court is not faced with really analogous situations: as the Government pointed out, the documents in the file do not show that the publications and entertainment in question were aimed, to the same extent as the Schoolbook (paragraph 52 above), at children and adolescents having ready access thereto.

57. The applicant and the minority of the Commission laid stress on the further point that, in addition to the original Danish edition, translations of the "Little Book" appeared and circulated freely in the majority of the member States of the Council of Europe.

Here again, the national margin of appreciation and the optional nature of the "restrictions" and "penalties" referred to in Article 10 para. 2 (art. 10-2) prevent the Court from accepting the argument. The Contracting States have each fashioned their approach in the light of the situation obtaining in their respective territories; they have had regard, inter alia, to the different views prevailing there about the demands of the protection of morals in a democratic society. The fact that most of them decided to allow the work to be distributed does not mean that the contrary decision of the Inner London Quarter Sessions was a breach of Article 10 (art. 10). Besides, some of the editions published outside the United Kingdom do not include the passages, or at least not all the passages, cited in the judgment of 29 October 1971 as striking examples of a tendency to "deprave and corrupt".

58. Finally, at the hearing on 5 June 1976, the delegate expounding the opinion of the minority of the Commission maintained that in any event the respondent State need not have taken measures as Draconian as the initiation of criminal proceedings leading to the conviction of Mr. Handyside and to the forfeiture and subsequent destruction of the Schoolbook. The United Kingdom was said to have violated the principle of proportionality, inherent in the adjective "necessary", by not limiting itself either to a request to the applicant to expurgate the book or to restrictions on its sale and advertisement.

With regard to the first solution, the Government argued that the applicant would never have agreed to modify the Schoolbook if he had been ordered or asked to do so before 1 April 1971: was he not strenuously disputing its "obscenity"? The Court for its part confines itself to finding that Article 10 (art. 10) of the Convention certainly does not oblige the Contracting States to introduce such prior censorship.

The Government did not indicate whether the second solution was feasible under English law. Neither does it appear that it would have been appropriate in this case. There would scarcely have been any sense in restricting to adults sales of a work destined above all for the young; the Schoolbook would thereby have lost the substance of what the applicant considered to be its raison d'être. Moreover, he did not advert to this question.

59. On the strength of the data before it, the Court thus reaches the conclusion that no breach of the requirements of Article 10 (art. 10) has been established in the circumstances of the present case.

II. ON THE ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 (P1-1)

60. The applicant in the second place alleges the violation of Article 1 of Protocol No. 1 (P1-1) which provides:

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

61. The complaint concerns two distinct measures, namely, the seizure on 31 March and 1 April 1971 of the matrix and of hundreds of copies of the Schoolbook, on the one hand, and their forfeiture and subsequent destruction following the judgment of 29 October 1971, on the other. Both measures interfered with Mr. Handyside's right "to the peaceful enjoyment of his possessions". The Government do not contest this but, in agreement with the majority of the Commission, maintain that justification for the measures is to be found in the exceptions attached by Article 1 of the Protocol (P1-1) to the principle enunciated in its first sentence.

62. The seizure complained of was provisional. It did no more than prevent the applicant, for a period, from enjoying and using as he pleased possessions of which he remained the owner and which he would have recovered had the proceedings against him resulted in an acquittal.

In these circumstances, the Court thinks that the second sentence of the first paragraph of Article 1 (P1-1) does not come into play in this case. Admittedly the expression "deprived of his possessions", in the English text, could lead one to think otherwise but the structure of Article 1 (P1-1) shows that that sentence, which originated moreover in a Belgian amendment drafted in French (Collected Edition of the "travaux préparatoires", document H (61) 4, pp. 1083, 1084, 1086, 1090, 1099, 1105, 1110-1111 and 1113-1114), applies only to someone who is "deprived of ownership" ("privé de sa propriété").

On the other hand the seizure did relate to "the use of property" and thus falls within the ambit of the second paragraph. Unlike Article 10 para. 2 (art. 10-2) of the Convention, this paragraph sets the Contracting States up as sole judges of the "necessity" for an interference. Consequently, the

Court must restrict itself to supervising the lawfulness and the purpose of the restriction in question. It finds that the contested measure was ordered pursuant to section 3 of the 1959/1964 Acts and following proceedings which it was not contested were in accordance with the law. Again, the aim of the seizure was "the protection of morals" as understood by the competent British authorities in the exercise of their power of appreciation (paragraph 52 above). And the concept of "protection of morals" used in Article 10 para. 2 (art. 10-2) of the Convention, is encompassed in the much wider notion of the "general interest" within the meaning of the second paragraph of Article 1 of the Protocol (P1-1).

On this point the Court thus accepts the argument of the Government and the opinion of the majority of the Commission.

63. The forfeiture and destruction of the Schoolbook, on the other hand, permanently deprived the applicant of the ownership of certain possessions. However, these measures were authorised by the second paragraph of Article 1 of Protocol No. 1 (P1-1), interpreted in the light of the principle of law, common to the Contracting States, where under items whose use has been lawfully adjudged illicit and dangerous to the general interest are forfeited with a view to destruction.

III. ON THE ALLEGED VIOLATION OF ARTICLE 18 (art. 18) OF THE CONVENTION

64. Mr. Handyside is of the opinion that, contrary to Article 18 (art. 18), he underwent "restrictions" pursuing a "purpose" mentioned neither by Article 10 (art. 10) of the Convention nor by Article 1 of Protocol No. 1 (P1-1).

This complaint does not support examination since the Court has already concluded that the said restrictions concerned aims that were legitimate under these two last-mentioned Articles (art. 10, P1-1) (paragraphs 52, 62 and 63 above).

IV. ON THE ALLEGED VIOLATION OF ARTICLE 14 (art. 14) OF THE CONVENTION

65. In the early stages of the proceedings initiated before the Commission by the applicant, he claimed to be the victim of a violation of Article 14 (art. 14) of the Convention which provides:

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

66. On 4 April 1974 the Commission rejected the application on this point as being manifestly ill-founded. However, the Court was of the opinion that it should also have regard to Article 14, taken together with Article 10 (art. 14+10) of the Convention and Article 1 of Protocol No. 1 (art. 14+P1-1) (paragraph 41 above): some of Mr. Handyside's complaints, made after as well as before the decision of 4 April 1974 and with or without express reference to Article 14 (art. 14), raise the question of an arbitrary difference in treatment.

However, the data before the Court do not show that he suffered discrimination in the enjoyment of his freedom of expression and his property rights. In particular, they do not reveal that he was persecuted on account of his political leanings (paragraph 52 above). Neither does it appear that the pornographic publications and entertainment which he said profited by an extreme degree of tolerance in the United Kingdom were aimed, to the same extent as the Schoolbook, at children and adolescents having ready access thereto (paragraph 56 above). Finally, the documents in the file do not disclose that the measures taken against the applicant and the book departed from other decisions, taken in similar cases, to the point of constituting a denial of justice or a manifest abuse (Engel and others judgment of 8 June 1976, Series A no. 22, p. 42, para. 103).

V. ON THE APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

67. Having found no violation of Protocol No. 1 (P1) or of the Convention, the Court concludes that the question of the application of Article 50 (art. 50) does not arise in this case.

FOR THESE REASONS, THE COURT

1. Holds by thirteen votes to one that there has been no breach of Article 10 (art. 10) of the Convention;

2. Holds unanimously that there has been no breach either of Article 1 of Protocol No. 1 (P1-1) or of Articles 14 and 18 (art. 14, art. 18) of the Convention.

Done in French and in English, the French text being authentic, at the Human Rights Building, Strasbourg, this seventh day of December, one thousand nine hundred and seventy-six.

Giorgio BALLADORE PALLIERI

Marc-André EISSEN

Judges Mosler and Zekia have annexed their separate opinions to the present judgment, in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 50 para. 2 of the Rules of Court.

G. B.P.
M.-A.E.

SEPARATE OPINION OF JUDGE MOSLER

(Translation)

1. I differ from the Court's reasoning on one point only. However, it is so decisive for the question of whether or not there has been a violation in this case that my view on this point of detail has compelled me to vote against paragraph 1 of the operative provisions of the judgment. I am not convinced that the measures taken by the British authorities, including the judgment of the Inner London Quarter Sessions, were "necessary", within the meaning of Article 10 para. 2 (art. 10-2), for the achievement of their aim, namely the protection of morals. Paragraph 2 of Article 10 (art. 10-2) allows the States to subject the exercise of everyone's right to freedom of expression to restrictions and penalties only if they are measures necessary, in a democratic society, for certain aims considered to be legitimate exceptions to the right guaranteed by paragraph 1 (art. 10-1). These aims include the protection of morals which is relied on by the Government. In the absence of one of the factors which, when found in combination, entitle the State to avail itself of the exception to the right to freedom of expression, paragraph 2 (art. 10-2) does not apply and the individual's right must be respected without any interference. However, my interpretation of the word "necessary" and my conception of its application to the impugned measures do not, in part, coincide with the Court's view. They have thus led to my contrary vote although I entirely approve the other reasons contained in the judgment and, inter alia, the opinions expressed on certain questions of principle concerning the scope of the Convention in relation to the States' domestic legal systems and the definition of certain elements of the rights guaranteed and the exceptions permitted.

In order to leave no doubt about my agreement with the opinion of the Court insofar as it follows and develops more precisely existing case-law or adopts new and well-defined standpoints, I should like to emphasise that I accept in particular the passages on the Court's independence in the characterisation of facts (paragraph 41), on the respective powers of the Court and of the national authorities (problem of the "margin of appreciation" - cf., inter alia, paragraph 50) and on the examination of measures intended to protect morals in a democratic society (cf., inter alia, paragraph 48).

2. The measures inflicted on the applicant thus had a legitimate aim. They were taken pursuant to legislation that cannot be criticised under Article 10 para. 2 (art. 10-2). Nobody disputes their conformity with this legislation. They were "prescribed by law" within the meaning of the Convention.

However, the Court's supervision cannot stop there. Since the criteria in Article 10 para. 2 (art. 10-2) are autonomous concepts (cf. most recently,

mutatis mutandis, the Engel and others judgment of 8 June 1976, Series A no. 22, p. 34, para. 81), the Court must investigate both whether it was "necessary", for the domestic authorities, to have recourse to the means they employed to achieve the aim and whether they overstepped the national margin of appreciation with a resultant violation of the common standard guaranteed by an autonomous concept.

What is "necessary" is not the same as what is indispensable (paragraph 48 of the judgment). Such a definition would be too narrow and would not correspond to the usage of this word in domestic law. On the other hand, it is beyond question that the measure must be appropriate for achieving the aim. However, a measure cannot be regarded as inappropriate, and hence not "necessary", just because it proves ineffectual by not achieving its aim. A measure likely to be effectual under normal conditions cannot be deprived of its legal basis after the event by failure to attain the success which it might have had in more favourable circumstances.

The greater part of the first edition of the book circulated without impediment. The measures taken by the competent authorities and confirmed by the Inner London Quarter Sessions prevented merely the distribution of under 10 per cent of the impression. The remainder, that is about 90 per cent, reached the public including probably, to a large extent, the adolescents meant to be protected (cf. the address of Mr. Thornberry at the hearing on 7 June 1976). The measures in respect of the applicant thus had so little success that they must be taken as ineffectual in relation to the aim pursued. In fact young people were not protected against the influence of the book that had been qualified as likely to "deprave and corrupt" them by the authorities, acting within their legitimate margin of appreciation.

The ineffectualness of the measures would in no way prevent their being considered appropriate if it had been due to circumstances beyond the influence and control of the authorities. However, that was not the case. Certainly it cannot be presumed that the measures were not taken in good faith and with the genuine intention of preventing the book's circulation. Above all, the carefully reasoned judgment of the Inner London Quarter Sessions excludes such a presumption. Nevertheless, from an objective point of view, the measures actually taken against the book's circulation could never have achieved their aim without being accompanied by other measures against the 90 per cent of the impression. Yet nothing in the case file, in particular in the addresses of those appearing before the Court, shows that action of this kind was attempted.

Under Article 10 para. 2 (art. 10-2), the authorities' action in certain respects and their lack of action in others must be viewed as a whole. The aim, legitimate under Article 10 para. 2 (art. 10-2), of restricting freedom of expression in order to protect the morals of the young against The Little Red Schoolbook, is one and indivisible. The result of the authorities' action as well as of their inaction must be attributed to the British State. It is

responsible for the application of measures that were not appropriate with regard to the aim pursued because they covered only one small part of the object of the prosecution without taking the others into account.

Accordingly the measures chosen by the authorities were, by their very nature, inappropriate.

Furthermore some attendant facts must be reviewed.

I leave aside the fact, apparently not disputed between the State, the Commission and the applicant, that publications far more "obscene" than The Little Red Schoolbook were readily accessible to anyone in the United Kingdom. Assuming this to be correct, it does not prevent the authorities from having recourse to measures of prohibition against a book intended in particular for schoolchildren.

On the other hand, the diversity of the approaches adopted in different regions of the United Kingdom (paragraph 19 of the judgment) raises doubts about the necessity of the measures taken in London. Undoubtedly the Convention does not compel the Contracting States to pass uniform legislation for all the territory under their jurisdiction. Nevertheless, it does oblige them to act in such a way that the level of protection guaranteed by the Convention is maintained throughout the whole of that territory. In this case it is difficult to understand why a measure that was not thought necessary outside England and Wales was deemed to be so in London.

There remains the question whether the application of the contested measures, which were inappropriate from an objective point of view, fell within the margin left to the domestic institutions to choose between different measures having a legitimate aim and to assess their potential effectualness. In my view, the reply must be negative because of the clear lack of proportion between that part of the impression subjected to the said measures and that part whose circulation was not impeded. Admittedly the result of the action taken was the punishment of Mr. Handyside in accordance with the law, but this result does not by itself justify measures that were not apt to protect the young against the consequences of reading the book.

3. It must follow that the action complained of was not "necessary", within the meaning of Article 10 para. 2 (art. 10-2), with regard to the aim pursued. Such a measure is not covered by the exceptions to which freedom of expression can be subjected, even if the aim is perfectly legitimate and if the qualification of what is moral in a democratic society remained within the framework of the State's margin of appreciation.

The right enshrined in Article 10 para. 1 (art. 10-1) is so valuable for every democratic society that the criterion of necessity, which, when combined with other criteria, justifies an exception to the principle, must be examined from every aspect suggested by the circumstances.

It is only for this reason that I have regretfully voted against paragraph 1 of the operative provisions. As for paragraph 2, concerning Article 1 of

Protocol No. 1 (P1-1) and two other Articles, I have rejoined the majority as I was bound by the prior decision on Article 10 (art. 10) and, on this basis, was quite able to accept the Court's reasons.

SEPARATE OPINION OF JUDGE ZEKIA

The Court, in arriving at the conclusion that Article 1 of Protocol No. 1 (P1-1) has not been contravened by the forfeiture and destruction of the matrix and copies of the "Little Red Schoolbook", in paragraph 63 stated the following:

> "63. The forfeiture and destruction of the Schoolbook, on the other hand, permanently deprived the applicant of the ownership of certain possessions. However, these measures were authorised by the second paragraph of Article 1 of Protocol No. 1 (P1-1), interpreted in the light of the principle of law, common to the Contracting States, where under items whose use has been lawfully adjudged illicit and dangerous to the general interest are forfeited with a view to destruction."

In considering the legality of the seizure of the matrix and of hundreds of copies of the Schoolbook, which took place on 31 March and 1 April 1971, I concede that the second paragraph of Article 1 of Protocol No. 1 (P1-1) is relevant. The said paragraph (P1-1) speaks of the right of a State if necessary for the general interest to control the use of the property. It deals with the right of a State, provided the conditions stated therein have been complied with, to interfere with the possessory rights of the owner who is at liberty to make use of his property in any way he likes as long as such usage does not go against the law.

The seizure under review was made in pursuance of a warrant issued by a judge under section 3 of the "Obscene Publications Acts 1959/1964". The object of a seizure might very well be to prevent the commission or the furtherance of an offence connected with the protection of morals; it might also be to secure an article for its being produced before the court as an exhibit or even as "corpus delicti". Such an article may constitute the subject-matter of the prosecution and therefore there is nothing wrong in its seizure by an authorised person.

The English court on 1 July 1971, applying the relevant provision of the aforesaid Acts after the completion of the trial, ordered the forfeiture of the matrix and books already seized. The order was confirmed by the appeal court on 29 October 1971 and the books and articles already forfeited were destroyed.

In ascertaining the legality of the order of forfeiture and the destruction of the items involved, in my view, the first paragraph of Article 1 of Protocol No. 1 (P1-1) fits in more precisely than any other paragraph of the Protocol. The first paragraph relates to deprivation of possession. Surely the forfeiture and destruction of an article owned by somebody else amount to deprivation of possession of such owner. Coming to the other requirements prescribed for the legality of such deprivation; the enabling Acts empowering forfeiture and destruction are admittedly not incompatible with relevant provisions of the Convention. Protection of morals is undoubtedly

of public interest and the conditions set out in the aforesaid Acts for ordering forfeiture and destruction have been observed.

I consider it more appropriate therefore to base the legality of the order of forfeiture and destruction complained of on the first paragraph of Article 1 of Protocol No. 1 (P1-1). I am content in rendering my interpretation to confine myself to the wording of the text of the first paragraph and to attach the ordinary meaning to the words used therein.



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

COURT (CHAMBER)

CASE OF HUVIG v. FRANCE

(Application no. 11105/84)

JUDGMENT

STRASBOURG

24 April 1990

In the Huvig case*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 October 1989 and 27 March 1990,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 March 1989, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11105/84) against the French Republic lodged with the Commission under Article 25 (art. 25) by two nationals of that State, Mr Jacques Huvig and his wife Mrs Janine Huvig-Sylvestre, on 9 August 1984.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 (art. 8).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

* Note by the Registrar: The case is numbered 4/1989/164/220. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

3. On 30 March 1989 the President of the Court decided, under Rule 21 § 6 and in the interests of sound administration of justice, that a single Chamber should be constituted to consider both the instant case and the Kruslin case*.

The Chamber thus constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On the same day, 30 March 1989, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Mr F. Matscher, Mr B. Walsh and Sir Vincent Evans (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the French Government ("the Government"), the Delegate of the Commission and the lawyer for the applicants on the need for a written procedure (Rule 37 § 1). In accordance with his orders and instructions, the Registrar received the Government's memorial on 18 August 1989; the applicants' representative and the Delegate of the Commission informed the Registrar on 11 July and 19 October respectively that they would not be filing memorials.

On 13 September and 10 October 1989 the Commission provided the Registrar with various documents he had asked for on the President's instructions.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President had directed on 21 June 1989 that the oral proceedings should open on 24 October 1989 (Rule 38).

6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr J.-P. PUISSOCHET, Head
of the Department of Legal Affairs, Ministry of Foreign Affairs, *Agent*,

Mrs I. CHAUSSADE, magistrat,
on secondment to the Department of Legal Affairs, Ministry of Foreign Affairs,

Miss M. PICARD, magistrat,
on secondment to the Department of Legal Affairs, Ministry of Foreign Affairs,

Mr M. DOBKINE, magistrat, Department of Criminal Affairs and Pardons, Ministry of Justice,

* Note by the Registrar: Case no. 7/1989/167/223.

Mr F. LE GUNEHEC, magistrat,
Department of Criminal Affairs and Pardons, Ministry of Justice, *Counsel*;
- for the Commission
Mr S. TRECHSEL, *Delegate*.

By letter of 11 July 1989 counsel for the applicant had informed the Registrar that he would not be attending the hearing.

The Court heard addresses by Mr Puissochet for the Government and by Mr Trechsel for the Commission, as well as their answers to a question it put.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Mr Jacques Huvig and his wife Janine, née Sylvestre, currently live at Grau-du-Roi (Gard). Before he retired, Mr Huvig, with his wife's assistance, ran a wholesale fruit-and-vegetable business at Varennes-sur-Amance and Montigny-le-Roi (Haute-Marne).

8. On 20 December 1973 the Director of the Haute-Marne Tax Office lodged a complaint against the applicant and two other persons alleging tax evasion, failure to make entries in accounts and false accounting.

A judicial investigation was begun on 26 December by an investigating judge at Chaumont, assigned by the President of the Chaumont tribunal de grande instance.

Mr and Mrs Huvig's home was searched as were their business premises, pursuant to a warrant issued on 14 March 1974 by the investigating judge. The latter also issued a warrant to the gendarmerie at Langres (Haute-Marne) on 4 April requiring them to monitor and transcribe all Mr and Mrs Huvig's telephone calls - both business and private ones - on that day and the next day.

The telephone tapping took place from about 8 p.m. on 4 April 1974 until midnight on 5 April; on 6 April the second in command of the gendarmerie unit at Langres made a "summary report" on the tapping, which was subsequently brought to the knowledge of the applicants.

9. Mr Huvig was charged with tax evasion, forgery of private and business documents, failure to keep proper accounts, aiding and abetting misuse of company property and receiving funds derived from misuse of company property, and on 9 April he appeared before the investigating judge, who remanded him in custody; he was released on 11 June 1974.

Mrs Huvig, who from 20 March 1974 onwards was questioned several times as a witness, was charged on 13 May 1976 with aiding and abetting tax evasion and forgery of business documents.

10. On 23 December 1976 the investigating judge committed them for trial - with the other two persons mentioned above - at the Chaumont tribunal de grande instance, in Mr Huvig's case on charges of forgery, uttering, aiding and abetting misuse of company property, aiding and abetting tax evasion, aiding and abetting fraud, receiving funds derived from misuse of company property, and false or incomplete accounting, and in Mrs Huvig's case on charges of aiding and abetting forgery, aiding and abetting tax evasion and aiding and abetting improper keeping of accounts.

They raised as a preliminary issue several pleas of nullity, one of which related to the telephone tapping carried out on 4 and 5 April 1974. On 26 January 1982 the court ordered that these pleas should be heard as part of the main trial, and on 30 March 1982 it rejected them. Of the telephone tapping it said:

> "This investigative measure, even if it must remain an exceptional one, is within the investigating judge's powers as part of his inquiries during an investigation;
>
> No infringement of the rights of the defence has been substantiated, especially as in the instant case the results were unusable and did not serve as a basis for the prosecution ..."

In the same judgment it was held that the various offences with which the applicants were charged had been made out, except that of aiding and abetting fraud in Mr Huvig's case; in consequence, Mr Huvig was sentenced to eight months' imprisonment, six months of which were suspended, and Mrs Huvig to two months suspended.

11. The defendants, the civil party seeking damages and the prosecution appealed to the Dijon Court of Appeal.

The defence again raised the pleas of nullity that had been put forward unsuccessfully at the original trial. The Court of Appeal rejected all of them on 17 March 1983. As regards the impugned telephone tapping, it gave the following reasons for its decision:

> "[According to Mr Huvig, the investigating judge] infringed the rights of the defence and the guarantees afforded by law to all accused persons, seeing that, even though he had not yet had his first interview with the investigating judge (which took place on 9 April 1974 ...), he nonetheless had to be regarded as having already been charged, since the public prosecutor's application of 20 December 1973 was directed against him among others;
>
> But, as the trial court rightly pointed out, this investigative measure, while it must remain an exceptional one, is one of the prerogatives of an investigating judge carrying out inquiries as part of an investigation he is conducting;
>
> The Court has been able to check and satisfy itself that this operation, which to be effective must be carried out without the knowledge of the person suspected - or even

charged -, was carried out on the investigating judge's authority and under his supervision, without any subterfuge or ruse being employed;

The operation, moreover, lasted only 28 hours ..., did not yield anything usable and did not serve as a basis for the prosecution;

Nothing enables it to be established that the procedure thus followed had the result of jeopardising the exercise of the rights of the defence, since it must be borne in mind that Mr Huvig had not at that stage been officially charged by the investigating judge and that Article 81 of the Code of Criminal Procedure empowers the latter to take all investigative measures he deems useful for establishing the truth ...;

..."

At the same time the Dijon Court of Appeal upheld the judgment under appeal as to the finding that the defendants were guilty but increased the sentences passed on them by the trial court, sentencing the applicant to two years' imprisonment, twenty-two months of which were suspended, and to a fine of 10,000 French francs, and his wife to six months suspended.

12. The applicants appealed to the Court of Cassation on points of law. In the first of their grounds of appeal the Court of Appeal's judgment was criticised for its failure to quash the investigating judge's warrant of 4 April 1974:

"Firstly, investigating judges are not empowered by Article 81 of the Code of Criminal Procedure to tap the telephone of anybody - whether it be a person charged with a criminal offence, a third party or a witness - and such a procedure is contrary to the law, since the Code of Criminal Procedure has regulated searches, the seizing of property and the taking of evidence from witnesses and has not conferred on investigating judges the power to tap the telephones of persons against whom there is substantial, consistent evidence of guilt, such a procedure being prohibited both by Articles 6 and 8 (art. 6, art. 8) of the Convention ... and by Article 9 of the Civil Code, Articles L. 41 and L. 42 of the Post and Telecommunications Code and Article 368 of the Criminal Code;

Secondly, an individual who has been personally proceeded against by the civil party seeking damages and in respect of whom ... the public prosecutor has requested that an investigation be commenced is a party to the proceedings and must consequently be regarded as a person charged with a criminal offence within the meaning of Article 114 of the Code of Criminal Procedure; such a person must, therefore, before any statement is taken by the investigating judge, be informed of the charges against him, of his right not to make any statement and of his right to the assistance of a lawyer; the investigating judge accordingly cannot, without infringing the rights of the defence, record such a person's telephone conversations without the person's knowledge;

Lastly, since what is at issue is a nullity that is absolute as a matter of public policy - unlawful telephone tapping being a criminal offence -, it is of little importance that the conversations recorded were not used as the basis for the prosecution."

On pages 6 and 7 of the supplementary pleadings there were references to the Klass and Others judgment of the European Court of Human Rights (6 September 1978, Series A no. 28).

The Criminal Division of the Court of Cassation dismissed the appeal on 24 April 1984. It rejected the foregoing ground in the following terms:

> "In the judgment [of the Dijon Court of Appeal] the plea that the investigation proceedings were null and void because of the nullity of the warrant issued by the investigating judge on 4 April 1974 ordering that Huvig's telephone conversations should be monitored was rejected on the grounds that this measure was within the contemplation of Article 81 of the Code of Criminal Procedure and that as, moreover, it had not served as a basis for the prosecution, it had not had the effect of jeopardising the exercise of the rights of the defence;
>
> As these reasons stand and seeing, furthermore, that it has not been found - nor even alleged by the appellants - that the investigative measure in question, which was carried out under the supervision of the investigating judge, entailed any subterfuges or ruses, the Court of Appeal did, without laying itself open to the objection raised in the ground of appeal, provide a legal basis for its decision;
>
> ..." (Recueil Dalloz Sirey (DS) 1986, jurisprudence, pp. 125-128)

II. THE RELEVANT LEGISLATION AND CASE-LAW

13. French criminal law adopts the principle that any kind of evidence is admissible: "unless otherwise provided by statute, any type of evidence shall be admissible to substantiate a criminal charge ..." (Article 427 of the Code of Criminal Procedure).

There is no statutory provision which expressly empowers investigating judges to carry out or order telephone tapping, or indeed to carry out or order various measures which are nonetheless in common use, such as the taking of photographs or fingerprints, shadowing, surveillance, requisitions, confrontations of witnesses and reconstructions of crimes. On the other hand, the Code of Criminal Procedure does expressly confer power on them to take several other measures, which it regulates in detail, such as pre-trial detention, seizure of property and searches.

14. Under the old Code of Criminal Procedure the Court of Cassation had condemned the use of telephone tapping by investigating judges, at least in circumstances which it regarded as disclosing, on the part of a judge or the police, a lack of "fairness" incompatible with the rules of criminal procedure and the safeguards essential to the rights of the defence (combined divisions, 31 January 1888, ministère public c. Vigneau, Dalloz 1888, jurisprudence, pp. 72-74; Criminal Division, 12 June 1952, Imbert, Bull. no. 153, pp. 258-260; Civil Division, second section, 18 March 1955, époux Jolivot c. époux Lubrano et autres, DS 1955, jurisprudence, pp. 573-574, and Gazette du Palais (GP) 1955, jurisprudence, p. 249). Some trial

courts and courts of appeal which had to deal with the issue, on the other hand, showed some willingness to hold that such telephone tapping was lawful if there had been neither "entrapment" nor "provocation"; this view was based on Article 90 of the former Code (Seine Criminal Court, Tenth Division, 13 February 1957, ministère public contre X, GP 1957, jurisprudence, pp. 309-310).

15. Since the 1958 Code of Criminal Procedure came into force, the courts have had regard in this respect to, among others, Articles 81, 151 and 152, which provide:

Article 81

(first, fourth and fifth paragraphs)

"The investigating judge shall, in accordance with the law, take all the investigative measures which he deems useful for establishing the truth.

...

If the investigating judge is unable to take all the investigative measures himself, he may issue warrants to senior police officers (officiers de police judiciaire) in order to have them carry out all the necessary investigative measures on the conditions and subject to the reservations provided for in Articles 151 and 152.

The investigating judge must verify the information thus gathered.

..."

Article 151

(as worded at the material time)

"An investigating judge may issue a warrant requiring any judge of his court, any district-court judge within the territorial jurisdiction of that court, any senior police officer (officier de police judiciaire) with authority in that jurisdiction or any investigating judge to undertake any investigative measures he considers necessary in places coming under their respective jurisdictions.

The warrant shall indicate the nature of the offence to which the proceedings relate. It shall be dated and signed by the issuing judge and shall bear his seal.

It may only order investigative measures directly connected with the prosecution of the offence to which the proceedings relate.

..."

Article 152

"The judges or senior police officers instructed to act shall exercise, within the limits of the warrant, all the powers of the investigating judge.

..."

16. An Act of 17 July 1970 added to the Civil Code an Article 9 guaranteeing to everyone "the right to respect for his private life". It also added to the Criminal Code an Article 368, whereby:

"Anyone who wilfully intrudes on the privacy of others:

1. By listening to, recording or transmitting by means of any device, words spoken by a person in a private place, without that person's consent;

2. ...

shall be liable to imprisonment for not less than two months and not more than one year and a fine ... or to only one of these two penalties."

During the preparatory work, one of the vice-chairmen of the National Assembly's Statutes Committee, Mr Zimmermann, sought "certain assurances" that this enactment "[would] not prevent the investigating judge from issuing strictly within the limits of the law warrants to have telephones tapped, obviously without making use of any form of inducement and in compliance with all the legal procedures" (Journal officiel, National Assembly, 1970 proceedings, p. 2074). The Minister of Justice, Mr René Pleven, replied: "... there is no question of interfering with the powers of investigating judges, who are indeed empowered, in the circumstances laid down by law, to order tapping"; he added a little later: "when an official taps a telephone, he can only do so lawfully if he has a warrant from a judicial authority or is acting on the instructions of a minister" (ibid., p. 2075). Both Houses of Parliament thereupon passed the Bill without amending it on this point.

17. Article 41 of the Post and Telecommunications Code provides that any public servant or anyone authorised to assist with the performance of relevant official duties who breaches the secrecy of correspondence entrusted to the telecommunications service shall be liable to the penalties provided for in Article 187 of the Criminal Code - a fine, imprisonment and temporary disqualification from any public office or employment. Article 42 provides that anyone who, without permission from the sender or the addressee, divulges, publishes or uses the content of correspondence transmitted over the air or by telephone shall be liable to the penalties provided for in Article 378 of the Criminal Code (on professional confidentiality) - a fine or imprisonment.

General Instruction no. 500-78 on the telephone service - intended for Post and Telecommunications Authority officials - contains the following

provisions, however, given here in the amended version of 1964 (Article 24 of Part III):

> "Postmasters and sub-postmasters are required to comply with any requests that ... calls to or from a specified telephone should be monitored by the relevant authority, made by:
>
> 1. An investigating judge (Arts. 81, 92 and 94 of the Code of Criminal Procedure) or any judge or senior police officer (officier de police judiciaire) to whom a judicial warrant has been issued (Art. 152);
>
> ..."

The General Instruction was published in the official bulletin of the Ministry of Post and Telecommunications and was described by the Government as an "implementing regulation".

18. The striking development of various forms of serious crime - large-scale thefts and robberies, terrorism, drug-trafficking - appears in France to have led to a marked increase in the frequency with which investigating judges resort to telephone tapping. The courts have as a result given many more decisions on the subject than formerly; telephone tapping has not been held to be unlawful in itself, although the courts have occasionally shown some distaste for it (Paris Court of Appeal, Ninth Criminal Division, 28 March 1960, Cany et Rozenbaum, GP 1960, jurisprudence, pp. 253-254).

The vast majority of the decisions cited to the Court by the Government and the Commission, or of which the Court has had cognisance by its own means, are of later date than the facts of the instant case (April 1974) and have gradually provided a number of clarifications. These do not all stem from judgments of the Court of Cassation, and do not for the time being constitute a uniform body of case-law, because the decisions or reasons given in some of the cases have remained unique. They may be summarised as follows.

(a) Articles 81 and 151 of the Code of Criminal Procedure (see paragraph 15 above) empower investigating judges - and them alone, as far as judicial investigations are concerned - to carry out telephone tapping or, much more commonly in practice, to issue a warrant to that effect to a senior police officer (officier de police judiciaire) within the meaning of Article 16 (see, in particular, Court of Cassation, Criminal Division, 9 October 1980, Tournet, Bull. no. 255, pp. 662-664; 24 April 1984 - see paragraph 12 above; 23 July 1985, Kruslin, Bull. no. 275, pp. 713-715; 4 November 1987, Croce, Antoine et Kruslin, DS 1988, sommaires, p. 195; 15 February 1988, Schroeder, and 15 March 1988, Arfi, Bull. no. 128, pp. 327-335). Telephone tapping is an "investigative measure" which may sometimes be "useful for establishing the truth". It is comparable to the seizure of letters or telegrams (see, among other authorities, Poitiers Court of Appeal, Criminal Division, 7 January 1960, Manchet, Juris-Classeur périodique (JCP) 1960, jurisprudence, no. 11599, and Paris Court of Indictment Division, 27 June

1984, F. et autre, DS 1985, jurisprudence, pp. 93-96) and it similarly does not offend the provisions of Article 368 of the Criminal Code, having regard to the legislative history and to the principle that any kind of evidence is admissible (see paragraphs 13 and 16 above and Strasbourg tribunal de grande instance, 15 February 1983, S. et autres, unreported; Colmar Court of Appeal, 9 March 1984, Chalvignac et autre, unreported; Paris Court of Appeal, Indictment Division, judgment of 27 June 1984 previously cited and judgment of 31 October 1984, Li Siu Lung et autres, GP 1985, sommaires, pp. 94-95).

(b) The investigating judge can only issue such a warrant "where there is a presumption that a specific offence has been committed which has given rise to the investigation" which he is responsible for conducting and not in respect of a whole category of offences "on the off chance"; this is clear not only from Articles 81 and 151 (second and third paragraphs) of the Code of Criminal Procedure but also "from the general principles of criminal procedure" (see, among other authorities, Court of Cassation, Criminal Division, judgments of 23 July 1985, 4 November 1987 and 15 March 1988 previously cited).

The French courts do not seem ever to have held that telephone tapping is lawful only where the offences being investigated are of some seriousness or if the investigating judge has specified a maximum duration for it.

(c) "Within the limits of the warrant" that has been issued to him - if need be by fax (Limoges Court of Appeal, Criminal Division, 18 November 1988, Lecesne et autres, DS 1989, sommaires, p. 394) - the senior police officer exercises "all the powers of the investigating judge" (Article 152 of the Code of Criminal Procedure). He exercises these under the supervision of the investigating judge, who by the fifth paragraph of Article 81 is bound to "verify the information ... gathered" (see, among other authorities, Court of Cassation, Criminal Division, judgments of 9 October 1980, 24 April 1984, 23 July 1985, 4 November 1987 and 15 March 1988 previously cited).

The warrant apparently sometimes takes the form of a general delegation of powers, including - without its being expressly mentioned - the power to tap telephones (Court of Cassation, Civil Division, second section, judgment of 18 March previously cited, and Paris Court of Appeal, judgment of 28 March 1960 previously cited).

(d) In no case may a police officer tap telephones on his own initiative without a warrant, for example during the preliminary investigation preceding the opening of the judicial investigation (see, among other authorities, Court of Cassation, Criminal Division, 13 June 1989, Derrien, and 19 June 1989, Grayo, Bull. no. 254, pp. 635-637, and no. 261, pp. 648-651; full court, 24 November 1989, Derrien, DS 1990, p. 34, and JCP 1990, jurisprudence, no. 21418, with the submissions of Mr Advocate-General Emile Robert).

(e) Telephone tapping must not be accompanied by "any subterfuge or ruse" (see, among other authorities, Court of Cassation, Criminal Division, judgment of 9 October 1980, 24 April 1984, 23 July 1985, 4 November 1987, 15 February 1988 and 15 March 1988 previously cited) failing which the information gathered by means of it must be either deleted or removed from the case file (Court of Cassation, Criminal Division, judgments of 13 and 19 June 1989 previously cited).

(f) The telephone tapping must also be carried out "in such a way that the exercise of the rights of the defence cannot be jeopardised" (see, among other authorities, Court of Cassation, Criminal Division, judgments of 9 October 1980, 24 April 1984, 23 July 1985, 4 November 1987, 15 February 1988, 15 March 1988 and 19 June 1989 previously cited). In particular, the confidentiality of the relations between suspect or person accused and lawyer must be respected, as must, more generally, a lawyer's duty of professional confidentiality, at least when he is not acting in any other capacity (Aix-en-Provence Court of Appeal, Indictment Division, 16 June 1982 and 2 February 1983, Sadji Hamou et autres, GP 1982, jurisprudence, pp. 645-649, and GP 1983, jurisprudence, pp. 313-315; Paris Court of Appeal, Indictment Division, judgment of 27 June 1984 previously cited).

(g) With this reservation, it is permissible to tap telephone calls to or from a charged person (Court of Cassation, Criminal Division, judgments of 9 October 1980 and 24 April 1984 previously cited) or a mere suspect (judgments of the Strasbourg tribunal de grande instance, 15 February 1983, the Colmar Court of Appeal, 9 March 1984, and the Indictment Division of the Paris Court of Appeal, 27 June 1984, previously cited) or even a third party, such as a witness, whom there is reason to believe to be in possession of information about the perpetrators or circumstances of the offence (see, among other authorities, Aix-en-Provence Court of Appeal, judgment of 16 June 1982 previously cited).

(h) A public telephone-box may be tapped (Seine Criminal Court, Tenth Division, 30 October 1964, Trésor public et Société de courses c. L. et autres, DS 1965, jurisprudence, pp. 423-424) just like a private line, irrespective of whether current is diverted to a listening station (Court of Cassation, Criminal Division, 13 June 1989, and full court, 24 November 1989, previously cited).

(i) The senior police officer supervises the tape or cassette recording of the conversations and their transcription, where he does not carry out these operations himself; when it comes to choosing extracts to submit "for examination by the court", it is for him to determine "what words may render the speaker liable to criminal proceedings". He performs these duties "on his own responsibility and under the supervision of the investigating judge" (Strasbourg tribunal de grande instance, judgment of 15 February 1983 previously cited, upheld by the Colmar Court of Appeal on 9 March 1984; Paris Court of Appeal, judgment of 27 June 1984 previously cited).

(j) The original tapes are "exhibits", not "investigation documents", but have only the weight of circumstantial evidence; their contents are transcribed in reports in order to give them a physical form so that they can be inspected (Court of Cassation, Criminal Division, 28 April 1987, Allieis, Bull. no. 173, pp. 462-467).

(k) If transcription raises a problem of translation into French, Articles 156 et seq. of the Code of Criminal Procedure, which deal with expert opinions, do not apply to the appointment and work of the translator (Court of Cassation, Criminal Division, 6 September 1988, Fekari, Bull. no. 317, pp. 861-862 (extracts), and 18 December 1989, M. et autres, not yet reported).

(l) There is no statutory provision prohibiting the inclusion in the file on a criminal case of evidence from other proceedings, such as tapes and reports containing transcriptions, if they may "assist the judges and help to establish the truth", provided that such evidence is added under an adversarial procedure (Court of Cassation, Criminal Division, judgments of 23 July 1985 and 6 September 1988 previously cited).

(m) The defence must be able to inspect the reports containing transcriptions, to hear the original tape recordings, to challenge their authenticity during the judicial investigation and subsequent trial and to apply for any necessary investigative measures - such as an expert opinion - relating to their contents and the circumstances in which they were made (see, among other authorities, Court of Cassation, Criminal Division, 23 July 1985, previously cited; 16 July 1986, Illouz, unreported; and 28 April 1987, Allieis, previously cited).

(n) Just as the investigating judge supervises the senior police officer, he is himself supervised by the Indictment Division, to which he - exactly like the public prosecutor - may apply under Article 171 of the Code of Criminal Procedure.

Trial courts, courts of appeal and the Court of Cassation may have to deal with objections or grounds of appeal as the case may be - particularly by defendants but also, on occasion, by the prosecution (Court of Cassation, judgments of 19 June and 24 November 1989 previously cited) - based on a failure to comply with the requirements summarised above or with other rules which the parties concerned claim are applicable. A failure of this kind, however, would not automatically nullify the proceedings such that a court of appeal could be held to have erred if it had not dealt with them of its own motion; they affect only defence rights (Court of Cassation, Criminal Division, 11 December 1989, Takrouni, not yet reported).

19. Since at least 1981, parties have increasingly often relied on Article 8 (art. 8) of the Convention - and, much less frequently, on Article 6 (art. 6) (Court of Cassation, Criminal Division, 23 April 1981, Pellegrin et autres, Bull. no. 117, pp. 328-335, and 21 November 1988, S. et autres) - in support of their complaints about telephone tapping; they have sometimes as in the

instant case (see paragraph 12 above) - cited the case-law of the European Court of Human Rights.

Hitherto only telephone tapping carried out without a warrant, during the police investigation (see, among other authorities, Court of Cassation, judgments of 13 June and 24 November 1989 previously cited), or in unexplained circumstances (see, among other authorities, Court of Cassation, judgment of 19 June 1989 previously cited) or in violation of defence rights (Paris Court of Appeal, Indictment Division, judgment of 31 October 1984 previously cited) has been held by the French courts to be contrary to Article 8 § 2 (art. 8-2) ("in accordance with the law") or to domestic law in the strict sense. In all other cases the courts have either found no violation (Court of Cassation, Criminal Division, judgments of 24 April 1984, 23 July 1985, 16 July 1986, 28 April 1987, 4 November 1987, 15 February 1988, 15 March 1988, 6 September 1988 and 18 December 1989 previously cited, and 16 November 1988, S. et autre, unreported, and the judgments of 15 February 1983 (Strasbourg), 9 March 1984 (Colmar) and 27 June 1984 (Paris) previously cited) or else ruled the plea inadmissible for various reasons (Court of Cassation, Criminal Division, judgments of 23 April 1981, 21 November 1988 and 11 December 1989 previously cited and the unreported judgments of 24 May 1983, S. et autres; 23 May 1985, Y. H. W.; 17 February 1986, H.; 4 November 1986, J.; and 5 February 1990, B. et autres).

20. While academic opinion is divided as to the compatibility of telephone tapping as carried out in France - on the orders of investigating judges or others - with the national and international legal rules in force in the country, there seems to be unanimous agreement that it is desirable and even necessary for Parliament to try to solve the problem by following the example set by many foreign States (see in particular Gaëtan di Marino, comments on the Tournet judgment of 9 October 1980 (Court of Cassation), JCP 1981, jurisprudence, no. 19578; Albert Chavanne, ‘Les résultats de l’audio-surveillance comme preuve pénale’, Revue internationale de droit comparé, 1986, pp. 752-753 and 755; Gérard Cohen-Jonathan, ‘Les écoutes téléphoniques’, Studies in honour of Gérard J. Wiarda, 1988, p. 104; Jean Pradel, ‘Écoutes téléphoniques et Convention européenne des Droits de l’Homme’, DS 1990, chronique, pp. 17-20). In July 1981 the Government set up a study group chaired by Mr Robert Schmelck, who was then President of the Court of Cassation, and consisting of senators and MPs of various political persuasions, judges, university professors, senior civil servants, judges and a barrister. The group submitted a report on 25 June 1982, but this has remained confidential and has not yet led to a bill being tabled.

PROCEEDINGS BEFORE THE COMMISSION

21. The applicants applied to the Commission on 9 August 1984 (application no. 11105/84). Mr Huvig relied on Article 6 § 1 (art. 6-1) of the Convention and complained of the investigating judge's refusal to grant his application for an expert opinion on technical and financial matters; he ascribed this refusal to evidence improperly taken from a witness. He and his wife also complained under Article 6 § 3 (a) (art. 6-3-a) of the delay in charging them. Lastly, both alleged that the telephone tapping carried out on 4 and 5 April 1974 had contravened Article 8 (art. 8).

22. On 15 October 1987 the Commission declared the first complaint inadmissible as being manifestly ill-founded (under Article 27 § 2) (art. 27-2) and the second complaint inadmissible for failure to exhaust domestic remedies (under Articles 26 and 27 § 3) (art. 26, art. 27-3). The third and final complaint, however, it declared admissible, on 6 July 1988.

In its report of 14 December 1988 (made under Article 31) (art. 31) the Commission expressed the opinion by ten votes to two that there had been a breach of Article 8 (art. 8). The full text of the Commission's opinion and of the separate opinion contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

23. At the hearing the Court was requested:

(a) by the Agent of the Government to "hold that in the instant case there ha[d] been no conduct disclosing a breach of Article 8 (art. 8) of the Convention"; and

(b) by the Delegate of the Commission to "find that there ha[d] been a violation of Article 8 (art. 8)".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

24. Mr and Mrs Huvig claimed that in the instant case there had been a breach of Article 8 (art. 8), which provides:

* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 176-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

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

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

The Government disputed that submission, while the Commission agreed with it in substance.

25. The telephone tapping complained of amounted without any doubt to an "interference by a public authority" with the exercise of the applicants' right to respect for their "correspondence" and their "private life" (see the Klass and Others judgment of 8 September 1978, Series A no. 28, p. 21, § 41, and the Malone judgment of 2 August 1984, Series A no. 82, p. 30, § 64). The Government did not dispute this.

Such an interference contravenes Article 8 (art. 8) unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 (art. 8-2) and furthermore is "necessary in a democratic society" in order to achieve them.

A. "In accordance with the law"

26. The expression "in accordance with the law", within the meaning of Article 8 § 2 (art. 8-2), requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law.

1. Whether there was a legal basis in French law

27. It was a matter of dispute before the Commission and the Court whether the first condition was satisfied in the instant case.

The applicants said it was not. They submitted that there was no law in France governing the matter. France being a country of written law, case-law was a source only of law in general (droit), not of law in the statutory sense (loi). Furthermore, the courts had left the question of tapping private telephones to the unfettered discretion of investigating judges.

In the Government's submission, there was no contradiction between Article 368 of the Criminal Code and Article 81 of the Code of Criminal Procedure, at least not if regard was had to the drafting history of the former (see paragraph 16 above). The Code of Criminal Procedure, they argued, did not give an exhaustive list of the investigative means available to the investigating judge - measures as common as the taking of photographs or

fingerprints, shadowing, surveillance, requisitions, confrontations between witnesses, and reconstructions of crimes, for example, were not mentioned in it either (see paragraph 13 above). The provisions added to Article 81 by Articles 151 and 152 were supplemented in national case-law (see paragraphs 15 and 18-19 above). By "law" as referred to in Article 8 § 2 (art. 8-2) of the Convention was meant the law in force in a given legal system, in this instance a combination of the written law - essentially Articles 81, 151 and 152 of the Code of Criminal Procedure - and the case-law interpreting it.

The Delegate of the Commission considered that in the case of the Continental countries, including France, only a substantive enactment of general application - whether or not passed by Parliament - could amount to a "law" for the purposes of Article 8 § 2 (art. 8-2) of the Convention. Admittedly the Court had held that "the word ‘law’ in the expression ‘prescribed by law’ cover[ed] not only statute but also unwritten law" (see the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 30, § 47, the Dudgeon judgment of 22 October 1981, Series A no. 45, p. 19, § 44, and the Chappell judgment of 30 March 1989, Series A no. 152, p. 22, § 52), but in those instances the Court was, so the Delegate maintained, thinking only of the common-law system. That system, however, was radically different from, in particular, the French system. In the latter, case-law was undoubtedly a very important source of law, but a secondary one, whereas by "law" the Convention meant a primary source.

28. Like the Government and the Delegate, the Court points out, firstly, that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among many other authorities, the Malone judgment previously cited, Series A no. 82, p. 36, § 79, and the Eriksson judgment of 22 June 1989, Series A no. 156, p. 25, § 62). It is therefore not for the Court to express an opinion contrary to theirs on whether telephone tapping ordered by investigating judges is compatible with Article 368 of the Criminal Code. For many years now, the courts - and in particular the Court of Cassation - have regarded Articles 81, 151 and 152 of the Code of Criminal Procedure as providing a legal basis for telephone tapping carried out by a senior police officer (officier de police judiciaire) under a warrant issued by an investigating judge.

Settled case-law of this kind cannot be disregarded. In relation to paragraph 2 of Article 8 (art. 8-2) of the Convention and other similar clauses, the Court has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both enactments of lower rank than statutes (see, in particular, the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 45, § 93) and unwritten law. The Sunday Times, Dudgeon and Chappell judgments admittedly concerned the United Kingdom, but it would be wrong to exaggerate the distinction between common-law countries and Continental countries, as the

Government rightly pointed out. Statute law is, of course, also of importance in common-law countries. Conversely, case-law has traditionally played a major role in Continental countries, to such an extent that whole branches of positive law are largely the outcome of decisions by the courts. The Court has indeed taken account of case-law in such countries on more than one occasion (see, in particular, the Müller and Others judgment of 24 May 1988, Series A no. 133, p. 20, § 29, the Salabiaku judgment of 7 October 1988, Series A no. 141, pp. 16-17, § 29, and the Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989, Series A no. 165, pp. 18-19, § 30). Were it to overlook case-law, the Court would undermine the legal system of the Continental States almost as much as the Sunday Times judgment of 26 April 1979 would have "struck at the very roots" of the United Kingdom's legal system if it had excluded the common law from the concept of "law" (Series A no. 30, p. 30, § 47). In a sphere covered by the written law, the "law" is the enactment in force as the competent courts have interpreted it in the light, if necessary, of any new practical developments.

In sum, the interference complained of had a legal basis in French law.

2. "Quality of the law"

29. The second requirement which emerges from the phrase "in accordance with the law" - the accessibility of the law - does not raise any problem in the instant case.

The same is not true of the third requirement, the law's "foreseeability" as to the meaning and nature of the applicable measures. As the Court pointed out in the Malone judgment of 2 August 1984, Article 8 § 2 (art. 8-2) of the Convention "does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law". It

> "thus implies ... that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 (art. 8-1) ... Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident ... Undoubtedly ..., the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations"

- or judicial investigations -

> "as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.

> ... [In its judgment of 25 March 1983 in the case of Silver and Others the Court] held that 'a law which confers a discretion must indicate the scope of that discretion', although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law (Series A no. 61, pp. 33-34, §§ 88-89). The degree of precision required of the 'law' in this connection will depend upon the particular subject-matter ... Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive"

- or to a judge -

> "to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity ... to give the individual adequate protection against arbitrary interference." (Series A no. 82, pp. 32-33, §§ 67-68)

30. The Government submitted that the Court must be careful not to rule on whether French legislation conformed to the Convention in the abstract and not to give a decision based on legislative policy. The Court was therefore not concerned, they said, with matters irrelevant to Mr and Mrs Huvig's case, such as the fact that there was no requirement that an individual whose telephone had been monitored should be so informed after the event where proceedings had not in the end been taken against him. Such matters were in reality connected with the condition of "necessity in a democratic society", fulfilment of which had to be reviewed in concrete terms, in the light of the particular circumstances of each case.

31. The Court is not persuaded by this argument. Since it must ascertain whether the interference complained of was "in accordance with the law", it must inevitably assess the relevant French "law" in force at the time in relation to the requirements of the fundamental principle of the rule of law. Such a review necessarily entails some degree of abstraction. It is none the less concerned with the "quality" of the national legal rules applicable to Mr and Mrs Huvig in the instant case.

32. Tapping and other forms of interception of telephone conversations represent a serious interference with private life and correspondence and must accordingly be based on a "law" that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated.

Before the Commission (supplementary observations of 17 October 1988, pages 4-7, summarised in paragraph 31 of the report) and, in a slightly different form, before the Court, the Government listed seventeen safeguards which they said were provided for in French law (droit). These related either to the carrying out of telephone tapping or to the use made of the results or to the means of having any irregularities righted, and the Government claimed that the applicants had not been deprived of any of them.

33. The Court does not in any way minimise the value of several of the safeguards, in particular the need for a decision by an investigating judge, who is an independent judicial authority; the latter's supervision of senior police officers and the possible supervision of the judge himself by the Indictment Division (chambre d'accusation) of the Court of Appeal, by trial courts and courts of appeal and, if need be, by the Court of Cassation; the exclusion of any "subterfuge" or "ruse" consisting not merely in the use of telephone tapping but in an actual trick, trap or provocation; and the duty to respect the confidentiality of relations between suspect or accused and lawyer.

It has to be noted, however, that only some of these safeguards are expressly provided for in Articles 81, 151 and 152 of the Code of Criminal Procedure. Others have been laid down piecemeal in judgments given over the years, practically all of them after the interception complained of by the applicants (April 1974). Some have not yet been expressly laid down in the case-law at all, at least according to the information gathered by the Court; the Government appear to infer them either from general enactments or principles or else from an analogical interpretation of legislative provisions - or court decisions - concerning investigative measures different from telephone tapping, notably searches and seizure of property. Although logical in itself, such "extrapolation" does not provide sufficient legal certainty in the present context.

34. Above all, the system does not for the time being afford adequate safeguards against various possible abuses. For example, the categories of people liable to have their telephones tapped by judicial order and the nature of the offences which may give rise to such an order are nowhere defined. Nothing obliges a judge to set a limit on the duration of telephone tapping. Similarly unspecified are the procedure for drawing up the summary reports containing intercepted conversations; the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge (who can hardly verify the number and length of the original tapes on the spot) and by the defence; and the circumstances in which recordings may or must be erased or the tapes be destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court. The information provided by the Government on these various points shows at best the existence of a practice, but a practice lacking the necessary regulatory control in the absence of legislation or case-law.

35. In short, French law, written and unwritten, does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. This was truer still at the material time, so that Mr and Mrs Huvig did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society (see the Malone judgment previously cited, Series A no.

82, p. 36, § 79). Admittedly they suffered little or no harm from this, as the results of the impugned telephone tapping did not "serve as a basis for the prosecution" (see paragraphs 10-12 above), but the Court has consistently held that a violation is conceivable even in the absence of any detriment; the latter is relevant only to the application of Article 50 (art. 50) (see, inter alia, the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 21, § 42).

There has therefore been a breach of Article 8 (art. 8) of the Convention.

B. Purpose and necessity of the interference

36. Having regard to the foregoing conclusion, the Court, like the Commission (see paragraph 67 of the report), does not consider it necessary to review compliance with the other requirements of paragraph 2 of Article 8 (art. 8-2) in this case.

II. APPLICATION OF ARTICLE 50 (art. 50)

37. By Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

In their written observations of February and September 1988 the applicants asked the Commission to "award them just compensation", but before the Court they did not seek either compensation or reimbursement of costs and expenses.

38. As these are not matters which the Court has to examine of its own motion (see, as the most recent authority, the Kostovski judgment of 20 November 1989, Series A no. 166, p. 18, § 46), it finds that it is unnecessary to apply Article 50 (art. 50) in this case.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a breach of Article 8 (art. 8);

2. Holds that it is unnecessary to apply Article 50 (art. 50).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 April 1990.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar



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

CASE OF OSMAN v. THE UNITED KINGDOM

(87/1997/871/1083)

JUDGMENT

STRASBOURG

28 October 1998

In the case of Osman v. the United Kingdom[1],

The European Court of Human Rights, sitting, in accordance with Rule 51 of Rules of Court A[2], as a Grand Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr THÓR VILHJÁLMSSON,
Mr J. DE MEYER,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr J.M. MORENILLA,
Sir John FREELAND,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr G. MIFSUD BONNICI,
Mr J. MAKARCZYK,
Mr D. GOTCHEV,
Mr P. JAMBREK,
Mr K. JUNGWIERT,
Mr P. KŪRIS,
Mr U. LŌHMUS,
Mr J. CASADEVALL,
Mr T. PANTIRU,
Mr V. TOUMANOV,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 27 July and 24 September 1998,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 22 September 1997, within the three-

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Notes by the Registrar

1. The case is numbered 87/1997/871/1083. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

month period laid down by Article 32 § 1 and Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 23452/94) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 by two British nationals, Mrs Mulkiye Osman and her son, Ahmet Osman, on 10 November 1993.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2, 6, 8 and 13 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included *ex officio* Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention), and Mr R. Ryssdal, the then President of the Court (Rule 21 § 4 (b)). On 25 September 1997, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr R. Macdonald, Mr A.B. Baka, Mr L. Wildhaber, Mr K. Jungwiert, Mr J. Casadevall and Mr V. Toumanov (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr R. Bernhardt, the Vice-President of the Court, replaced Mr Ryssdal as President of the Chamber following the latter's death (Rule 21 § 6, second sub-paragraph).

4. As President of the Chamber at the time (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, had consulted the Agent of the United Kingdom Government ("the Government"), the applicants' lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's and the applicants' memorials on 5 and 24 March 1998 respectively, the applicants having been granted an extension by the President of the Chamber of the deadline for submission of their memorial. The applicants filed with the registry on 9 April and 8 June 1998 further details of their claims for just satisfaction under Article 50 of the Convention. The Government's observations in reply to these claims were filed with the registry on 18 June 1998.

5. In accordance with the decision of the new President of the Chamber, Mr Bernhardt, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 June 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr M. EATON, Deputy Legal Adviser,
Foreign and Commonwealth Office, *Agent*,
Mr J. EADIE, Barrister-at-Law,
Mr S. FREELAND, Barrister-at-Law, *Counsel*,
Ms R. DAVIES, Home Office,
Mr P. EDMUNDSON, Home Office, *Advisers*;

(b) *for the Commission*
Mr C.L. ROZAKIS, *Delegate*;

(c) *for the applicants*
Mr B. EMMERSON, Barrister-at-Law,
Mr N. AHLUWALIA, Barrister-at-Law,
Mr A.B. CLAPHAM, Barrister-at-Law, *Counsel*,
Mrs N. MOLE,
MS L. CHRISTIAN, Solicitor, *Advisers*.

The Court heard addresses by Mr Rozakis, Mr Emmerson and Mr Eadie.

6. Following deliberations on 26 June 1998 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51).

7. The Grand Chamber to be constituted included *ex officio* Mr Bernhardt, the President of the Court, who was elected to this office following the death of Mr Ryssdal, and Mr Thór Vilhjálmsson, the Vice-President, who was elected to this office in succession to Mr Bernhardt, together with the other members and the four substitutes of the original Chamber, the latter being Mr I. Foighel, Mr J. Makarczyk, Mr M.A. Lopes Rocha and Mr R. Pekkanen (Rule 51 § 2 (a) and (b)). On 28 June 1998 the President, in the presence of the Registrar, drew by lot the names of the eight additional judges needed to complete the Grand Chamber, namely Mr J. De Meyer, Mr J.M. Morenilla, Mr G. Mifsud Bonnici, Mr D. Gotchev, Mr P. Jambrek, Mr P. Kūris, Mr U. Lõhmus and Mr T. Pantiru (Rule 51 § 2 (c)). Subsequently Mr Macdonald, a member of the original Chamber, withdrew from the Grand Chamber, being unable to take part in the further consideration of the case.

8. On 26 June 1998, having consulted the Agent of the Government and the Delegate of the Commission, the President acceded to the applicants' request for legal aid (Rule 4 of the Addendum to Rules of Court A).

9. Having taken note of the opinions of the Agent of the Government, the Delegate of the Commission and the applicants, the Grand Chamber decided on 27 July 1998 that it was not necessary to hold a further hearing following the relinquishment of jurisdiction by the original Chamber (Rules 38 and 51 § 6).

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicants

10. The applicants are British citizens resident in London. The first applicant, Mrs Mulkiye Osman, was born in Cyprus in 1948. She is the widow of Mr Ali Osman who was shot dead by Mr Paul Paget-Lewis on 7 March 1988. The second applicant, Ahmet Osman, is her son, born in England in 1972. He was a former pupil of Paul Paget-Lewis at Homerton House School. Ahmet Osman was wounded in the shooting incident which led to the death of his father.

The applicants complaints are directed at the failure of the authorities to appreciate and act on what they claim was a series of clear warning signs that Paul Paget-Lewis represented a serious threat to the physical safety of Ahmet Osman and his family. There is disagreement between the applicants and the respondent State on essential aspects of the circumstances leading to the tragedy. The applicants have disputed in this respect the completeness of the facts as found by the Commission.

B. The events to the end of March 1987

1. The initial complaints against Paget-Lewis

11. In 1986 the headmaster of Homerton House School, Mr John Prince, noticed that one of his teaching staff, Paul Paget-Lewis, had developed an attachment to Ahmet Osman, a pupil at the school. According to a statement which he made to the police on 10 March 1988, Mr Prince indicated that he "made a point of personally keeping an eye on the situation". As a result of this attachment, Paget-Lewis informed Mr Prince that he intended to leave the school and become a supply teacher. Mr Kenneth Perkins, a deputy head teacher, spoke with Paget-Lewis and managed to persuade him to remain at the school.

12. In January 1987 Mrs Green, the mother of Leslie Green, another pupil at the school and the applicants' neighbour, telephoned Mr Fleming – another deputy head teacher – to complain that Paget-Lewis had been following her son home after school and harassing him. She alleged that Paget-Lewis had been spreading rumours that her son had engaged in deviant sexual practices and that he objected to her son's friendship with Ahmet Osman. Mrs Green made a formal complaint to this effect to Mr Prince on 2 March 1987.

2. The various interviews regarding the complaints

(a) Leslie Green

13. On 3 March 1987 Mr Perkins interviewed Leslie Green, who confirmed that Paget-Lewis had been following him and had been spreading rumours of a sexual nature about him because of his friendship with Ahmet Osman.

(b) Ahmet Osman

14. Also on 3 March 1987 Mr Fleming interviewed Ahmet Osman. In the typed record of this interview dated 6 March 1987, Ahmet confirmed that Paget-Lewis had warned him about Leslie Green, accusing Leslie of sexual misconduct with another boy at the school. Ahmet also reported to Mr Fleming during the interview that on one occasion Paget-Lewis had followed Leslie and himself home in his car. He also stated that Paget-Lewis had asked him to come and see him in his classroom at lunch times, apparently to learn Turkish, and that Paget-Lewis had taken photographs of him and given him money, a pen and a Turkish dictionary. However, he later took the pen and deliberately snapped it in half during a lesson.

(c) Paget-Lewis

15. On 6 March 1987 Mr Perkins interviewed Paget-Lewis. In the course of the interview Paget-Lewis stated that he had a special relationship with Ahmet Osman which had developed over a period of a year and which Leslie Green was trying to disrupt and that he was so upset on one occasion that he confronted Leslie and accused the boy of being a sexual deviant. He admitted that he had followed Leslie home on one occasion and had waited outside his parents' house for 45 minutes. Paget-Lewis mentioned to Mr Perkins that he had told Leslie Green that he would become "very angry" if anything happened to his relationship with Ahmet, although he indicated to Mr Perkins that this was not to be seen as a threat. He also acknowledged that he had given Ahmet money and presents, and had taken photographs of him for "sentimental reasons". In a later memorandum dated 5 May 1988, Mr Perkins described Paget-Lewis as having been in a highly

irrational state during this interview and unwilling to admit that his behaviour displayed a serious lack of wisdom and professionalism.

16. On 9 March 1987 Paget-Lewis submitted a written statement to Mr Perkins regarding the complaint made by Mrs Green. In his memorandum of 5 May 1988 (see paragraph 15 above) Mr Perkins stated that he found the statement "disturbing" since it showed clearly that Paget-Lewis was "overpoweringly jealous" of the friendship between Ahmet Osman and Leslie Green and provided clear evidence that he "was not in control of his emotions". Leslie was presented as devious, malicious and an evil influence.

Mr Perkins again interviewed Paget-Lewis on his written statement during which he pointed out his concerns about the content of the statement and suggested to Paget-Lewis that he seek psychiatric help. Mr Perkins informed Mr Prince of everything which had happened up until that date.

17. Prior to 13 March 1987 Mr Prince had an informal discussion with Paget-Lewis in which he admitted telling pupils at the school that Leslie Green had engaged in acts of oral sex with Ahmet Osman in revenge for rumours spread by Leslie concerning his relationship with Ahmet.

On 13 March 1987 Mr Prince formally interviewed Paget-Lewis on the basis of the notes of the interview between Paget-Lewis and Mr Perkins. The contemporaneous notes taken of the meeting reveal that Paget-Lewis admitted that he had become attached to Ahmet Osman; that he had accused Leslie Green of trying to turn Ahmet against him; and that he had parked outside Leslie's house to show that he was not to be scared away. Paget-Lewis denied that he had accused Leslie of deviant sexual practices. The notes of the meeting conclude with the sentence "the situation has now escalated and Mr Prince has no confidence in his own ability to contain it".

(d) Leslie Green and his mother

18. Mr Prince was informed on 16 March 1987 in an interview with Leslie Green and his mother that Paget-Lewis had been spying on Ahmet Osman and that Paget-Lewis had told Ahmet that "he knew where his mother worked and how much money she earned and that if Ahmet left school, he would find him".

(e) Ahmet Osman

19. During this period another deputy head teacher, Mr Youssouf, also interviewed Ahmet Osman on a number of occasions. These interviews revealed that Paget-Lewis had told Ahmet that he would be able to find him if he left the school. Paget-Lewis claimed to have discovered Ahmet's previous address and the name of his previous school and said he had visited the area and had spoken to his former neighbours.

(f) The Osman family

20. On 17 March 1987 Mr Prince met with the Osman family to explain his concerns about the interest Paget-Lewis had taken in Ahmet. He explained that the school was quite satisfied that nothing improper had taken place between Paget-Lewis and Ahmet. He told them that the school would monitor the situation closely to ensure that Ahmet would be safe. Ahmet was told never to be alone with Paget-Lewis. During this meeting Ahmet's mother expressed her wish that her son should be transferred to another school.

3. Contacts between the school and the police during this period

21. According to the diary of Mr Prince between 3 March 1987 and 17 March 1987 he met with PC Williams on four occasions. The applicants state that during these meetings information concerning Paget-Lewis' conduct towards Ahmet Osman was passed on to the police. The Government state that PC Williams had no recollection of being told about the presents which Paget-Lewis had given to Ahmet or that Paget-Lewis had followed Ahmet home. PC Williams did not keep any record of the meetings, nor did he make any report concerning the nature and extent of the information that was communicated to him, or if he did no such record now exists. The Government stress that all concerned were satisfied that there was no sexual element to Paget-Lewis' attachment to Ahmet and the matter could be dealt with internally by the school.

4. The graffiti incident

22. By 17 March 1987 graffiti had appeared at six locations around the school which read "Leslie, do not forget to wear a condom when you screw Ahmet or he will get Aids." The words had been written with spray paint and a stencil.

23. Following the discovery of the graffiti, Mr Perkins interviewed Paget-Lewis and asked him if he was responsible. He denied this. However, Mr Perkins noted in his report that Paget-Lewis knew the precise wording and the exact locations of all the graffiti.

5. The stolen files

24. On 19 March 1987 a further discussion took place between Mr Prince and the Osman family regarding Ahmet's transfer to another school. For his safety Mr Prince told Ahmet not to give his new school address to anyone from Homerton House. While attempting to arrange his transfer, Mr Youssouf discovered that the files relating to Ahmet and Leslie Green had been stolen from the school office. The file relating to staff disciplinary matters was also found to be missing.

Mr Perkins considered that the stolen files were the likely source of the information that Paget-Lewis had acquired about Ahmet Osman's previous address and school (see paragraph 19 above). He subsequently questioned Paget-Lewis, who denied any involvement in the theft and denied having made any comments about Ahmet's previous address and school or visiting the area in which Ahmet used to live.

25. On 23 March 1987 Ahmet Osman was transferred to a different school, but owing to curriculum difficulties he had to return to Homerton House fourteen days later.

C. The events between April 1987 and August 1987

1. Paget-Lewis changes name

26. On 14 April 1987, Paget-Lewis changed his name by deed poll to Paul Ahmet Yildirim Osman. On 1 May 1987, Mr Prince wrote to the Inner London Education Authority (ILEA) informing them that Paget-Lewis had changed his name and that he was worried that some psychological imbalance might pose a threat to the safety of Ahmet Osman. He also stated that he was of the opinion that Paget-Lewis should be removed from the school as soon as possible.

2. Further contacts between the school and the police

27. On 4 May 1987 Mr Prince spoke with two police officers, Detective Chief Inspector Newman and Detective Inspector Clarke. According to the applicants during this meeting the headmaster informed them of the missing files and the graffiti incident and discussed the fact that Paget-Lewis' real name was Ronald Stephen Potter. He had previously changed his name by deed poll to name himself after a pupil called Paget-Lewis whom he had taught at Highbury Grove School. The Government state that the two police officers have no recollection of having been informed of these matters.

3. The contacts with the ILEA

28. Following his letter of 1 May 1987 (see paragraph 26 above), Mr Prince wrote to the Head of Discipline at ILEA in a letter dated 8 May 1987 stating that while he believed Paget-Lewis needed medical help, his continued presence in the school jeopardised the welfare, safety and education of the pupils. An internal memorandum from the Head of Discipline at ILEA dated the same day makes reference to "a fear that [Paget-Lewis] might seek to take the boy out of the country" and that the police are investigating the complaint that "he has removed certain files about the matter from the school".

Undated notes written by the same official between 14 April and 8 May 1987 indicate that it was feared that Ahmet Osman may be harmed and that by changing his name Paget-Lewis may abscond with the boy. The notes refer to the fact that the police had stated that Mr Prince should contact them if Ahmet goes missing for more than an hour. In addition, the police would investigate the disappearance of the missing files, search Paget-Lewis' home and check up on his background.

The Government deny that the police said that they should be contacted if Ahmet went missing or that they intended to search Paget-Lewis' house.

4. The conclusions of the ILEA psychiatrist following the first meeting with Paget-Lewis

29. On 19 May 1987 Paget-Lewis was seen by Dr Ferguson, the ILEA psychiatrist. Dr Ferguson was provided with, *inter alia*, the documents showing Paget-Lewis' change of name; the records of the interviews conducted in March 1987; and the memorandum prepared by Mr Perkins on 5 May 1987 (see paragraph 15 above). Dr Ferguson reported:

> "This teacher must indeed give cause for concern. He does not present ill in formal terms, nor does he seem sexually deviant. He does have personality problems, and his judgment regarding his friendship with a pupil is reprehensibly suspect."

Dr Ferguson recommended that Paget-Lewis remain teaching at the school but that he should receive some form of counselling and psychotherapy.

5. The attacks on the applicants' property

30. On or about 21 May 1987, a brick was thrown through a window of the applicants' house. The police were informed and a police officer was sent to the house and completed a crime report. On two occasions in June 1987 the tyres of Ali Osman's car were deliberately burst. Both incidents were reported to the police, but no police records relating to the offences can be found.

6. Dr Ferguson's further interviews with Paget-Lewis

31. On 1 June 1987 Mr Prince requested Paget-Lewis to take sick-leave. On 2 June 1987 Paget-Lewis was examined again by Dr Ferguson. He described a continuing strong urge to speak with Ahmet Osman and said that he felt angry that Ahmet seemed content with the situation of non-contact. Dr Ferguson concluded that under the circumstances, Paget-Lewis should remain away from Homerton House and was designated temporarily unfit to work.

Paget-Lewis subsequently informed Mr Perkins that he would be taking medical leave for the remainder of the school term. He then left Homerton House and did not return again.

32. On 16 June 1987, following a further interview with Paget-Lewis, Dr Ferguson recommended that he should no longer teach at Homerton House and that transfer on medical grounds was strongly and urgently recommended.

7. Mrs Green's further complaints against Paget-Lewis

33. On 4 June 1987 Mrs Green telephoned Mr Perkins making further complaints about Paget-Lewis following her son. She also informed him that she had sent her son to stay with her sister.

8. Paget-Lewis' suspension from teaching duties and subsequent reinstatement

34. On 18 June 1987, Paget-Lewis was suspended pending an ILEA investigation for "unprofessional behaviour" towards Ahmet Osman. He submitted a statement dated 6 July 1987 in which, *inter alia*, he admitted taking photographs of Ahmet and giving him money but denied stealing files or painting graffiti. He accused Mr Perkins of lying about him and said that Mr Perkins has stated his intention of breaking him.

35. On 7 August 1987, ILEA sent a letter to Paget-Lewis officially reprimanding and severely warning him but lifting the suspension. The letter also stated that he was not to return to Homerton House. Shortly afterwards he began working as a supply teacher at two other local schools, Haggerston School and Skinners School.

D. The events between August 1987 and December 1987

1. The criminal damage to the Osmans' property

36. In August or September 1987, a mixture of engine oil and paraffin was poured on the area outside the Osman family home. On 18 October 1987, the windscreen of Ali Osman's car was smashed. During November 1987, in a series of incidents, the applicants' front door lock was jammed with superglue, dog excrement was smeared on their doorstep and on their car, and on more than one occasion the light bulb was stolen from the light in the outside porch. Around this time all the windows of their car were also broken. All these incidents were reported to the police and on two occasions Ali Osman visited Hackney police station to discuss the vandalism and criminal damage to his property.

37. At some point during November 1987, PC Adams visited the Osmans' home and then spoke to Paget-Lewis about the acts of vandalism. In a later statement to the police, Paget-Lewis alleged that he told PC Adams that the loss of his job was so distressing that he felt that he was in danger of doing something criminally insane. The Government deny that

this was said, and refer to the fact that during the interview with PC Adams Paget-Lewis denied any involvement in the acts of vandalism and criminal damage. No detailed records were made by PC Adams of his contacts with Paget-Lewis or the Osman family. Any entries in notebooks or duty registers (crime reports or parade books) could not later be traced by the Metropolitan Police Solicitor's Department.

2. The vehicle collision involving Paget-Lewis

38. On 7 December 1987 a car driven by Paget-Lewis collided with a van in which Leslie Green was a passenger. According to the driver of the van, Paget-Lewis claimed that his accelerator had jammed and that he could not help what happened. After the police arrived at the scene of the accident they cautioned Paget-Lewis, and provided him with a form requesting him to produce his driving documents.

39. On 10 December 1987 Paget-Lewis attended Hackney police station and produced his driving documents for inspection. Since he failed to produce a road worthiness (MOT) certificate for his car he was cautioned by the police.

40. In a statement taken by the police on 22 December 1987 from the driver of the van that had been allegedly rammed by Paget-Lewis, the driver recalled that after the accident Paget-Lewis had said: "I'm not worried because in a few months I'll be doing life."

3. Contacts between Detective Sergeant Boardman and ILEA

41. On 8 December 1987, following the collision incident, Detective Sergeant Boardman contacted ILEA stating that he wished to interview Paget-Lewis and the headmaster. The applicants state that Detective Sergeant Boardman assured ILEA that the Osman family would be protected. The Government deny that such an assurance was given.

An ILEA memorandum dated 8 December 1987 referred to the harassment of the Osman family and Paget-Lewis' alleged admission of responsibility for the van collision saying that Leslie Green had lured Ahmet Osman away from his affections. It noted that the police were pursuing enquiries but that if nothing was heard the matter should be "chased". It concluded with the note "Families getting police protection".

4. Detective Sergeant Boardman interviews the Green and the Osman families and visits the school

42. On 9 December 1987 Detective Sergeant Boardman took a detailed statement from Leslie Green and his mother concerning, *inter alia*, the fact that Paget-Lewis had followed Leslie home, the acts of harassment and the

graffiti which had appeared at the school. In his statement Leslie claimed that Paget-Lewis had threatened to "get him" whether it took "thirty days or thirty years". He also said that he had not been to school for two weeks as he was afraid to travel there and that he had moved in with his aunt, so as to be safe from Paget-Lewis.

43. On 14 December 1987 Detective Sergeant Boardman visited Homerton House and inspected the graffiti. A police photographer took photographs of the graffiti.

44. On or about 15 December 1987 Detective Sergeant Boardman visited the Osman family and discussed the criminal damage and Paget-Lewis' relationship with Ahmet. The applicants allege that Detective Sergeant Boardman told the family that he knew Paget-Lewis was responsible for the acts of vandalism, and gave them assurances that he would cause the incidents to stop. The Government deny that Detective Sergeant Boardman said that he knew Paget-Lewis was responsible, and that he gave assurances as to the family's safety.

5. Detective Sergeant Boardman's report on the case

45. In his report on the case which was completed on or about 15 December 1987, Detective Sergeant Boardman observed:

> "It should be pointed out at this stage that there is no evidence to implicate Paget-Lewis in either of these offences [the graffiti at the school] or the acts of vandalism against Osmans' address, although there is no doubt in everybody's mind that he was in fact responsible and this was just another example of his spite."

6. Paget-Lewis is interviewed by ILEA officers

46. On 15 December 1987 Paget-Lewis was interviewed by officers of ILEA at his own request. An ILEA memorandum dated the same day recorded that Paget-Lewis felt in a totally self-destructive mood, stating that it was all a symphony and the last chord had to be played. He admitted being deeply in debt and as a result was selling all his possessions. He blamed Mr Perkins for all his troubles but would not do a "Hungerford"[1] in a school but would see him at his home. The memorandum stated that the concerns of ILEA should be passed on to the police and noted that a call was made to Detective Sergeant Boardman, who was unavailable. Nevertheless, a detailed message was left with the receptionist.

One of the officers of ILEA recalled later in a statement dated 9 March 1988 that Paget-Lewis spoke in a manner which was very disturbing, said that he blamed Mr Perkins for the loss of his job, that he knew where he lived and that he was going to do something though not at the school. The

1. Hungerford was the scene of a 1987 massacre in which a gunman killed sixteen persons before committing suicide.

other officer recalled in her statement of 9 March 1988 that Paget-Lewis had stated that he was going to do something that would be "a sort of Hungerford". She recalled that as a result of this conversation she informed the police and the school that she considered that the head and deputy head were at risk of violence.

Although the applicants state that the content of the interview was passed on to the police, the Government deny that mention was made of the "Hungerford" reference or that there was any suggestion that the Osmans might be in danger.

7. Detective Sergeant Boardman's reaction to the ILEA message and the decision to arrest Paget-Lewis

47. On 15 December 1987 after receiving the message of the officer of ILEA (see paragraph 46 above), Detective Sergeant Boardman sent a telex to the local police station near Mr Perkins' home referring to the fact that vague threats had been made and that the school authorities were very concerned. He asked them to pay casual attention to the address, giving a brief description of Paget-Lewis and the registration number of his car.

48. On 16 December 1987 Detective Sergeant Boardman contacted ILEA with a view to tracing Paget-Lewis and was provided with his address. He requested the official at ILEA to ask Paget-Lewis to contact the police. On the same day, Detective Sergeant Boardman met with Mr Prince and Mr Perkins. The applicants state that he assured Mr Prince that the police would undertake the necessary measures to protect both Mr Perkins and the applicants. A diary entry of Mr Prince dated 16 December 1987 refers to Detective Sergeant Boardman and contains a heading "OSMAN/PERKINS/POLICE PRESENCE ARRANGED" and a note that ILEA had called "to finalise arrangements re protection for Perkins/Osman families". According to the Government no assurance of protection was given. Detective Sergeant Boardman received the impression from his meetings with Mr Prince and Mr Perkins that Paget-Lewis was angry at being removed from the school but that the anger was directed against the deputy head, who in any case did not feel in danger.

49. On 17 December 1987 Detective Sergeant Boardman and other police officers arrived at Paget-Lewis' house with the intention of arresting him on suspicion of criminal damage. Paget-Lewis was absent. The police were unaware that he was teaching at Haggerston School that day.

50. On 18 December 1987 pursuant to the request of the police, ILEA sent a letter to Paget-Lewis requesting him to contact Detective Sergeant Boardman. The same day ILEA informed the police that Paget-Lewis had not attended Haggerston School. He did not return to the school again.

E. The events between January 1988 and October 1988

1. Attempts to trace the whereabouts of Paget-Lewis

51. In early January 1988 the police commenced the procedure of laying an information before the Magistrates' Court with a view to prosecuting Paget-Lewis for driving without due care and attention. In addition, Paget-Lewis' name was put on the Police National Computer as being wanted in relation to the collision incident and on suspicion of having committed offences of criminal damage.

52. On 8 January an officer of ILEA rang Detective Sergeant Boardman for an update on the case but he was unavailable. Three days later he returned her call saying there had been no progress.

53. Between January and March 1988 Paget-Lewis travelled around England hiring cars in his adopted name of Osman and was involved in a number of accidents. He spent time at his home address during this period and continued to receive mail there.

54. On 17 January 1988 Paget-Lewis broke into a car parked near a clay-pigeon shoot near Leeds in Yorkshire and stole a shotgun. He sawed off both barrels. While the theft was reported to the local police, because there was nothing to connect the incident to Paget-Lewis the theft did not come to the attention of the Metropolitan police dealing with the case.

2. Paget-Lewis is sighted near the Osman home

55. On 1, 4 and 5 March 1988 Leslie Green saw Paget-Lewis wearing a black crash helmet near the applicants' home. According to the applicants, Mrs Green informed the police on each occasion, but her calls were not returned. The Government accept that, on 5 March 1988, Detective Sergeant Boardman received a message which stated "phone Mrs Green" but since there was no phone number on the note he did not connect the message with the mother of Leslie Green.

3. The fatal shootings and the arrest of Paget-Lewis

56. On 7 March 1988 Paget-Lewis was seen near the applicants' home by a number of people. At about 11 p.m. Paget-Lewis shot and killed Ali Osman and seriously wounded Ahmet. He then drove to the home of Mr Perkins where he shot and wounded him and killed his son.

57. Early the next morning Paget-Lewis was arrested. On being arrested he stated "why didn't you stop me before I did it, I gave you all the warning signs?"

58. Later that day Paget-Lewis was interviewed by the police. According to the record of the interview, Paget-Lewis said that he had been planning the attacks ever since he lost his job, and for the previous two weeks he had

been watching the Osmans' house. Although he considered Mr Perkins as his main target, he also regarded Ali and Ahmet Osman as being responsible for his losing his position at Homerton House. Paget-Lewis stated that he had been hoping in the back of his mind that the police would stop him. He admitted holding the family at gunpoint as they returned to the house, making Ali and Ahmet Osman kneel down in the kitchen, turning out the light and shooting at them. He denied that on earlier occasions he had damaged the windows of the Osmans' house but admitted that he had let down the tyres of their car as a prank. He also denied responsibility for the graffiti and taking the files from the school office.

4. Paget-Lewis is convicted of manslaughter

59. On 28 October 1988 Paget-Lewis was convicted of two charges of manslaughter having pleaded guilty on grounds of diminished responsibility (see paragraph 73 below). He was sentenced to be detained in a secure mental hospital without limit of time pursuant to section 41 of the Mental Health Act 1983.

F. Judicial proceedings against the police for negligence

60. An inquest was held into the death of Ali Osman after the conclusion of the criminal proceedings. Since a person had been convicted in connection with the death, the Coroner did not hold a full inquest (section 16 of the Coroner's Act 1988).

61. On 28 September 1989 the applicants commenced proceedings against, *inter alios*, the Commissioner of Police of the Metropolis alleging negligence in that although the police were aware of Paget-Lewis' activities since May 1987 they failed to apprehend or interview him, search his home or charge him with an offence before March 1988. Orders for discovery of documents were made on 24 April 1990.

62. On 19 August 1991 the Metropolitan Police Commissioner issued an application to strike out the statement of claim on the ground that it disclosed no reasonable cause of action. The High Court judge dismissed the application.

63. On 7 October 1992 the Court of Appeal upheld the appeal by the Commissioner (*Osman and another v. Ferguson and another* [1993] 4 All England Law Reports at p. 344). In its judgment, the court held that in light of previous authorities no action could lie against the police in negligence in the investigation and suppression of crime on the grounds that public policy required an immunity from suit.

64. Lord Justice McCowan found, *inter alia*:

> "In my judgment the plaintiffs [the applicants] have therefore an arguable cause that as between [the second applicant] and his family, on the one hand and the investigating officers, on the other, there existed a very close degree of proximity amounting to a special relationship."

65. However, having regard to the judgment of the House of Lords in the case of *Hill v. Chief Constable of West Yorkshire* (see paragraphs 90–92 below), from which he found no relevant distinction, he considered that the matters in issue were failures in investigation of crime and thus public policy doomed the action to failure. He rejected the argument that where the class of victim was sufficiently proximate and sufficiently small the public policy argument might not apply. He found that Lord Keith in the Hill case had treated public policy as a separate point that is not reached unless there is a duty of care.

The second judge in the Court of Appeal, Lord Justice Beldam, also held that on grounds of public policy the claims were not maintainable but refrained from expressing an opinion as to whether the facts, if proved, were sufficient to establish a relationship sufficiently proximate to found a duty of care. Lord Justice Simon Brown agreed with the judgment of Lord Justice McCowan. The applicants' claim was accordingly struck out.

66. The Court of Appeal refused leave to appeal to the House of Lords and the application to the House of Lords for leave to appeal was refused on 10 May 1993.

G. The Commission's findings of fact

67. The domestic courts had not established the full facts of the case since Paget-Lewis pleaded guilty to the charges against him and a full inquest was not conducted into the death of Ali Osman (see paragraph 60 above). Furthermore, the applicants' civil action against the police was struck out as showing no reasonable cause of action (see paragraph 65 above). Having examined the submissions and materials of the parties especially as regards the facts in dispute the Commission proceeded to the establishment of the facts of the case. Its findings may be summarised as follows.

68. As to the four meetings which took place between the police and the school between 3 March and 17 March 1987 (see paragraph 21 above), the Commission was satisfied that the police were made aware of the substance of the events and of the school's concerns about the disturbing attachment which Paget-Lewis was showing towards Ahmet Osman as well as Paget-Lewis' worrying reaction towards Leslie Green.

Furthermore, Mr Prince had in all probability informed Detective Inspectors Newman and Clarke on 4 May 1987 (see paragraph 27 above)

about the graffiti incident, the theft of the school files and Paget-Lewis' change of name, even if both officers had no recollection of having been told about the first two matters. Like the meetings between PC Williams and Mr Prince, no police notes appear to have been taken. However, the Commission did not find it established that at this stage the police had made any commitment to searching Paget-Lewis' home or were seriously concerned about the possibility of Paget-Lewis kidnapping Ahmet. These hypotheses emerge from the memoranda drawn up by ILEA officers around this time (see paragraph 28 above) and were probably based on the contacts which the officers had with Mr Prince and not on any direct contact between the officers and the police.

69. While all the vandalism on the Osmans' home and property between May and November 1987 had been reported to the police and the family had informed the police of its concern that Paget-Lewis was behind the attacks, the only step taken during that period was to invite Paget-Lewis to the police station for an interview (see paragraph 37 above). In the Commission's opinion, little reliance could be placed on Paget-Lewis' later assertions that he told PC Adams during the interview that he was in danger of doing something criminally insane. No police notes or records of this meeting which took place on an unspecified date could be traced.

70. Following the alleged ramming incident (see paragraph 38 above), the police immediately interviewed the Greens and the Osmans and photographed the graffiti at the school (see paragraphs 42 and 43 above). Although Detective Sergeant Boardman in his undated report (see paragraph 45 above) had stated that there was no evidence that Paget-Lewis was responsible for the graffiti and the attacks on the Osmans' home the police had nevertheless taken the view that he was presenting a sufficient threat that formal steps should be taken against him. Thus the decision was taken on 16 December 1987 to arrest Paget-Lewis on suspicion of criminal damage.

The Commission was also satisfied that there was no evidence that Paget-Lewis had made any direct or indirect threats against the Osmans during his meeting with ILEA officers on 15 December 1987 (see paragraph 46 above). It placed greater weight on the contemporaneous notes of the meeting rather than on the statement of one of the officers taken several months later that Paget-Lewis threatened at the meeting to commit a "Hungerford massacre". According to the notes of the meeting, Paget-Lewis is reported as having stated that he would not do a "Hungerford" at the school but would see the deputy at home. In the Commission's view, this would explain why the police requested that a casual watch should be kept on Mr Perkins' address. Furthermore, despite the wording of the ILEA memorandum of 8 December and of Mr Prince's rather cryptic diary entry on 16 December 1987 (see paragraphs 41 and 48 above) it seemed unlikely

that the police had referred to or promised police protection to the Osman family especially since none was in fact envisaged or provided. The school authorities had probably received this impression from the assurances given by the police that the necessary measures were being taken to deal with the situation including the vague threats made against Mr Perkins.

71. The Commission did not find it established that the letter sent by the ILEA to Paget-Lewis at the request of the police following the failed arrest attempt on 17 December 1987 caused Paget-Lewis to disappear (see paragraph 50 above). It was also satisfied that the police took no further active steps to trace the whereabouts of Paget-Lewis from 18 December 1987 to March 1988 apart from placing his name on the Police National Computer in January 1988. In addition, there were no contemporaneous records to support the assertion that Mrs Green had informed the police about Paget-Lewis being seen by her son around the Osman home in early March 1988 (see paragraph 55 above). It may have been the case that Mrs Green merely left a message with the police station that Detective Sergeant Boardman should ring her back. In that event, it was not surprising that Detective Sergeant Boardman had not been able to make a connection between a Mrs Green and the Paget-Lewis file since the case had been dormant for three months.

II. RELEVANT DOMESTIC LAW

A. The criminal law

1. Murder

72. The offence of murder is committed if a person of sound mind unlawfully kills any human being with malice aforethought. The mental element of murder, "malice aforethought", is established if it is proved that there was, on the part of the accused, an intention to kill, an intention to cause grievous bodily harm or an intention to do an act knowing it to be highly probable that the act will cause death or grievous bodily harm. The sentence for murder is life imprisonment.

2. Manslaughter

73. The offence of manslaughter is committed if the victim is unlawfully killed by a person who, by reason of abnormality of mind, suffered from diminished responsibility – i.e. who suffered from such abnormality of mind as substantially impaired his mental responsibility for his acts. The sentence of manslaughter is imprisonment for life or for any shorter term.

B. Criminal procedure

1. Search warrants

74. The power to obtain a warrant to search for items that have been used, or are intended for use, in committing criminal damage is governed by section 6(1) of the Criminal Damage Act 1971 which provides:

> "If it is made to appear by information on oath before a justice of the peace that there is reasonable cause to believe that any person has in his custody or under his control or on his premises anything which there is reasonable cause to believe has been used or is intended for use without lawful excuse –
>
> (a) to destroy or damage property belonging to another; or
>
> (b) to destroy or damage any property in a way likely to endanger the life of another,
>
> the Justice of the Peace may grant a warrant authorising any constable to search for and seize that thing."

2. Police powers of arrest and detention

75. In order for an arrest to be lawful it must first satisfy either section 24 or 25 of the Police and Criminal Evidence Act 1984 ("the 1984 Act").

76. Under section 24 a police officer may arrest any person whom he has reasonable grounds to believe is guilty of an arrestable offence. All offences which carry a maximum sentence of five years' imprisonment or more are considered arrestable offences (section 24(1)).

77. Under section 25 a police officer may arrest without warrant any person whom he has reasonable grounds to suspect is guilty of a non-arrestable offence provided that one of the general interest conditions apply. These include:

(a) that the constable has reasonable grounds for doubting whether a name furnished by the relevant person as a name is in fact his real name (section 25(3)(a));

(b) that the constable has reasonable grounds to believe that an arrest is necessary to prevent the relevant person causing physical injury to any person or causing loss or damage to property (section 25(3)(d)(i) and (ii));

(c) that the constable has reasonable grounds to believe that an arrest is necessary to protect a child or other vulnerable person from the relevant person (section 25(3)(e)).

78. In determining whether the available information is sufficient to give rise to a reasonable suspicion, the test to be applied is that laid down by the House of Lords in *Hussein v. Chang Fook Kam* [1970] Appeal Cases at p. 942:

> "Suspicion in its ordinary meaning is a state of conjuncture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is at the end."

3. The decision to charge

79. Where a person is arrested for an offence without a warrant, or under a warrant not endorsed for bail, the custody officer at the police station where he is detained after his arrest must determine whether he has sufficient evidence to charge the person for the offence for which he has been arrested (section 37(1)(b) of the 1984 Act). In reaching this decision the custody officer must have "reasonable and probable" cause to prosecute. In *Hicks v. Faulkner* [1878] 8 Queen's Bench Division at p. 167, Judge Hawkins interpreted this requirement to mean:

> "… an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser to the conclusion that the person was probably guilty of the crime imputed."

80. The custody officer is not required to be sure that the accused person is guilty before charging him (*Tempest v. Snowden* [1952] 1 King's Bench Reports at p. 130). Nor is it necessary for a charging officer to believe that the prosecution will result in a conviction (*Dawson v. Vasandau* [1863] 11 Weekly Reporter at p. 516). The charging officer is simply required to make an assessment of whether there is sufficient evidence to withstand examination in the course of "a fair and impartial trial" (*Glinski v. McIver* [1962] Appeal Cases at p. 726).

81. If the custody officer does not have sufficient evidence to charge, the arrested person must be released either on bail or without bail. However, if the custody officer has reasonable grounds to believe that the suspect's detention is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him, the custody officer may authorise the suspect's further detention (section 37(2) of the 1984 Act).

4. Pattern of offending

82. In determining whether to bring criminal charges against a person, the custody officer may take into account evidence disclosing a pattern of

offending. However, in *D.P.P. v. P.* [1991] 2 Appeal Cases at p. 447 the House of Lords stated that admissibility of such evidence is to be determined by the degree of its probative worth. The Lord Chancellor, Lord Mackay of Clashfern, said:

> "… the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime… Once the principle is recognised that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative weight to outweigh its prejudicial effect must in each case be a question of fact and degree." (at p. 460)

He continued:

> "Where the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of what has been called in the course of argument a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle." (at p. 462)

5. Bail

83. Section 38 of the 1984 Act provides that where an arrested person is charged with an offence, the custody officer shall order his release from police detention, either on bail or without bail, unless, *inter alia*, his name or address cannot be ascertained; detention is necessary for the person's own protection or to prevent him causing physical injury to any other person or damage to property; or the person arrested will fail to appear in court to answer bail.

84. If the custody officer decides not to release the defendant, he must be produced before a Magistrates' Court within 24 hours after his arrest who shall either commit him in custody or release him on bail. Pursuant to section 13 of Schedule 1 Part 1 to the Bail Act 1976:

> "The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would –
>
> (a) fail to surrender to custody, or
>
> (b) commit an offence while on bail, or
>
> (c) interfere with witnesses or otherwise obstruct the course of justice, either in relation to himself or any other person."

In taking this decision the Magistrates' Court is required, pursuant to section 9 of Schedule 1 Part 1, to have regard to such of the following considerations as appear to it to be relevant, namely:

> "(a) the nature and seriousness of the offence…;
>
> (b) the character, antecedents, associations and community ties of the defendant;
>
> (c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings;
>
> (d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having defaulted."

C. Mental health

85. Section 136 of the Mental Health Act 1983 provides:

> "(1) If a constable finds in a place to which the public have access a person who appears to him to be suffering from mental disorder and to be in immediate need of care or control, the constable may, if he thinks it necessary to do so in the interests of that person, or for the protection of other persons, remove that person to a place of safety…
>
> (2) A person removed to a place of safety under this section may be detained there for a period not exceeding 72 hours for the purpose of enabling him to be examined by a registered medical practitioner and to be interviewed by an approved social worker and of making any necessary arrangements for his treatment or care."

86. Both the Magistrates' Court and the Crown Court have the power to remand an accused person to a specified hospital for the preparation of a report on his mental condition. Section 35(2) defines an accused person as follows:

> "(a) in relation to the Crown Court, any person who is awaiting trial before the court for an offence punishable with imprisonment or who has been arraigned before the court for such an offence and has not yet been sentenced or otherwise dealt with for the offence on which he has been arraigned;
>
> (b) in relation to a Magistrates' Court any person who has been convicted by the court of an offence punishable on summary conviction with imprisonment and any person charged with such an offence if the court is satisfied that he did the act or made the omission charged or he has consented to the exercise by the court of the powers conferred by this section."

If these requirements are met the court may, pursuant to section 35(3), remand the accused person to a hospital for a report if:

> "(a) the court is satisfied on the written or oral evidence of a registered medical practitioner, that there is reason to suspect that the accused person is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment; and
>
> (b) the court is of the opinion that it would be impracticable for a report on his mental condition to be made if he were remanded on bail…"

87. The Crown Court may remand an accused person to a specified hospital for treatment, if it is satisfied on the evidence of two medical practitioners that he is suffering from mental illness or severe mental impairment of a nature or degree which makes it appropriate for him to be so detained (section 36(1)).

88. Following conviction for an offence punishable with imprisonment, both the Magistrates' Court and the Crown Court have the power under section 38(1) to make an interim hospital order, where:

> "… the court before or by which he is convicted is satisfied, on the written or oral evidence of two registered medical practitioners
>
> (a) that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment; and
>
> (b) that there is reason to suppose that the mental disorder from which the offender is suffering is such that it may be appropriate for a hospital order to be made in his case…"

Pursuant to section 37(2) both the Magistrates' Court and the Crown Court may also admit an offender to a hospital if:

> "(a) the court is satisfied, on the written or oral evidence of two registered medical practitioners, that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment and that…
>
> (i) the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and, in the case of psychopathic disorder or mental impairment, that such treatment is likely to alleviate or prevent a deterioration of his condition…
>
> (b) the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section."

D. Actions against the police for negligence

89. In the case of *Dorset Yacht Co. Ltd v. the Home Office* ([1970] Appeal Cases at p. 1004), the owners of a yacht damaged by borstal boys who had escaped from the supervision of prison officers sought to sue the

Home Office alleging negligence by the prison officers. The House of Lords held that in the particular case a duty of care could arise. Lord Diplock said:

> "I should therefore hold that any duty of a borstal officer to use reasonable care to prevent a borstal trainee from escaping from his custody was owed only to persons whom he could reasonably foresee had property situated in the vicinity of the place of detention of the detainee which the detainee was likely to steal or to appropriate and damage in the course of eluding immediate pursuit and capture."

90. In the case of *Hill v. Chief Constable of West Yorkshire* ([1989] Appeal Cases at p. 53), the mother of a victim of the Yorkshire Ripper instituted proceedings against the police alleging that they had failed properly to exercise their duty to exercise all reasonable care and skill to apprehend the perpetrator of the murders and to protect members of the public who might be his victims. Lord Keith in the House of Lords found:

> "The alleged negligence of the police consists in a failure to discover his identity. But if there is no general duty of care owed to individual members of the public by the responsible authorities to prevent the escape of a known criminal or to recapture him, there cannot reasonably be imposed upon any police force a duty of care similarly to identify and apprehend an unknown one. Miss Hill cannot for this purpose be regarded as a person at special risk simply because she was young and female. Where the class of potential victims of a particular habitual criminal is a large one the precise size of it cannot in principle affect the issue. All householders are potential victims of an habitual burglar and all females those of an habitual rapist. The conclusion must be that although there existed reasonable foreseeability of likely harm to Miss Hill if Sutcliffe were not identified and apprehended, there is absent from the case any such ingredient or characteristic as led to the liability of the Home Secretary in the Dorset Yacht case. Nor is there present any additional characteristic such as might make up a deficiency. The circumstances of the case are therefore not capable of establishing a duty of care owed towards Miss Hill by the West Yorkshire Police."

91. While he considered this sufficient to dispose of the appeal, Lord Keith went on to set out public-policy objections to the existence of an action in negligence against the police in the performance of their duties in the investigation and suppression of crime.

> "Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had

failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward type of failure – for example that a police officer negligently tripped and fell while pursuing a burglar – others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted."

92. Lord Templeman commented:

"... if this action lies, every citizen will be able to require the court to investigate the performance of every policeman. If the policeman concentrates on one crime, he may be accused of neglecting others. If the policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes. The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties.

This action is misconceived and will do more harm than good."

93. In *Swinney and another v. the Chief Constable of Northumbria* ([1997] Queen's Bench Reports at p. 464), the plaintiff had passed on information in confidence to the police about the identity of a person implicated in the killing of a police officer, expressing her concern that she did not want the source of the information to be traced back to her. The information was recorded, naming the plaintiff, in a document which was left in an unattended police vehicle, which was broken into with the result that the document was stolen, came into the possession of the person implicated and the plaintiff was threatened with violence and arson and suffered psychiatric damage. The plaintiff's claim in negligence against the police was struck out but allowed on appeal by the High Court judge. The Chief Constable appealed contending that the police owed no duty of care or alternatively that public policy precluded the prosecution of the claim since the police were immune for claims arising out of their activities in the investigation or suppression of crime. The Court of Appeal dismissed the appeal.

In his judgment Lord Justice Hirst referring to the cases of *Dorset Yacht* and *Hill* (see paragraphs 89–92 above) stated that he could not accept a claim of blanket immunity for the police in this case, but that there were

other considerations of public policy in this case, namely, the need to protect springs of information, to protect informers and to encourage them to come forward. On the facts of the case, it was arguable that the police had assumed a responsibility of confidentiality towards the plaintiff. The case should therefore proceed to trial.

94. Lord Justice Ward held that it was arguable that:

> "There is a special relationship between the plaintiffs and the defendant, which is sufficiently proximate. Proximity is shown by the police assuming responsibility, and the plaintiffs relying upon that assumption of responsibility, for preserving the confidentiality of the information which, if it fell into the wrong hands, was likely to expose the first plaintiff and members of her family to a special risk of damage from the criminal acts of others, greater than the general risk which ordinary members of the public must endure with phlegmatic fortitude.
>
> It is fair, just and reasonable that the law should impose a duty, there being no overwhelming dictate of public policy to exclude the prosecution of this claim. On the one hand there is, as more fully set out in *Hill v. the Chief Constable* ... an important public interest that the police should carry out their difficult duties to the best of their endeavours without being fettered by, or even influenced by, the spectre of litigation looming over every judgment they make, every discretion they exercise, every act they undertake or omit to perform, in their ceaseless battle to investigate and suppress crime. The greater good rightly outweighs any individual hardship. On the other hand it is incontrovertible that the fight against crime is daily dependent upon information fed to the police by members of the public, often at real risk of villainous retribution from the criminals and their associates. The public interest will not accept that good citizens should be expected to entrust information to the police without also expecting that they are entrusting their safety to the police. The public interest would be affronted were it to be the law that members of the public should be expected, in the execution of public service, to undertake the risk of harm to themselves without the police, in return, being expected to take no more than reasonable care to ensure that the confidential information imparted to them is protected..."

95. The police have been held liable in negligence or failure in their duties in other cases. In *Kirkham v. the Chief Constable of Manchester* ([1989] 2 Queen's Bench Reports at p. 283), the Court of Appeal upheld a finding of liability in negligence under the Fatal Accidents Act 1976 where the police had taken a man into custody, knew he was a suicide risk but did not communicate that information to the prison authorities. The man, diagnosed as suffering from clinical depression had committed suicide in remand prison. The police, which had assumed responsibility for the man, had owed a duty of care, which they had breached with the result that his death had ensued.

96. In *Rigby and another v. Chief Constable of Northamptonshire* ([1985] 2 All England Law Reports at p. 986), the High Court found the police liable to pay damages for negligence in that they had fired a gas canister into the plaintiffs' premises in order to flush out a dangerous psychopath. There had been a real and substantial fire risk in firing the canister into the building and that risk was only acceptable if there was

fire-fighting equipment available to put the fire out at an early stage. No equipment had been present at the time and the fire had broken out and spread very quickly. Negligence was also found in *Knightley v. Johns and others* ([1982] 1 All England Law Reports at p. 301) where a police inspector at the site of an accident failed to close a tunnel and ordered officers to go back through the tunnel in the face of traffic, thereby leading to a further accident.

97. In *R. v. Dytham* ([1979] 1 Queen's Bench Reports at p. 722), where a police officer stood by while a man died outside a club in a murderous assault, the Court of Appeal upheld the conviction of the officer for wilful neglect to perform a duty.

PROCEEDINGS BEFORE THE COMMISSION

98. The applicants applied to the Commission on 10 November 1993, complaining that there had been a failure to protect the lives of Ali and Ahmet Osman and to prevent the harassment of their family, and that they had no access to court or effective remedy in respect of that failure. The applicants relied on Articles 2, 6, 8 and 13 of the Convention.

99. The Commission declared the application (no. 23452/94) admissible on 17 May 1996. In its report of 1 July 1997 (Article 31), it expressed the opinion that there had been no violation of Article 2 of the Convention (ten votes to seven); that there had been no violation of Article 8 of the Convention (ten votes to seven); that there had been a violation of Article 6 § 1 of the Convention (twelve votes to five); and that no separate issue arose under Article 13 of the Convention (twelve votes to five). The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

100. The applicants maintained in their memorial and at the hearing that the facts of the case disclosed breaches by the respondent State of its obligations under Articles 2, 6, 8 and 13 of the Convention. They requested

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

the Court to find accordingly and to award them just satisfaction under Article 50.

The Government for their part requested the Court to find that there had been no breach of any of the Articles relied on by the applicants.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

101. The applicants asserted that by failing to take adequate and appropriate steps to protect the lives of the second applicant and his father, Ali Osman, from the real and known danger which Paget-Lewis posed, the authorities had failed to comply with their positive obligation under Article 2 of the Convention, which provides as relevant:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> …"

102. The Government maintained that the facts of the case did not bear out the applicants' allegation and for that reason there had been no breach of Article 2. The Commission agreed with the Government's arguments.

A. Arguments of those appearing before the Court

1. The applicants

103. The applicants contended that a most careful scrutiny of the events leading to the tragic shooting incident revealed that the police were several times put on notice that the lives of Ali and Ahmet Osman were at real risk from the threat posed by Paget-Lewis. Despite the clear warning signals given the police failed to take appropriate and adequate preventive measures to secure effective protection for their lives from that risk. While disagreeing with the standard of care formulated by the Government (see paragraph 107 below), they submitted that even on the basis of that overly-strict standard the obvious inadequacy of the police response over a period of fourteen months must be considered to amount to a grave dereliction of the authorities' duty to protect life and a substantial contributing factor to the death of Ali Osman and the wounding of the second applicant.

104. The applicants argued that by May 1987 the police, on the basis of their contacts with the headmaster of the school, Mr Prince (see paragraphs 21 and 27 above) must be taken to have been fully aware that Paget-Lewis was an unbalanced, obsessive and aggressive individual who had stalked Ahmet Osman, taken photographs of him, plied him with gifts and even assumed his name. Further, they were plainly made aware that Paget-Lewis was strongly suspected of being responsible for the graffiti incident and the theft of the school files. However, these warning signs were never taken seriously by the police even though they must have known of Mr Prince's assessment of the situation, in particular his view that Paget-Lewis was psychologically unbalanced (see paragraph 26 above). In spite of the existence of compelling circumstantial evidence linking Paget-Lewis with the theft of the school files and the spraying of graffiti close to the school (see paragraphs 22 and 24 above), the police did not investigate these matters further.

The applicants further submitted that this inertia on the part of the police in the face of clear indications that the life of a vulnerable child was at real risk from the danger posed by Paget-Lewis was compounded by their failure to apprehend the significance of the eight reported attacks on the home and property of the Osman family between May and November 1987 marking an escalation in an already life-threatening situation. In brief, nothing was done to establish that Paget-Lewis was the author of this campaign of harassment and intimidation threatening the security of the family. It was only on 17 December 1987, and ten days following the ramming incident (see paragraph 38 above), that a decision was finally taken to arrest Paget-Lewis. Even then the police seriously mishandled the situation by giving Paget-Lewis the opportunity to avoid arrest and abscond, and then failing to inform the Osman family of this occurrence and to keep a watch on their home.

105. The applicants emphasised that Paget-Lewis had on three separate occasions stated that he intended to commit a murder and each of his statements came to the attention of the police (see paragraphs 37, 40 and 46 above). However, the police once again failed to take seriously what was conclusive proof that the lives of the Osman family were at risk from an unstable, obsessive, disturbed and dangerous individual. The fact that no records were ever kept of the police visits to the school in March and May 1987 nor of the attacks on the home and property of the family confirmed in the applicants' view the casual and careless approach of the authorities to the investigation of a very grave threat to life and explained their failure to make use of their powers to prevent that threat from materialising by arresting Paget-Lewis on suspicion of being responsible for the graffiti incident, the theft of the school files or the attacks on the Osmans' home, or

searching his home for evidence of his involvement in these offences or by having him compulsorily admitted to a psychiatric hospital for assessment.

106. For the above reasons, the applicants concluded that the authorities had failed in the circumstances to comply with their positive obligation under Article 2 of the Convention. They further contended that there had never been any effective official investigation into the authorities' failure in this respect. Their civil action in negligence against the police founded on the successful invocation by the Metropolitan Police Commissioner of the rule of police immunity (see paragraph 63 above). In their view, this gave rise to a separate violation of Article 2.

2. The Government

107. The Government did not dispute that Article 2 of the Convention may imply a positive obligation on the authorities of a Contracting State to take preventive measures to protect the life of an individual from the danger posed by another individual. They emphasised however that this obligation could only arise in exceptional circumstances where there is a known risk of a real, direct and immediate threat to that individual's life and where the authorities have assumed responsibility for his or her safety. In addition, it had to be shown that their failure to take preventive action amounted to gross dereliction or wilful disregard of their duty to protect life. Finally, it must be established on sound and persuasive grounds that there is a causal link between the failure to take the preventive action of which the authorities are accused and that that action, judged fairly and realistically, would have been likely to have prevented the incident in question.

108. On that basis, and having regard to the facts of the instant case, the Government argued that the police could not be taken at any relevant time to have appreciated that Paget-Lewis represented a real and immediate threat to the lives of the Osman family. He had never threatened either Ali or Ahmet Osman in word or deed and both before and after his arrest he had consistently denied that he had been responsible for the theft of the school files, the graffiti in the area around the school and the acts of vandalism on the home and property of the family. Significantly, the Inner London Education Authority ("ILEA"), after investigating the complaints against Paget-Lewis, considered that a reprimand was sufficient action and he was allowed to assume teaching duties in another school. The fact that Dr Ferguson, the ILEA psychiatrist, had concluded on the basis of a complete case file that Paget-Lewis was fit to teach (see paragraph 29 above) confirmed that the latter manifested no clear signs of mental illness which would have suggested that he posed a real and immediate danger to the lives of the Osmans.

109. In the Government's submission, the police response at each stage of the events in the light of their knowledge and information at the relevant times was reasonable. At no time was there sufficient evidence on which to lay charges against Paget-Lewis on suspicion of having committed acts of criminal damage or to search his home to secure proof of such. Detective Sergeant Boardman conducted a complete review of the case file in December 1987 but was forced to concede that, in the absence of a confession statement, there was no evidence on which to lay charges against Paget-Lewis.

110. The Government averred that the weakness of the applicants' case before the Court lay not only in their assessment of the police action from the standpoint of hindsight but also in their erroneous interpretation of certain events in order to impute to the police knowledge of the danger posed by Paget-Lewis to the Osman family or to accuse them of gross negligence. In this latter respect they challenged, *inter alia*, the applicants' unfounded assertions that the police had promised protection to the family on the basis of the ILEA memorandum of 8 December 1987 (see paragraph 41 above) or that the ILEA letter of 17 December 1987 caused Paget-Lewis to abscond before he could be arrested (see paragraph 50 above) or that no police records had been kept of the incidents reported to them (see paragraph 105 above). As to the latter allegation, they pointed to the fact that Detective Sergeant Boardman was fully apprised of the entire case file in December 1987 (see paragraph 109 above).

3. The Commission

111. Having regard to its own findings in this case (see paragraphs 67-71 above), the Commission considered that there were no factors which, judged reasonably, rendered it foreseeable at the time with any degree of probability that Paget-Lewis would carry out an armed attack on the Osman family. While noting that it was to be regretted that the police did not keep or preserve records of their meetings with the school and ILEA officials and with Paget-Lewis himself, it did not consider that this failure prevented a proper assessment of the risk to the Osman family or posed an obstacle to effective steps being taken; nor did the failure to take any additional investigative steps suggest any seriously defective response to the threat posed by Paget-Lewis as perceived at the time. The Commission concluded that the circumstances of the case did not disclose any fundamental disregard by the police of the duties imposed by law in respect of the protection of life.

112. As to the applicants' argument that their inability to sue the police in negligence amounted to a breach of Article 2 (see paragraph 106 above), the Commission was not satisfied that the limited nature of the exclusion of

a duty of care in relation to negligence actions against the police (see paragraphs 90–97 above) demonstrated any lack of protection to the right to life in the domestic law of the respondent State.

B. The Court's assessment

1. As to the establishment of the facts

113. The Court notes that there was never any independent judicial determination at the domestic level of the facts of the instant case. The Commission on the basis of the pleadings of the parties and the hearing which it held in the case made its own findings on the course of events in the case up until the time of the armed attack by Paget-Lewis on Ali and Ahmet Osman on 7 March 1988 (see paragraphs 67–71 above). According to the applicants, the Commission overlooked in its findings of fact the importance of certain events which they claim have a bearing on the level of knowledge which can be imputed to the police in respect of the seriousness of the danger which Paget-Lewis represented for the lives of the Osman family (see paragraph 10 above).

114. The Court observes that it is called on to determine whether the facts of the instant case disclose a failure by the authorities of the respondent State to protect the right to life of Ali and Ahmet Osman, in breach of Article 2 of the Convention. In addressing that issue, and having due regard to the Commission's role under the Convention in the establishment and verification of the facts of a case, it will assess this issue in accordance with its usual practice in the light of all the material placed before it by the applicants and by the Government or, if necessary, material obtained of its own motion (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 64, § 160; and the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 51, § 173).

2. As to the alleged failure of the authorities to protect the rights to life of Ali and Ahmet Osman

115. The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression

and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (see paragraph 107 above). Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (see, *mutatis mutandis*, the above-mentioned McCann and Others judgment, p. 45, § 146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.

On the above understanding the Court will examine the particular circumstances of this case.

117. The Court observes, like the Commission, that the concerns of the school about Paget-Lewis' disturbing attachment to Ahmet Osman can be reasonably considered to have been communicated to the police over the course of the five meetings which took place between 3 March and 4 May 1987 (see paragraphs 21 and 27 above), having regard to the fact that Mr Prince's decision to call in the police in the first place was motivated by the allegations which Mrs Green had made against Paget-Lewis and the school's follow-up to those allegations. It may for the same reason be reasonably accepted that the police were informed of all relevant connected matters which had come to light by 4 May 1987 including the graffiti incident, the theft of the school files and Paget-Lewis' change of name.

It is the applicants' contention that by that stage the police should have been alert to the need to investigate further Paget-Lewis' alleged involvement in the graffiti incident and the theft of the school files or to keep a closer watch on him given their awareness of the obsessive nature of his behaviour towards Ahmet Osman and how that behaviour manifested itself. The Court for its part is not persuaded that the police's failure to do so at this stage can be impugned from the standpoint of Article 2 having regard to the state of their knowledge at that time. While Paget-Lewis' attachment to Ahmet Osman could be judged by the police officers who visited the school to be most reprehensible from a professional point of view, there was never any suggestion that Ahmet Osman was at risk sexually from him, less so that his life was in danger. Furthermore, Mr Perkins, the deputy headmaster, alone had reached the conclusion that Paget-Lewis had been responsible for the graffiti in the neighbourhood of the school and the theft of the files. However Paget-Lewis had denied all involvement when interviewed by Mr Perkins and there was nothing to link him with either incident. Accordingly, at that juncture, the police's appreciation of the situation and their decision to treat it as a matter internal to the school cannot be considered unreasonable.

Like the Commission (see paragraph 68 above), the Court is not persuaded either that the ILEA official's memorandum and internal notes written between 14 April and 8 May 1987 are an accurate reflection of how the discussions between Mr Prince and the police officers wound up (see paragraph 28 above).

118. The applicants have attached particular weight to Paget-Lewis' mental condition and in particular to his potential to turn violent and to direct that violence at Ahmet Osman. However, it is to be noted that Paget-Lewis continued to teach at the school up until June 1987. Dr Ferguson examined him on three occasions and was satisfied that he was not mentally ill. On 7 August 1987 he was allowed to resume teaching, although not at Homerton House (see paragraph 35 above). It is most improbable that the

decision to lift his suspension from teaching duties would have been made if it had been believed at the time that there was the slightest risk that he constituted a danger to the safety of young people in his charge. The applicants are especially critical of Dr Ferguson's psychiatric assessment of Paget-Lewis. However, that assessment was made on the basis of three separate interviews with Paget-Lewis and if it appeared to a professional psychiatrist that he did not at the time display any signs of mental illness or a propensity to violence it would be unreasonable to have expected the police to have construed the actions of Paget-Lewis as they were reported to them by the school as those of a mentally disturbed and highly dangerous individual.

119. In assessing the level of knowledge which can be imputed to the police at the relevant time, the Court has also had close regard to the series of acts of vandalism against the Osmans' home and property between May and November 1987 (see paragraphs 30, 36 and 37 above). It observes firstly that none of these incidents could be described as life-threatening and secondly that there was no evidence pointing to the involvement of Paget-Lewis. This was also the view of Detective Sergeant Boardman in his report on the case in mid-December 1987 having interviewed the Green and Osman families, visited the school and taken stock of the file (see paragraphs 42–45 above). The completeness of Detective Sergeant Boardman's report and the assessment he made in the knowledge of all the allegations made against Paget-Lewis would suggest that even if it were to be assumed that the applicants are correct in their assertions that the police did not keep records of the reported incidents of vandalism and of their meetings with the school and ILEA officials, this failing could not be said to have prevented them from apprehending at an earlier stage any real threat to the lives of the Osman family or that the irrationality of Paget-Lewis' behaviour concealed a deadly disposition. The Court notes in this regard that when the decision was finally taken to arrest Paget-Lewis it was not based on any perceived risk to the lives of the Osman family but on his suspected involvement in acts of minor criminal damage (see paragraph 49 above).

120. The Court has also examined carefully the strength of the applicants' arguments that Paget-Lewis on three occasions communicated to the police, either directly or indirectly, his murderous intentions (see paragraph 105 above). However, in its view these statements cannot be reasonably considered to imply that the Osman family were the target of his threats and to put the police on notice of such. The applicants rely in particular on Paget-Lewis' threat to "do a sort of Hungerford" which they allege he uttered at the meeting with ILEA officers on 15 December 1987 (see paragraph 46 above). The Government have disputed that these words were said on that occasion, but even taking them at their most favourable to the applicants' case, it would appear more likely that they were uttered with

respect to Mr Perkins whom he regarded as principally to blame for being forced to leave his teaching post at Homerton House. Furthermore, the fact that Paget-Lewis is reported to have intimated to the driver of the car with which he collided on 7 December 1987 that he was on the verge of committing some terrible deed (see paragraphs 38 and 40 above) could not reasonably be taken at the time to be a veiled reference to a planned attack on the lives of the Osman family. The Court must also attach weight in this respect to the fact that, even if Paget-Lewis had deliberately rammed the vehicle as alleged, that act of hostility was in all probability directed at Leslie Green, the passenger in the vehicle. Nor have the applicants adduced any further arguments which would enhance the weight to be given to Paget-Lewis' claim that he had told PC Adams that he was in danger of doing something criminally insane (see paragraph 37 above). In any event, as with his other cryptic threats, this statement could not reasonably be construed as a threat against the lives of the Osman family.

121. In the view of the Court the applicants have failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis. While the applicants have pointed to a series of missed opportunities which would have enabled the police to neutralise the threat posed by Paget-Lewis, for example by searching his home for evidence to link him with the graffiti incident or by having him detained under the Mental Health Act 1983 or by taking more active investigative steps following his disappearance, it cannot be said that these measures, judged reasonably, would in fact have produced that result or that a domestic court would have convicted him or ordered his detention in a psychiatric hospital on the basis of the evidence adduced before it. As noted earlier (see paragraph 116 above), the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals. In the circumstances of the present case, they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would in fact have produced concrete results.

122. For the above reasons, the Court concludes that there has been no violation of Article 2 of the Convention in this case.

3. As to the alleged breach by the authorities of a procedural obligation under Article 2

123. The Court considers that the essence of the applicants' complaint under this head (see paragraph 106 above) concerns their inability to secure access to a court or other remedy to have an independent assessment of the police response to the threat posed by Paget-Lewis to the lives of the Osman family. The Court considers it appropriate therefore to consider this grievance in the context of the applicants' complaints under Articles 6 and 13 of the Convention (see, *mutatis mutandis,* the above-mentioned McCann and Others judgment, p. 48, § 160).

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

124. The applicants contended that the failure of the police firstly to bring an end to the campaign of harassment, vandalism and victimisation which Paget-Lewis waged against their property and family and secondly, and in particular, to avert the wounding of the second applicant constituted a breach of Article 8 of the Convention, which stipulates:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

125. The applicants maintained that they could not have been expected to obtain a civil injunction to prevent Paget-Lewis from intimidating their family and attacking their home and property since any such request would have been futile. They pleaded in this respect that they would have been unable to provide a court with any proof that Paget-Lewis was responsible for the acts of vandalism given that the police had never taken any steps to investigate the incidents which they had reported.

At the hearing the applicants informed the Court that their main complaint under Article 8 concerned the failure of the police to secure the second applicant's personal safety, an issue which the Commission had not addressed. In the applicants' submission, even if it were to be accepted that the police could not have foreseen that Paget-Lewis would have carried out a near-fatal attack on the life of Ahmet Osman, the risk of some harm being caused to him was nevertheless foreseeable. In their view that was in itself sufficient to engage the responsibility of the authorities under Article 8.

126. The Commission found that the applicants' complaints concerning the failure of the authorities to protect their home and property against the attacks allegedly perpetrated by Paget-Lewis did not give rise to a breach of Article 8 since in its view it would have been open to the applicants to seek an injunction against Paget-Lewis.

As to the complaint that the police failed to protect the second applicant's physical integrity, the Delegate of the Commission informed the Court at the hearing that the Commission had in fact addressed this grievance. For the reasons which led it to conclude that there had been no violation of Article 2, it found that the complaint under Article 8 could not be sustained either.

127. The Government agreed with the Commission on both points.

128. The Court recalls that it has not found it established that the police knew or ought to have known at the time that Paget-Lewis represented a real and immediate risk to the life of Ahmet Osman and that their response to the events as they unfolded was reasonable in the circumstances and not incompatible with the authorities' duty under Article 2 of the Convention to safeguard the right to life. In the Court's view, that conclusion equally supports a finding that there has been no breach of any positive obligation implied by Article 8 of the Convention to safeguard the second applicant's physical integrity.

129. As to the applicants' contention that the police failed to investigate the attacks on their home with a view to ending the campaign of harassment against the Osman family, the Court reiterates that the police had taken the view that there was no evidence to implicate Paget-Lewis and for that reason charges could not be laid against him. It is to be noted in this respect that Paget-Lewis was questioned by PC Adams sometime in November 1987, but he denied all responsibility. Detective Sergeant Boardman also confirmed in his report that there was no evidence on which to mount a prosecution case against Paget-Lewis (see paragraph 45 above). In the light of new developments in the case, an attempt was in fact made to arrest and question Paget-Lewis on 17 December 1987 on suspicion of criminal damage including with respect to the acts of vandalism directed at the applicants' home and property (see paragraph 49 above). However, that attempt failed.

130. The Court concludes accordingly that the facts of the case do not disclose the breach by the authorities of any positive obligation under Article 8 of the Convention.

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

131. The applicants alleged that the dismissal by the Court of Appeal of their negligence action against the police on grounds of public policy

amounted to a restriction on their right of access to a court in breach of Article 6 § 1 of the Convention, which provides to the extent relevant:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing … by [a] ... tribunal..."

132. The Commission agreed with the applicants' arguments in this respect. The Government however contended that the applicants could not rely on Article 6 § 1, maintaining in the alternative that there had been no breach of that provision in the circumstances of the case.

A. Applicability of Article 6 § 1

133. The Government maintained that the applicants could not rely on any substantive right in domestic law to sue the police for their alleged failure to prevent Paget-Lewis from shooting dead Ali Osman and seriously wounding the second applicant. They explained that whether or not the police can be considered to owe a plaintiff a duty of care in a particular context depended not only on proof of proximity between the parties and the foreseeability of harm but also on the answer to the question whether it was fair, just and reasonable to impose a duty of care on the police. The Court of Appeal had answered the latter question in the negative, being satisfied that there were no other public-policy considerations which would have led it to reach a different conclusion. Accordingly, since the applicants had failed to establish an essential ingredient of the duty of care under domestic law they did not have any substantive right for the purposes of the applicability of Article 6 § 1. Any other conclusion would result in the impermissible creation by the Convention institutions of a substantive right where none in fact existed in the domestic law of the respondent State.

134. The applicants replied that the Court of Appeal had accepted their proposition that there was a special relationship of proximity between them and the police since the police knew that Paget-Lewis was conducting a campaign of victimisation against the Osman family and that the second applicant was especially at risk from the threat posed by Paget-Lewis to his life. The applicants maintained that although they had established all the constituent elements of the duty of care, the Court of Appeal was constrained by precedent to apply the doctrine of police immunity developed by the House of Lords in the Hill case (see paragraph 90 above) to strike out their statement of claim. In their view the doctrine of police immunity was not one of the essential elements of the duty of care as was claimed by the Government, but a separate and distinct ground for defeating a negligence action in order to ensure, *inter alia*, that police manpower was

not diverted from their ordinary functions or to avoid overly cautious or defensive policing.

135. The Commission agreed with the applicants that Article 6 § 1 was applicable. It considered that the applicants' claim against the police was arguably based on an existing right in domestic law, namely the general tort of negligence. The House of Lords in the Hill case modified that right for reasons of public policy in order to provide an immunity for the police from civil suit for their acts and omissions in the context of the investigation and suppression of crime. In the instant case, that immunity acted as a bar to the applicants' civil action by preventing them from having an adjudication by a court on the merits of their case against the police.

136. The Court recalls at the outset that Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters constitutes one aspect only (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no.18, p. 18, § 36).

137. The Court notes with reference to this fundamental principle that the respondent Government have disputed the applicability of Article 6 § 1 to the applicants' claim. They allege that the applicants did not have any substantive right under domestic law given that the Court of Appeal, in application of the exclusionary rule established by the House of Lords in the Hill case (see paragraph 65 above), dismissed their civil action against the police as showing no cause of action.

138. The Court would observe that the common law of the respondent State has long accorded a plaintiff the right to submit to a court a claim in negligence against a defendant and to request that court to find that the facts of the case disclose a breach of a duty of care owed by the defendant to the plaintiff which has caused harm to the latter. The domestic court's enquiry is directed at determining whether the constituent elements of a duty of care have been satisfied, namely: whether the damage is foreseeable; whether there exists a relationship of proximity between the parties; and whether it is fair, just and reasonable to impose a duty of care in the circumstances (see paragraphs 94 and 133 above).

It is to be noted that the latter criterion, which has been relied on by the Government in support of their contention that the applicants have no substantive right under domestic law, is not of sole application to civil actions taken against the police alleging negligence in the investigation and suppression of crime, but has been considered and applied in other spheres of activity. The House of Lords in the Hill case declared for the first time that this criterion could be invoked to shield the police from liability in the context of the investigation and suppression of crime (see paragraphs 90–92

above). Although the applicants have argued in terms which suggest that the exclusionary rule operates as an absolute immunity to negligence actions against the police in the context at issue, the Court accepts the Government's contention that the rule does not automatically doom to failure such a civil action from the outset but in principle allows a domestic court to make a considered assessment on the basis of the arguments before it as to whether a particular case is or is not suitable for the application of the rule. They have referred to relevant domestic case-law in this respect (see paragraph 94 above).

139. On that understanding the Court considers that the applicants must be taken to have had a right, derived from the law of negligence, to seek an adjudication on the admissibility and merits of an arguable claim that they were in a relationship of proximity to the police, that the harm caused was foreseeable and that in the circumstances it was fair, just and reasonable not to apply the exclusionary rule outlined in the Hill case. In the view of the Court the assertion of that right by the applicants is in itself sufficient to ensure the applicability of Article 6 § 1 of the Convention.

140. For the above reasons, the Court concludes that Article 6 § 1 is applicable. It remains to be determined whether the restriction which was imposed on the exercise of the applicants' right under that provision was lawful.

B. Compliance with Article 6 § 1

141. According to the applicants the public-interest considerations invoked by the House of Lords in the Hill case as justification for the police immunity rule and on which the Government have based their case could not be sustained. Thus, the argument that exposing the police to actions in negligence would result in a significant diversion of manpower from their crime-suppression function sits ill with the fact that the immunity is limited to negligence actions involving the investigation and suppression of crime and not to cases of assault or false imprisonment which could equally be said to give rise to a diversion of manpower.

As to the contention that the threat of liability for negligence would lead to defensive or over-cautious policing, they maintained that this consideration has never been invoked to protect other vital public services such as hospitals, ambulances and the fire brigade from negligence actions. They also disputed the validity of the argument that a negligence action against the police would have the undesirable effect of reopening closed investigations in order to ascertain whether they had been conducted competently. In their submission if a negligent investigation has resulted in

a wholly preventable death there are cogent reasons to re-examine the conduct of the police. The applicants further contended, *inter alia*, that the imposition of liability in negligence on the police in respect of the investigation and suppression of crime would serve to enhance standards among officers, especially where the activity in question concerned the protection of the right to life.

142. In their alternative submission the applicants asserted that even if it could be said that the immunity pursued a legitimate aim or aims, its operation offended against the principle of proportionality. They reasoned in this respect that the immunity was complete and as such did not distinguish between cases where the merits were strong and those where they were weak. In the instant case, involving the protection of a child and the right to life and where the damage caused was grave, the requirements of public policy could not dictate that the police should be immune from liability. Furthermore, the combined effect of the strict tests of proximity and foreseeability provided limitation enough to prevent untenable cases ever reaching a hearing and to confine liability to those cases where the police have caused serious loss through truly negligent actions.

143. The Government replied that the exclusionary rule which defeated the applicants' civil action pursued the legitimate aim or aims outlined by the House of Lords in the Hill case, in particular the avoidance of defensive policing and the diversion of police manpower (see paragraph 91 above). In the Government's view it was central to the reasoning of the House of Lords in the Hill case that the imposition of a duty of care in the context in question carried with it a real risk that effective policing for the benefit of the public at large would be undermined.

144. Further, the rule was a proportionate response to the attainment of those aims and fell well within the respondent State's margin of appreciation. They emphasised that the exclusion was not a blanket exclusion of liability but a carefully and narrowly focused limitation which applied only in respect of the investigation and suppression of crime, and even then not in every case (see paragraph 93 above). Thus, in the instant case, the Court of Appeal had considered that there were no competing public-policy considerations at stake which would have outweighed the general public-policy consideration that it would not be fair, just and reasonable to impose a duty of care on the police.

145. The Government further stressed in defence of the proportionality of the restriction on the applicants' right to sue the police that they could have taken civil proceedings against Paget-Lewis. Moreover, they had in fact sought to sue Dr Ferguson but subsequently abandoned their action against him. In either case they had full access to a court.

146. The Commission accepted that the impugned rule may be considered to pursue the legitimate aims suggested by the Government (see paragraph 143 above). However, it agreed with the essence of the applicants' arguments for countering the Government's justification for the application of the rule (see paragraphs 141 and 142 above). The Commission noted, in particular, that the applicants claimed to have satisfied the proximity component of the duty of care, which had not been satisfied by the plaintiff in the Hill case. However, they were denied the opportunity of establishing the factual basis of their claim in adversarial proceedings through the operation of an immunity rule which, moreover, did not distinguish between negligence having trivial effects and that, as in this case, with catastrophic results.

147. The Court recalls that Article 6 § 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect.

However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, most recently, the Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom judgment of 10 July 1998, *Reports* 1998-IV, p. 1660, § 72).

148. Against that background the Court notes that the applicants' claim never fully proceeded to trial in that there was never any determination on its merits or on the facts on which it was based. The decision of the Court of Appeal striking out their statement of claim was given in the context of interlocutory proceedings initiated by the Metropolitan Police Commissioner and that court assumed for the purposes of those proceedings that the facts as pleaded in the applicants' statement of claim were true. The applicants' claim was rejected since it was found to fall squarely within the scope of the exclusionary rule formulated by the House of Lords in the Hill case.

149. The reasons which led the House of Lords in the Hill case to lay down an exclusionary rule to protect the police from negligence actions in the context at issue are based on the view that the interests of the community as a whole are best served by a police service whose efficiency and effectiveness in the battle against crime are not jeopardised by the

constant risk of exposure to tortious liability for policy and operational decisions.

150. Although the aim of such a rule may be accepted as legitimate in terms of the Convention, as being directed to the maintenance of the effectiveness of the police service and hence to the prevention of disorder or crime, the Court must nevertheless, in turning to the issue of proportionality, have particular regard to its scope and especially its application in the case at issue. While the Government have contended that the exclusionary rule of liability is not of an absolute nature (see paragraph 144 above) and that its application may yield to other public-policy considerations, it would appear to the Court that in the instant case the Court of Appeal proceeded on the basis that the rule provided a watertight defence to the police and that it was impossible to prise open an immunity which the police enjoy from civil suit in respect of their acts and omissions in the investigation and suppression of crime.

151. The Court would observe that the application of the rule in this manner without further enquiry into the existence of competing public-interest considerations only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases.

In its view, it must be open to a domestic court to have regard to the presence of other public-interest considerations which pull in the opposite direction to the application of the rule. Failing this, there will be no distinction made between degrees of negligence or of harm suffered or any consideration of the justice of a particular case. It is to be noted that in the instant case Lord Justice McCowan (see paragraph 64 above) appeared to be satisfied that the applicants, unlike the plaintiff Hill, had complied with the proximity test, a threshold requirement which is in itself sufficiently rigid to narrow considerably the number of negligence cases against the police which can proceed to trial. Furthermore, the applicants' case involved the alleged failure to protect the life of a child and their view that that failure was the result of a catalogue of acts and omissions which amounted to grave negligence as opposed to minor acts of incompetence. The applicants also claimed that the police had assumed responsibility for their safety. Finally, the harm sustained was of the most serious nature.

152. For the Court, these are considerations which must be examined on the merits and not automatically excluded by the application of a rule which amounts to the grant of an immunity to the police. In the instant case, the Court is not persuaded by the Government's argument that the rule as interpreted by the domestic court did not provide an automatic immunity to the police.

153. The Court is not persuaded either by the Government's plea that the applicants had available to them alternative routes for securing compensation (see paragraph 145 above). In its opinion the pursuit of these remedies could not be said to mitigate the loss of their right to take legal proceedings against the police in negligence and to argue the justice of their case. Neither an action against Paget-Lewis nor against Dr Ferguson, the ILEA psychiatrist, would have enabled them to secure answers to the basic question which underpinned their civil action, namely why did the police not take action sooner to prevent Paget-Lewis from exacting a deadly retribution against Ali and Ahmet Osman. They may or may not have failed to convince the domestic court that the police were negligent in the circumstances. However, they were entitled to have the police account for their actions and omissions in adversarial proceedings.

154. For the above reasons, the Court concludes that the application of the exclusionary rule in the instant case constituted a disproportionate restriction on the applicants' right of access to a court. There has accordingly been a violation of Article 6 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

155. The applicants complained that they had no effective remedy enabling them to have an adjudication on their claim that the authorities had not done all that was required of them under Article 2 to protect the lives of Ali and Ahmet Osman. They relied on Article 13 of the Convention, which provides:

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

156. The applicants submitted that the only effective mechanism in the circumstances for holding the authorities accountable for their failure in the instant case to comply with their positive obligation under Article 2 of the Convention would have been a civil action in negligence against the police. However the pursuit of that remedy was blocked when the Court of Appeal accepted the Metropolitan Police Commissioner's plea of police immunity and struck out their statement of claim.

157. The Commission considered that no separate issue arose under Article 13 in view of its finding of a violation of Article 6 § 1 of the Convention. The Government invited the Court to follow this view should it be minded to find a breach of Article 6 § 1.

158. The Court agrees with the Commission's opinion on this complaint having regard to its own conclusion that the applicants' rights under Article 6 § 1 have been violated. It recalls in this respect that the requirements of Article 13 are less strict than, and are here absorbed by, those of Article 6 (see, most recently, the above-mentioned Tinnelly and Others judgment, pp. 1662–63, § 77).

V. APPLICATION OF ARTICLE 50 OF THE CONVENTION

159. The applicants claimed just satisfaction under Article 50 of the Convention, which provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary and non-pecuniary damage

160. The applicants in their memorial requested the Court to award them compensation for pecuniary and non-pecuniary loss calculated by reference to the appropriate level of compensation which would have been payable in the domestic courts if their claim had been permitted to proceed and had succeeded in full.

161. In their supplementary submissions received at the registry on 9 June 1998 the applicants provided detailed estimates of what each of them might have been expected to receive from a domestic court by way of compensation. They indicated however that these were only to be seen as guidance for the benefit of the Court and that they were content for the Court to make its own assessment of the appropriate level of just satisfaction in accordance with its established principles.

162. The Government maintained in their primary submission that the applicants' detailed claims should be rejected since they were submitted out of time and were in any event unsubstantiated and inflated. In the alternative, they considered that a finding of a violation of any or all of the Articles of the Convention invoked by the applicants would in itself constitute sufficient just satisfaction.

163. The Delegate of the Commission did not comment on this branch of the Article 50 issue.

164. The Court notes that it conducts its assessment of what an applicant is entitled to by way of just satisfaction in accordance with the principles laid down in its own case-law under Article 50 and not by reference to the principles or scales of assessment used by domestic courts.

The applicants accept this to be the case (see paragraph 161 above). The Court does not consider it necessary therefore to answer the Government's objections to the admissibility of their supplementary submissions.

In any event, the Court cannot speculate as to the outcome of the domestic proceedings had the applicants' statement of claim not been struck out. It considers nevertheless that the applicants were denied the opportunity to obtain a ruling on the merits of their claim for damages against the police. Deciding on an equitable basis it awards each of the applicants the sum of 10,000 pounds sterling (GBP).

B. Costs and expenses

165. The applicants claimed a total amount of GBP 46,976.78 by way of costs and expenses incurred in bringing their case before the Convention institutions. They provided details of the number of lawyers who worked on the case, the hourly rates charged and the nature of the work involved as well as disbursements. The applicants were in receipt of legal aid from the Council of Europe.

166. The Government considered, *inter alia*, that the details supplied by the applicants showed a considerable overlap between the time spent by the solicitors and legal advisers on the case and the time spent by counsel. They contended that the claim should be reduced on that account. They suggested that a sum of GBP 27,216.43 would represent a more reasonable claim in the circumstances, this amount being subject to any award of legal aid by the Council of Europe and to apportionment to reflect anything other than a finding of violation of each of the Articles under which a complaint has been made.

167. The Delegate of the Commission did not comment on this limb of the Article 50 claim either.

168. Having regard to the specifications provided by the applicants, to the fact that their complaints under Articles 2 and 8 have not been substantiated and to equitable considerations, the Court awards the applicants the sum of GBP 30,000 together with any value-added tax that may be chargeable, less the 28,514 French francs already paid in legal aid by the Council of Europe.

C. Default interest

169. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by seventeen votes to three that there has been no violation of Article 2 of the Convention;

2. *Holds* by seventeen votes to three that there has been no violation of Article 8 of the Convention;

3. *Holds* unanimously that Article 6 § 1 of the Convention is applicable in this case and has been violated;

4. *Holds* by nineteen votes to one that it is unnecessary to examine the applicants' complaints under Article 13 of the Convention;

5. *Holds* unanimously
   (a) that the respondent State is to pay the applicants, within three months, 10,000 (ten thousand) pounds sterling each by way of compensation for loss of opportunity;
   (b) that the respondent State is to pay the applicants, within three months, 30,000 (thirty thousand) pounds sterling in respect of costs and expenses together with any value-added tax that may be chargeable, less 28,514 (twenty-eight thousand five hundred and fourteen) French francs to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;
   (c) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

6. *Dismisses* by nineteen votes to one the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 October 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to the judgment:

(a) concurring opinion of Mr Foighel;
(b) concurring opinion of Sir John Freeland;
(c) concurring opinion of Mr Jambrek;
(d) partly dissenting, partly concurring opinion of Mr De Meyer joined by Mr Lopes Rocha and Mr Casadevall;
(e) partly dissenting, partly concurring opinion of Mr Lopes Rocha.

Initialled: R. B.
Initialled: H. P.

CONCURRING OPINION OF JUDGE FOIGHEL

I agree with the conclusion of the majority that there has been no violation of Article 2 of the Convention in this case.

I also agree with that there has been a violation of Article 6 § 1 on account of the disproportionate impact of the restriction on the applicants' rights of access to a court guaranteed by that Convention provision (see paragraph 154 of the judgment). However, as regards the prior issue of the *applicability* of Article 6 § 1, I have based myself on a different line of reasoning to that used by the Court.

In the first place, and irrespective of whether the domestic rule which defeated the applicants' civil action in this case is framed in terms of a substantive or procedural bar, the applicants had first and foremost a Convention right under domestic law to submit their claim to a court and to have a determination on it. The fact that the applicants' claim failed to get off the ground does not displace the right guaranteed them by Article 6 § 1 of the Convention. In my view, what is decisive for the applicability of Article 6 § 1 in this case is that the applicants had a right to a determination on their claim that their rights to life should have been protected by the police, which claim could not be considered devoid of merit from the outset. In my opinion, the fact that they were adjudged by the Court of Appeal in application of the rule in the Hill case to have no cause of action, or as the Government have formulated it, no substantive right to sue the police, is irrelevant for the purposes of the applicability of Article 6 § 1. That decision is an issue which is independent of the question of the applicability of Article 6 § 1.

I am of course aware that the Court up until now has understood the expression "civil rights" in Article 6 § 1 as rights which exist under domestic law. For me, however, this does not exclude other rights whose existence cannot be a matter of doubt. The fundamental nature of an applicant's right to submit a civil claim to a court cannot be determined exclusively by domestic-law considerations on whether or not such a right exists in a particular set of circumstances. In this respect, I would recall that the Court has stressed on occasions that it is sufficient for an applicant to show that there are at least arguable grounds which point to the recognition of the right at issue under domestic law (see, *inter alia*, the Fayed v. the United Kingdom judgment of 21 September 1994, Series A no. 294-B, p. 49, § 65), and in the final analysis it is for the Court in the exercise of its supervisory jurisdiction and on the basis of Convention criteria to rule on whether the applicant has shown this to be the case. I would also note that

the requirement that there be a dispute (*contestation*) over a civil right in order to bring Article 6 § 1 into play has been construed by the Court in its case-law to cover not only disputes concerning the scope of a right but also its *very existence* under domestic law (see the Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, p. 24, § 55).

Furthermore, and of even greater importance, is the fact that the domestic law of the Contracting States must secure the enjoyment of the rights and freedoms laid down in the Convention and its Protocols (see Article 1 of the Convention). This includes the right to life. In the instant case, the applicants have relied on a civil action against the police to establish that their right to life was breached on account of the culpable failure of the police to prevent the tragedy which befell them. In my view that right, derived from the Convention, secures them in consequence their right to the protection of Article 6 § 1 of the Convention.

For the above reasons, I have been led to conclude that Article 6 § 1 is applicable in this case.

CONCURRING OPINION OF JUDGE Sir John FREELAND

1. To the reasons given in the judgment for the finding of a violation of Article 6 § 1, I would add only briefly in explanation of my own vote in that sense.

2. I so voted because of the way in which, in practice, the public-policy exception from liability enunciated by the House of Lords in *Hill v. Chief Constable of West Yorkshire* (see paragraphs 90–92 of the judgment) operated in this case to block the claims of the applicants in their actions against the police in negligence. I accept, as indeed does paragraph 150 of the judgment, that the aim of the exception is legitimate in terms of the Convention; and I also accept that the exception may in other cases be applied proportionately to that aim. The difficulty for me arises primarily from the fact that in the present case it appears to have been applied as if conferring on the police a blanket exemption from liability in negligence so far as concerns their function in the investigation and suppression of crime, to the exclusion of any examination by the court of considerations which might pull in another direction.

3. In this latter respect the present case stands in marked contrast to the later Court of Appeal case of *Swinney and another v. Chief Constable of Northumbria Police Force* (see paragraphs 93 and 94 of the judgment), where the court had regard to the possible existence of other, and countervailing, considerations of public policy – in particular, as relevant in the circumstances of that case, the need to preserve the springs of information, to protect informers, and to encourage them to come forward. The court also considered it arguable, on the facts pleaded in that case, that there had been a voluntary assumption of responsibility by the police (a similar argument has been advanced by the applicants in the present case).

4. I also note that in the Hill case the plaintiff lost her action on two grounds, either of which would have been enough to defeat it – first, the absence of the necessary proximity and, secondly, the public-policy exception. In the present case, however, McCowan LJ, with whom Simon Brown LJ agreed, expressed the view that the plaintiffs had an arguable case that there existed a very close degree of proximity amounting to a special relationship (the third member, Beldam LJ, preferred to express no opinion on the point at that stage); and the court proceeded to strike out the claim against the police on the sole ground of the public-policy exception.

5. The weight thus attached to the exception in this case, together with its broad reach and the exclusive application given to it, combined in my view to produce a disproportionate limitation on the applicants' right of access to court. I therefore concurred in the conclusion stated in

paragraph 154 of the judgment. For me the exception, operating in this way, is an inappropriately blunt instrument for the disposal of claims raising human rights issues such as those of the present case.

CONCURRING OPINION OF JUDGE JAMBREK

1. I agreed with the Court's unanimous conclusion that Article 6 § 1 of the Convention is applicable to the applicants' claim and with the reasons given in the judgment in support thereof.

2. However, in my opinion, a more extensive interpretation of the term "civil rights and obligations" than the one applied by the Court in this case and in its case-law in general, would only require the Court to be satisfied that a right existed under domestic law – in the instant case, a right derived from the general tort of negligence or the duty of care owed by the police to the plaintiff. The only condition for the Court's recognition of a right as a "civil" right, thereby guaranteeing an applicant the right of access to a domestic court as protected by Article 6 § 1, would be that the right at issue is recognised in the national legal system as an individual right within the sphere of general individual freedom. Seen in these terms, the right of everyone to a fair trial by a court of law would also protect the individual in his or her relations with the authorities of the State.

3. Had the Court taken this interpretation of the term "civil rights" as its starting-point, it would not have been necessary for it to examine in the instant case whether the exclusionary rule imposed on the exercise of the right operated in an absolute manner or whether it allowed the domestic courts to make a considered assessment as to whether a particular case should be allowed to proceed to a consideration on the merits before a domestic court and thus guaranteeing a plaintiff access to a court for this purpose (see paragraph 138 of the judgment). Nor would it have been necessary for the Court to establish whether the applicants could arguably claim that in the circumstances it was fair, just and reasonable not to apply the exclusionary rule in the Hill case (see paragraph 139 of the judgment).

4. My reasoning has been informed by the dissenting opinions of Mr Melchior and Mr Frowein in the decision of the European Commission of Human Rights in the Benthem case (Article 31 report of 8 October 1983) and by Judge van Dijk's chapter on "The interpretation of 'civil rights and obligations' by the European Court of Human Rights – one more step to take" in Franz Matscher and Herbert Petzold (eds.), *Protecting Human Rights: The European Dimension – Studies in Honour of Gerard J. Wiarda*, Köln, Carl Heymanns Verlag KG, 1988, pp. 131–43.

5. In the Sporrong and Lönnroth v. Sweden case (judgment of 23 September 1982, Series A no. 52), the Court ruled that, since the applicants' case could not be heard by a tribunal competent to determine all the aspects of the matter, there had for that reason been a violation of Article 6 § 1 of the Convention (p. 31, § 87). In its Golder v. the United Kingdom judgment (21 February 1975, Series A no. 18) the Court also

stressed (p. 17, § 35) that the guarantees embodied in Article 6 § 1 of the Convention could be frustrated by national legislators if the right to a court were not considered to be implied in that provision:

> "... a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government."

The situation as described in the facts of the present case comes close to the concerns expressed by the Court in this quotation.

6. I therefore also agree with Judge van Dijk's assessment that if the Court were to take this additional step, and thereby no longer restrict the meaning of "civil rights and obligations" to "private rights and obligations", the certainty and foreseeability of its case-law would be enhanced. Furthermore, if "civil rights and obligations" were to be understood as "all those rights which are individual rights under the national legal system and fall within the sphere of general individual freedom" (see, *supra*, the dissenting opinion of Mr Melchior and Mr Frowein in the Benthem case), the Court's case-law would conform better to the object and purpose of Article 6 and of the Convention as a whole, that is to say respect for the requirement of the rule of law as interpreted by the Court in, for example, the Klass and Others v. Germany case (judgment of 6 September 1978, Series A no. 28) wherein it held (pp. 25–26, § 55):

> "The rule of law implies, *inter alia*, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure."

PARTLY DISSENTING, PARTLY CONCURRING OPINION OF JUDGE DE MEYER JOINED BY JUDGES LOPES ROCHA AND CASADEVALL

In this sad case there was enough evidence that for several months before 7 March 1988 the authorities of the respondent State were well aware of the strange and worrying behaviour of Mr Paget-Lewis. Both ILEA[1] and the police[2] knew, at least since the spring of 1987[3], that he was obsessed with Ahmet Osman. They knew that he was harassing the Osman family and the Green family[4], and that he was increasingly threatening them as well as Mr Perkins[5]. They knew that some harm had already been caused[6]. From December 1987 they could have had hardly any doubts that further, more serious, harm was to be foreseen[7].

They took, however, almost no action to avert impending danger and to protect those concerned[8].

They should have taken Mr Paget-Lewis into custody before it was too late in order to have him cared for properly. Instead they let things go until he killed two persons and wounded two others.

Mr Paget-Lewis himself asked the police arresting him why they did not stop him before he acted as he did and reminded them that he had given all the warning signs[9]. He was right.

In my view, therefore, the authorities of the respondent State, by failing to do what they should have done[10], have violated the applicants' right to life and also their right to private and family life.

There was of course also a violation of the applicants' right to a court, since the Osmans were denied any possibility to have their claims concerning the failures of the police properly examined by a tribunal. Whether or not they could rely on any substantive right thereto in domestic law is irrelevant, since they were asserting that they were the victims of a violation of fundamental (and therefore also civil[11]) rights, which had to be secured to them under the Convention[12], notwithstanding anything to the contrary in domestic law or practice, and since their right to have their case heard in court was also such a right[13]. It was likewise irrelevant whether the immunity of the police was or was not absolute, since the very principle of such immunity is not acceptable under the rule of law. The refusal to consider the applicants' action was therefore an obvious denial of justice[14].

NOTES

1. The management of Homerton House School noticed since 1986 Mr Paget-Lewis' "attachment" to Ahmet Osman (Government's memorial, § 1.5) and they were informed in January 1987 that he was harassing Leslie Green (ibid., § 1.7). They viewed the events seriously (Commission's report, § 96 (b) and investigated the matter in March 1987. Mr Prince's letter of 1 May 1987 to Mrs May (Annex A to applicants' memorial, no. 4, p. 17) shows that the problem was known at the headquarters of ILEA before May 1987.
2. Mr Prince met with PC Williams on 3, 9, 13 and 17 March 1987 (see the extracts of his diary, Annex A to applicants' memorial, no. 1, pp. 1–10). The Government admit that, on these occasions, "no doubt the substance of the concerns was made known to PC Williams" (Government's memorial, § 1.13).
3. Commission's report, § 96 (a)–(b).
4. Ibid., §§ 20–25.
5. The graffiti incident, the theft of the files and Mr Paget-Lewis' change of name occurred already in March-April 1987 (ibid., §§ 27, 28, 29 and 96 (c)). Then followed, in May-November 1987, the "vandalising attacks" on the home and car of the Osman family, for which "there was no doubt in everybody's mind he was in fact responsible" (ibid., §§ 32, 33, 37, 39 and 96 (d), Government's memorial, § 1.42, and Detective Sergeant Boardman's memo of 16 December 1987, Annex D to Government's memorial, p. 5, § 18), and also on the Green family (Annex A to applicants' memorial, no. 7, pp. 24–26, and Annex B to Government's memorial, pp. 37–38), on 7 December 1987 the ramming of the van in which Leslie Green was a passenger and Mr Paget-Lewis' statement to Mr Prince that "in a few months" he would "be doing life" (Commission's report, §§ 41 and 96 (e), Annex A to applicants' memorial, loc. cit., and Annex B to Government's memorial, pp. 41–42), on 15 December 1987, at the meeting with Mr David and Mrs May, Mr Paget-Lewis' saying that he would "not do a 'Hungerford' in a school", but "see Perkins at home" (Commission's report, §§ 47 and 96 (f), and Annex A to applicants' memorial, no. 8, pp. 27–29), on 18 December 1987 his disappearance from school (Commission's report, §§ 53 and 96 (g)), between January and March 1988 his roaming around and being involved in "a number of accidents" (ibid., § 58), and finally on 1, 4 and 5 March 1988 his presence in a crash helmet near the applicants' home (ibid., §§ 60 and 96 (j)). All these facts were known to the police before 7 March 1988.
6. Commission's report, §§ 32–33, 37, 39 and 41. See also Mrs Green's statement to Detective Sergeant Boardman on 9 December 1987 (Annex B to Government's memorial, pp. 37–38).
7. Commission's report, § 47. See the ILEA memorandum dated 15 December 1987 (Annex A to the applicants' memorial, no. 8, pp. 27–29) relating the meeting of Mr Paget-Lewis with Mrs May and Mr David. According to that document, Mr Paget-Lewis had "spoken in the following terms: He feels in a totally self-destructive mood … it is all a symphony and the last chord has to be played … he is deeply in debt and is selling all his possessions … Nick Perkins is the cause of all his troubles, has said he is sexually deviant … He wouldn't do a 'Hungerford' in a school, but will see Perkins at home". The memorandum adds that this information was passed on to the police. See also the statement of Mr Prince to Detective Sergeant Boardman on 22 December 1987 (Annex B to the Government's memorial, pp. 41–42). According to that statement, Mr Paget-Lewis had said, immediately after the collision of 9 December 1987: "I'm not worried about all this because in a few months I'll be doing life." After the shootings, he recalled, in one of his statements to Detective Sergeant Boardman on 8 March 1988, that he had earlier warned the police (PC Adams) that "there was a danger of me doing something criminally insane unless things were mended between me and the Osmans". (Annex B to Government's

memorial p. 77). It is rather obvious that these utterances ought to have been taken more seriously.

8. In December 1987, after the van incident, the police decided to arrest Mr Paget-Lewis, but, having not found him at his home, they did not even try to find him at his school before he disappeared. They took no further steps to trace him, except for asking ILEA to request him to contact Detective Sergeant Boardman and putting him in January 1988 on their National Computer. It is most surprising that they could not get hold of him whilst he was travelling around in hired cars and getting involved in several accidents (Commission's report, §§ 50, 52, 57, 58 and 96 (h)–(i)).

9. Commission's report, § 62. See also his statement to Detective Sergeant Boardman on 8 March 1988 (Annex B to Government's memorial, p. 98).

10. A few months ago, in another case (McLeod v. the United Kingdom judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-V, p. 1964), the representative of the Government of the United Kingdom observed that "there is a pressing social need to prevent disorder or crime" ant that more "particularly, in circumstances where there is a genuine and reasonable belief that there is a risk of disorder or crime, there is then a pressing social need to take steps to prevent it". He added that "it is much more desirable to prevent such disorder or crime than to await its development and only then take steps to contain it" (see the verbatim record of the hearing held on 18 May 1998, Doc. Cour/Misc(98) 355, at p. 20).

11. See, *mutatis mutandis*, the Aerts v. Belgium judgment of 30 July 1998, *Reports* 1998-V, p. 1964, § 59, and my separate opinion concerning the Pierre-Bloch v. France case, judgment of 21 October 1997, *Reports* 1997-VI, p. 2228.

12. Articles 1, 2 and 8 of the Convention.

13. Articles 1 and 6 of the Convention.

14. The dismissal of their civil action was also a violation of Article 13 of the Convention, as they were thereby denied what would have been "an effective remedy before a national authority" and it has not been shown, or even alleged, that any other remedy of that kind was available. Such a remedy had indeed to be ensured to them "notwithstanding that the violation ha[d] been committed by persons acting in an official capacity".

PARTLY DISSENTING, PARTLY CONCURRING OPINION OF JUDGE LOPES ROCHA

(*Translation*)

I regret that I am unable to share the majority's view that there has been no violation of Articles 2 and 8 of the Convention.

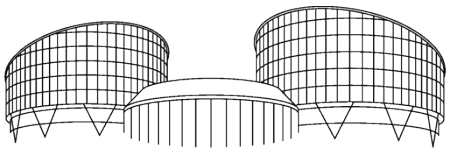
My interpretation of the facts – which is the same as Judge De Meyer's – leads me to conclude that the police underestimated the danger Mr Paget-Lewis presented for the life and physical integrity of Mr Ahmet Osman and, in all probability, of his close relatives.

In my opinion, it is not possible to say, as the Government did, that there was no causal link between the failure to take preventive action, of which the authorities are accused, and the events that occurred.

A quite different approach is required to determine liability for an omission from that required to determine liability for an act. The former must be determined according to generally accepted rules. It has to be decided whether the assault originated from the failure to take a particular measure or measures where the assailant's previous behaviour already pointed to a likelihood that he would act aggressively towards someone of whom he was particularly fond.

In the instant case, there was strong evidence of aggressive behaviour on the part of Mr Paget-Lewis suggesting that at the first opportunity he would act violently. It should not be forgotten that he displayed rather strange traits of personality and was known to the police, although there was some doubt over whether he was homosexual.

Given, too, the professional experience one is entitled to expect of them, the police could legitimately be required to exercise caution and to take measures to protect the people at risk. Failure to take such measures renders the police and the State concerned liable. There has therefore been a breach of the aforementioned Articles.



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

GRAND CHAMBER

CASE OF SÖDERMAN v. SWEDEN

(Application no. 5786/08)

JUDGMENT

STRASBOURG

12 November 2013

In the case of Söderman v. Sweden,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Josep Casadevall, *President*,
Guido Raimondi,
Ineta Ziemele,
Isabelle Berro-Lefèvre,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Mirjana Lazarova Trajkovska,
Ledi Bianku,
Zdravka Kalaydjieva,
Kristina Pardalos,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Erik Møse,
Helen Keller,
Helena Jäderblom,
Johannes Silvis, *judges*,
and Erik Fribergh, *Registrar*,

Having deliberated in private on 3 April 2013 and on 25 September 2013,

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

PROCEDURE

1. The case originated in an application (no. 5786/08) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swedish national, Ms Eliza Söderman ("the applicant"), on 21 January 2008.

2. The applicant was represented by Mr J. Södergren, Mr K. Lewis and Mr C. Crafoord, lawyers practising in Stockholm. The Swedish Government ("the Government") were represented by their Agents, Mr A. Rönquist, Ms G. Isaksson and Mr O. Widgren, of the Ministry of Foreign Affairs.

3. The applicant alleged that the Swedish State had failed to comply with its obligation under Article 8 of the Convention to provide her with remedies against her stepfather's violation of her personal integrity when he had attempted secretly to film her naked in their bathroom when she was 14 years old. She also relied on Article 13 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Its President acceded to the applicant's request not to have her name disclosed (Rule 47 § 3), and the case was called *E.S. v. Sweden*. On 1 February 2011 the Court changed the composition of its Sections (Rule 25 § 1) and the application was assigned to the newly composed Fifth Section. On 21 June 2012 a Chamber composed of Dean Spielmann, President, Elisabet Fura, Karel Jungwiert, Mark Villiger, Ann Power-Forde, Ganna Yudkivska, André Potocki, judges, and Claudia Westerdiek, Section Registrar, delivered its judgment. It decided to examine the complaint under Article 8 alone and unanimously declared it admissible, holding, by four votes to three, that there had been no violation of that provision. The joint dissenting opinion of Judges Spielmann, Villiger and Power-Forde was annexed to the judgment.

5. On 19 September 2012 the applicant requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention, and a panel of the Grand Chamber accepted the request on 19 November 2012.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicant and the Government each filed further observations on the merits (Rule 59 § 1).

8. In addition, third-party comments were received from the Human Rights Centre of Ghent University, which had been granted leave by the President of the Grand Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

9. On 22 March 2013, the President of the Grand Chamber acceded to the applicant's request of 12 March 2013 to lift the anonymity granted to her.

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 3 April 2013 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr A. RÖNQUIST, Agent, Ambassador and
Director General for Legal Affairs,
Ministry of Foreign Affairs, *Counsel*,
Ms G. ISAKSSON, Co-Agent, Deputy Director,
Ministry of Foreign Affairs,
Mr O. WIDGREN, Co-Agent, Special Adviser,
Ministry of Foreign Affairs,
Mr M. SÄFSTEN, Senior Legal Adviser, Ministry of Justice,
Ms V. LÅNG, Deputy Director, Ministry of Justice,
Mr C. ROSENMÜLLER, Legal Adviser, Ministry of Justice, *Advisers*;

(b) *for the applicant*
Mr J. SÖDERGREN,
Mr K. LEWIS,
Mr C. CRAFOORD, *Counsel*.

The applicant was also present.

The Court heard addresses by Mr Crafoord, Mr Lewis, Mr Södergren and Mr Rönquist, as well as their replies to questions put by Judges Ziemele, Sicilianos, Pinto de Albuquerque and Zupančič.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant was born in 1987 and lives in Ludvika.

12. In September 2002, when she was 14 years old, she discovered that her stepfather had hidden a video-camera in the laundry basket in the bathroom, which was in recording mode and directed towards the spot where she had undressed before taking a shower. Immediately after the incident, the film was burned without anyone seeing it.

13. In September 2004, two years later, the applicant's mother reported the incident to the police. An officially appointed counsel (*målsägandebiträde*) was assigned to the applicant on 5 October 2004.

14. On 21 October 2005 the public prosecutor indicted the applicant's stepfather for sexual molestation (*sexuellt ofredande*) under Chapter 6, Article 7 § 3, of the Penal Code. He was also charged on two counts of sexual molestation of the applicant's cousin, committed during the spring and summer of 2003 when the cousin was 16 years old, for having caressed her thigh and for having expressed his desire to have sex with her. He was charged on a fourth count of sexual molestation for having allegedly looked through the window of the applicant's room when she was undressing in the late summer of 2003.

15. On 20 January 2006 the applicant, represented by counsel, submitted a claim for damages of 25,000 Swedish kronor (SEK): SEK 15,000 in compensation for violation of her personal integrity and SEK 10,000 for pain and suffering, to be joined to the criminal proceedings. The applicant based her private claim on "the criminal act for which her stepfather was being prosecuted", without invoking any specific sections of the Tort Liability Act.

16. The applicant, her stepfather, her mother and her cousin gave evidence before the District Court of Falun (*Falu Tingsrätt*). The applicant explained that on the relevant day in September 2002, as she was about to

take a shower, her stepfather had been doing something in the bathroom. When she discovered the camera, it was in recording mode, making a buzzing sound and flashing. She did not touch any of the buttons. She went to her mother in tears, taking the video-camera wrapped in a towel. H stepfather took the camera from her mother. Subsequently, the applicant saw her mother and stepfather burning a film, but she was not sure whether it was a recording of her.

17. The applicant's mother confirmed the applicant's statement and added that she did not know whether anything had been recorded since the film had been burned without her seeing it. She had not reported the incident to the police until 2004, when she had heard that the applicant's cousin had also experienced incidents with the accused.

18. The applicant's stepfather explained that he had lived with her mother from 1997 until the autumn of 2003. They had separated on account of the incident in question, among other things. He had wanted to try to film with a hidden camera, but it had been an impulsive act. He was not sure whether the camera had been in recording mode or whether a film had been recorded. The applicant's mother had burned the film without any of them seeing it.

19. By a judgment of 14 February 2006, the District Court convicted the applicant's stepfather on all four counts of sexual molestation under Chapter 6, Article 7 § 3, of the Penal Code. As regards the first count of sexual molestation, it found it established that he had had a sexual intention in hiding the camera in the laundry basket and directing it at the part of the bathroom where it was usual to undress. It added that the buzzing sound from the camera heard by the applicant strongly suggested that the camera was switched on and was actually recording. Otherwise, there would have been no point in hiding the camera among the clothes in the laundry basket. The hole in the laundry basket indicated that the strategy was quite refined. Regardless of the fact that, afterwards, no one had verified the contents of the film, it could under the circumstances be considered established that the applicant's stepfather had actually filmed her while she was naked.

20. The applicant's stepfather was given a suspended sentence combined with seventy-five hours' compulsory community service. Moreover, he was ordered to pay the applicant damages in the amount of SEK 20,000.

21. On appeal, by a judgment of 16 October 2007, the Svea Court of Appeal (*Svea hovrätt*) convicted him on the two counts of sexual molestation committed against the cousin, for which he was given a suspended sentence and ordered to pay sixty day-fines of SEK 50, amounting to a total of SEK 3,000.

22. The Court of Appeal acquitted him on the counts of sexual molestation allegedly committed against the applicant.

23. As to the incident in September 2002, the Court of Appeal found it established that the applicant's stepfather had put a camera in the bathroom

and that he had started the recording before she was about to take a shower. Whether a recording had actually been made, however, was unclear. It was apparent, the court continued, that his motive had been to film the applicant covertly for a sexual purpose. Given that motive, it was also regarded as certain that he had not intended the applicant to find out about the filming. Nor, according to the court, had he been indifferent to the risk that she would find out about it. In assessing whether the act legally constituted sexual molestation within the meaning of Chapter 6, Article 7 § 3, of the Penal Code, the Court of Appeal referred to a Supreme Court judgment (published in *Nyatt jurisdiskt arkiv* (NJA) 1996, p. 418) concerning a man who had covertly filmed his sleeping girlfriend while he masturbated. The man was acquitted of sexual molestation because he had not intended his girlfriend to find out about the filming. Moreover, in the said judgment the Supreme Court held that the isolated act of filming was not a crime in itself, as in Swedish law there was no general prohibition against filming an individual without his or her consent. Following that line of reasoning, and despite finding that the situation the applicant's stepfather intended to film was obviously of a sensitive nature as regards her personal integrity and that the violation was particularly serious on account of the applicant's age and relationship to her stepfather, the Court of Appeal found that he could not be held criminally responsible for the isolated act of filming the applicant without her knowledge. The court noted that the applicant had become aware of her stepfather's attempt to film her, but that this had not been covered by his intent.

24. The Court of Appeal went on to point out that the act might, at least theoretically, have constituted the crime of attempted child pornography (*försök till barnpornografibrott*) considering the applicant's age. However, since no charge of that kind had been brought against the applicant's stepfather, the Court of Appeal could not examine whether he could be held responsible for such a crime. In conclusion, despite finding his behaviour extremely reprehensible, he was acquitted and the applicant's claim for damages dismissed.

25. As regards the incident in the late summer of 2003, the Court of Appeal found it established that the applicant's stepfather had wanted to look at her secretly. Thus, although the court found such behaviour reprehensible, he had lacked the intent that the applicant should see him.

26. On 12 December 2007 the Supreme Court (*Högsta domstolen*) refused leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Sexual molestation

27. The offence of sexual molestation (and child pornography, see below) falls within the domain of public prosecution, in which the principle of objectivity is applied whereby no prosecution should be brought if the prosecutor deems that the conditions for a conviction are lacking. The provision on sexual molestation can be found in the Penal Code (*Brottsbalken*, 1962:700) which, before 1 April 2005, provided:

Chapter 6 on sexual crimes, Article 7

"1. If a person sexually touches a child under 15 years of age otherwise than as previously provided for in this Chapter, or induces the child to undertake or participate in an act with sexual implications, a fine or imprisonment of a maximum period of two years shall be imposed for sexual molestation.

2. A sentence for sexual molestation shall also be imposed on a person who by coercion, seduction or other improper influence induces a person who has attained the age of 15 but not 18 to undertake or participate in an act with sexual implications if the act is an element in the production of pornographic pictures or constitutes pornographic posing in circumstances other than those relating to the production of a picture.

3. This shall also apply if a person exposes himself or herself in such a manner that the nature thereof gives offence or otherwise manifestly behaves indecently by word or deed towards a person in a way that flagrantly violates a sense of propriety."

28. On 1 April 2005 that provision was incorporated into Article 10 of Chapter 6 and reads as follows:

"1. A person who, otherwise than as previously provided in this Chapter, sexually touches a child under 15 years of age or induces the child to undertake or participate in an act with sexual implications shall be sentenced for sexual molestation to a fine or to imprisonment of a maximum period of two years.

2. This also applies to a person who exposes himself or herself to another person in a manner that is likely to cause discomfort or who otherwise by word or deed molests a person in a way that is likely to violate that person's sexual integrity."

29. It should be noted that a person cannot be held responsible for an uncompleted act of sexual molestation, such as attempting or preparing to commit such a crime (see, by converse implication, Chapter 23, Article 1, of the Penal Code).

30. Subsequently, based on the statements in the preparatory works to the provision, the 2008 Sexual Offences Commission stated the following.

"In our view, it is ... quite clear that the second paragraph of the provision on sexual molestation should also include actions directed at persons who are unconscious or asleep. The provision therefore belongs to the category of sexual offences, not offences against integrity. Using this as the starting point for how the offence of sexual molestation should be handled, it may also be possible to assess situations in

which a person has covertly filmed or photographed another person in a sexually intrusive way as sexual molestation."

B. Attempted child pornography

31. The relevant provisions of the Penal Code read:

Article 10a of Chapter 16 on crimes against public order

"A person who

1. portrays a child in a pornographic picture;

2. disseminates, transfers, grants use of, exhibits, or in any other way makes such a picture of a child available to some other person;

3. acquires or offers such a picture of a child;

4. brings about contact between a buyer and a seller of such pictures of children or takes any other similar step to facilitate dealing in such pictures; or

5. possesses such a picture of a child

shall be sentenced for the crime of child pornography to imprisonment for a maximum period of two years, or, if it is a petty offence, to a fine or imprisonment for a maximum period of six months.

A child is held to be a person whose pubertal development is not complete or who is under 18 years of age. If a person's pubertal development is complete, liability shall be imposed for deeds committed under points 2 to 5 above only if it is apparent from the picture or its circumstances that the depicted person is under 18 years of age.

..."

32. Before 1 January 2011, the second paragraph of the above Article read:

"A child is held to be a person whose pubertal development is not complete or who, where this is apparent from the picture and its circumstances, is less than 18 years of age ..."

33. The term "pornographic picture" is not defined in the text of the law. In the preparatory works it was stated that the provision about pornographic crimes applied only to pictures, but to pictures of all kinds, such as, *inter alia*, pictures in publications, photographic pictures, including films and pictures distributed by TV-technique or video recordings (Governmental Bill 1978/79:179, p. 9). Moreover it was stated that:

"A certain prudence was called for, so that the criminalised area would not become too wide or difficult to assess. It was not the intention to criminalise every exposure of naked children or all pictures in which a child's genitals may be perceived, even if such pictures may stimulate some people's sexual instincts. In order for the handling of a picture to be illegal, it is a condition that it be pornographic according to common parlance and general values."

34. In a review of the legislation (Law no. 2010:1357), which led to the amendment of the second paragraph of Chapter 16, Article 10a, as from

1 January 2011, as set out above, the following was stated, among other things, as regards the definition (Swedish Government Official Reports, SOU 2007:54, p. 77):

> "A picture may be regarded as pornographic when, without any real scientific or artistic merits, and in a blatant and alluring manner, it displays a sexual motive (Gov. Bill 1970:125, pp. 79 et seq.). Not only do pictures in which children are involved in acts which obviously have a sexual connotation fall within the provision regarding child-pornography crimes, but also pictures in which children appear together with one or several adults who are performing such actions. Pictures in which a child appears in a manner which is designed to appeal to sexual instincts without the child being considered to have participated in sexual behaviour during the picturing may fall within the criminalised area ... A picture may be presented in different ways, *inter alia*, by a real child being pictured, filmed or drawn. By using different techniques, more or less realistic artificial pictures may also be created. For criminal liability to be incurred it is not necessary that the picture depicts a real child; pictures of fictive children are also included."

35. With regard specifically to attempt, the Penal Code reads:

Chapter 16, Article 17

> "A person preparing or conspiring to commit mutiny ... shall be sentenced in accordance with the provisions of Chapter 23. The same shall also apply ... to the crime of attempting to commit the crime of child pornography described in Article 10a, first paragraph ..."

Chapter 23, Article 1

> "A person who has begun to commit a crime without bringing it to completion shall, in cases where specific provisions exist for the purpose, be sentenced for attempting to commit a crime if there was a danger that the act would lead to the completion of the crime or such danger was precluded only because of fortuitous circumstances.
>
> Punishment for attempt shall not exceed the sentence applicable to a completed crime and shall not be less than imprisonment if the least stringent punishment for the completed crime is imprisonment of two years or more."

C. Other relevant legal provisions

36. The Code of Judicial Procedure (*Rättegångsbalken* 1942:740) provides in so far as relevant:

Chapter 17, Article 3

> "A judgment shall not be given for anything other or more than that properly requested by a party. In cases amenable to out-of-court settlement, the judgment shall not be based on circumstances other than those pleaded by a party as the foundation of his or her action."

Chapter 22, Article 7

"If an action for private claims in consequence of an offence is brought in conjunction with the prosecution and it is found that the offence charged is not punishable, the action may nonetheless be adjudicated in the case."

Chapter 29, Article 6

"...Where a private claim is joined to the prosecution, the court's finding of criminal liability shall be binding for the adjudication of the private claim."

Chapter 30, Article 3

"The judgment may relate only to an act for which a prosecution was properly instituted or to a matter referred by statute to the court's criminal jurisdiction. The court is not bound by the legal characterisation of the offence or applicable provisions of law stated in the claim."

37. The Tort Liability Act (*Skadeståndslag* 1972:207) provides in so far as relevant:

Chapter 2, section 1

"Anyone who deliberately or negligently causes personal injury or damage to property shall compensate the injury or damage caused."

Chapter 2, section 3

"Anyone who seriously violates another person through a crime involving an attack against the person or the freedom, serenity or honour of that person shall compensate the damage caused by the violation."

D. Domestic practice concerning covert filming

38. In a Supreme Court judgment of 16 October 1992 (NJA 1992, p. 594) concerning a person who had secretly filmed sexual intercourse between himself and his girlfriend and who had subsequently shown the film to several persons, the Supreme Court noted that it was not prohibited under Swedish law to film another person without his or her consent. This was so, the court continued, even in situations where the deed in question seriously violated the personal integrity of the person concerned. Apart from certain exceptional situations, the only protection available was under the criminal provisions on defamation in conjunction with Chapter 1, section 3, of the Tort Liability Act (now Chapter 2, section 3, of that Act). The Supreme Court found that the accused person had committed defamation by showing the film to others.

39. A further Supreme Court judgment dated 27 June 1996 (NJA 1996, p. 418) concerned a man who had covertly filmed his sleeping girlfriend while he masturbated. The District Court found his acts to constitute, *inter alia*, sexual molestation, but the Court of Appeal and the Supreme Court acquitted him of this offence. The Supreme Court held that the isolated act

of filming was not a crime in itself as in Swedish law there was no general prohibition against filming an individual without his or her consent.

40. Yet another Supreme Court judgment, dated 23 October 2008 (NJA 2008, p. 946), concerned, *inter alia*, a person who had covertly filmed his ex-girlfriend with another man in an intimate situation and who had subsequently e-mailed the film, together with certain descriptive messages, to others. The Court of Appeal found the filming to constitute molestation and the sending of some of the e-mails to amount to defamation, and awarded the ex-girlfriend damages for violation of personal integrity. The Supreme Court granted leave to appeal in respect of the alleged molestation. The Supreme Court acquitted the person of molestation and reiterated at the same time that Swedish law contained no general prohibition against covert filming. The court also noted that in cases where the covert filming did not constitute a crime, no damages could be awarded. Although the need for a strengthened legal framework in this regard had already been acknowledged in Swedish legislative work in the 1960s, the court noted further that it had so far not led to any concrete results. The court found it highly questionable whether the fact that acts of filming an individual in situations where such filming seriously violated the personal integrity of the person concerned were left wholly unpunished under Swedish law was compatible with the requirements of Article 8 of the Convention. Given that finding, the court continued, it was legitimate to examine whether punishment could be imposed by interpreting otherwise non-applicable domestic provisions in a Convention-compliant manner. In that regard, the court referred to domestic case-law concerning compensation for violations of the Convention. However, the court noted, another requirement under the Convention was that no one should be punished for an act which, at the time when it was committed, did not clearly constitute a criminal offence under the law. After finding that the filming in issue did not fall under any applicable criminal provision, it was left unpunished and no damages were awarded.

E. Recent legislative work concerning covert filming

41. In 2004 the Government instructed the Committee on the Protection of Integrity (*Integritetsskyddskommittén*) to investigate the need for general legal provisions for the protection of personal integrity (apart from the legislation on data protection, crimes against individuals, secrecy, and so on). In the meantime, the Penal Code was reviewed and in April 2005 an amendment to the provision on sexual molestation, which was designed to encompass covert filming for sexual purposes, was introduced (see paragraphs 28-30 above).

42. In 2008 the Committee on the Protection of Integrity proposed a general provision in the Penal Code on illicit photography and in January 2011 the Ministry of Justice issued a report on illicit photography

(Ds 2011:1) which proposed the criminalisation of photography and filming in certain situations. On 1 March 2012 the Government approved the referral of a proposal entitled "Intrusive Photography" to the Law Council (*Lagrådet*) for consideration. The latter criticised the proposal, *inter alia*, on account of the potential effects that it could have on the principles laid down in order to protect those who procure information for publication under the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, which are part of the Swedish Constitution.

43. Consequently, on 20 December 2012 the Government adopted a new proposal modifying the scope of the criminalisation of intrusive photography. The Law Council did not have any comments on the substance of the proposal and on 7 February 2013 the Government presented the bill to the Swedish Parliament proposing to criminalise intrusive photography in accordance with the proposal referred to the Law Council on 20 December 2012. The Law (SFS 2013:366) was enacted by Parliament on 29 May 2013 and came into force on 1 July 2013. Henceforth, Article 6a of Chapter 4 of the Penal Code, regarding crimes against liberty and peace, reads as follows:

> "A person who, with the aid of technical means, illicitly and covertly records a picture of someone who is inside a home or in a bathroom, in a changing room or other similar space, shall be sentenced for intrusive photography to a fine or imprisonment of a maximum of two years.
>
> No criminal responsibility shall be imposed if the act is justifiable considering its purpose and other circumstances.
>
> The first paragraph does not apply to a person who depicts someone with the aid of technical means in the course of duty on behalf of a public authority."

In concrete terms, covertly filming a person without his or her permission in a shower or bathroom would be punishable as intrusive photography. Placing, or "rigging", a camera with the aim of committing an intrusive-photography offence would also be punishable as preparation to commit such an offence.

F. Domestic practice concerning the crime of child pornography

44. In a judgment of 25 February 2005 (NJA 2005, p. 80), which concerned the photographing and filming of certain young individuals aged over 15 but under 18, the Supreme Court held that the pubertal development of the individuals was clearly complete and that it was impossible, from the pictures alone or their presentation, to determine whether they had attained the age of 18 or not. Their age could not be determined from any text accompanying the pictures or any other circumstances. In such a situation, and regardless of whether the person responsible for the pictures was aware

of the individuals' age or not, the act could not be held to constitute the crime of child pornography.

G. Domestic practice and ongoing legislative work concerning compensation for violations of the Convention

45. In a judgment of 9 June 2005 (NJA 2005, p. 462) concerning a claim for damages brought by an individual against the Swedish State, *inter alia*, on the basis of an alleged violation of Article 6 of the Convention on account of the excessive length of criminal proceedings, the Supreme Court held that the claimant's right under this Article had been violated. Based on this finding, and with reference, *inter alia*, to Articles 6 and 13 and the Court's case-law under these provisions, in particular the case of *Kudła v. Poland* ([GC], no. 30210/96, ECHR 2000-XI), the Supreme Court concluded that the claimant was entitled to compensation from the State directly under Swedish legislation on tort liability for pecuniary damage and under Article 13 of the Convention for non-pecuniary damage to the extent that no other remedy was available.

46. Similar decisions followed on 4 May 2007 (NJA 2007, p. 295), concerning length of detention and Article 5 of the Convention, and on 21 September 2007 (NJA 2007, p. 584) regarding Article 8 of the Convention.

47. A Supreme Court decision of 29 October 2007 (NJA 2007, p. 747) concerned a claim for damages brought by an individual against a private insurance company. The claim concerned an alleged violation of Article 8 of the Convention related to secret surveillance undertaken in respect of the claimant. The Supreme Court noted that the Convention did not impose duties on individuals. Even if the State might have positive obligations under the Convention, the court continued, in view of the rule-of-law value enshrined in the principle of predictability, an individual could not be obliged to compensate another individual directly on the basis of the Convention.

48. The right to obtain compensation on the basis of an alleged violation of the Convention was subsequently acknowledged by the Supreme Court in its judgments of December 2009 (NJA 2009, N 70), June 2010 (NJA 2010, p. 363) and April 2012 (NJA 2012, p. 211).

49. Furthermore, the Chancellor of Justice has delivered various decisions concerning compensation to individuals for violations of the Convention.

50. Finally, in May 2009 the Government decided to set up a committee (*en särskild utredare*) on tort liability and the Convention to examine the current legal situation. In December 2010 the committee submitted its report (*Skadestånd och Europakonventionen*, SOU 2010:87) to the Government. It proposed the inclusion of an explicit provision in the Tort Liability Act

allowing natural and legal persons to obtain pecuniary and non-pecuniary damages from the State or a municipality for violations of the Convention. Such an action against public authorities would be examined by an ordinary court which would first need to establish that a right under the Convention had been violated. The aim of the proposal is to fulfil, together with the other already existing legal remedies, Sweden's obligations under Article 13 of the Convention.

III. INTERNATIONAL CONVENTIONS

A. The United Nations Convention on the Rights of the Child 1989

51. The United Nations Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989, has binding force under international law on the Contracting States, including all of the member States of the Council of Europe. It was ratified by Sweden on 29 June 1990 and its relevant Articles read:

Article 19

"1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

Article 34

"States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials."

B. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

52. This Convention obliges its Parties to take the necessary legislative or other measures to prevent all forms of sexual exploitation and sexual abuse of children and to criminalise certain intentional conduct, including offences concerning child pornography. It was signed by Sweden on 25 October 2007 and came into force on 1 July 2010. Sweden ratified it on 28 June 2013. The relevant parts of Chapter VI, "Substantive criminal law" read:

Article 18 – Sexual abuse

"1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised:

a. engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities;

b. engaging in sexual activities with a child where:

– use is made of coercion, force or threats; or

– abuse is made of a recognised position of trust, authority or influence over the child, including within the family; or

– abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence.

2. For the purpose of paragraph 1 above, each Party shall decide the age below which it is prohibited to engage in sexual activities with a child.

3. The provisions of paragraph 1.a are not intended to govern consensual sexual activities between minors."

Article 20 – Offences concerning child pornography

"1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct, when committed without right, is criminalised:

a. producing child pornography;

b. offering or making available child pornography;

c. distributing or transmitting child pornography;

d. procuring child pornography for oneself or for another person;

e. possessing child pornography;

f. knowingly obtaining access, through information and communication technologies, to child pornography.

2. For the purpose of the present article, the term 'child pornography' shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes.

3. Each Party may reserve the right not to apply, in whole or in part, paragraph 1.a and e to the production and possession of pornographic material:

– consisting exclusively of simulated representations or realistic images of a non-existent child;

– involving children who have reached the age set in application of Article 18, paragraph 2, where these images are produced and possessed by them with their consent and solely for their own private use.

4. Each Party may reserve the right not to apply, in whole or in part, paragraph 1.f."

Article 21 – Offences concerning the participation of a child in pornographic performances

"1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised:

a. recruiting a child into participating in pornographic performances or causing a child to participate in such performances;

b. coercing a child into participating in pornographic performances or profiting from or otherwise exploiting a child for such purposes;

c. knowingly attending pornographic performances involving the participation of children.

2. Each Party may reserve the right to limit the application of paragraph 1.c to cases where children have been recruited or coerced in conformity with paragraph 1.a or b.

..."

IV. COMPARATIVE LAW

53. From the information available to the Court, including a survey of thirty-nine Council of Europe member States, it would appear that child pornography is criminalised in all of those States.

54. The isolated act of covert/non-consensual filming, photographing or portrayal of a child for sexual purposes is criminalised either as child pornography or as a specific offence in thirty-three of the member States studied (Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Finland, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Republic of Moldova, Montenegro, the Netherlands, Norway, Poland, Romania, Russia, Slovakia, Slovenia, Spain, Switzerland, Turkey, Ukraine and the United Kingdom), while a conviction in the remaining six member States (Azerbaijan, Denmark, France, Monaco, Lithuania and the former Yugoslav Republic of Macedonia) can only be obtained where an intent to distribute the pornographic material can be proven. In most of the latter countries the conduct in question might still be illegal under other provisions of the Criminal Code relating to sexual offences.

55. The isolated act of covert or non-consensual filming/photographing of an individual (a child or an adult) for non-sexual purposes is considered a criminal offence in twenty-five of the member States studied (Albania, Bosnia and Herzegovina, Croatia, Denmark, Finland, France, Georgia,

Germany, Greece, Iceland, Italy, Lithuania, Luxembourg, Monaco, Montenegro, the Netherlands, Poland, Russia, Slovakia, Slovenia, Spain, Switzerland, the former Yugoslav Republic of Macedonia, Turkey and Ukraine), namely as a violation of the right to privacy. Eleven of the remaining fourteen member States which do not include privacy crimes in their criminal codes provide for civil remedies against infringements of a person's privacy. Three of the member States examined also do not have a civil-law procedure for claims against covert/non-consensual capturing of one's image.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 8 AND 13 OF THE CONVENTION

56. The applicant complained that the Swedish State had failed to comply with its obligation under Article 8 to provide her with remedies against her stepfather's violation of her personal integrity when he had attempted secretly to film her naked in their bathroom when she was 14 years old. She also relied on Article 13 of the Convention.

57. The Court reiterates that it is the master of the characterisation to be given in law to the facts of a case (see, for instance, *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 43, ECHR 2012). In the present case, it considers that the applicant's complaint concerns exclusively the remedies available to her against her stepfather, not those available against the State to enforce the substance of a Convention right or freedom at the national level. The complaint is therefore to be examined under Article 8 of the Convention alone, which provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The Chamber judgment

58. In its judgment of 21 June 2012 (see *E.S. v. Sweden*, no. 5786/08, 21 June 2012), the Chamber also considered that the complaint was to be examined under Article 8 of the Convention alone. It was satisfied that, although Swedish law contained no provision relating to covert filming,

laws were in place which could, at least in theory, cover acts such as the one in this case. It pointed out that the public prosecutor, when indicting the applicant's stepfather, and the District Court, when convicting him on 14 February 2006, considered that the impugned act could be covered by the provision on sexual molestation. Accordingly, although at the relevant time a similar outcome had been seen in Swedish case-law (see NJA 1996, p. 418), it was not until delivery of the Court of Appeal's judgment that it became clear that the act could not legally constitute sexual molestation given the applicant's stepfather's lack of the requisite intent that she find out about the filming. The Chamber also reiterated that the Court of Appeal, in its judgment acquitting him of sexual molestation, had pointed out that his acts might, at least theoretically, have constituted the crime of attempted child pornography under the Penal Code. However, since no charge of that kind had been brought by the prosecution against the applicant's stepfather, the Court of Appeal could not examine whether he could be held responsible for that crime. Lastly, the Chamber noted that civil-law remedies were available to the applicant and that she had chosen, represented by counsel, to join her claim for damages to the criminal proceedings. In those circumstances the Chamber concluded that there were no such significant flaws in Swedish legislation and practice as to amount to a breach of Sweden's positive obligations under Article 8.

B. The parties' submissions

1. The applicant

59. The applicant maintained that the Swedish legal system did not provide any remedy to protect her against the concrete actions of her stepfather.

60. Firstly, with regard to the provision on sexual molestation, it was a requirement for a conviction that her stepfather should intend the applicant to know of the filming, the reason being that a person could not be molested unless he or she was aware of it. Accordingly, in the applicant's view, her stepfather had been acquitted of sexual molestation on account of the construction of that provision. It could and should have been construed in such a way that it criminalised the filming, whether or not the applicant became aware of it at the time it was carried out. Accordingly, the applicant found that the construction of the provision on sexual molestation was open to criticism, notably since the act in issue was not covered by other criminal provisions.

61. Secondly, referring, *inter alia*, to the preparatory works to the provision on child pornography and to a legal opinion by Professor Madeleine Leijonhufvud, the applicant contended that her stepfather could not have been convicted of attempted child pornography either, because the

basic requirement for that provision was lacking, namely that the picture in question be pornographic. In the present case images of a 14-year-old girl undressing before taking a shower, in an otherwise everyday situation, could not be regarded as pornographic within the meaning of Chapter 16, Article 10a, of the Penal Code concerning child pornography. In order for the film to be pornographic, her stepfather would have had to manipulate the film, *inter alia*, by making it appear as if the applicant was posing for him, or otherwise placing the film in a pornographic context. When the case was pending before the national courts it was not possible to speculate as to what her stepfather would have done with the film because it had been destroyed. In the applicant's view, it was therefore completely understandable that the prosecutor had not formulated or amended the indictment to include a child-pornography crime, since such a claim would not have had any prospect of success.

62. For the reasons set out above, the applicant did not criticise the prosecution on procedural grounds for not complying with their obligation to indict crimes or their duty to assist her in pursuing claims for damages under Chapter 22 of the Code of Judicial Procedure. Rather, she found that the legislator and the domestic courts had failed in their respective positive obligations in the present case, the legislator on account of the flaw in the law and the courts on account of the failure to award the applicant damages.

63. In respect of the legislator, the applicant observed that the mere filming or depiction of a minor in a situation which upset the essential aspects of the portrayed person's personal integrity was not a criminal offence unless the image could objectively be regarded as pornographic according to common parlance and general values. For adults, no such protection existed at all. The applicant found that the failure for years to criminalise the act of covert or illicit filming amounted to a violation of Article 8. She pointed out that the weak protection in this area had been known and discussed since 1966. In her view it was inadequate to "quantify" this deficiency as a "significant" or "insufficiently significant" flaw in the law, for the purpose of an examination under Article 8. It sufficed to conclude that the protection for the right to respect for private life was – and still is – insufficient in the Swedish legal system and that the applicant was a victim of that deficiency. The applicant pointed out that the legislative proposal regarding covert filming had been initiated after the applicant's case had been communicated and that the ongoing legislative measures seemed to have progressed quite far, especially after the Grand Chamber had accepted her request for referral of her case, which demonstrated the urgent need for such legislative protection.

64. Lastly, referring to the outcome of the criminal proceedings before the domestic courts, the applicant alleged that the Swedish system did not afford her a civil remedy to protect her against the act of her stepfather. She maintained that, despite his acquittal, the courts could have awarded her

compensation on the basis of the Tort Liability Act or the Convention alone. She observed that the domestic courts were the masters of the classification of the law and that therefore it had not been necessary for the parties to invoke any legal provisions at all. Furthermore, since it was a matter of a private claim in consequence of an offence and Chapter 22, Article 7, of the Code of Judicial Procedure applied, the courts were under an obligation to determine the claim, even if it was found that the act was not punishable. Accordingly, in the applicant's view her claim should have been determined by the domestic courts of their own motion, even though she had not invoked any specific legal provisions.

2. The Government

65. The Government contended that Sweden had fulfilled its positive obligations under Article 8 in the present case. The act in issue fell within the scope of the Swedish criminal legislation, notably the provisions concerning sexual molestation and the offence of child pornography, and there were no elements suggesting that the primary investigation and the prosecution had not been conducted effectively or in a manner otherwise incompatible with Swedish law or Article 8. The applicant's stepfather had been prosecuted for the act but could not be convicted on account of the lack of requisite evidence. Nevertheless, deterrent sanctions existed in this case and were backed up by effective law-enforcement machinery.

66. The Government initially pointed out that the Court had repeatedly stated that States enjoyed a wide margin of appreciation with regard to ensuring adequate protection under Article 8, even in cases of very severe offences such as the rape of a minor (see, for example, *M.C. v. Bulgaria*, no. 39272/98, § 154, ECHR 2003-XII), and that only significant flaws in legislation and practice, and their application, would amount to a breach of a State's positive obligations under the said provision.

67. In the present case, the applicant's stepfather was indicted for sexual molestation under Chapter 6, Article 7 § 3, of the Penal Code and both the District Court and the Court of Appeal found that his act corresponded to the objective criteria that constituted this offence, but the latter found that it was not possible to prove the subjective element required for criminal liability under that provision, namely his intent that the applicant find out about the filming. The reason for his acquittal was therefore not the lack of a criminal-law provision covering the relevant act but the public prosecutor's inability to prove that he had the necessary intent and hence that the crime had been committed. The Government pointed out in this context that the Convention did not require a guarantee that a prosecution should result in a conviction (see, for example, *Öneryıldız v. Turkey* [GC], no. 48939/99, §§ 96 and 147, ECHR 2004-XII).

68. The Government observed that the provision on sexual molestation had been amended on 1 April 2005 and moved to Chapter 6, Article 10, of

the Penal Code. The crucial factor in criminal liability under the new wording was that the act must have been committed "in a way that is likely to violate that person's sexual integrity". Referring to the statements by the 2008 Sexual Offences Commission on the amended provision, the Government pointed out that after 1 April 2005 the provision on sexual molestation also covered situations like the one in issue, in which a person covertly filmed or photographed another person in a sexually intrusive way.

69. The Court of Appeal held in its judgment of 16 October 2007 that the act could, at least in theory, constitute an attempted child-pornography offence. Both sexual molestation and child pornography fell within the domain of public prosecution, in which the principle of objectivity was applied, whereby no prosecution should be brought if the prosecutor deemed that the conditions for a conviction were lacking. In the present case, there was no documentation as to why the applicant's stepfather was not also charged with attempted child pornography. It was therefore not possible for the Government to draw any conclusions concerning the specific grounds on which the prosecutor had decided to include only the offence of sexual molestation in the indictment. There were several possible reasons, though, why no prosecution for an attempted child pornography offence was brought.

70. One reason for this might have been that some of the necessary conditions for such an offence were not, in the view of the prosecutor, fulfilled. An example of this might have been the criterion that the image could be considered "pornographic" in common parlance. That meant that not all depictions of naked children or pictures in which a child's genitals were visible were liable to punishment, even if such images could stimulate some individuals' sex drive. What was in the picture and how the child was presented in the picture, *inter alia*, through the cutting of the picture, were of relevance to this assessment.

71. Secondly, the wording of the provision at the relevant time could have contributed to a lack of expectation on the prosecutor's part of securing a conviction for this offence, namely, the requirement that the pubertal development of the child was not complete or, if it was complete, that it was apparent from the image and its circumstances that the child was under 18 years of age.

72. Thirdly, the fact that the applicant's mother had destroyed the film immediately after the incident in September 2002, and the applicant and her mother did not report the incident to the police until September 2004, thus a long time after the incident had taken place, might have reduced the possibilities for the prosecution to prove that there had been a "pornographic" picture and that the applicant's pubertal development at the time of the event, in September 2002, had not been complete, or that it was apparent from the circumstances that she had been under 18 years of age.

73. As to the applicant's claim for damages, the Government pointed out that by virtue of Chapter 29, section 6, of the Code of Judicial Procedure, when such a claim was joined to a prosecution, the court's finding as to criminal liability was binding for the adjudication of the private claim. Accordingly, it had not been possible for the Court of Appeal to award damages based on Chapter 2, Article 3, of the Tort Liability Act as no crime within the meaning of the Penal Code had been made out. In the Government's view, however, in the criminal proceedings the applicant, represented by counsel, could have relied on other grounds for her claim for damages against her stepfather than the act cited in the indictment, notably that he had caused her personal injury by acting negligently, under Chapter 2, section 1, of the Tort Liability Act, which would have covered any physical and psychological injury. Under that provision, damages could have been awarded also on the basis that an injury had been caused by non-criminal acts carried out wilfully or negligently.

74. The Government pointed out that the courts could not award damages based on Article 8 of the Convention as a sole legal ground. The reason for this was that, although the Convention had been incorporated into Swedish law, and the Swedish Supreme Court had established the principle whereby an individual could be awarded damages from the State for violations of the Convention without the support of specific provisions in Swedish law, according to the Supreme Court's case NJA 2007 (p. 747) this principle could not be applied to claims between individuals, as it would be difficult for an individual to foresee from the case-law of the Court when he or she could be liable to pay damages.

75. Lastly, the ongoing legislative work concerning covert and illicit filming had so far resulted in the Government's approval on 1 March 2012 of a proposal entitled "Intrusive Photography", which had been modified by a proposal of 20 December 2012, and had in substance been approved by the Law Council on 7 February 2013. It was proposed that the legislation come into force on 1 July 2013. In concrete terms, under the proposal, covertly filming a person without his or her permission in a shower or bathroom would be punishable as intrusive photography. Placing, or "rigging", a camera with the aim of committing an offence of intrusive photography would also be punishable as preparation to commit such an offence.

76. In view of the foregoing, the Government contended that the absence at the relevant time of a specific provision in Swedish legislation concerning acts of covert or illicit filming could not be considered to entail a breach of the applicant's right to respect for private life under Article 8 of the Convention.

3. Third-party observations

77. The Human Rights Centre of Ghent University considered that the "significant flaw" test applied by the Chamber amounted to a lowering of standards in the Court's jurisprudence on positive obligations. In its view, the Grand Chamber should instead endorse the principles of "priority-to-rights" and "effectiveness". The former required that Convention rights be principally accorded greater weight than public interests in the proportionality analysis and that the State bear the burden of proving the proportionality of its inactions. The latter required the existence in practice of a means capable of protecting a Convention right. In the context of the positive obligation to investigate, any deficiency in the investigation that undermined the ability to establish the circumstances of the case or the perpetrator's liability fell foul of the standard of effectiveness.

C. The Court's assessment

1. General principles

78. The Court reiterates that the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities. However, this provision does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there are positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, *inter alia*, *Airey v. Ireland*, 9 October 1979, § 32, Series A no. 32).

79. The choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation, whether the obligations on the State are positive or negative. There are different ways of ensuring respect for private life and the nature of the State's obligation will depend on the particular aspect of private life that is in issue (see, for example, *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 104, ECHR 2012; *Odièvre v. France* [GC], no. 42326/98, § 46, ECHR 2003-III; *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I; and *Mosley v. the United Kingdom*, no. 48009/08, § 109, 10 May 2011). Where a particularly important facet of an individual's existence or identity is at stake, or where the activities at stake involve a most intimate aspect of private life, the margin allowed to the State is correspondingly narrowed (see *Mosley*, cited above, § 109).

80. Regarding the protection of the physical and psychological integrity of an individual from other persons, the Court has previously held that the

authorities' positive obligations – in some cases under Articles 2 or 3 of the Convention and in other instances under Article 8 taken alone or in combination with Article 3 – may include a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals (see, *inter alia*, *Osman v. the United Kingdom*, 28 October 1998, §§ 128-30, *Reports of Judgments and Decisions* 1998-VIII, §§ 128-30; *Bevacqua and S. v. Bulgaria*, no. 71127/01, § 65, 12 June 2008; *Sandra Janković v. Croatia*, no. 38478/05, § 45, 5 March 2009; *A v. Croatia*, no. 55164/08, § 60, 14 October 2010; and *Đorđević v. Croatia*, no. 41526/10, §§141-43, ECHR 2012).

81. In respect of children, who are particularly vulnerable, the measures applied by the State to protect them against acts of violence falling within the scope of Articles 3 and 8 should be effective and include reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge and effective deterrence against such serious breaches of personal integrity (see *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V, and *M.P. and Others v. Bulgaria*, no. 22457/08, § 108, 15 November 2011). Such measures must be aimed at ensuring respect for human dignity and protecting the best interests of the child (see *C.A.S. and C.S. v. Romania*, no. 26692/05, § 82, 20 March 2012, and *Pretty v. the United Kingdom*, no. 2346/02, § 65, ECHR 2002-III).

82. Regarding, more specifically, serious acts such as rape and sexual abuse of children, where fundamental values and essential aspects of private life are at stake, it falls upon the member States to ensure that efficient criminal-law provisions are in place (see, for example, *X and Y v. the Netherlands*, 26 March 1985, § 27, Series A no. 91, and *M.C. v. Bulgaria*, cited above, § 150). This obligation also stems from other international instruments, such as, *inter alia*, Articles 19 and 34 of the United Nations Convention on the Rights of the Child and Chapter VI, "Substantive criminal law", of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (see paragraphs 51 and 52 above).

83. Concerning such serious acts, the State's positive obligation under Articles 3 and 8 to safeguard the individual's physical integrity may also extend to questions relating to the effectiveness of the criminal investigation (see, among other authorities, *C.A.S. and C.S. v. Romania*, cited above, § 72; *M.P. and Others v. Bulgaria*, cited above, §§ 109-10; and *M.C. v. Bulgaria*, cited above, § 152) and to the possibility of obtaining reparation and redress (see, *mutatis mutandis*, *C.A.S. and C.S. v. Romania*, cited above, § 72), although there is no absolute right to obtain the prosecution or conviction of any particular person where there were no culpable failures in seeking to hold perpetrators of criminal offences accountable (see, for example, *Brecknell v. the United Kingdom*, no. 32457/04, § 64,

27 November 2007, and *Szula v. the United Kingdom* (dec.), no. 18727/06, 4 January 2007).

84. As to acts which do not attain the seriousness of those in issue in *X and Y v. the Netherlands* (cited above) and *M.C. v Bulgaria* (cited above), the Court has examined under Article 8 the State's obligation to protect, for example, a minor against malicious misrepresentation (see *K.U. v. Finland*, no. 2872/02, §§ 45-49, ECHR 2008). The act in that case did not involve any physical violence, but could not be considered trivial as it entailed a potential threat to the minor's physical and mental welfare, brought about by the impugned situation, namely, that he was made the target for approaches by paedophiles. The act constituted a criminal offence under domestic law and the Court considered that practical and effective protection of the applicant required the availability of a remedy enabling the actual offender to be identified and brought to justice.

85. More generally, however, in respect of less serious acts between individuals, which may violate psychological integrity, the obligation of the State under Article 8 to maintain and apply in practice an adequate legal framework affording protection does not always require that an efficient criminal-law provision covering the specific act be in place. The legal framework could also consist of civil-law remedies capable of affording sufficient protection (see, *mutatis mutandis*, *X and Y v. the Netherlands*, cited above, §§ 24 and 27, and *K.U. v. Finland*, cited above, § 47). The Court notes, for example, that in some previous cases concerning the protection of a person's picture against abuse by others, the remedies available in the member States have been of a civil-law nature, possibly combined with procedural remedies such as the granting of an injunction (see, *inter alia*, *Von Hannover*, cited above; *Reklos and Davourlis v. Greece*, no. 1234/05, 15 January 2009; and *Schüssel v. Austria* (dec.), no. 42409/98, 21 February 2002).

2. Application of the above-mentioned principles to the present case

86. The Court observes that the Court of Appeal found that the applicant's stepfather's act constituted a violation of her personal integrity (see paragraph 23 above). The Court endorses this finding and considers, on the one hand, that the circumstances were aggravated by the fact that the applicant was a minor, that the incident took place in her home, where she was supposed to feel safe, and that the offender was her stepfather, a person whom she was entitled and expected to trust. This event affected the applicant in highly intimate aspects of her private life. On the other hand, it observes that the offence in question did not involve any physical violence, abuse or contact. While noting the domestic courts' finding that her stepfather's act was certainly reprehensible, in the Court's view the act in question did not attain the seriousness of the grave acts in the case-law cited above which concerned rape and sexual abuse of children (see paragraph 81

above), considered not only under Article 8 of the Convention but also Article 3.

87. On the latter point, it is worth noting that the applicant, apart from complaining about the lack of a criminal remedy with reference to the construction of the molestation offence and the absence in Swedish legislation of a separate offence of covert or illicit filming, also complained that the Swedish system did not afford her a civil remedy to protect her against her stepfather's act. More specifically, the applicant maintained that the domestic courts had not fulfilled their positive obligations on account of their failure to award her compensation either on the basis of the Tort Liability Act or the Convention. Accordingly, the applicant did not claim that recourse to criminal law was the only way that Sweden could fulfil its obligation under Article 8 to protect her against her stepfather's act.

88. The applicant did not complain about the effectiveness of the criminal investigation carried out by the Swedish authorities. The Court has not found any evidence that the manner in which the investigating authorities and the public prosecution carried out their tasks was ineffective in safeguarding the applicant's physical integrity, or that they failed to comply with their positive obligation to conduct an effective prosecution in order to ensure adequate protection of the applicant's rights under Article 8 of the Convention.

89. In the light of these preliminary observations, the Court will proceed to examine whether, in the specific circumstances of the case before it, Sweden had an adequate legal framework providing the applicant with protection against the concrete actions of her stepfather and will, to this end, assess each of the remedies allegedly available to her.

90. This approach, it should be emphasised, differs from that followed by the Chamber, which affirmed that "only significant flaws in legislation and practice, and their application, would amount to a breach of the State's positive obligations under Article 8". This was with reference to the terms used in *M.C. v. Bulgaria* (cited above, § 167) in relation to the scope of the State's positive obligations under Articles 3 and 8 of the Convention in affording protection against rape and sexual abuse. However, in that judgment the Court had applied the "significant flaw" test to "alleged shortcomings in the *investigation*", pointing out that it "was not concerned with allegations of errors or isolated omissions" (ibid., § 168) and holding that the shortcomings were "significant" (see, for instance, *M.C. v. Bulgaria*, cited above, §§ 179 and 184; see also *M. and C. v. Romania*, no. 29032/04, §§ 112 et seq., 27 September 2011; compare and contrast *Siliadin v. France*, no. 73316/01, § 130, ECHR 2005-VII, where such wording was used in relation to a review of legislation and practice under Article 4 of the Convention).

91. The Grand Chamber considers that such a significant-flaw test, while understandable in the context of investigations, has no meaningful role in an

assessment as to whether the respondent State had in place an *adequate legal framework* in compliance with its positive obligations under Article 8 of the Convention since the issue before the Court concerns the question of whether the law afforded an acceptable level of protection to the applicant in the circumstances.

(a) Child pornography

92. From the outset, the Court notes that a considerable part of the parties' pleadings before it were devoted to the existence under Swedish law of the offence of attempted child pornography and its relevance to the case under consideration. This had its background in the fact that when acquitting the applicant's stepfather of the charge of sexual molestation (under Chapter 6, Article 7 § 3, of the Penal Code) in its judgment of 16 October 2007, the Court of Appeal affirmed in an *obiter dictum* that, considering the applicant's age, the act in question could, at least in theory, have constituted attempted child pornography under Chapter 16, Article 10a, of the Penal Code (see the provisions cited in paragraphs 31-32 above). However, since no charge of that kind had been brought against the applicant's stepfather, it could not examine whether he could be held liable for such a crime (see paragraph 24 above).

93. The Government were of the opinion that the type of act in issue in the applicant's case could, under certain circumstances, fall not only within the provisions on sexual molestation but also within those on attempted child pornography.

94. However, whilst acknowledging that no information was available as to whether at the relevant time the public prosecutor had given any consideration to indicting the applicant's stepfather with attempted child pornography, the Government enumerated a number of possible reasons why the prosecutor might have decided not to do so, notably a series of difficulties in adducing sufficient evidence to show that there had been a "pornographic" picture (see paragraphs 69 to 72 above). For instance, they pointed out that the applicant's mother had destroyed the film immediately after the incident in September 2002 and that the applicant and her mother had not reported the incident to the police until September 2004, thus a long time after the incident had taken place.

95. The Court has further taken note of the fact that, in the applicant's view, expressed with reference, *inter alia*, to the preparatory works to the provision on child pornography and to a legal opinion (see paragraph 61 above), even if the film had existed her stepfather could not have been convicted of attempted child pornography. This was because the basic condition for the offence, namely that the picture in question be "pornographic", was absent. Images of a 14-year-old girl undressing before taking a shower in an otherwise everyday situation could not be regarded as pornographic within the meaning of Chapter 16, Article 10a, of the Penal

Code concerning child pornography. In order for the film to be pornographic, the applicant's stepfather would have had to manipulate the film, for example by making it appear as if she had been posing for him, or otherwise place the film in a pornographic context. Had a charge been brought for the offence of attempted child pornography in the instant case, it would not have had any prospect of success. The applicant requested the Court to disregard the existence of this offence under the relevant national law in its examination of her complaint.

96. The Court observes that the term "pornographic picture" was not defined in the Penal Code and that the preparatory works referred to by the applicant stated that

> "a certain prudence was called for, so that the criminalised area would not become too wide or difficult to assess. It was not the intention to criminalise every exposure of naked children or all pictures in which a child's genitals may be perceived, even if such pictures may stimulate some people's sexual instincts. In order for the handling of a picture to be illegal, it was a condition that it be pornographic according to common parlance and general values" (see paragraph 33 above).

97. Against this background, the possibility that the offence of attempted child pornography might have afforded the applicant protection in respect of the specific act in issue seems rather theoretical. The Court is not convinced that her stepfather's act was covered by the said offence and sees no need in the particular circumstances to speculate on what the implications would have been for the protection of the applicant's right to respect for her private life under Article 8 of the Convention had a charge for such conduct also been brought.

(b) Sexual molestation

98. Another issue is the question whether the offence of sexual molestation provided the applicant with the protection required by Article 8 of the Convention. Before 1 April 2005, the relevant part of the provision on sexual molestation under Chapter 6, Article 7 § 3, of the Penal Code read as follows:

> "[A sentence for sexual molestation shall be imposed] if a person exposes himself or herself in such a manner that the nature thereof gives offence or otherwise manifestly behaves indecently by word or deed towards the latter in a way that flagrantly violates a sense of propriety."

99. The applicant's stepfather was convicted accordingly by the District Court on 14 February 2006. The Court of Appeal acquitted him by a judgment of 16 October 2007 since it considered that, legally, the act could not constitute sexual molestation. The Court of Appeal found it established that his motive had been to film the applicant covertly for a sexual purpose. It was thus regarded as certain that he did not intend the applicant to find out about the filming. Nor, according to the court, was he indifferent to the risk that she would find out about it. The Court of Appeal then referred to a

judgment (NJA 1996, p. 418) in which the Supreme Court had held, among other things, that covert filming was not a crime in itself as in Swedish law there was no general prohibition against filming an individual without his or her consent. Following that line of reasoning, and although finding that the act in question constituted a violation of personal integrity, notably in the light of the applicant's age and relationship to her stepfather, the Court of Appeal found that he could not be held criminally responsible for the isolated act of filming the applicant without her knowledge. Even if she had indeed obtained knowledge of the filming afterwards, the court reiterated, this knowledge was not covered by her stepfather's intent. The Supreme Court refused leave to appeal on 12 December 2007.

100. In order for the offence of sexual molestation under Chapter 6, Article 7 § 3, of the Penal Code to be made out, it was thus a requirement when carrying out the act that the offender intended that the victim find out about the sexual molestation or that the offender was indifferent to the risk that the victim would find out about it. In other words, the victim could not be considered sexually molested unless he or she was aware of the molestation. It will be recalled that the applicant's stepfather was indeed convicted of sexual molestation under the said provision as regards the two counts of indecent behaviour against the applicant's 16-year-old cousin, namely, for having caressed her thigh and for having expressed his desire to have sex with her (see paragraph 14 above).

101. This interpretation of the provision on sexual molestation by the Court of Appeal was confirmed in another case by the Supreme Court in a judgment of 23 October 2008 (NJA 2008, p. 946) (see paragraph 40 above). The Supreme Court acquitted a person of molestation and reiterated at the same time that Swedish law contained no general prohibition against covert filming. It further noted that although the need for a strengthened legal framework in this regard had been acknowledged in Swedish legislative work as early as the 1960s, it had so far not led to any concrete results. It found it highly questionable whether the fact that acts of filming an individual in situations where such filming seriously violated the personal integrity of the person concerned were left wholly unpunished under Swedish law was compatible with the requirements of Article 8 of the Convention.

102. The applicant maintained that the construction of the provision on sexual molestation as worded before 1 April 2005 was open to criticism. In so far as this criticism was not only aimed at the legislators but also aimed at the interpretation by the Court of Appeal in its judgment of 16 October 2007, and subsequently confirmed by the Supreme Court in another case, the Court reiterates that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 49, 20 October 2011).

The Court agrees with the applicant, however, that it was not on account of a lack of requisite evidence, as maintained by the Government, that her stepfather was acquitted of sexual molestation, but rather, as pointed out by the Court of Appeal, because, legally at the relevant time, the act could not constitute sexual molestation.

103. The provision on sexual molestation was amended on 1 April 2005, thus after the act in the present case had been committed in September 2002, and before the acquittal of the applicant's stepfather in the criminal proceedings. Thereafter, the provision on sexual molestation also included acts carried out "in a way that [was] likely to violate that person's sexual integrity". Subsequently, the 2008 Sexual Offences Commission stated that in their view the amended provision included actions directed at persons who were unconscious or asleep and that it could also be used in situations where a person had covertly filmed or photographed another person in a sexually intrusive way.

104. The Court observes that the Government have not pointed to any domestic case-law in which the amended provision on sexual molestation was applied to covert filming carried out after 1 April 2005. In any event, it suffices to conclude that the provision on sexual molestation as worded before 1 April 2005, and interpreted in the present case by the Court of Appeal in their judgment of 16 October 2007, which became final when the Supreme Court refused leave to appeal, could not legally cover the act in issue and thus did not protect the applicant against the lack of respect for her private life under Article 8 of the Convention.

(c) Recent legislation on covert filming

105. Nor does it appear that the above-mentioned gaps in the substantive protection of the applicant's Article 8 rights were in any way remedied by any other existing national provisions at the time. In this connection, the Court cannot but note that the absence of such provisions has long been a matter of concern in Sweden and that many other member States have legislation in place covering the isolated act of covert or non-consensual filming/photographing of an individual (child or adult) for other than sexual purposes, either under criminal or civil law (see paragraph 55 above). According to the Supreme Court judgment of 23 October 2008 (NJA 2008, p. 946 – see paragraph 40 above) the need for a strengthened legal framework against covert filming had already been acknowledged in Swedish legislative work in the 1960s, but had not yet led to any concrete results. The Supreme Court found it highly questionable whether the fact that acts of filming of an individual in situations where such filming deeply violated the personal integrity of the person concerned were left wholly unpunished under Swedish law was compatible with the requirements of Article 8 of the Convention (see also paragraph 101 above).

106. The Court notes that the most recent proposal by the Government, of 20 December 2012, entitled "Intrusive Photography", has been adopted by Parliament. In concrete terms, under the new provisions, which came into force on 1 July 2013, covertly filming a person without his or her permission in a shower or bathroom would be punishable as intrusive photography. Placing, or "rigging", a camera with the aim of committing an intrusive photography offence would also be punishable as preparation to commit such an offence (see paragraph 43 above).

107. The Court further observes that the legislation is designed to cover an act such as the one in issue in the present case. It also notes that the principles laid down in the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, which are part of the Swedish Constitution, notably as regards the protection of procurers of information to the media, were carefully considered before the said bill could be presented to Parliament. However, as was undisputed, the applicant could not rely on the new legislation regarding an incident which took place in 2002 and could not avail herself of any such protection of her right to respect for her private life.

(d) Civil-law remedies

108. In this case recourse to the criminal law was, in the Court's view, not necessarily the only way that the respondent State could fulfil its obligations under Article 8 of the Convention. Accordingly, the question arises whether the applicant had a civil remedy available to her.

109. In this connection, it is to be observed that the applicant joined her civil claim for damages against her stepfather to the criminal proceedings against him. Thus, on 20 January 2006, represented by counsel, the applicant submitted a claim for damages of SEK 25,000, with SEK 15,000 of this sum as compensation for violation of her personal integrity and SEK 10,000 for pain and suffering. As the basis for her claim the applicant referred to "the criminal act for which her stepfather was being prosecuted".

110. According to the Government, the claim was founded partly on section 1 and partly on section 3 of Chapter 2 of the Tort Liability Act (see paragraph 37 above).

111. In its judgment of 14 February 2006 convicting the applicant's stepfather, the District Court ordered him to pay the applicant damages in the amount of SEK 20,000. However, when acquitting him in its judgment of 16 October 2007, because the act could not legally constitute sexual molestation, the Court of Appeal also dismissed the applicant's claim for damages. The Government pointed out in this connection that by virtue of Chapter 29, section 6, of the Code of Judicial Procedure, when a civil claim is joined to a prosecution, the court's finding in the matter of criminal liability is binding for the adjudication of the private claim. Accordingly, it was not possible for the Court of Appeal to award damages based on

Chapter 2, section 3, of the Tort Liability Act as no crime within the meaning of the Penal Code had been made out. This conclusion is consistent with the statement of the Supreme Court in the subsequent judgment, NJA 2008, p. 946 (see paragraph 40 above) of 23 October 2008, that Swedish law contained no general prohibition against covert filming and that in cases where such filming did not constitute a crime, damages could not be awarded.

112. Nevertheless, the Government contended that in the criminal proceedings the applicant could have relied on other grounds in support of the claim for damages directed against her stepfather, namely, that he had caused her personal injury by acting negligently under Chapter 2, section 1, of the Tort Liability Act, which could have covered any physical and psychological injury (see paragraph 73 above).

113. In this regard, it should be borne in mind, however, that the applicant's stepfather had at no time during the investigation or the criminal proceedings alleged that he had left the camera in recording mode in the laundry basket in the bathroom by accident. On the contrary, he acknowledged that it had been a wilful but impulsive act. Therefore, in the Court's view, the applicant and her counsel could not be expected to have invoked negligence just for the sake of ensuring that her claim be dealt with in the event that the act was not deemed to be covered by the offence of sexual molestation.

114. Accordingly, the Court is not convinced that in the specific situation at hand, where the act in issue was not legally covered by the provision on sexual molestation and where covert filming in general did not constitute a crime, the applicant had a civil remedy available to her.

(e) Compensation on the basis of the Convention

115. Lastly, the Court has considered the applicant's contention that the domestic courts in the criminal proceedings could have awarded her compensation on the basis of the Convention alone but had failed do so of their own motion.

116. As pointed out by the Government, although the Supreme Court had established a principle whereby an individual could be awarded damages from the State for violations of the Convention without the support of specific provisions in Swedish law, this could not apply to claims between individuals as it would be difficult for an individual to foresee from the Court's case-law when he or she could be liable to pay damages (NJA 2007, p. 747, see paragraph 47 above). Having regard to the Swedish domestic practice on compensation for violations of the Convention (see paragraphs 45 to 50 above), including the aforementioned Supreme Court ruling, the Court is not persuaded that this alleged avenue of redress really existed or that it could have made up for the absence of a civil remedy in the specific situation at hand as found above.

(f) Conclusion

117. Having regard to the all the above-mentioned considerations, the Court is not satisfied that the relevant Swedish law, as it stood in September 2002 when the specific act of the applicant's stepfather covertly attempting to film the applicant naked in their bathroom for a sexual purpose occurred, ensured protection of her right to respect for her private life in a manner that, notwithstanding the respondent State's margin of appreciation, complied with its positive obligations under Article 8 of the Convention. The act in question violated the applicant's integrity; it was aggravated by the fact that she was a minor, that the incident took place in her home, where she was supposed to feel safe, and that the offender was her stepfather, a person whom she was entitled and expected to trust. However, as the Court has found above, neither a criminal remedy nor a civil remedy existed under Swedish law that could enable the applicant to obtain effective protection against the said violation of her personal integrity in the concrete circumstances of her case.

Accordingly, there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

118. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

119. The applicant claimed 20,000 euros (EUR) in compensation for non-pecuniary damage.

120. The Government found that amount excessive. In their view, an amount not exceeding a total of EUR 3,000 would be sufficient to compensate the applicant.

121. The Court considers that the applicant must have suffered non-pecuniary damage that is not sufficiently compensated for by the mere finding of a violation of Article 8. Ruling on an equitable basis, it awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

122. The applicant claimed 516,410 Swedish kronor (SEK) (corresponding to approximately EUR 60,500) including value-added tax (VAT) for costs and expenses, which comprised:

(i) SEK 146,250 for lawyers' fees incurred in the proceedings before the Chamber, equal to 65 hours at an hourly rate of SEK 1,800 (exclusive of VAT);

(ii) SEK 353,750 for lawyers' fees incurred in the proceedings before the Grand Chamber, equal to 141.50 hours at an hourly rate of SEK 2,000 (exclusive of VAT);

(iii) SEK 11,021 for a legal opinion obtained;

(iv) SEK 5,389 for travel costs and an allowance for expenses incurred by her three counsel in attending the hearing before the Grand Chamber.

In connection with the latter item, the applicant also claimed compensation for expenses amounting to EUR 3,260.60 for flight tickets and accommodation costs incurred by her and her three counsel in attending the hearing before the Grand Chamber.

123. The Government found the lawyers' fees excessive both as to the hours and the hourly rate. They considered a total amount of 80 hours reasonable as well as an hourly rate corresponding to the Swedish hourly legal aid fee, which for 2013 was SEK 1,242 (exclusive of VAT). Regarding the other costs and expenses, the Government found that the cost of the legal opinion had been unnecessarily incurred. They did not object to the remainder of the claims as such.

124. According to the Court's established case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum.

125. In respect of the lawyers' fees, be this before the Chamber or the Grand Chamber, the Court can accept an hourly rate as claimed by the applicant. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 25,000 including VAT (see, for example, *X and Others v. Austria* [GC], no. 19010/07, § 163, ECHR 2013; *Nada v. Switzerland* [GC], no. 10593/08, § 245, ECHR 2012; and *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, § 117, ECHR 2011).

126. Turning to the other costs and expenses before the Grand Chamber, it appears that the amount included plane tickets for five persons. The Court can only award travel expenses for the applicant and her three counsel. It therefore awards the applicant EUR 4,700 under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds*, by sixteen votes to one, that there has been a violation of Article 8 of the Convention;

2. *Holds*, by sixteen votes to one,
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 29,700 (twenty-nine thousand seven hundred euros) under the head of costs and expenses, plus any tax that may be chargeable to the applicant in this respect;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 November 2013.

Erik Fribergh	Josep Casadevall
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Pinto de Albuquerque;
(b) dissenting opinion of Judge Kalaydjieva.

J.C.
E.F.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

The *Söderman* case raises three fundamental legal questions, namely, the international obligation to criminalise non-consensual filming or photography; the limits of an evolutive interpretation of criminal law in accordance with the respondent State's international obligations; and the legal force of the European Convention on Human Rights ("the Convention") as a direct basis for awarding compensation for non-pecuniary damage. I concur with the majority in finding a violation of Article 8, though for different reasons. In addition, I would have addressed separately the complaint under Article 13 taken in conjunction with Article 8 and found a violation thereof.

The international obligation to criminalise non-consensual filming or photography

The Convention guarantees the right to protection of one's image. Filming or photographing a person without her or his consent infringes core personality rights, since a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development[1]. The ambit of protection of this right is defined broadly, to include all situations and events in which a person's image is captured without his or her knowledge and consent and regardless of the private nature of the person's environment. It also covers unauthorised use by the offender, or the offender's permission of use by a third person, of images that have been legally obtained[2].

The protection of a person's image against abuse by others is an obligation of States Parties, which must prevent violations from occurring and provide for remedies for violations that have already occurred[3]. States do not have a discretion when providing for these remedies. Where a

1. See *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 96, ECHR 2012. With regard to minors, the exercise of the right to protection of their image is overseen by their parents (see *Reklos and Davourlis v. Greece*, no. 1234/05, § 41, 15 January 2009).
2. See *Reklos and Davourlis*, cited above, § 40.
3. See, on images of public figures, *Schüssel v. Austria* (dec.), no. 42409/98, 21 February 2002; *Krone Verlag GmbH & Co. KG v. Austria*, no. 34315/96, § 37, 26 February 2002; and *Von Hannover*, cited above, § 57; and, on images of non-public persons, *Sciacca v. Italy*, no. 50774/99, § 28, ECHR 2005-I, and *Reklos and Davourlis*, cited above, § 35.

particularly important facet of the individual's personality is at stake, the State's margin of appreciation is narrow[4].

The obligation to criminalise child pornography derives from Articles 16, 19 and 34 (c) of the United Nations Convention on the Rights of the Child[5] and Article 3 of the Optional Protocol to the United Nations Convention on the Rights of the Child, on the sale of children, child prostitution and child pornography[6]. Articles 6 and 7 § 1 of the International Labour Organisation Worst Forms of Child Labour Convention (no. 182) oblige States Parties to take steps to eliminate, with the necessary penal sanctions, the sale of children, child prostitution and child pornography, including the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances[7]. The criminalisation of child pornography is also obligatory under Article 20 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse[8] and Article 9 of the Council of Europe Convention on Cybercrime[9]. The Council of the European Union adopted,

4. See *Dudgeon v. the United Kingdom*, 22 October 1981, § 52, Series A no. 45; *Norris v. Ireland*, 26 October 1988, § 46, Series A no. 142; *A.D.T. v. the United Kingdom*, no. 35765/97, § 38, ECHR 2000-IX; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI; and *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I.

5. The Convention has 193 States Parties and the respondent State ratified it in 1990. For the purpose of this opinion, I will consider any person under the age of 18 to be a child, according to the standard set by the United Nations Convention. This does not prevent States Parties to the European Convention on Human Rights from extending the legal protection of children beyond that age.

6. The Protocol was adopted in 2000 and came into force in 2002. As of October 2013, 166 States are party to the Protocol, including Sweden, which ratified it on 19 January 2007, that is, before the Svea Court of Appeal's judgment of 16 October 2007. Article 3 (c) of the Protocol requires States Parties to criminalise producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography, namely, "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes". The Committee on the Rights of the Child has nevertheless encouraged countries to criminalise mere possession (for example, United Nations Committee on the Rights of the Child, Concluding Observations for Costa Rica of 2 February 2007, §§ 14-15, and for Chile of 1 February 2008, §§ 23-24).

7. The Convention came into force in 2000, and has 174 States Parties. Sweden ratified it in 2001.

8. CETS no. 201. The Convention was approved in 2007, entered into force in 2010, has 25 States Parties and was ratified by Sweden in 2013. It contains obligations to criminalise conduct for which criminalisation is not expressly required by the United Nations Optional Protocol on the sale of children, child prostitution and child pornography, such as the possession of child pornography, that is, any visual depiction of a child engaged in real or simulated sexually explicit conduct, or any representation of a child's sexual organs for primarily sexual purposes.

9. CETS no. 185. The Convention was approved in 2001, came into force in 2004, has 39 States Parties and has been signed, but not ratified, by the respondent State.

in 2003, the Framework Decision on combating the sexual exploitation of children and child pornography (2004/68/JHA) according to which member States are obliged to criminalise the production, distribution, dissemination, transmission, supplying or making available, acquisition and possession of child pornography and provide for a minimum level of maximum penalties incurred for these offences[10]. The European Parliament and the Council approved Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, which replaced the Council Framework Decision of 2004, but maintained the criminalisation obligation[11]. In Europe, forty-one countries have criminalised child pornography, and in the United States both the federal law and the law of all fifty States make provision for the same offence[12]. In

10. Child pornography in the Framework Decision means pornographic material that visually depicts or represents a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or a real person appearing to be a child involved or engaged in the conduct mentioned above; or realistic images of a non-existent child involved or engaged in the conduct mentioned above.

11. Child pornography in the Directive has a broader definition, meaning any material that visually depicts a child engaged in real or simulated sexually explicit conduct; any depiction of the sexual organs of a child for primarily sexual purposes; any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes.

12. In addition to Sweden, these are Albania (Article 117 of the Criminal Code), Austria (Article 207a § 1, no. 1, of the Austrian Criminal Code), Azerbaijan (Article 242 of the Criminal Code), Belgium (Article 383 *bis* of the Criminal Code), Bosnia and Herzegovina (Article 199 of the Criminal Code of Republika Srpska and Article 211 of the Criminal Code of the Federation of Bosnia and Herzegovina), Bulgaria (Article 159 of the Criminal Code), Croatia (Article 163 of the Criminal Code), Czech Republic (Article 192 of the Criminal Code), Denmark (Article 230 of the Criminal Code), Estonia (Article 178 of the Criminal Code), Finland (Articles 18, 18a and 19 of Chapter 17 of the Criminal Code), France (Article 227-23 of the Criminal Code), Georgia (Article 255 of the Criminal Code), Germany (Article 184b § 4 of the Criminal Code), Greece (Article 348 of the Criminal Code), Hungary (Article 204 of the Criminal Code), Iceland (Articles 209 and 210a of the Criminal Code and section 99(3) of the Child Protection Act), Ireland (section 3(2) of the Child Trafficking and Pornography Act), Italy (Article 610 *quater* of the Criminal Code), Latvia (section 1(1) of the Limitation of Pornography Act 2007), Liechtenstein (Article 219 § 1, no. 1, of the Criminal Code), Lithuania (Article 162 of the Criminal Code), Luxembourg (Article 384 of the Criminal Code), Macedonia (Article 193a § 1 of the Criminal Code), Moldova (Article 208 of the Criminal Code), Monaco (Article 294-3 of the Criminal Code), Montenegro (Article 211 of the Criminal Code), the Netherlands (Article 240 b of the Criminal Code), Norway (Article 201 of the Criminal Code, according to the case-law), Poland (Article 202 § 4 of the Criminal Code), Portugal (Article 176 of the Criminal Code), Romania (section 51 of Law no. 161/2003), Russia (Article 242.1 and 2 of the Criminal Code), Slovakia (Articles 368 and 370 of the Criminal Code), Slovenia (Article 176 § 2 of the Criminal Code), Spain (Articles 189 and 197 § 6 of the Criminal Code), Switzerland (Article 197 § 3 of the Criminal Code), Turkey (Article 226 § 3 of the Criminal Code), the United Kingdom (section 1 of the Protection of Children Act

view of this broad consensus and constant practice, the criminalisation of child pornography, namely, any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes, is now part of international customary law, binding on all States.

Obligations to criminalise are not new under the Convention. The European Court of Human Rights ("the Court") has already considered that rape[13], forced labour[14], wilful attack on the physical integrity of a person[15], human trafficking[16] and the disclosure of certain confidential items of information[17] must be criminalised[18], but negligent violations of the right to life and physical integrity must not[19]. With regard to children, the Court has established the principle that any wilful offence against the physical and moral welfare of children should be criminalised[20] and punished with a

1978), United States of America (section 18 USC §§ 2251, 2252 and 2252a) and Ukraine (Article 301 § 4 of the Criminal Code).

13. See *X and Y v. the Netherlands*, 26 March 1985, § 27, Series A no. 91, and *M.C. v. Bulgaria,* no. 39272/98, §§ 50, 166, ECHR 2003-XII.

14. *Siliadin v. France*, no. 73316/01, § 112, ECHR 2005-VII, and *C.N. and V. v. France*, no. 67724/09, §§ 105-08, 11 October 2012.

15. *Sandra Janković v. Croatia*, no. 38478/05, § 36, 5 March 2009.

16. *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 284 and 288, ECHR 2010.

17. *Stoll v. Switzerland* [GC], no. 69698/01, § 155, ECHR 2007-V.

18. The Court not only reviews the political decision not to criminalise certain conduct, but also the excessive or disproportionate criminalisation of certain conduct, such as in *Dudgeon*, cited above, § 60; *Norris*, cited above, § 46; *Modinos v. Cyprus*, 22 April 1993, § 24, Series A no. 259; *A.D.T.*, cited above, § 38 (private homosexual acts between consenting adults); *S.L. v. Austria*, no. 45330/99, § 44, ECHR 2003-I (homosexual acts of adult men with consenting adolescents between 14 and 18 years of age); *Vajnai v. Hungary*, no. 33629/06, § 54-56, ECHR 2008 (wearing of red star); *Altug Taner Akçam v. Turkey*, no. 27520/07, §§ 93-95, 25 October 2011 (insulting Turkishness); *Mosley v. the United Kingdom*, no. 48009/08, § 129, 10 May 2011 (non-compliance with pre-notification requirement to publish news on private life); *Akgöl and Göl v. Turkey*, nos. 28495/06 and 28516/06, § 43, 17 May 2011 (participation in an unlawful but peaceful demonstration); *Wizerkaniuk v. Poland*, no. 18990/05, §§ 82-83 and 86, 5 July 2011 (publication of unauthorised verbatim quotations); *Mallah v. France*, no. 29681/08, § 40, 10 November 2011 (assisting illegal entry, circulation or stay of foreigner in the national territory); *Gillberg v. Sweden* [GC], no. 41723/06, §§ 68-71, 3 April 2012 (misuse of office due to refusal of access to research material owned by a public university), *Stübing v. Germany*, no. 43547/08, §§ 63-65, 12 April 2012 (incest); and *Şükran Aydın and Others v. Turkey*, nos. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09, § 55, 22 January 2013 (use of mother tongue in political campaign).

19. See *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I; *Vo v. France* [GC], no. 53924/00, §§ 90-94, ECHR 2004-VIII; *Dodov v. Bulgaria*, no. 59548/00, § 87, 17 January 2008; *Branko Tomašić and Others v. Croatia*, no. 46598/06, § 64, 15 January 2009; and *Maiorano and Others v. Italy*, no. 28634/06, § 128, 15 December 2009.

20. *K.U. v. Finland*, no. 2872/02, § 46, ECHR 2008. The case dealt with a minor of 12 years of age who was the subject of an unauthorised advertisement of a sexual nature on an Internet dating site. In *C.A.S. and C.S. v. Romania* (no. 26692/05, 20 March 2012), the Court clearly recognised that States had an obligation under Articles 3 and 8 to ensure the

deterrent penalty[21]. Child pornography is certainly among these, having regard to its serious ethical censurability and to its reprehensibility under international customary and treaty law. Yet in view of the threshold of explicitness of the acts depicted and the required sexual purpose of the perpetrator, this criminal offence is subject to evidentiary problems. Thus, in order to provide full and effective protection of children, covert filming of children, with or without a sexual purpose on the part of the perpetrator, and in or outside a pornographic setting, should be criminalised. Such criminalisation is in line with the Convention guarantee of the child's right to protection of his or her image and the prevailing international prohibition of any kind of abuse or violation of the various facets of the child's personality, which includes his or her image.

Furthermore, as a matter of principle, adults deserve the same legal protection as children. There is no plausible reason to criminalise the abuse of a child's image and not that of an adult's, or the other way round. It cannot reasonably be argued that the violation of an adult's image has less ethical weight *per se* than that of a child. All are human beings, with the same personality right to protection of their own image. In fact, in some cases it is extremely difficult to distinguish an adult from a minor, and uncertainty about the victim's age should not prevent criminal prosecution. Hence, guaranteeing the Convention right to protection of one's image requires the criminalisation of covert filming and photographing of children and adults[22].

The legal framework in the respondent State

At the relevant time, there were two criminal provisions that could in theory be applied to the facts: sexual molestation (Chapter 6, Article 7, of the Penal Code) and child pornography (Chapter 16, Article 10a § 1, of the same Code)[23].

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effective criminal investigation of cases involving violence against children, referring to the international obligations the respondent State had entered into for the protection of children against any form of abuse.

21. See *Okkalı v. Turkey*, no. 52067/99, § 73, ECHR 2006-XII, and *Darraj v. France*, 34588/07, § 49, 4 November 2010.

22. Evidently, all grounds of justification and exculpation shall apply, such as in the case of undercover photography or filming by journalists when this contributes to a debate of public interest. Domestic courts and prosecutors must take into account fundamental rights, such as freedom of expression, when implementing criminal-law provisions, and specifically the provision criminalising covert filming or photographing of adults and children. In addition, States Parties may provide a defence in respect of conduct related to "pornographic material" having artistic, medical, scientific or similar merit.

23. Other criminal-law provisions invoked by the Government, such as breach of domiciliary peace, unlawful intrusion or defamation (Government observations to the Grand Chamber, paragraph 22), are not applicable, for obvious reasons. No case-law was submitted by the Government to support their contention that these provisions could be

Sexual molestation presupposes a specific action on the part of the offender, namely: (a) touching a child under 15 years of age; (b) inducing a child to undertake or participate in an act with sexual implications; (c) inducing a child of 15 years of age or more, but younger than 18, by coercion, seduction or other improper influence, to undertake or participate in a pornographic act; (d) exposing oneself; (e) behaving indecently. In any case the offence requires both the victim's knowledge of the offender's conduct at the moment it is carried out and the offender's intent that the victim find out about the conduct. That means that the core of the offence lies in the improper conduct of the offender with regard to the victim, with the latter's knowledge.

Child pornography also presupposes a specific action by the offender, such as portraying a child in a pornographic picture; disseminating, transferring, granting use, exhibiting, acquiring or offering such a picture; facilitating dealings with regard to such a picture; or possessing such a picture. The offence requires that the pubertal development of the child be incomplete or that it be apparent from the image or its attendant circumstances that the child is under 18 years of age. This crime is punishable both when brought to its completion and when attempted (Chapter 16, Article 7, and Chapter 23, Article 1). Sweden does not have a detailed legal definition of child pornography, but in the governmental bill containing this provision it was stated that "[i]t was not the intention to criminalise every exposure of naked children or all pictures in which a child's genitals may be perceived, even if such pictures may stimulate some people's sexual instincts. In order for the handling of a picture to be illegal, it is a condition that it be pornographic according to common parlance and general values"[24]. It is obvious that such a restrictive formulation of the criminal provision regarding child pornography does not satisfy the respondent State's international obligations, in so far as these require the criminalisation of any representation of the sexual parts of a child for primarily sexual purposes.

Lastly, Swedish criminal law did not have a criminal offence of covert photography or filming at the relevant time. Application by analogy of the criminal offence of sexual molestation to the detriment of the defendant was evidently ruled out. After the amendment to the Penal Code of April 2005, the Sexual Offences Commission considered that the new Chapter 6, Article 10 § 2 of the Swedish Penal Code included actions directed at persons unconscious or asleep, and therefore could also encompass covert

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applied, and a merely literal interpretation of these provisions shows that they are not applicable. The case did not raise a question of breach of domiciliary peace, simply because the offender lived at the house in question, nor of defamation, since the applicant's stepfather did not intend to release the film to third persons.

24. The Government reiterated and sustained this interpretation in paragraph 45 of their observations to the Grand Chamber.

filming of a person in a sexually intrusive way[25]. Yet this very questionable interpretation did not prevail in judicial practice. The Government did not provide the Court with case-law confirming that interpretation. Furthermore, the Government themselves acknowledged that further amendments to the Penal Code were needed to criminalise the conduct of the defendant. That is why the recent bill on intrusive photography and filming was approved. In fact, this legislative initiative cannot but be read as a confession by the Government of the existence of a legal flaw in the domestic criminal-law system[26]. It remains to be seen whether that shortcoming is relevant in terms of the protection required by the Convention rights.

The application of criminal law by the national authorities

The public prosecutor chose to charge the defendant with sexual molestation. This proved to be the wrong legal avenue, since there was obviously no conduct falling within the offence of sexual molestation: no touching, no inducing, no coercion, no seduction, no improper influence, no exposure or indecent behaviour of the defendant. Furthermore, the relevant criminal intent that the applicant should find out about the filming could not be established. The Government maintained that this was a problem of evidence, but the applicant replied that it was rather a problem of erroneous interpretation of penal law by the public prosecutor. The applicant is right, since the requisite subjective element of the offence of sexual molestation (namely, the perpetrator's intention that the victim be aware of the illegal conduct while it is taking place) is incompatible *per se* with any covert action of filming or photographing.

The public prosecutor did not charge the defendant with child pornography. No reasons were given for that approach. The Government assumed that it was because there was no film, and no physical evidence of the completed crime. As the applicant argued, it is clear that the non-existence of the film did not preclude charges of attempted child pornography, especially in a case where the defendant confessed to the facts, and there were two witnesses: the victim, who discovered the film, and her mother, who destroyed it. The confession was thus supported by sufficient additional evidence. Hence, there was no evidentiary problem with regard to the offence of child pornography either.

Whilst the criminal offence of sexual molestation could not be applied to the facts of the case, the offence of attempted child pornography could have guaranteed the applicant's Convention right to protection of her image, had the Court of Appeal had regard to Sweden's international obligations. Although it admitted that the offence of attempted child pornography was in

25. Government's observations to the Grand Chamber, paragraph 66.
26. Paragraph 76 of the Government's observations to the Grand Chamber.

theory applicable to the facts, the Court of Appeal was not willing to give an evolutive interpretation of the concept of child pornography, and preferred to follow the historical interpretation of the corresponding incriminating provision, based on the preparatory works of the Penal Code referred to above. That construction of the child-pornography offence adopted by the Court of Appeal, which was in line with the practice of the Supreme Court and the Government's own view, could not provide any redress to the applicant.

Indeed, the Court of Appeal had two alternatives for the purposes of guaranteeing the victim's right to protection of her image: either to adopt an evolutive interpretation of the concept of child pornography, correct the erroneous legal characterisation given to the facts by the first-instance court and convict the defendant of the crime of attempted child pornography; or to stick to the historical interpretation of the concept of child pornography and acquit the defendant, but at least award compensation for non-pecuniary damage, as claimed by the applicant on the basis of the violation of her personal integrity by her stepfather's conduct.

The change of legal characterisation of the offence

The first alternative could have been pursued under Chapter 30, Article 3, of the Code of Judicial Procedure: when examining a complaint, the domestic courts are not bound by the legal characterisation of the offence or the applicable provisions of law. In Sweden, as in many European countries, the criminal court is bound by the facts of the indictment, but not by its legal characterisation of the offence[27].

The fact is that the domestic courts did not use the power they had under Chapter 30, Article 3, of the Code of Judicial Procedure. No reasons were given by the domestic courts for not using that alternative, although they could have used it of their own motion. In spite of the restrictive intention of the Swedish legislature when it introduced the criminal offence of child pornography, as reflected in the relevant preparatory works, the domestic courts could, and should, have adopted an evolutive interpretation of the concept of child pornography, in order to include any representation of the sexual parts of a child for primarily sexual purposes. An evolutive interpretation of penal law is acceptable provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen. This interpretation would at the same time be in accordance with the international obligations of Sweden and the general

27. The Government said, in their observations to the Grand Chamber, paragraph 54: "In Swedish criminal procedure, the court is not formally bound in its assessment by what offence has been put before it, i.e., the court may examine on its own initiative questions concerning the classification of a criminal offence and the applicable section of law (Chapter 30, Article 3, of the Code of Judicial Procedure)."

principles of interpretation of penal law[28]. The facts imputed to the applicant's stepfather would be sufficient to make out this offence, in its ancillary and preparatory form of attempted child pornography: the images of a 14-year-old girl undressing before taking a shower in an otherwise everyday situation certainly do fall within the concept of "any representation of the sexual parts of a child" and the applicant's stepfather completed all the necessary steps to obtain images of the sexual parts of a child for primarily sexual purposes, which he ultimately did not obtain on account of the fortuitous circumstance that the girl discovered the hidden camera[29]. No additional reference to pornography in the indictment was necessary, since it already included all the relevant elements of the offence of attempted child pornography, interpreted in the light of Sweden's above-mentioned international obligations. It was up to the domestic courts to change the legal characterisation of the offence and adopt an evolutive interpretation of the concept of child pornography compatible with Sweden's international obligations[30]. The domestic courts took neither of those steps, thus leaving unpunished highly reprehensible conduct that should have been punished in the light of the international obligations of the respondent State. To the legislature's long-standing inertia in clarifying the legal situation the courts added their unwillingness to apply the criminal law according to the canon of evolutive interpretation.

The compensation for non-pecuniary damage based directly on the Convention

Assuming, for the sake of argument, that the first alternative was not an available legal avenue in the instant case, in accordance with the historical interpretation of the criminal provision of child pornography, the alternative to guaranteeing the victim's right to protection of her image could have been to award the applicant reparation for non-pecuniary damage. Indeed,

28. The Court has already stated that "the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen" (see *S.W. v. the United Kingdom*, 22 November 1995, §§ 34-36, Series A no. 335-B, and *C.R. v. the United Kingdom*, 22 November 1995, Series A no. 335-C). Hence, I cannot agree with the Grand Chamber's statement in paragraph 97 of the present judgment.

29. Thus, the applicant's stepfather started to commit the crime without bringing it to its completion and the danger that the act would lead to the completion of the crime was only averted because of unforeseen and unwanted circumstances. All the requisite elements of the attempted offence were fulfilled (Chapter 23, Article 1, of the Penal Code).

30. It goes without saying that, in accordance with the national law and the European standard, the amended criminal charge should be communicated to the defendant, in order to give him the opportunity to contest it.

the applicant referred to the facts set out in the indictment that had caused her pain and suffering and even adduced independent evidence of the nature and extent of the injury that she had suffered.

The legal basis for that award was Chapter 22, Article 7, of the Swedish Code of Judicial Procedure[31]. This provision was not used by the Court of Appeal, although it could have used it of its own motion. The Court of Appeal dismissed the claim for compensation because no crime had been proven, but did not determine the civil action, as it could have done. Even assuming that no crime was made out and therefore damages based on Chapter 2, section 3, of the Tort Liability Act could not be awarded, the Court of Appeal could still have invoked Chapter 2, section 1, of the same Act, which covered both wilful and negligent physical and psychological injury, for the purpose of awarding damages to the applicant. By not doing so, for no plausible reason, it left the applicant's proven personal injury without compensation[32].

Last but not least, the Court of Appeal refrained from awarding compensation based on the Convention. This approach is in line with the case-law of the Swedish Supreme Court according to which in disputes between individuals there is no civil liability based on Convention violations when these are not simultaneously violations of the domestic law. There are two reasons for this: firstly, the Convention does not impose duties on individuals and, secondly, individuals cannot foresee the grounds for compensation when there have been only breaches of the Convention[33].

This line of argument is at odds with the Convention's direct effect in the legal order of the respondent State, the principle of subsidiarity and the principle of interpretation of human rights treaties in a way which is most protective of the rights and freedoms which they foresee[34]. Since the Convention is applied directly in the domestic State, and violations of it must primarily be resolved by the national authorities, there should be provision for compensation for victims of Convention breaches, even when domestic law has not been violated. The argument of unforeseeability does

31. As the applicant argued, the procedural legal situation in Sweden resembles the situation in *Y v. Norway*, no. 56568/00, §§ 23-24, ECHR 2003-II in that a private claim may be upheld in the same proceedings as a criminal case even if the defendant has been acquitted of the offence.

32. The Government argued that, in order to benefit from Chapter 2, section 1, of the Tort Liability Act, the applicant should have claimed "that he had caused her personal injury by acting negligently in respect of her" (Government observations to the Grand Chamber, paragraph 35). This interpretation of the said provision sounds very abstruse, for two reasons. Firstly, the said provision encompasses literally wilful (or deliberate) and negligent injuries. Secondly, the applicant's stepfather acted wilfully and not negligently.

33. Swedish Supreme Court judgment of 29 October 2007 (NJA 2007, p. 747): "in view of the rule-of-law value held by the principle of predictability, an individual could not be obliged to compensate another individual directly on the basis of the Convention."

34. See *Wemhoff v. Germany*, 27 June 1968, § 8, Series A no. 7, and my separate opinion in *Fabris v. France* [GC], no. 16574/08, ECHR 2013.

not stand, in so far as the Convention is part of national law and therefore the grounds for compensation deriving from the Court's case-law are predictable. The Court's interpretation of the Convention regarding grounds for compensation for breaches of Convention rights is as binding for national courts as the rest of the Court's case-law, and should therefore be implemented by the national courts whenever national law fails to provide such compensation. In addition, if damages awarded for a State's violations of the Convention are predictable, even where there are no specific provisions on civil liability in national law, as the Swedish Supreme Court correctly admits, the same applies to awards for violations perpetrated by individuals who are not State agents, such as the one in this case[35]. In such a case, the State would be neglecting its obligations to protect Convention rights if it did not ensure a means of civil redress in circumstances where no criminal sanctions were applicable despite the ethical censurability and the reprehensibility under international customary and treaty law of the conduct. To put it positively, whenever criminal remedies are lacking for such conduct committed by individuals who are not State agents, the Contracting Parties to the Convention should nonetheless provide for civil remedies. An obligation is placed upon the State to provide for an effective civil remedy to deal with the substance of an "arguable complaint" of a breach of the Convention, in accordance with Article 13 in conjunction with Article 8, not upon the individuals themselves. Hence, the domestic courts failed to repair the applicant's injury, in spite of the available civil-law remedy based solely on the Convention.

The application of the European standard to the present case

The applicant had a right to be protected and the State had an obligation to protect that right. The parties accept both points. The dispute between the parties revolves around one point: the existence of effective remedies for this violation in the legal order of the respondent State. Sweden had a child-pornography provision, but that offence was ignored by the courts, which did not apply it in the instant case. Moreover, the offence was insufficient to punish the applicant's stepfather's conduct on account of its strict judicial construction which read into the provision an implied requirement of explicit sexual behaviour of the victim. The 2005 law reforming the criminal offence of sexual molestation, which does not include covert

35. The Court has accepted that damages provide an adequate remedy for violations of Article 8 rights arising from a dispute between private persons (see *Von Hannover v. Germany*, no. 59320/00, §§ 72-74, ECHR 2004-VI, and *Armonienė v. Lithuania*, no. 36919/02, §§ 45-48, 25 November 2008). In addition, in *Kontrová v. Slovakia* (no. 7510/04, 31 May 2007), the Court found a violation of Article 2 on the ground of the authorities' failure to protect the children's lives, and a violation of Article 13 because their mother had been denied the possibility of seeking compensation from the offender.

filming and photography, could not in any case be applied to the facts, owing to the basic principle of prohibition of retroactive application of penal law to the detriment of the defendant. Lastly, the civil remedy was not used, owing to the Court of Appeal's unjustified refusal to apply the Tort Liability Act and the Supreme Court's strict interpretation of the conditions of civil liability based on breaches of the Convention. Thus, no legal avenue was afforded, in practical terms, for guaranteeing the applicant's right to protection of her image[36].

Conclusion

In view of the Convention obligation to criminalise non-consensual filming and photography regardless of any sexual purpose on the part of the perpetrator and to provide compensation based directly on breaches of Article 8, the national legislature's failure to satisfy the first obligation, and the domestic courts' unwillingness to satisfy the second, I find that there has been a violation of Article 8 taken alone and in conjunction with Article 13.

36. As the visionary Supreme Court judgment of 23 October 2008 (NJA 2008, p. 946) concluded, when it stated that the non-criminalisation of covert filming of adults could amount to a breach of Article 8. *A fortiori* the same reasoning has to be applied to covert filming of children.

DISSENTING OPINION OF JUDGE KALAYDJIEVA

I fully agree with the majority that the applicant's personal integrity was violated by the acts committed by her stepfather and that her situation was aggravated by the fact that she was a minor, that the covert filming of her undressing took place in her home, where she was supposed to feel safe, and that the offender was her stepfather, a person whom she was entitled and expected to trust. The Grand Chamber undertook (see paragraph 89 of the judgment) to examine whether Sweden had an adequate legal framework providing the applicant with an acceptable level of protection (see paragraph 91) and to assess, to this end, each of the remedies available to her (see paragraph 89). To my regret, I fail to understand the logic followed by the majority in finding and providing a legal response to these questions and for this reason I also find myself unable to agree with the conclusions reached.

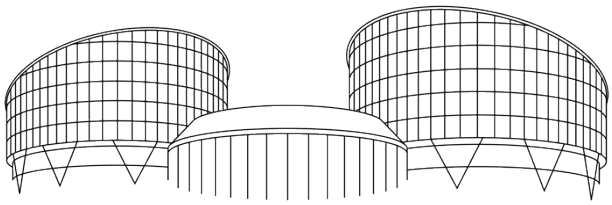
The applicant did not claim that recourse to criminal law was the only way that Sweden could fulfil its obligation under Article 8 to protect her against her stepfather's act (see paragraph 87) and did not criticise the prosecution for not complying with an obligation to indict crimes, but rather found that the legislator had failed in its positive obligation to criminalise the act of covert filming of a minor in a situation which upset the essential aspects of personal integrity. She pointed out that the "weak protection in this area had been known and discussed since 1966". This, in her view, "sufficed to conclude that the protection for the right to respect for private life was – and still is – insufficient" (see paragraphs 62-63).

In response to this complaint, while noting that the impugned acts "did not attain the seriousness of the grave acts ... considered not only under Article 8 but also Article 3 of the Convention", the majority failed to state clearly whether (similarly to the cases mentioned in paragraphs 83 and 84) positive obligations arose in the present case – as maintained by the applicant – and if so which ones, or whether a criminal-law remedy was nevertheless necessary to achieve the appropriate and acceptable level of protection of the applicant's rights under Article 8, or – alternatively – that the decision whether or not to criminalise and prosecute such acts remained within the Swedish authorities' margin of appreciation. In this connection it is difficult to understand the source of the majority's dissatisfaction with the fact that "notwithstanding the ... margin of appreciation", Swedish law did not provide a criminal remedy for the effective protection of the applicant.

The majority also failed to specify (compare and contrast *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, ECHR 2002-I) whether a civil-law remedy – if available – might in principle have sufficed for the appropriate protection of the applicant and instead addressed the fact that the *criminal* courts did not award any compensation for damage resulting from a crime as the impugned acts did not constitute a crime. In this regard the applicant

insisted that – being the masters of the classification of the law – the criminal courts should have reclassified and determined her claim on other grounds. However, she never complained about the lack of such a remedy in the civil courts (see paragraph 64). I remain unconvinced that the fact that the criminal courts dismissed the applicant's civil claim for damages resulting from a crime suffices to conclude that no other civil remedy existed under Swedish law to redress the substance of her complaints (see paragraph 117).

As a result, noting first that "[t]he choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation" (see paragraph 79), the majority arrived at the conclusion that the proceedings before the criminal courts offered neither criminal nor civil redress – as the applicant had initially complained. This conclusion only reflects the facts of the case, and does not necessarily provide a legal response to the Grand Chamber's undertaking to establish whether Swedish law, as it stood in September 2002, ensured appropriate protection of the applicant's "right to respect for her private life". Indeed, it seems to me that in the absence of criteria defining the required "acceptable level of protection" in specific terms, a comparison between the failed and the undefined remedies will inevitably lead to dissatisfaction "notwithstanding the respondent State's margin of appreciation" in this area (see paragraph 117).



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

GRAND CHAMBER

CASE OF VON HANNOVER v. GERMANY (No. 2)

(Applications nos. 40660/08 and 60641/08)

JUDGMENT

STRASBOURG

7 February 2012

In the case of Von Hannover v. Germany (no. 2),

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President*,
Jean-Paul Costa,
Françoise Tulkens,
Josep Casadevall,
Lech Garlicki,
Peer Lorenzen,
Karel Jungwiert,
Renate Jaeger,
Davíd Thór Björgvinsson,
Ján Šikuta,
Mark Villiger,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Nona Tsotsoria,
Zdravka Kalaydjieva,
Mihai Poalelungi,
Kristina Pardalos, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 13 October 2010 and on 7 December 2011,

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

PROCEDURE

1. The case originated in two applications (nos. 40660/08 and 60641/08) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Monegasque national, Princess Caroline von Hannover, and a German national, Prince Ernst August von Hannover ("the applicants"), on 22 August and 15 December 2008 respectively.

2. The applicants alleged that the refusal by the German courts to grant an injunction against any further publication of photos of them infringed their right to respect for their private life as guaranteed by Article 8 of the Convention.

3. The applications were initially allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 13 November 2008 a Chamber of that Section decided to give notice of application no. 40660/08

to the German Government ("the Government"). By virtue of Article 29 § 3 of the Convention, as worded at the relevant time, it also decided that the admissibility and merits of the case should be considered together. On 8 January 2009 the President of the Fifth Section decided to give notice of application no. 60641/08 to the Government. By virtue of Article 29 § 3 of the Convention, as worded at the relevant time, he also decided that the admissibility and merits of the case should be considered together. On 24 November 2009 a Chamber of the Fifth Section decided to join the two applications.

On 30 March 2010 the Chamber, composed of Peer Lorenzen, President, Renate Jaeger, Karel Jungwiert, Rait Maruste, Mark Villiger, Mirjana Lazarova Trajkovska and Zdravka Kalaydjieva, judges, and Claudia Westerdiek, Section Registrar, after deciding to join the present applications to the application *Axel Springer AG v. Germany* (no. 39954/08), also communicated by it on 13 November 2008 and concerning an injunction against the applicant company on publishing two reports on the arrest and criminal conviction of a television actor, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

4. The composition of the Grand Chamber was determined according to the provisions of former Article 27 §§ 2 and 3 of the Convention (now Article 26 §§ 4 and 5) and Rule 24. On 3 November 2011 Jean-Paul Costa's term as President of the Court came to an end. Nicolas Bratza succeeded him in that capacity and took over the presidency of the Grand Chamber in the present case (Rule 9 § 2). Mr Costa continued to sit following the expiry of his term of office, in accordance with Article 23 § 3 of the Convention and Rule 24 § 4. At the final deliberations Lech Garlicki and Nona Tsotsoria, substitute judges, replaced Rait Maruste and Christos Rozakis, who were unable to take part in the further consideration of the case (Rule 24 § 3).

5. The President of the Grand Chamber decided to maintain the application of Article 29 § 3 of the Convention before the Grand Chamber with a view to a joint examination of the admissibility and merits of the applications. He also decided that the proceedings in the present cases should be conducted simultaneously with those in *Axel Springer AG v. Germany* (Rule 42 § 2).

6. The applicants and the Government each filed observations on the admissibility and the merits of the case. The parties replied in writing to each other's observations.

7. In addition, third-party comments were received from the Association of German Magazine Publishers (*Verband Deutscher Zeitungsverleger*), from the publishing company that had published one of the photos in question, Ehrlich & Sohn GmbH & Co. KG, from the Media Lawyers Association, from the Media Legal Defence Initiative, from the

International Press Institute and from the World Association of Newspapers and News Publishers, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The parties were given an opportunity to reply to those comments (Rule 44 § 5).

8. Having been informed on 17 November 2008 of their right to submit observations, the Monegasque Government indicated to the Court that they did not intend to take part in the proceedings. After being informed of that right again on 31 March 2010, following the decision of the Chamber to relinquish jurisdiction in favour of the Grand Chamber, the Monegasque Government did not express an intention to take part in the proceedings.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 13 October 2010 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms A. WITTLING-VOGEL, Federal Ministry of Justice, *Agent*,
Mr C. WALTER, Professor of Public Law, *Counsel*,
Ms A. VON UNGERN-STERNBERG, Assistant,
Mr R. SOMMERLATTE, Federal Office for Culture,
Mr A. MAATSCH, Judge of the Hamburg Regional Court, *Advisers*;

(b) *for the applicants*

Mr M. PRINZ, member of the Hamburg Bar,
Mr M. LEHR, member of the Hamburg Bar, *Counsel*,
Ms S. LINGENS, Lawyer, *Adviser*.

The Court heard addresses by Mr Walter and Mr Prinz.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicants, who are the elder daughter of the late Prince Rainier III of Monaco and her husband, were born in 1957 and 1954 respectively and live in Monaco.

A. Background to the cases

11. Since the early 1990s the first applicant has been trying – often through the courts – to prevent the publication of photos about her private life in the press.

12. Two series of photos, published in 1993 and 1997 respectively in three German magazines and showing the first applicant with the actor Vincent Lindon or her husband, had been the subject of three sets of proceedings in the German courts and, in particular, leading judgments of the Federal Court of Justice of 19 December 1995 and of the Federal Constitutional Court of 15 December 1999 dismissing the first applicant's claims.

13. Those proceedings were the subject of the *Von Hannover v. Germany* judgment of 24 June 2004 (no. 59320/00, ECHR 2004-VI) in which the Court held that the court decisions had infringed the first applicant's right to respect for her private life, a right guaranteed by Article 8 of the Convention.

14. Regarding the reasoning of the domestic courts, the Court made the following findings in particular:

> "72. The Court finds it hard to agree with the domestic courts' interpretation of section 23(1) of the Copyright (Arts Domain) Act, which consists in describing a person as such as a figure of contemporary society '*par excellence*'. Since that definition affords the person very limited protection of their private life or the right to control the use of their image, it could conceivably be appropriate for politicians exercising official functions. However, it cannot be justified for a 'private' individual, such as the applicant, in whom the interest of the general public and the press is based solely on her membership of a reigning family, whereas she herself does not exercise any official functions.
>
> In any event the Court considers that, in these conditions, the Act has to be interpreted narrowly to ensure that the State complies with its positive obligation under the Convention to protect private life and the right to control the use of one's image.
>
> 73. Lastly, the distinction drawn between figures of contemporary society '*par excellence*' and 'relatively' public figures has to be clear and obvious so that, in a State governed by the rule of law, the individual has precise indications as to the behaviour he or she should adopt. Above all, they need to know exactly when and where they are in a protected sphere or, on the contrary, in a sphere in which they must expect interference from others, especially the tabloid press.
>
> 74. The Court therefore considers that the criteria on which the domestic courts based their decisions were not sufficient to protect the applicant's private life effectively. As a figure of contemporary society '*par excellence*' she cannot – in the name of freedom of the press and the public interest – rely on protection of her private life unless she is in a secluded place out of the public eye and, moreover, succeeds in proving it (which can be difficult). Where that is not the case, she has to accept that she might be photographed at almost any time, systematically, and that the photos are

then very widely disseminated even if, as was the case here, the photos and accompanying articles relate exclusively to details of her private life.

75. In the Court's view, the criterion of spatial isolation, although apposite in theory, is in reality too vague and difficult for the person concerned to determine in advance. In the present case, merely classifying the applicant as a figure of contemporary society '*par excellence*' does not suffice to justify such an intrusion into her private life."

B. The photos in issue

15. Relying on the Court's judgment in the first applicant's case, the applicants subsequently brought several sets of proceedings in the civil courts seeking an injunction against any further publication of photos that had appeared in German magazines.

1. The photos published in the magazine Frau im Spiegel

16. The first three photos were published by the publishing company Ehrlich & Sohn GmbH & Co. KG in the magazine *Frau im Spiegel*.

(a) The first photo

17. The first photo, which appeared in issue no. 9/02 of 20 February 2002, shows the applicants out for a walk during their skiing holiday in St Moritz. It is accompanied by an article with the heading: "Prince Rainier – not home alone" ("*Fürst Rainier – Nicht allein zu Haus*"). The article reads as follows.

"The first magnolia buds are flowering in the grounds of Monaco Palace – but Prince Rainier (78) appears to have no interest in the burgeoning spring. He goes for a walk outside with his daughter Stéphanie (37). She supports him as he walks along slowly. He is cold despite the sunshine. The old gentleman is weary. The Monegasques saw their prince for the last time three weeks ago at a circus festival. He had appeared bright and cheerful, walking along beside his daughter who was laughing. But since then he has not left the palace. Not even for the St Devota celebration held in honour of the national Patron Saint. The Principality is worried, as are Prince Rainier's children. Prince Albert (who is currently taking part in the Olympic Games in Salt Lake City), Princess Caroline (on holiday in St Moritz with Prince Ernst August von Hannover) and Princess Stéphanie take it in turns to look after their father. He must not be left home alone when he is not well. Not without his children's love."

A photo of Prince Rainier with his daughter Princess Stéphanie and a photo of Prince Albert of Monaco taken during the Olympic Games in Salt Lake City appeared on the same page.

(b) The second photo

18. The second photo, which appeared in issue no. 9/03 of 20 February 2003, shows the applicants out for a walk in St Moritz. The caption says: "Ernst August von Hannover and his wife, Princess Caroline of Monaco, enjoy the sun and snow in St Moritz." A small photo of Prince Albert and two photos of members of a European royal family appeared on the same page. The article accompanying the photos, bearing the heading "Royal fun in the snow", is about how happy the persons photographed are to meet up in St Moritz.

(c) The third photo

19. The third photo, which appeared in issue no. 12/04 of 11 March 2004, shows the applicants in a chair lift in Zürs am Arlberg during their skiing holiday. On the same page there is a small photo of Prince Rainier, the first applicant and Prince Albert, taken during the national holiday on 19 November and bearing the heading "The princess's last appearance". Another photo, taking up half the page, shows the first applicant at the Rose Ball.

The three photos illustrate an article bearing the heading "Princess Caroline. The whole of Monaco awaits her", of which the passages relevant to the present case read as follows.

> "Tickets for the Rose Ball, which will be held on 20 March in Monaco, have been selling for weeks. And the guests will be coming only for her: Princess Caroline von Hannover (47). She has not attended any official engagements since the national holiday ... She was not at the circus festival or the St Devota celebration held in honour of the patron saint of Monaco. By tradition, the eldest daughter of Prince Rainier (80) opens the annual ball. She has inherited this role from her mother, who died in an accident, and this ball is Caroline's favourite ... The prince, who is seriously ill, has just come out of hospital after a heart operation and is still too weak to attend the ball. The welcome speech which he will be making in honour of the guests will be retransmitted via television cameras and projected onto a big screen. Princess Caroline and her husband [Prince] Ernst August von Hannover will open the Rose Ball with a waltz.
>
> They celebrated their fifth wedding anniversary together in January. And there was more cause for celebration in the von Hannover household: the prince turned 50 on 26 February. He celebrated his birthday with Caroline and some friends at the fashionable resort of St Moritz, glistening white in the snow. The couple were actually spending their holiday in Zürs am Arlberg, but for the birthday party they went down to the Palace Hotel in St Moritz for a few days."

2. The photo published in the magazine Frau Aktuell

20. The publishing company WZV Westdeutsche Zeitschriftenverlag GmbH & Co. KG published in issue no. 9/02 of 20 February 2002 of the magazine *Frau Aktuell* the same photo (or a virtually identical one) as the

one that had appeared the same day in the magazine *Frau im Spiegel* no. 9/02 (see paragraph 17 above). The article accompanying the photo in *Frau Aktuell* bears the heading: "That is genuine love. Princess Stéphanie. She is the only one looking after the sick prince." The relevant passages of the article are worded as follows.

> "Her love life may appear unbridled. One thing is certain, though: as far as her father is concerned, Princess Stéphanie knows where her heart lies. While the rest of the family are travelling around the world, she has run to be at the side of Prince Rainier (78), who appears to be seriously ailing. She is the only one who takes care of the sick monarch. Stéphanie's sister, Caroline (45), has taken a few days' holiday with her husband Ernst August (48) and their daughter Alexandra (2) at the fashionable St Moritz ski resort in Switzerland. Prince Albert, for his part, has been at the Olympic Games in Salt Lake City taking part in the four-man bobsleigh race. 'For the fifth and last time,' he said. From time to time he would disappear for a number of days. It is said that the prince has seen his heart-throb, Alicia Warlick (24), an American pole vaulter who is rumoured to become his future wife. [Prince Rainier], who hates being alone now, was very glad to see his younger daughter. Stéphanie has devoted a lot of time to him. She has been out on long walks with him and they have greatly confided in each other. 'Rainier has relished the company of his younger daughter. When she is at his side he truly flourishes. During those moments he forgets that he is old and sick,' say the Monegasques. 'Stéphanie should come much more often.'"

On the same page there is the photo of Princess Stéphanie with her father that had appeared the same day in the magazine *Frau im Spiegel* no. 9/02 (see paragraph 17 above), a headshot of her and two other photos, one of Prince Albert alone and the other of the prince with Alicia Warlick.

C. The proceedings in issue

1. The proceedings instituted by the first applicant

(a) The first set of proceedings

(i) Judgment of the Regional Court of 29 April 2005

21. On an unspecified date in 2004, the first applicant sought an injunction in the Hamburg Regional Court against any further publication of the three photos by the Ehrlich & Sohn publishing company.

22. In a judgment of 29 April 2005, the Regional Court granted the injunction on the ground that the first applicant had not consented to publication of the photos, which was a precondition under section 22 of the Copyright (Arts Domain) Act (hereafter "the Copyright Act" – see paragraph 70 below). The court stated, however, that even if consent were deemed unnecessary in the case of the first photo on the ground that it was an image from contemporary society (*Bildnis aus dem Bereich der*

Zeitgeschichte) within the meaning of section 23(1)(1) of the same Act, publication of the photo was not justified. Under subsection 2 of that provision, publication of such an image was only lawful if it did not interfere with a legitimate interest of the person photographed. According to the court, the question as to whether there was such a legitimate interest had to be determined by balancing the interests of the person photographed against those of the public in being informed.

23. The Regional Court found that in the present case it was the first applicant's right to the protection of her personality rights that prevailed. In reaching that conclusion the Regional Court referred extensively to the Court's judgment in *Von Hannover*. It found that the first applicant's relationship with her father, regardless of the fact that he was ill, did not contribute to a debate of general interest to society especially as the first applicant was connected to the prince of a State of minor importance in international politics merely through a family tie and did not exercise any official function.

24. The Regional Court stated that, whilst that reasoning was not entirely in keeping with the principles established by the Federal Constitutional Court, which did not recognise a legitimate interest unless the person photographed had retired to a secluded place away from the public eye, it was not bound by that precedent to the extent that it could not take into consideration the Court's case-law on the subject.

(ii) Judgment of the Court of Appeal of 31 January 2006

25. The publishing company appealed against that judgment.

26. In a judgment of 31 January 2006, the Hamburg Court of Appeal set aside the judgment on the ground that the applicant's right under Article 8 of the Convention had to yield to the fundamental rights of the press. It found that, whilst the articles were primarily of entertainment value, publication of the photos was nonetheless lawful in terms of the judgment of the Federal Constitutional Court of 15 December 1999 whose main legal reasoning (*tragende Erwägungen*) was binding on the Court of Appeal. It pointed out that public figures should certainly be protected from the risk of being photographed at any time and anywhere and seeing the photos subsequently published. However, in the Court of Appeal's opinion, the legitimate interest of such figures, within the meaning of section 23(2) of the Copyright Act, should not result in the prohibition of any reporting on well-known people outside their official appearances. In any event, the right to respect for private life did not require the banning of publication of photos taken in public places accessible to all and where the individual concerned was amongst many other people.

(iii) Judgment of the Federal Court of Justice of 6 March 2007

27. The first applicant appealed on points of law against that judgment.

28. In a judgment of 6 March 2007 (no. VI ZR 51/06), the Federal Court of Justice dismissed her appeal in respect of the first photo. With regard to the second and third photos, it upheld her appeal, quashed the judgment of the Court of Appeal and reinstated the injunction imposed by the Regional Court.

29. The Federal Court of Justice found that the opinion of the Court of Appeal did not correspond to the concept of graduated protection (*abgestuftes Schutzkonzept*) that had been developed in the case-law on the basis of sections 22 and 23 of the Copyright Act and which it had clarified in a number of recent decisions delivered following the *Von Hannover* judgment and in response to the reservations of principle which the Court had expressed in that judgment. According to that new concept of protection, section 23(1) of the Copyright Act, which provided for an exception to the rule according to which a photo could not be published without the prior consent of the person concerned, took account of the public's interest in being informed and of the freedom of the press. Accordingly, when assessing whether or not the impugned publication portrayed an aspect of contemporary society within the meaning of section 23(1)(1) of the Copyright Act, a balancing exercise had to be undertaken between the rights under Articles 1 § 1 and 2 § 1 of the Basic Law and Article 8 of the Convention on the one hand, and those under Article 5 § 1, second sentence, of the Basic Law and Article 10 of the Convention on the other hand.

30. The Federal Court of Justice added that the Court's criticism of the expression "figure of contemporary society *par excellence*" ultimately concerned the determination of the conditions in which the media could report on well-known people such as these. It considered that, irrespective of the issue whether the first applicant should be regarded as a figure of contemporary society *par excellence*, she was in any case a well-known person who particularly attracted public attention. In the court's view, that fact, combined with the fact that she had not been in a secluded place out of the public eye when the photos had been taken, was nonetheless insufficient to deprive her of protection of her private sphere. That conclusion was not only appropriate in the light of the Court's ruling but also reflected a proper understanding of the concept of protection thus developed.

31. Accordingly, the Federal Court of Justice found that the publication of images of persons who – on account of their importance in contemporary society – were in theory required, under section 23(1)(1) of the Copyright Act, to tolerate the publication of photos of themselves was nevertheless unlawful if the legitimate interests of the person concerned were infringed (section 23(2)). There could be no exception to the obligation to obtain the consent of the person in question unless the report in question concerned an important event of contemporary society. The expression "contemporary society" – and indeed the term "information value" – had to be interpreted

in a broad sense and according to whether there was a public interest. It comprised any matter of general interest to society and included reports for entertainment purposes, which could also play a role in the formation of opinions, or even stimulate or influence these to a greater degree than purely factual information.

32. Whilst the freedom of the press and the prohibition of censorship required the press to be able to decide for itself which subjects it intended to report on and what it intended to publish, the press was not exempt from the duty to weigh its interest in publishing the information against the protection of the privacy of the person concerned. The greater the information value for the general public, the more the right to protection had to yield. Conversely, where the interest in informing the public decreased, the importance of protecting the person concerned carried correspondingly greater weight. The reader's interest in being entertained generally carried less weight than that of protecting privacy, in which case the reader's interest did not merit protection.

33. The Federal Court of Justice stated that, accordingly, even where persons who had hitherto been regarded as figures of contemporary society were concerned, consideration must be given to the question whether the report contributed to a factual debate (*mit Sachgehalt*) and whether the content went beyond a mere intention to satisfy public curiosity. In determining that question, there was nothing to prevent regard being had to how well the person concerned was known to the public.

34. The Federal Court of Justice stressed that that manner of balancing the various interests at stake corresponded to the requirements of the Court regarding effective protection of the private sphere and the requirements of the freedom of the press, and that it did not conflict with the binding force of the judgment of the Federal Constitutional Court of 15 December 1999. Admittedly, that court had limited the protection afforded to the private sphere against the publication of unwanted photos to cases of spatial seclusion. That did not, however, prevent the courts – when balancing the various interests – from having more regard to the value of the information for the public. Furthermore, the Federal Constitutional Court had [recently] endorsed the balancing exercise undertaken by the Federal Court of Justice according to those criteria in a judgment concerning the second applicant (decision of 13 June 2006, no. 1 BvR 565/06).

35. The Federal Court of Justice specified that as the determining criterion for the balancing exercise was the information value of the photo in question and as it had been published in the context of a written article, the content of the text accompanying the photo could not be ignored.

36. Applying the criteria thus established to the case submitted to it, the Federal Court of Justice, beginning with the second and third photos, observed that the second photo showed the applicants in a busy street in St Moritz during their skiing holiday. Whilst the press could, as a matter of

principle, make its own decision regarding the content of its publications and the applicants had indeed been in a public place amongst other people, neither the article nor the photo related to an event of general interest or contemporary society. A celebrity's holidays fell within the core area (*Kernbereich*) of his or her private sphere. The publication of the article and photo had been for entertainment purposes only and was not in any way relevant to matters of public interest, so could only be done with the first applicant's consent.

37. The Federal Court of Justice noted that the third photo showed the applicants in a chair lift in Zürs during their skiing holiday. Whilst the Rose Ball shortly to be held in Monaco, which was the subject of the article accompanying the photo, could possibly be regarded as an event of contemporary society that was a matter of general interest to society, there was no link between the photo and that event. The purpose of the photo had been to supplement the part of the article about the second applicant's birthday party in St Moritz and the applicants' skiing holiday in Zürs. Thus the information centred exclusively on the first applicant's private life and served merely entertainment purposes. Accordingly, the third photo could not be published without the first applicant's consent either.

38. Regarding the first photo, the Federal Court of Justice observed that whilst it contained no information having any connection with an event of contemporary society or contributing to a debate of general interest, the same was not true of the accompanying text. Admittedly, the part about the first applicant's skiing holiday did not concern an event of contemporary society or general interest, even interpreting those terms broadly. However, with regard to the prince's health, the Federal Court of Justice found as follows:

> "The information also concerned the ill-health of the reigning Prince of Monaco. His ill-health was thus an event of contemporary society on which the press was entitled to report. The journalistic quality and the conception of the article are not decisive because the principle of the freedom of the press does not allow the applicability of a fundamental right to depend upon the quality of the press coverage or how the article is drafted. This also applies to the comments in the article on the conduct of members of the family during the prince's illness, and, moreover, the applicant has not complained about the article in that respect. The photo in question supports and illustrates the information being conveyed."

39. The Federal Court of Justice concluded that, in those circumstances and having regard to the context of the report as a whole, the first applicant had no legitimate interest that could have opposed publication of the photo of the applicants out in the street. There had, in particular, been nothing about the photo itself that constituted a violation (*eigenständiger Verletzungseffekt*) and thus justified a different conclusion; nor was there anything to suggest that the photo had been taken surreptitiously or by using secret technical devices that rendered its publication unlawful.

(iv) Judgment of the Federal Constitutional Court of 26 February 2008

40. In a judgment of 26 February 2008, the First Division (*Senat*) of the Federal Constitutional Court dismissed constitutional appeals lodged by the first applicant (no. 1 BvR 1626/07) and by the Ehrlich & Sohn GmbH & Co. KG publishing company (no. 1 BvR 1602/07) against the judgment of the Federal Court of Justice (no. VI ZR 51/06).

In the same judgment it allowed a constitutional appeal (no. 1 BvR 1606/07) lodged by the Klambt-Verlag GmbH & Co. publishing company against an injunction, imposed by the Federal Court of Justice (judgment of 6 March 2007, no. VI ZR 52/06), on any further publication of a photo that had appeared in *7 Tage* magazine showing the applicants on holiday in an unspecified location and accompanying a written and photographic report on the possibility of renting a holiday villa owned by the von Hannover family in Kenya. Those proceedings are the subject of a separate application by the first applicant to the Court (no. 8772/10).

41. The Federal Constitutional Court observed, firstly, that the court decisions constituted an interference with the first applicant's right to the protection of her personality rights guaranteed by Articles 1 § 1 and 2 § 1 of the Basic Law. There were limits on the protection afforded to that right and on the freedom of the press, however. The freedom of the press was subject to the restrictions laid down in sections 22 et seq. of the Copyright Act and Article 8 of the Convention, whilst the provisions of the Copyright Act and Article 10 of the Convention limited the right to the protection of personality rights. In the German legal order the Convention had the status of an ordinary federal law. At constitutional-law level, the rights and freedoms guaranteed by the Convention and the Court's case-law served as guides to interpretation when determining the content and scope of a fundamental right.

42. The Federal Constitutional Court reiterated the case-law of the Court regarding Articles 8 and 10 of the Convention and its own case-law on the different fundamental rights at stake by referring to the principles established in its leading judgment of 15 December 1999 (*Von Hannover*, cited above, § 25). It added that in so far as an image did not itself make any contribution to the formation of public opinion, its information value had to be assessed in the context of the accompanying article. However, if that article was merely a pretext for publishing a photo of a well-known person, no contribution was made to the formation of public opinion and there were therefore no grounds for allowing the interest in publication to prevail over the protection of personality rights.

43. The Federal Constitutional Court went on to say that, in order to determine the weight to be attached to the protection of personality rights, regard had to be had not only to the circumstances in which the photo had been taken, for example whether it had been taken surreptitiously or as a result of persistent hounding by photographers, but also to the situation in

which the person concerned had been photographed and how he or she was portrayed. The right to protection of personality rights thus carried more weight where the photo showed details of the person's private life that were not normally the subject of public discussion. The same was true where the person concerned could legitimately expect, having regard to the circumstances, that no photo would be published because he or she was in a private place (*räumliche Privatheit*), such as in a specially protected location. The right to protection of personality rights could also prevail over the interest in publication in cases other than those of spatial isolation, notably where the person concerned was pictured enjoying a moment of relaxation or letting go, freed from the constraints of professional or everyday life.

44. The Federal Constitutional Court stated that importance had to be attached in that connection to the allocation of procedural obligations regarding the presentation of the facts and the burden of proof. It had to be ensured that neither the press nor the person being photographed was prevented from adducing proof of circumstances relevant for the balancing of the competing interests. Where the press intended to publish a photo without the consent of the person concerned, it could be required to substantiate the circumstances in which the photo had been taken in order to allow the courts to examine the question whether publication of the photo could be opposed on grounds of the legitimate expectations of the person photographed.

45. The Federal Constitutional Court observed that it was the task of the civil courts to apply and interpret the provisions of civil law in the light of the fundamental rights at stake while having regard to the Convention. It added that its own role was limited to examining whether the lower courts had had sufficient regard to the impact of fundamental rights when interpreting and applying the law and when balancing the competing rights. Such was also the scope of the scrutiny of the Constitutional Court regarding the question whether the courts had fulfilled their obligation to incorporate the Court's relevant case-law into the national legal order (*Teilrechtsordnung*). The fact that the court's balancing exercise of the various rights in multi-polar disputes – that is, disputes involving the interests of several different persons – and complex ones could also result in a different outcome was not sufficient reason for requiring the Federal Constitutional Court to correct a court decision. However, there would be a violation of the Constitution if the protective scope (*Schutzbereich*) or extent of a fundamental right had been wrongly determined and the balancing exercise were accordingly flawed, or if the requirements under constitutional law or the Convention had not been duly taken into account.

46. Applying those principles to the case submitted to it, the Federal Constitutional Court observed that the Federal Court of Justice and the criteria it had established were constitutionally unobjectionable. It

considered in particular that nothing, from a constitutional-law perspective, had prevented the Federal Court of Justice from departing from its own established case-law in the field and developing a new concept of protection. The fact that it had not itself called into question, in its leading judgment of 15 December 1999, the former concept of protection established by the Federal Court of Justice merely meant that this had been in conformity with constitutional-law criteria. It did not mean, by extension, that a different concept could not meet those criteria. The Federal Court of Justice had not been prevented, in particular, from dispensing with the legal concept of "figure of contemporary society" and instead balancing the competing interests when examining the question whether a photo was an aspect of contemporary society and could accordingly be published without the consent of the person concerned (unless it interfered with a legitimate interest of the latter).

47. Applying the criteria thus established to the photos in question, starting with the second and third ones on which an injunction had been imposed by the courts and then challenged by the publishing company Ehrlich & Sohn (see paragraph 40 above), the Federal Constitutional Court noted that the Federal Court of Justice had had regard to the fact that the second photo showed the applicant in a public place which was neither isolated nor out of public view. It had attached decisive weight, however, to the fact that the article concerned only the applicant's skiing holiday, that is, a situation falling within the core area of private life and concerning the applicant's need for peace and quiet, and the consequent lack of public interest other than satisfying public curiosity. Contrary to the submissions of the publishing company, the readers' interest in the applicant's fashionable ski suit did not amount to a public interest. Moreover, that aspect had not been mentioned anywhere in the article.

48. In the opinion of the Federal Constitutional Court, the same conclusion had to be drawn with regard to the third photo whose publication had been challenged by the first applicant. There had been no public interest, beyond merely satisfying public curiosity, in the information contained in either the article commenting on the first applicant and her husband's trip to St Moritz to celebrate the latter's birthday or the photo showing them both in a chairlift. Whilst the article had also mentioned the Rose Ball – an event which, according to the Federal Court of Justice, could possibly be regarded as an aspect of contemporary society – no link had been made between that event and the photo.

49. With regard to the first photo, the Federal Constitutional Court found that the Federal Court of Justice had had valid grounds for considering that the reigning Prince of Monaco's ill-health was a matter of general interest and that the press had accordingly been entitled to report on the manner in which the prince's children reconciled their obligations of family solidarity with the legitimate needs of their private life, among which was the desire to

go on holiday. The conclusion reached by the Federal Court of Justice, according to which the photo that had been published had a sufficiently close link with the event described in the article, was constitutionally unobjectionable.

50. The Federal Constitutional Court pointed out that the Federal Court of Justice had indicated that the protection of personality rights could prevail in cases where the photo in question had been taken in conditions that were particularly unfavourable for the person concerned, for example where it had been taken surreptitiously or following continual harassment by photographers. However, the publishing company had given details about how the photo had been taken and the first applicant had not complained before the lower civil courts or the Federal Court of Justice that those details were insufficient. In particular, she had not alleged that the photo had been taken in conditions that were unfavourable to her.

51. The Federal Constitutional Court also dismissed the first applicant's allegation that the Federal Court of Justice had disregarded or taken insufficient account of the Court's case-law. Pointing out that a complaint of that nature could be raised in constitutional proceedings if it was based on a fundamental right guaranteed by the Basic Law, it observed that the Federal Court of Justice had taken account of the judgments delivered in *Von Hannover*, cited above, and *Karhuvaara and Iltalehti v. Finland* (no. 53678/00, ECHR 2004-X) and had not failed to comply with its obligation to satisfy the criteria established by the Convention. The Federal Constitutional Court had undertaken an analysis of the Court's relevant case-law and observed that the Court's decisive criterion when balancing the competing rights was the question whether the report in its entirety (article and photo) contributed to the free formation of public opinion. Furthermore, a distinction had to be drawn between political figures, public figures and ordinary individuals. Whilst the latter enjoyed the greatest protection of the three groups, political figures could expect only a small degree of protection from media reports about themselves.

52. According to the Court's case-law (*Gurgenidze v. Georgia*, no. 71678/01, § 57, 17 October 2006, and *Sciacca v. Italy*, no. 50774/99, § 27, ECHR 2005-I), the first applicant was a public figure, which allowed the press – where there was an interest in informing the public – to publish photos, even of the person going about his or her daily business in public. Publication of that sort, which, moreover, attracted the protection of Article 10 of the Convention, could serve to exercise public scrutiny over the private conduct of persons who were influential in the economic, cultural or media sectors. The Federal Constitutional Court pointed out that the Court had previously criticised the approach taken by domestic courts which had applied over-restrictive criteria to the question whether the media were or were not reporting matters of public interest when they reported on circumstances relating to the private life of a person who was not part of

political life (*Tønsbergs Blad A.S. and Haukom v. Norway*, no. 510/04, § 87, 1 March 2007). It was sufficient that the report concerned, at least to some degree, important matters relating to politics or another sphere (*Karhuvaara and Iltalehti*, cited above, § 45).

53. The Federal Constitutional Court concluded that the Federal Court of Justice had found in the present case that the report in question concerned important subjects in a democratic society. In its *Von Hannover* judgment, cited above, the Court had not categorically excluded the possibility that a report contributing to a debate about questions of interest to the public could be illustrated by photos showing a scene from the daily life of a political or public figure. Even though the Court had concluded in *Von Hannover* that the photos in question had not been of information value, the decision reached by the Federal Court of Justice – after assessing the circumstances of the case submitted to it and having regard to the Court's case-law – that the photo in question was of information value was constitutionally unobjectionable.

(b) The second set of proceedings

54. On an unspecified date, the first applicant sought an injunction in the Hamburg Regional Court against any further publication of the photo that had appeared in the magazine *Frau Aktuell*, issue no. 9/02 of 20 February 2002.

55. In a judgement of 1 July 2005, the Regional Court granted the applicant's request.

56. In a judgment of 13 December 2005, the Hamburg Court of Appeal allowed an appeal lodged by the publishing company and set aside the Regional Court's judgment.

57. In a judgment of 6 March 2007 (no. VI ZR 14/06), the Federal Court of Justice dismissed an appeal by the first applicant on the same grounds as those set out in its judgment of the same date (no. VI ZR 51/06 – see paragraphs 28-39 above). It stated that the first applicant had not argued before it – and nor was there anything to suggest – that the photo had been taken surreptitiously or with equivalent secret technical devices such as to render its publication unlawful.

58. In a decision of 16 June 2008 (no. 1 BvR 1625/07), a three-judge panel of the Federal Constitutional Court declined, without giving reasons, to entertain a constitutional appeal lodged by the first applicant.

2. The proceedings brought by the second applicant

(a) The first set of proceedings

59. On 30 November 2004 the second applicant sought an injunction in the Hamburg Regional Court against any further publication by the Ehrlich

& Sohn GmbH & Co. KG publishing company of the three photos that had appeared in the magazine *Frau im Spiegel*.

60. In a judgment of 1 July 2005, the Regional Court granted the injunction.

61. In a judgment of 31 January 2006, the Hamburg Court of Appeal allowed an appeal by the publishing company.

62. In a judgment of 6 March 2007 (no. VI ZR 50/06), the Federal Court of Justice dismissed an appeal on points of law by the second applicant in respect of the first photo. With regard to the second and third photos, it allowed the appeal, quashed the judgment of the Court of Appeal and reinstated the injunction imposed by the Regional Court. It based its conclusions on the same grounds as those set out in its judgment no. VI ZR 51/06 of the same day (see paragraphs 28-39 above). With regard to the second applicant's high profile, it upheld the opinion of the Court of Appeal that he was well known to the public, in particular as the husband of the first applicant who was especially the subject of public attention.

63. In a decision of 16 June 2008 (no. 1 BvR 1624/07), a three-judge panel of the Federal Constitutional Court declined, without giving reasons, to entertain a constitutional appeal lodged by the second applicant.

(b) The second set of proceedings

64. On 29 November 2004 the second applicant sought an injunction in the Hamburg Regional Court against any further publication by the WZV Westdeutsche Zeitschriftenverlag GmbH & Co KG publishing company of the photo that had appeared in the magazine *Frau Aktuell*.

65. In a judgment of 24 June 2005, the Regional Court granted the injunction.

66. In a judgment of 13 December 2005, the Hamburg Court of Appeal allowed an appeal by the publishing company.

67. In a judgment of 6 March 2007 (no. VI ZR 13/06), the Federal Court of Justice dismissed an appeal on points of law lodged by the second applicant on the same grounds as those set out in its judgment of the same date (no. VI ZR 14/06 – see paragraph 57 above).

68. In a decision of 16 June 2008 (no. 1 BvR 1622/07), a three-judge panel of the Federal Constitutional Court declined, without giving reasons, to entertain a constitutional appeal lodged by the second applicant.

II. RELEVANT DOMESTIC AND EUROPEAN LAW

A. The Basic Law

69. The relevant provisions of the Basic Law provide as follows.

Article 1 § 1

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

Article 2 § 1

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

Article 5 §§ 1 and 2

"1. Everyone shall have the right freely to express and disseminate his or her opinions in speech, writing and pictures and freely to obtain information from generally accessible sources. Freedom of the press and freedom of reporting via the radio, television and cinema shall be guaranteed. There shall be no censorship.

2. These rights shall be subject to the limitations laid down by the provisions of the general laws and to statutory provisions for the protection of young people and to the obligation to respect personal honour [*Recht der persönlichen Ehre*]."

B. The Copyright (Arts Domain) Act

70. Section 22(1) of the Copyright (Arts Domain) Act (*Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie*) provides that images can only be disseminated with the express consent of the person concerned. Section 23(1)(1) of the Act provides for exceptions to that rule, where the images portray an aspect of contemporary society (*Bildnisse aus dem Bereich der Zeitgeschichte*) on condition that publication does not interfere with a legitimate interest (*berechtigtes Interesse*) of the person concerned (section 23(2)).

C. Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy

71. The relevant passages of this Resolution, adopted by the Parliamentary Assembly of the Council of Europe on 26 June 1998, read as follows.

"1. The Assembly recalls the current affairs debate it held on the right to privacy during its September 1997 session, a few weeks after the accident which cost the Princess of Wales her life.

2. On that occasion, some people called for the protection of privacy, and in particular that of public figures, to be reinforced at the European level by means of a convention, while others believed that privacy was sufficiently protected by national legislation and the European Convention on Human Rights, and that freedom of expression should not be jeopardised.

3. In order to explore the matter further, the Committee on Legal Affairs and Human Rights organised a hearing in Paris on 16 December 1997 with the participation of public figures or their representatives and the media.

4. The right to privacy, guaranteed by Article 8 of the European Convention on Human Rights, has already been defined by the Assembly in the declaration on mass communication media and human rights, contained within Resolution 428 (1970), as 'the right to live one's own life with a minimum of interference'.

5. In view of the new communication technologies which make it possible to store and use personal data, the right to control one's own data should be added to this definition.

6. The Assembly is aware that personal privacy is often invaded, even in countries with specific legislation to protect it, as people's private lives have become a highly lucrative commodity for certain sectors of the media. The victims are essentially public figures, since details of their private lives serve as a stimulus to sales. At the same time, public figures must recognise that the position they occupy in society – in many cases by choice – automatically entails increased pressure on their privacy.

7. Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.

8. It is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Article 10 of the European Convention on Human Rights, that the media invade people's privacy, claiming that their readers are entitled to know everything about public figures.

9. Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.

10. It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed in the European Convention on Human Rights: the right to respect for one's private life and the right to freedom of expression.

11. The Assembly reaffirms the importance of every person's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.

12. However, the Assembly points out that the right to privacy afforded by Article 8 of the European Convention on Human Rights should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media.

13. The Assembly believes that, since all member States have now ratified the European Convention on Human Rights, and since many systems of national legislation comprise provisions guaranteeing this protection, there is no need to propose that a new convention guaranteeing the right to privacy should be adopted.

..."

D. Resolution of the Committee of Ministers on the execution of the *Von Hannover* judgment (no. 59320/00) of 24 June 2004

72. The Resolution of the Committee of Ministers (CM/ResDH(2007)124), including the Appendix (extracts), adopted on 31 October 2007 at the 1007th meeting of the Ministers' Deputies, is worded as follows:

"The Committee of Ministers, under the terms of Article 46, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that the Committee supervises the execution of final judgments of the European Court of Human Rights (hereinafter 'the Convention' and 'the Court');

Having regard to the judgments transmitted by the Court to the Committee once they had become final;

Recalling that the violation of the Convention found by the Court in this case concerns a breach of the right to respect for private life of the applicant, Princess Caroline von Hannover, the eldest daughter of Prince Rainier III of Monaco, on account of [the] German courts' refusal of her requests to prohibit publication of a series of photographs of her (see details in Appendix);

Having invited the government of the respondent State to inform the Committee of the measures taken to comply with Germany's obligation under Article 46, paragraph 1, of the Convention to abide by the judgment;

Having examined the information provided by the government in accordance with the Committee's Rules for the application of Article 46, paragraph 2, of the Convention;

Having satisfied itself that, within the time-limit set, the respondent State paid the applicant the just satisfaction provided in the judgment (see details in Appendix);

Recalling that a finding of violations by the Court requires, over and above the payment of just satisfaction awarded in the judgment, the adoption by the respondent State, where appropriate, of

– individual measures to put an end to the violations and erase their consequences so as to achieve as far as possible *restitutio in integrum*; and

– general measures, preventing similar violations;

DECLARES, having examined the measures taken by the respondent State (see Appendix), that it has exercised its functions under Article 46, paragraph 2, of the Convention in this case and

DECIDES to close the examination of this case.

Appendix to Resolution CM/ResDH(2007)124

Information about the measures to comply with the judgment in the case of

...

I. Payment of just satisfaction and individual measures

...

b) Individual measures

Although it is possible under German law, the applicant did not take action to prevent further publication of the photographs in question after the European Court's judgment, but took action against a similar photograph (see under "General Measures", No. 4) below. According to information available to the Secretariat, the photographs at issue in the European Court's judgment have not been reprinted by the German press.

II. General measures

– Publication and dissemination of the judgment of the European Court: The judgment has been widely published and discussed by the German legal community. As is the case with all judgments of the European Court against Germany it is publicly available via the website of the Federal Ministry of Justice (www.bmj.de, *Themen: Menschenrechte*, EGMR) which provides a direct link to the Court's website for judgments in German (www.coe.int/T/D/Menschenrechtsgerichtshof/Dokumente_auf_Deutsch/). Furthermore, the judgment was disseminated by letter of the Government Agent to the courts and justice authorities concerned.

– Change of domestic case-law: When deciding upon similar cases, domestic courts have taken into account the judgment of the European Court, thus giving it direct effect in German law:

1) The partner of a famous singer successfully sued at the Berlin Court of Appeal (KG Urt. v. 29.10.2004, 9 W 128/04, *Neue Juristische Wochenschrift*, NJW, 2005, pp. 605-07).

2) The Convention's principles as set out in the European Court's judgments were also acknowledged, even though they were not directly relevant to the case, in a judgment of the Hamburg District Court forbidding commercial exploitation of the popularity of former Chancellor Schröder (AG Hamburg, Urt. v. 2.11.2004, 36A C 184/04, NJW-RR 2005, pp. 196-98).

3) On the basis of the judgment of the European Court, the German Federal Civil Court upheld a judgment allowing the publication of an article about fining the applicant's husband for speeding on a French motorway. The Court stated that the public had a justified interest in this information as it constitutes an offence, making this behaviour the topic of a public discussion (BGH, Urt. v. 15.11.2005, VI ZR 286/04, available via www.bundesgerichtshof.de).

4) Concerning the applicant herself, in July 2005, the regional court of Hamburg (*Landgericht*), referring to the judgment of the European Court, decided in favour of the applicant, prohibiting the publication of a photograph showing her together with her husband in a St Moritz street during a skiing holiday. However, in December 2005, the second instance (Appeal Court of Hamburg, *Oberlandesgericht*) reversed this decision, basing its judgment rather on the case-law of the German Federal Constitutional Court (*Bundesverfassungsgericht*). Upon revision to the Federal Civil Court (*Bundesgerichtshof*) sought by the applicant, the Federal Civil Court on 6 March 2007 decided that the photograph in question may be published. In its reasoning the domestic court, balancing the different interests at stake, explicitly took into account the Convention's requirements as set out in the European Court's judgment (BGH, Urt. v. 6.3.2007, VI ZR 14/06 available via www.bundesgerichtshof.de).

..."

THE LAW

I. DISJOINDER OF THE APPLICATIONS

73. The Court notes that before relinquishing jurisdiction in favour of the Grand Chamber the Chamber had joined the present applications to another application, *Axel Springer AG v. Germany* (no. 39954/08 – see paragraph 3 above). Having regard, however, to the nature of the facts and the substantive issues raised in these cases, the Grand Chamber considers it appropriate to disjoin application no. 39954/08 from the present applications.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

74. The applicants complained of the refusal by the German courts to grant an injunction against any further publication of the photo that had appeared on 20 February 2002 in the magazines *Frau im Spiegel*, issue no. 9/02, and *Frau aktuell*, issue no. 9/02. They alleged that there had been a violation of their right to respect for their private life, as guaranteed by Article 8 of the Convention, the relevant parts of which read as follows:

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of ... the protection of the rights and freedoms of others."

A. Admissibility

75. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It notes further that no other ground for declaring it inadmissible has been established and that it must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

76. The Government pointed out at the outset that there was no conflict between the Federal Constitutional Court and the Court. They observed that in its judgment of 14 October 2004 (*Görgülü* judgment – no. 2 BvR 1481/04, Reports of Judgments and Decisions of the Federal Constitutional Court no. 111, p. 307), the Federal Constitutional Court had stated that there were grounds for lodging a constitutional appeal before it where the domestic court had failed to take sufficient account of the Convention or of the Court's case-law. They pointed out that in the present cases the Federal Court of Justice and the Federal Constitutional Court had taken the Court's case-law into consideration, particularly the *Von Hannover* judgment. It could not therefore be alleged that there was an attitude of denial on the part of the German courts; on the contrary, they had granted far greater protection to personality rights than had been the case in the past.

77. The Government pointed out that the present applications related in essence to only one photo. In their submission, whilst it was true that the photos published on 20 February 2002, although not identical, were apparently part of the same series, the fact remained that from the point of view of an unbiased observer it was the same photographic representation of the applicants, albeit in a different size and format. The Government observed that in respect of the other photos examined in the judgment of the Federal Constitutional Court of 26 February 2008 either the Federal Court of Justice had upheld the injunction on their publication or they were the subject of a separate application before the Court. Other photos, mentioned by the applicants in their observations, could not be taken into consideration

by the Court as the relevant domestic proceedings had not yet been concluded.

78. The Government submitted that up until the *Von Hannover* judgment the German courts had used the hard and fast concept of "figure of contemporary society *par excellence*", which attracted only limited protection under German law. Following the *Von Hannover* judgment, the Federal Court of Justice had abandoned that concept and developed a new concept of (graduated) protection according to which it was henceforth necessary to show in respect of every photo why there was an interest in publishing it. Furthermore, under the new approach adopted by the Federal Court of Justice the balancing of competing interests consisted in determining whether the publication contributed to a public debate. The information value of the publication was of particular importance in that respect. In sum, the new case-law of the Federal Court of Justice, endorsed by the Federal Constitutional Court, afforded greater weight to the protection of personality rights, as evidenced by the fact that an injunction was imposed on publication of two of the initial three photos. Besides that, the photo in question and the articles accompanying it could be clearly differentiated from the photos and their commentaries that had been the subject of the *Von Hannover* judgment.

79. The Government contested the applicants' allegation that, according to the clear findings of the Court, the first applicant was a private individual. The Court had in several judgments referred to her as a public figure in order to differentiate her from a private individual (see *Gurgenidze v. Georgia*, no. 71678/01, § 40, 17 October 2006; *Sciacca v. Italy*, no. 50774/99, § 27, ECHR 2005-I; and *Reklos and Davourlis v. Greece*, no. 1234/05, § 38, 15 January 2009). In categorising the applicants as public figures the German courts had merely followed the Court's case-law. As a member of a reigning dynasty, the first applicant appeared in public at official functions in the Principality. Moreover, she was the Chair of the Princess Grace Foundation, whose activities had been published by the Monegasque authorities in the official yearbook of the Principality.

80. The Government pointed out that the applicants had not complained before the national courts about the circumstances in which the photos had been taken, although those were factors which, as a general rule, the courts duly took into account. In their submission, whilst the photos in question had certainly been taken without the knowledge or consent of the relevant parties, this did not mean that they had been taken surreptitiously or in conditions unfavourable to the applicants.

81. The Government argued that the special nature of certain cases, such as the present ones, in which the domestic courts were required to balance the rights and interests of two or more private individuals lay in the fact that the proceedings before the Court were in fact a continuation of the original legal action, with each party to the domestic proceedings potentially able to

apply to the Court. It was precisely for that reason that one result alone of the balancing exercise of the competing interests was insufficient, and that there should be a "corridor" of solutions within the confines of which the national courts should be allowed to give decisions in conformity with the Convention. Failing that, the Court would have to take the decision on every case itself, which could hardly be its role. Consequently, it should limit the scope of its scrutiny and intervene only where the domestic courts had not taken account of certain specific circumstances when undertaking the balancing exercise or where the result of that exercise was patently disproportionate (see, for example, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 111-20, ECHR 2004-XI). The Government argued that where the relationship between State and citizen was concerned, a gain of freedom for the individual concerned involved only a loss of competence for the State, whereas in the relationship between two citizens the fact of attaching more weight to the right of one of the persons concerned restricted the right of the others, which was forbidden under Article 53 of the Convention. The scope of the Court's scrutiny was accordingly reduced in such cases.

82. The Government highlighted the margin of appreciation enjoyed by the State in the present case. That margin depended on the nature of the activities in question and the aim pursued by the restrictions. In its recent case-law, the Court had moreover left the State a broad margin of appreciation in cases concerning Article 8 of the Convention (see *A. v. Norway*, no. 28070/06, § 66, 9 April 2009, and *Armonienė v. Lithuania*, no. 36919/02, § 38, 25 November 2008). Generally speaking, the margin enjoyed by the States was broader where there was no European consensus. In the Government's submission, whilst there was admittedly a trend towards harmonisation of the legal systems in Europe, differences nevertheless remained, as evidenced by the failure of the negotiations for the adoption of a regulation of the European Union on conflict-of-law rules regarding non-contractual obligations (Regulation EC No. 864/2007 of 11 July 2007 – Rome II Regulation). The margin of appreciation was also broad where the national authorities had to strike a balance between competing private and public interests or Convention rights (see *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V, and *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I). Moreover, the case-law of the Court of Justice of the European Union apparently took the same approach (cases of *Schmidberger* of 12 June 2003, C-112/00, and *Omega* of 14 October 2004, C-36/02).

(b) The applicants

83. The applicants wished to stress the context of the present applications. Since the first applicant had lost her first husband in a tragic accident in 1985, the media had realised that the story of the widow and her

three young children would sell well and provided a lucrative market. Although it was illegal under the French Civil Code to take or publish such photos in France, the applicants had nonetheless been pursued by paparazzi who could sell the photos in other markets, particularly in Germany. Whereas the public had never heard of the second applicant before, he had also been pursued by paparazzi since his marriage to the first applicant and the birth of their child. In accordance with decisions of the German civil courts, upheld by the Federal Constitutional Court in 1999, the applicants had been able to oppose publication of such photos only where they were in a secluded location, out of public view. The applicants had constantly been aware of being observed, pursued and hounded and had therefore had high hopes after the adoption of the *Von Hannover* judgment, in which the Court had called into question the case-law of the domestic courts. They had accordingly brought six test cases regarding photos comparable to those that had been the subject of the *Von Hannover* judgment. It would appear that the German authorities had not been ready to follow that judgment, however. This was evidenced both by the statements of the Federal Minister of Justice and the German Chancellor at the time, according to which the Court's judgment was not binding on the German courts because the case-law of the Federal Constitutional Court was of higher ranking than the Convention, and by the opinions expressed by the respective reporting judges in the *Caroline von Hannover* cases before the Federal Constitutional Court in an interview and in a legal article published in 2004 and 2009 respectively.

84. Germany had categorically refused until now to execute the *Von Hannover* judgment, in breach of Article 46 of the Convention. Accordingly, in its *Görgülü* judgment the Federal Constitutional Court had observed that a blanket execution of the Court's judgments should be avoided. The Court of Appeal had clearly stated in the present case that the judgment of the Federal Constitutional Court of 1999 took precedence. The Federal Court of Justice and the Federal Constitutional Court, for their part, had circumvented the *Von Hannover* judgment and continued to rely on the concept of figure of contemporary society (*par excellence*) that had been called into question by the Court, by using the terms "prominent persons" or "high-profile persons", and referring – *de facto* – to the spatial-isolation factor by using the expression "moment of relaxation or letting go, freed from the constraints of professional or everyday life". The applicants continued to be the subject of press articles on their daily and private life and to be hounded by paparazzi, with the German courts doing nothing to put a stop to this. As it was impossible for them to know whether they were protected from harassment by paparazzi, they complained of an intolerable situation of legal insecurity and a considerable risk of litigation and costs resulting from that.

85. The applicants argued that none of the photos, whether considered alone or in the context of the written article, contributed to a debate of public interest in a democratic society. They served purely to satisfy the curiosity of a particular readership. How and where the applicants spent their holidays clearly did not concern any matter that materially affected the public. A walk by the applicants during their holiday was not an event of contemporary society, especially as it was not undertaken in the exercise of any official function.

86. The reference to Prince Rainier's long-term illness in the article accompanying the photos in question could not alter that finding. The article was not about whether the prince's illness prevented him from carrying out his sovereign tasks. There were only a few sentences informing the reader about his illness; the article was mainly about the private life of the applicants and other members of the prince's family. The prince's illness had been merely a pretext for extensive coverage of the applicants' private life. It was already doubtful whether publication of the photo of Prince Rainier with his daughter Stéphanie could be justified, so publication of the photo complained of in this case was clearly unjustified. Even if there was information value in the prince's illness, there was no genuine link between the applicants' skiing holiday and that illness. A simple article would, moreover, have sufficed to satisfy the public's interest.

87. The applicants submitted that there had been nothing unusual or reprehensible in their spending a few days on a skiing holiday with their daughter during the prince's illness, just like other families. That information was totally irrelevant to how the Principality of Monaco was governed. It was precisely when a family member was suffering from a long-term illness that the relatives needed special protection during the few days that they could relax. If a relative's poor health were sufficient grounds upon which to publish photos, the Article 8 guarantees would be undermined and the press could permanently report on the applicants' private life. Where the photos showed the applicants visiting the prince, the event of contemporary society would be the visit, and where they were elsewhere the event would be their absence. The German media had fully grasped this: they could enrich their articles with a few sentences to artificially generate information value.

88. The applicants complained of the absence of two important factors in the balancing exercise undertaken by the German courts. They argued that the courts had failed to have regard to the fact that they had never sought to publicise details of their private life in the media, but had always defended themselves against any illegal publication. They thus had a legitimate expectation that their private life would be protected. Moreover, unlike the Court, the German courts had not taken account of the fact that the applicants were being permanently observed and hounded by paparazzi and that the photos had been taken without their knowledge or consent.

Furthermore, the first applicant had not at any time been called to the throne of the Principality of Monaco: her father had still been alive when the photos were taken. On the latter's death, it was her brother Albert who had succeeded him to the throne.

89. The applicants submitted that since the *Von Hannover* judgment, in which the Court had clearly established the criteria that had to be met in cases of illegal publication of photos, the German authorities could no longer rely on a margin of appreciation. In their submission, a European consensus had emerged following the influence of that judgment as illustrated by the adoption of a Resolution by the Parliamentary Assembly in 1998. The differences that remained were merely in the nuances. The *Von Hannover* judgment was part of a line of established case-law and had subsequently been confirmed many times. The applicants expressed surprise, moreover, that the Court, as a supreme European court, should have less extensive powers of scrutiny than those exercised by the Federal Constitutional Court, which, in the proceedings in respect of the photo published in the magazine *7 Tage* (paragraph 40 above), had overridden the opinion of the eleven professional judges who had examined the case and substituted its own opinion down to the last detail.

2. Third parties' observations

(a) Association of German magazine editors

90. The third-party association observed that the *Von Hannover* judgment delivered by the Court had had considerable effects on the freedom of the press in Germany. Following that judgment, the German courts had attached much less weight to the freedom of the press than before. Their decisions had now fallen into line with the Court's case-law, to which they often referred moreover. The association submitted that the press, in its role of "public watchdog", had the task not only of watching over parliaments, governance and other political events, but also of observing public life in general whether in politics, the economy, the arts, the social sphere, sport or any other domain. Like members of other royal families, the first applicant had a function as a role model and was unquestionably a public figure. The third-party association pointed out that, since 2003, the first applicant had been a UNESCO Goodwill Ambassador, a title bestowed on famous persons such as Nelson Mandela, Claudia Cardinale or Pierre Cardin. The Court had, moreover, described the first applicant as a public figure in judgments delivered after the *Von Hannover* judgment. In the association's view, the protection of privacy had already been quite extensive before the *Von Hannover* judgment and that protection had subsequently been further extended. The German courts had not therefore exceeded their margin of appreciation. The standard as it existed in France could not constitute a model for Europe.

(b) Ehrlich & Sohn GmbH & Co KG publishing company

91. The third-party publishing company reiterated the importance of the freedom of the press in Germany, particularly having regard to the country's former National Socialist era. It observed that, in accordance with the settled case-law of the Federal Constitutional Court, the entertainment press also enjoyed the protection of press freedom. Moreover, as the daughter of the late sovereign prince of a European country, sister of the current sovereign prince and wife of the Head of a former German noble dynasty, the first applicant was undeniably a public figure who attracted attention, at least in Europe. The publishing company submitted, lastly, that following the *Von Hannover* judgment delivered by the Court in 2004, the German courts had departed from precedent by restricting the possibility of publishing photographs of persons taken outside official events and without the consent of the interested parties and had thus severely curtailed the freedom of information and of the press.

(c) Media Lawyers Association

92. The third-party association argued that Article 8 of the Convention did not create an image right or, moreover, a right to reputation. Publication of a person's photo did not, of itself, necessarily constitute an interference with the rights guaranteed under that provision. In determining whether there had been an interference, regard had to be had to all the circumstances and a certain level of seriousness was required. It was vital that media reporting upon all matters of public interest was strongly protected. In the Association's submission, whilst the Court had rightly held, in its *Von Hannover* judgment, that regard had to be had to the context in which a photo had been taken, it had gone too far in asserting – in error – that publication of any photo fell within the scope of Article 8. The Court had unfortunately confirmed that position in subsequent judgments. The association maintained that the correct approach was first to examine whether the photo that had been published did or did not fall within the private sphere. In that context consideration had to be given to whether the person concerned, having regard to all the circumstances, had a legitimate expectation of privacy. If not, that was the end of the matter as Article 8 of the Convention did not apply. If yes, the domestic courts had to balance competing rights – of equal status – under Articles 8 and 10 of the Convention, whilst taking account of all the circumstances of the case. The balancing exercise and the outcome were matters that fell within the margin of appreciation of the States. The Court should intervene only where the national authorities had failed to undertake a balancing exercise or where their decisions were unreasonable. Lastly, the decision whether to include a photo in a written report fell within the editor's discretion and judges could not substitute their own opinion.

(d) Joint submissions by the Media Legal Defence Initiative, International Press Institute and World Association of Newspapers and News Publishers

93. The three third-party associations submitted that a broad trend could be observed across the Contracting States towards the assimilation by the national courts of the principles and standards articulated by the Court relating to the balancing of the rights under Article 8 against those under Article 10 of the Convention, even if the individual weight given to a particular factor might vary from one State to another. They invited the Court to grant a broad margin of appreciation to the Contracting States, submitting that such was the thrust of Article 53 of the Convention. They referred to the Court's judgment in *Chassagnou and Others v. France* ([GC], nos. 25088/94, 28331/95 and 28443/95, § 113, ECHR 1999-III), submitting that the Court had indicated that it would allow the Contracting States a wide margin of appreciation in situations of competing interests. The Contracting States were likewise generally granted a wider margin in respect of positive obligations in relationships between private parties or other areas in which opinions within a democratic society might reasonably differ significantly (see *Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I). The Court had, moreover, already allowed the Contracting States a broad margin of appreciation in a case concerning a balancing exercise in respect of rights under Articles 8 and 10 of the Convention (see *A. v. Norway*, cited above, § 66). Its role was precisely to confirm that the Contracting States had put in place a mechanism for the determination of a fair balance and whether particular factors taken into account by the national courts in striking such a balance were consistent with the Convention and its case-law. It should only intervene where the domestic courts had considered irrelevant factors to be significant or where the conclusions reached by the domestic courts were clearly arbitrary or summarily dismissive of the privacy or reputational interests at stake. Otherwise, it ran the risk of becoming a court of appeal for such cases.

3. The Court's assessment

(a) Scope of the application

94. The Court observes at the outset that it is not its task in the present case to examine whether Germany has satisfied its obligations under Article 46 of the Convention regarding execution of the *Von Hannover* judgment it delivered in 2004, as that task is the responsibility of the Committee of Ministers (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 61, ECHR 2009, and *Öcalan v. Turkey* (dec.), no. 5980/07, 6 July 2010). The present applications concern only new proceedings instituted by the applicants following the *Von*

Hannover judgment and relating to the publication of other photos of them (see paragraphs 15-20 above).

(b) General principles

(i) Concerning private life

95. The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name, photo, or physical and moral integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is thus a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life. Publication of a photo may thus intrude upon a person's private life even where that person is a public figure (see *Schüssel v. Austria* (dec.), no. 42409/98, 21 February 2002; *Von Hannover v. Germany*, no. 59320/00, §§ 50 and 53, ECHR 2004-VI; *Sciacca*, cited above, § 29; and *Petrina v. Romania*, no. 78060/01, § 27, 14 October 2008).

96. Regarding photos, the Court has stated that a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof (see *Reklos and Davourlis v. Greece*, cited above, § 40).

97. The Court also reiterates that, in certain circumstances, even where a person is known to the general public, he or she may rely on a "legitimate expectation" of protection of and respect for his or her private life (see *Von Hannover*, cited above, § 51; *Leempoel & S.A. ED. Ciné Revue v. Belgium*, no. 64772/01, § 78, 9 November 2006; *Standard Verlags GmbH v. Austria (no. 2)*, no. 21277/05, § 48, 4 June 2009; and *Hachette Filipacchi Associés (*ICI PARIS*) v. France*, no. 12268/03, § 53, 23 July 2009).

98. In cases of the type being examined here, what is in issue is not an act by the State but the alleged inadequacy of the protection afforded by the domestic courts to the applicants' private life. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91, and *Armonienė*, cited above, § 36). That also applies to the

protection of a person's picture against abuse by others (see *Schüssel*, cited above; *Von Hannover*, cited above, § 57; and *Reklos and Davourlis*, cited above, § 35).

99. The boundary between the State's positive and negative obligations under Article 8 does not lend itself to precise definition; the applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the relevant competing interests (see *White v. Sweden*, no. 42435/02, § 20, 19 September 2006, and *Gurgenidze*, cited above, § 38).

(ii) Concerning freedom of expression

100. The present applications require an examination of the fair balance that has to be struck between the applicants' right to respect for their private life and the right of the publishing company to freedom of expression guaranteed under Article 10 of the Convention. The Court therefore considers it useful to reiterate the general principles relating to the application of that provision as well.

101. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among other authorities, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; *Editions Plon v. France*, no. 58148/00, § 42, ECHR 2004-IV; and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV).

102. The Court has also repeatedly emphasised the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, §§ 59 and 62, ECHR 1999-III, and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 71, ECHR 2004-XI).

Furthermore, is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what

techniques of reporting should be adopted in a particular case (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298, and *Stoll v. Switzerland* [GC], no. 69698/01, § 146, ECHR 2007-V).

103. The Court reiterates, lastly, that freedom of expression includes the publication of photos (see *Österreichischer Rundfunk v. Austria* (dec.), no. 57597/00, 25 May 2004, and *Verlagsgruppe News GmbH v. Austria (no. 2)*, no. 10520/02, §§ 29 and 40, 14 December 2006). This is nonetheless an area in which the protection of the rights and reputation of others takes on particular importance, as the photos may contain very personal or even intimate information about an individual or his or her family (see *Von Hannover*, cited above, § 59; *Hachette Filipacchi Associés v. France*, no. 71111/01, § 42, 14 June 2007; and *Eerikäinen and Others v. Finland*, no. 3514/02, § 70, 10 February 2009).

Moreover, photos appearing in the "sensationalist" press or in "romance" magazines, which generally aim to satisfy the public's curiosity regarding the details of a person's strictly private life (see *Société Prisma Presse v. France* (dec.), nos. 66910/01 and 71612/01, 1 July 2003, and *Hachette Filipacchi Associés (*ICI PARIS*)*, cited above, § 40), are often taken in a climate of continual harassment which may induce in the person concerned a very strong sense of intrusion into their private life or even of persecution (see *Von Hannover*, cited above, § 59, and *Gurgenidze*, cited above, § 59).

(iii) Concerning the margin of appreciation

104. The Court reiterates that the choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation, whether the obligations on the State are positive or negative. There are different ways of ensuring respect for private life and the nature of the State's obligation will depend on the particular aspect of private life that is at issue (see *X and Y v. the Netherlands*, cited above, § 24, and *Odièvre v. France* [GC], no. 42326/98, § 46, ECHR 2003-III).

Likewise, under Article 10 of the Convention, the Contracting States have a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of expression protected by this provision is necessary (see *Tammer v. Estonia*, no. 41205/98, § 60, ECHR 2001-I, and *Pedersen and Baadsgaard*, cited above, § 68).

105. However, this margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court (see, *mutatis mutandis*, *Peck v. the United Kingdom*, no. 44647/98, § 77, ECHR 2003-I, and *Karhuvaara and Iltalehti v. Finland*, no. 53678/00, § 38, ECHR 2004-X). In exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole,

whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on (see *Petrenco v. Moldova*, no. 20928/05, § 54, 30 March 2010; *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 41, 21 September 2010; and *Petrov v. Bulgaria* (dec.), no. 27103/04, 2 November 2010).

106. In cases such as the present one, which require the right to respect for private life to be balanced against the right to freedom of expression, the Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the article, or under Article 10 by the publisher. Indeed, as a matter of principle these rights deserve equal respect (see *Hachette Filipacchi Associés (*ICI PARIS*)*, cited above, § 41; *Timciuc v. Romania* (dec.), no. 28999/03, § 144, 12 October 2010; and *Mosley v. the United Kingdom*, no. 48009/08, § 111, 10 May 2011; see also point 11 of the Resolution of the Parliamentary Assembly – paragraph 71 above). Accordingly, the margin of appreciation should in theory be the same in both cases.

107. Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *MGN Limited v. the United Kingdom*, no. 39401/04, §§ 150 and 155, 18 January 2011, and *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 57, ECHR 2011).

(iv) The criteria relevant for the balancing exercise

108. Where the right to freedom of expression is being balanced against the right to respect for private life, the criteria laid down in the case-law that are relevant to the present case are set out below.

(α) Contribution to a debate of general interest

109. An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest (see *Von Hannover*, cited above, § 60; *Leempoel & S.A. ED. Ciné Revue*, cited above, § 68; and *Standard Verlags GmbH*, cited above, § 46). The definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court nevertheless considers it useful to point out that it has recognised the existence of such an interest not only where the publication concerned political issues or crimes (see *White*, cited above, § 29; *Egeland and Hanseid v. Norway*, no. 34438/04, § 58, 16 April 2009; and *Leempoel & S.A. ED. Ciné Revue*, cited above, § 72), but also where it concerned sporting issues or performing artists (see *Nikowitz and Verlagsgruppe News GmbH v. Austria*, no. 5266/03, § 25, 22 February 2007; *Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal*,

nos. 11182/03 and 11319/03, § 28, 26 April 2007; and *Sapan v. Turkey*, no. 44102/04, § 34, 8 June 2010). However, the rumoured marital difficulties of the President of a country or the financial difficulties of a famous singer were not deemed to be matters of general interest (see *Standard Verlags GmbH*, cited above, § 52, and *Hachette Filipacchi Associés (*ICI PARIS*)*, cited above, § 43).

(β) How well known is the person concerned and what is the subject of the report?

110. The role or function of the person concerned and the nature of the activities that are the subject of the report and/or photo constitute another important criterion, related to the preceding one. In that connection a distinction has to be made between private individuals and persons acting in a public context, as political figures or public figures. Accordingly, whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures (see *Minelli v. Switzerland* (dec.), no. 14991/02, 14 June 2005, and *Petrenco*, cited above, § 55). A fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions (see *Von Hannover*, cited above, § 63, and *Standard Verlags GmbH*, cited above, § 47).

While in the former case the press exercises its role of "public watchdog" in a democracy by imparting information and ideas on matters of public interest, that role appears less important in the latter case. Similarly, although in certain special circumstances the public's right to be informed can even extend to aspects of the private life of public figures, particularly where politicians are concerned, this will not be the case – despite the person concerned being well known to the public – where the published photos and accompanying commentaries relate exclusively to details of the person's private life and have the sole aim of satisfying public curiosity in that respect (see *Von Hannover*, cited above, § 65 with the references cited therein, and *Standard Verlags GmbH*, cited above, § 53; see also point 8 of the Resolution of the Parliamentary Assembly – paragraph 71 above). In the latter case, freedom of expression calls for a narrower interpretation (see *Von Hannover*, cited above, § 66; *Hachette Filipacchi Associés (*ICI PARIS*)*, cited above, § 40; and *MGN Limited*, cited above, § 143).

(γ) Prior conduct of the person concerned

111. The conduct of the person concerned prior to publication of the report or the fact that the photo and the related information have already appeared in an earlier publication are also factors to be taken into consideration (see *Hachette Filipacchi Associés (*ICI PARIS*)*, cited above,

§§ 52-53, and *Sapan*, cited above, § 34). However, the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving the party concerned of all protection against publication of the photo at issue (see *Egeland and Hanseid*, cited above, § 62).

(δ) Content, form and consequences of the publication

112. The way in which the photo or report are published and the manner in which the person concerned is represented in the photo or report may also be factors to be taken into consideration (see *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. v. Austria (no. 3)*, nos. 66298/01 and 15653/02, § 47, 13 December 2005; *Reklos and Davourlis*, cited above, § 42; and *Jokitaipale and Others v. Finland*, no. 43349/05, § 68, 6 April 2010). The extent to which the report and photo have been disseminated may also be an important factor, depending on whether the newspaper is a national or local one, and has a large or a limited circulation (see *Karhuvaara and Iltalehti*, cited above, § 47, and *Gurgenidze*, cited above, § 55).

(ε) Circumstances in which the photos were taken

113. Lastly, the Court has already held that the context and circumstances in which the published photos were taken cannot be disregarded. In that connection regard must be had to whether the person photographed gave their consent to the taking of the photos and their publication (see *Gurgenidze*, cited above, § 56, and *Reklos and Davourlis*, cited above, § 41) or whether this was done without their knowledge or by subterfuge or other illicit means (see *Hachette Filipacchi Associés (*ICI PARIS*)*, cited above, § 47, and *Flinkkilä and Others v. Finland*, no. 25576/04, § 81, 6 April 2010). Regard must also be had to the nature or seriousness of the intrusion and the consequences of publication of the photo for the person concerned (see *Egeland and Hanseid*, cited above, § 61, and *Timciuc*, cited above, § 150). For a private individual, unknown to the public, the publication of a photo may amount to a more substantial interference than a written article (see *Eerikäinen and Others*, cited above, § 70, and *A. v. Norway*, cited above, § 72).

(c) Application of the principles to the present case

114. The Court takes note of the changes made by the Federal Court of Justice to its earlier case-law following the *Von Hannover* judgment. That court stated, *inter alia*, that in future importance had to be attached to whether the report in question contributed to a factual debate and whether its contents went beyond a mere desire to satisfy public curiosity. It observed in that connection that the greater the information value for the public, the more the interest of a person in being protected against its

publication had to yield, and vice versa. Whilst pointing out that the freedom of expression also included the entertainment press, it stated that the reader's interest in being entertained generally carried less weight than the interest in protecting the private sphere.

115. The Federal Constitutional Court confirmed that approach, stating that whilst it had not, in its judgment of 15 December 1999, called into question the former case-law of the Federal Court of Justice, that did not mean that another concept of protection – giving greater weight to balancing the conflicting interests at stake when examining the question whether a photo could be regarded as an aspect of contemporary society and could accordingly be published without the consent of the person concerned – could not be in conformity with the Basic Law.

116. In so far as the applicants alleged that the new approach of the Federal Court of Justice and the Federal Constitutional Court merely reproduced the reasoning of the former case-law using different terms, the Court reiterates that its task is not to review the relevant domestic law and practice *in abstracto*, but to determine whether the manner in which they were applied to the applicants has infringed Article 8 of the Convention (see *Karhuvaara and Iltalehti*, cited above, § 49).

117. The Court observes that in applying its new approach the Federal Court of Justice found that as neither the part of the article accompanying the photos of the applicants' skiing holiday nor the photos themselves contained information related to an event of contemporary society, they did not contribute to a debate of general interest. The Federal Court of Justice found that the same could not be said, however, with regard to the information in the articles about the illness affecting Prince Rainier III, the reigning sovereign of the Principality of Monaco at the time, and the conduct of the members of his family during that illness. In the Federal Court of Justice's opinion, that subject qualified as an event of contemporary society on which the magazines were entitled to report, and which entitled them to include the photos in question in that report as these supported and illustrated the information being conveyed.

The Federal Constitutional Court, for its part, observed that the Federal Court of Justice had accepted that the reigning Prince of Monaco's illness could be regarded as a matter of general interest and that the press was therefore entitled to report on how the prince's children reconciled their obligations of family solidarity with the legitimate needs of their private life, among which was the desire to go on holiday. It also confirmed that there was a sufficiently close link between the photo and the event described in the article.

118. The Court observes that the fact that the Federal Court of Justice assessed the information value of the photo in question in the light of the accompanying article cannot be criticised under the Convention (see, *mutatis mutandis*, *Tønsbergs Blad A.S. and Haukom v. Norway*, no. 510/04,

§ 87, 1 March 2007, and *Österreichischer Rundfunk v. Austria*, no. 35841/02, §§ 68-69, 7 December 2006). Regarding the characterisation of Prince Rainier's illness as an event of contemporary society, the Court is of the opinion that, having regard to the reasons advanced by the German courts, that interpretation cannot be considered unreasonable (see, *mutatis mutandis*, *Editions Plon*, cited above, §§ 46-57). It is worth mentioning in this connection that the Federal Court of Justice upheld the injunction forbidding publication of two other photos showing the applicants in similar circumstances, precisely on the grounds that they were being published for entertainment purposes alone (see paragraphs 36-37 above). The Court can therefore accept that the photos in question, considered in the light of the accompanying articles, did contribute, at least to some degree, to a debate of general interest. It would reiterate, on this point, that not only does the press have the task of imparting information and ideas on all matters of public interest, the public also has a right to receive them (see paragraph 102 above).

119. In so far as the applicants complained of a risk that the media would circumvent the conditions laid down by the Federal Court of Justice by using any event of contemporary society as a pretext to justify the publication of photos of them, the Court notes that it is not its task, in the context of the present applications, to rule on the conformity with the Convention of any future publication of photos of the applicants. Should that happen, it will be open to them to bring proceedings in the appropriate national courts. The Court also observes that the Federal Constitutional Court stated in its judgment that where an article was merely a pretext for publishing a photo of a prominent person, no contribution was thereby made to the formation of public opinion and there were therefore no grounds for allowing the interest in publication to prevail over the protection of personality rights.

120. Admittedly, the Federal Court of Justice based its reasoning on the premise that the applicants were well-known public figures who particularly attracted public attention, without going into their reasons for reaching that conclusion. The Court considers, nonetheless, that irrespective of the question whether and to what extent the first applicant assumes official functions on behalf of the Principality of Monaco, it cannot be claimed that the applicants, who are undeniably very well known, are ordinary private individuals. They must, on the contrary, be regarded as public figures (see *Gurgenidze*, cited above, § 40; *Sciacca*, cited above, § 27; *Reklos and Davourlis*, cited above, § 38; and *Giorgi Nikolaishvili v. Georgia*, no. 37048/04, § 123, 13 January 2009).

121. The Federal Court of Justice then examined the question whether the photos had been taken in circumstances unfavourable to the applicants. The Government submitted that the fact that the photos had been taken without the applicants' knowledge did not necessarily mean that they had

been taken surreptitiously in conditions unfavourable to the applicants. The latter, for their part, alleged that the photos had been taken in a climate of general harassment with which they were constantly confronted.

122. The Court observes that the Federal Court of Justice concluded that the applicants had not adduced evidence of unfavourable circumstances in that connection and that there was nothing to indicate that the photos had been taken surreptitiously or by equivalent secret means such as to render their publication illegal. The Federal Constitutional Court, for its part, stated that the publishing company concerned had provided details of how the photo that had appeared in the *Frau im Spiegel* magazine had been taken, but that the first applicant had neither complained before the civil courts that those details were inadequate nor submitted that the photo in question had been taken in conditions that were unfavourable to her.

123. The Court observes that, according to the case-law of the German courts, the circumstances in which photos have been taken constitutes one of the factors that are normally examined when the competing interests are balanced against each other. In the present case it can be seen from the decisions of the national courts that this factor did not require a more thorough examination as the applicants did not put forward any relevant arguments and there were no particular circumstances justifying an injunction against publishing the photos. The Court notes, moreover, as pointed out by the Federal Court of Justice, that the photos of the applicants in the middle of a street in St Moritz in winter were not in themselves offensive to the point of justifying their prohibition.

(d) Conclusion

124. The Court observes that, in accordance with their case-law, the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken.

125. The Court also observes that the national courts explicitly took account of the Court's relevant case-law. Whilst the Federal Court of Justice had changed its approach following the *Von Hannover* judgment, the Federal Constitutional Court, for its part, had not only confirmed that approach, but also undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints that the Federal Court of Justice had disregarded the Convention and the Court's case-law.

126. In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with

their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Disjoins* the application in the case of *Axel Springer AG v. Germany* (no. 39954/08) from the present applications;

2. *Declares* the present applications admissible;

3. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 February 2012.

Michael O'Boyle	Nicolas Bratza
Deputy Registrar	President



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

THIRD SECTION

CASE OF VON HANNOVER v. GERMANY

(Application no. 59320/00)

JUDGMENT

STRASBOURG

24 June 2004

FINAL

24/09/2004

In the case of Von Hannover v. Germany,

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

Mr I. CABRAL BARRETO, *President*,
Mr G. RESS,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mr K. TRAJA, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 6 November 2003 and 3 June 2004,

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

PROCEDURE

1. The case originated in an application (no. 59320/00) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of Monaco, Caroline von Hannover ("the applicant"), on 6 June 2000.

2. The applicant alleged that the German court decisions in her case had infringed her right to respect for her private and family life as guaranteed by Article 8 of the Convention.

3. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

4. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

5. By a decision of 8 July 2003, the Chamber declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). In addition, comments were received from the Association of German Magazine Publishers (*Verband deutscher Zeitschriftenverleger*) and from Hubert Burda Media GmbH & Co. KG, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The applicant replied to those comments (Rule 44 § 5).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 6 November 2003 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr K. STOLTENBERG, *Ministerialdirigent*, *Agent*,
Mr A. OHLY, Professor of civil law at Bayreuth University, *Counsel*,
Mrs A. LAITENBERGER, executive assistant to the Agent, *Adviser*;

(b) *for the applicant*
Mr M. PRINZ, lawyer, *Counsel*,
Ms C. MOFFAT, lawyer,
Mr A. TOUCAS, lawyer, *Advisers*.

The Court heard addresses by Mr Prinz, Mr Stoltenberg and Mr Ohly.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, who is the eldest daughter of Prince Rainier III of Monaco, was born in 1957. Her official residence is in Monaco but she lives in the Paris area most of the time.

As a member of Prince Rainier's family, the applicant is the president of certain humanitarian or cultural foundations, such as the Princess Grace Foundation or the Prince Pierre of Monaco Foundation, and also represents the ruling family at events such as the Red Cross Ball or the opening of the International Circus Festival. She does not, however, perform any function within or on behalf of the State of Monaco or any of its institutions.

A. Background to the case

9. Since the early 1990s the applicant has been trying – often through the courts – in a number of European countries to prevent the publication of photos about her private life in the tabloid press.

10. The photos that were the subject of the proceedings described below were published by the Burda publishing company in the German magazines *Bunte* and *Freizeit Revue*, and by the Heinrich Bauer publishing company in the German magazine *Neue Post*.

1. The first series of photos

(a) The five photos of the applicant published in *Freizeit Revue* magazine (issue no. 30 of 22 July 1993)

11. These photos show her with the actor Vincent Lindon at the far end of a restaurant courtyard in Saint-Rémy-de-Provence. The first page of the magazine refers to "The most tender photos of her romance with Vincent" ("*Die zärtlichsten Fotos Ihrer Romanze mit Vincent*") and the photos themselves bear the caption "These photos are evidence of the most tender romance of our time" ("*Diese Fotos sind der Beweis für die zärtlichste Romanze unserer Zeit*").

(b) The two photos of the applicant published in *Bunte* magazine (issue no. 32 of 5 August 1993)

12. The first photo shows her on horseback with the caption "Caroline and the blues. Her life is a novel with innumerable misfortunes, says the author Roig" ("*Caroline und die Melancholie. Ihr Leben ist ein Roman mit unzähligen Unglücken, sagt Autor Roig*").

The second photo shows her with her children Pierre and Andrea.

The photos are part of an article entitled "I don't think I could be a man's ideal wife" ("*Ich glaube nicht, dass ich die ideale Frau für einen Mann sein kann*").

(c) The seven photos of the applicant published in *Bunte* magazine (issue no. 34 of 19 August 1993)

13. The first photo shows her canoeing with her daughter Charlotte, the second shows her son Andrea with a bunch of flowers in his arms.

The third photo shows her doing her shopping with a bag slung over her shoulder, the fourth with Vincent Lindon in a restaurant and the fifth alone on a bicycle.

The sixth photo shows her with Vincent Lindon and her son Pierre.

The seventh photo shows her doing her shopping at the market, accompanied by her bodyguard.

The article is entitled "Pure happiness" ("V*om einfachen Glück*").

2. The second series of photos

(a) The ten photos of the applicant published in *Bunte* magazine (issue no. 10 of 27 February 1997)

14. These photos show the applicant on a skiing holiday in Zürs/Arlberg. The accompanying article is entitled "Caroline... a woman returns to life" ("*Caroline... eine Frau kehrt ins Leben zurück*").

(b) The eleven photos of the applicant published in *Bunte* magazine (issue no. 12 of 13 March 1997)

15. Seven photos show her with Prince Ernst August von Hannover at a horse show in Saint-Rémy-de-Provence. The accompanying article is entitled "The kiss. Or: they are not hiding anymore" ("*Der Kuss. Oder: jetzt verstecken sie sich nicht mehr*").

Four other photos show her leaving her house in Paris with the caption "Out and about with Princess Caroline in Paris" ("*Mit Prinzessin Caroline unterwegs in Paris*").

(c) The seven photos of the applicant published in *Bunte* magazine (issue no. 16 of 10 April 1997)

16. These photos show the applicant on the front page with Prince Ernst August von Hannover and on the inside pages of the magazine playing tennis with him or both putting their bicycles down.

3. The third series of photos

17. The sequence of photos published in *Neue Post* magazine (issue no. 35/97) shows the applicant at the Monte Carlo Beach Club, dressed in a swimsuit and wrapped up in a bathing towel, tripping over an obstacle and falling down. The photos, which are quite blurred, are accompanied by an article entitled "Prince Ernst August played fisticuffs and Princess Caroline fell flat on her face" ("*Prinz Ernst August haute auf den Putz und Prinzessin Caroline fiel auf die Nase*").

B. The proceedings in the German courts

1. The first set of proceedings

(a) Judgment of the Hamburg Regional Court of 4 February 1993

18. On 13 August 1993 the applicant sought an injunction in the Hamburg Regional Court (*Landgericht*) against any further publication by the Burda publishing company of the first series of photos on the ground that they infringed her right to protection of her personality rights (*Persönlichkeitsrecht*), guaranteed by Articles 2 § 1 and 1 § 1 of the Basic Law (*Grundgesetz*), and her right to protection of her private life and to the control of the use of her image, guaranteed by sections 22 et seq. of the Copyright (Arts Domain) Act (*Kunsturhebergesetz* – "the Copyright Act" – see paragraphs 40-41 below).

19. In a judgment of 4 February 1993, the Regional Court granted the application only in respect of the distribution of the magazines in France, in accordance with the rules of private international law (section 38 of the

Introductory Act to the Civil Code – *Einführungsgesetz in das bürgerliche Gesetzbuch*) read in conjunction with Article 9 of the French Civil Code.

With regard to the distribution of the magazines in Germany, however, the Regional Court reiterated that it was German law which applied. Under section 23(1) no. 1 of the Copyright Act, the applicant, as a figure of contemporary society "*par excellence*" (*eine "absolute" Person der Zeitgeschichte*), had to tolerate this kind of publication.

The Regional Court held that she had failed to establish a legitimate interest (*berechtigtes Interesse*) justifying an injunction against further publication because, where figures of contemporary society "*par excellence*" were concerned, the right to protection of private life stopped at their front door. All the photos of the applicant had been taken exclusively in public places.

(b) Judgment of the Hamburg Court of Appeal of 8 December 1994

20. The applicant appealed against that judgment.

21. In a judgment of 8 December 1994, the Hamburg Court of Appeal (*Oberlandesgericht*) dismissed the applicant's appeal and set aside the injunction against subsequent publications in France.

Indeed, like the Regional Court, the Court of Appeal found that the applicant was a contemporary figure "*par excellence*" and therefore had to tolerate publication without her consent of the photos in question, which had all been taken in public places. Even if the constant hounding by photographers made her daily life difficult, it arose from a legitimate desire to inform the general public.

(c) Judgment of the Federal Court of Justice of 19 December 1995

22. The applicant appealed on points of law against that judgment.

23. In a judgment of 19 December 1995, the Federal Court of Justice (*Bundesgerichtshof*) allowed the applicant's appeal in part, granting her an injunction against any further publication of the photos that had appeared in *Freizeit Revue* magazine (issue no. 30 of 22 July 1993) showing her with Vincent Lindon in a restaurant courtyard on the ground that the photos interfered with her right to respect for her private life.

The Federal Court held that even figures of contemporary society "*par excellence*" were entitled to respect for their private life and that this was not limited to their home but also covered the publication of photos. Outside their home, however, they could not rely on the protection of their privacy unless they had retired to a secluded place – away from the public eye (*in eine örtliche Abgeschiedenheit*) – where it was objectively clear to everyone that they wanted to be alone and where, confident of being away from prying eyes, they behaved in a given situation in a manner in which they would not behave in a public place. Unlawful interference with the protection of that privacy could therefore be made out if photos were

published that had been taken secretly and/or by catching unawares a person who had retired to such a place. That was the position here, where the applicant and her male companion had withdrawn to the far end of a restaurant courtyard with the clear aim of being out of the public eye.

However, the Federal Court dismissed the remainder of her appeal on the ground that, as a figure of contemporary society "*par excellence*", the applicant had to tolerate the publication of photos in which she appeared in a public place even if they were photos of scenes from her daily life and not photos showing her exercising her official functions. The public had a legitimate interest in knowing where the applicant was staying and how she behaved in public.

(d) Judgment of the Federal Constitutional Court of 15 December 1999

24. The applicant then appealed to the Federal Constitutional Court (*Bundesverfassungsgericht*), submitting that there had been an infringement of her right to the protection of her personality rights (Article 2 § 1 read in conjunction with Article 1 § 1 of the Basic Law).

In the applicant's submission, the criteria established by the Federal Court of Justice regarding the protection of privacy in respect of photos taken in public places did not effectively protect the free development of the personality, be it in the context of private life or family life. Those criteria were so narrow that in practice the applicant could be photographed at any time outside her home and the photos subsequently published in the media.

Given that the photos were not used genuinely to inform people, but merely to entertain them, the right to control the use of one's image in respect of scenes from private life, which had been recognised by the case-law of the Federal Constitutional Court, prevailed over the right – also guaranteed by the Basic Law – to freedom of the press.

25. In a landmark judgment of 15 December 1999, delivered after a hearing, the Constitutional Court allowed the applicant's appeal in part on the ground that the publication of the three photos in issues nos. 32 and 34 of *Bunte* magazine, dated 5 August 1993 and 19 August 1993, featuring the applicant with her children had infringed her right to the protection of her personality rights guaranteed by Articles 2 § 1 and 1 § 1 of the Basic Law, reinforced by her right to family protection under Article 6 of the Basic Law. It referred the case to the Federal Court of Justice on that point. However, the Constitutional Court dismissed the applicant's appeal regarding the other photos.

The relevant extract of the judgment reads as follows:

> "The appeal is well-founded in part.
>
> ...
>
> II.

The decisions being appealed do not fully satisfy the requirements of Article 2 § 1 read in conjunction with Article 1 § 1 of the Basic Law.

1. The provisions of sections 22 and 23 of the KUG [*Kunsturhebergesetz* – Copyright Act] on which the civil courts based their decisions in the present case are, however, compatible with the Basic Law.

Under Article 2 § 1 of the Basic Law, general personality rights are guaranteed only within the framework of the constitutional order. The provisions concerning the publication of photographical representations of persons listed in sections 22 and 23 of the KUG are part of that constitutional order. They derive from an incident which at the time caused a scandal (photos of Bismarck on his deathbed ...) and from the ensuing politico-legal debate sparked off by this incident ..., and aim to strike a fair balance between respect for personality rights and the community's interest in being informed ...

Under section 22, first sentence, of the KUG, pictures can only be disseminated or exposed to the public eye with the express approval of the person represented. Pictures relating to contemporary society are excluded from that rule under section 23(1) of the KUG ... Under section 23(2) of the KUG, however, that exception does not apply where the dissemination interferes with a legitimate interest of the person represented. The protection by degrees under these rules ensures that they take account of the need to protect the person being represented as well as the community's desire to be informed and the interest of the media which satisfy that desire. That much has already been established by the Federal Constitutional Court ...

...

(b) In the instant case regard must be had, in interpreting and applying sections 22 and 23 of the KUG, not only to general personality rights, but also to the freedom of the press guaranteed by Article 5 § 1, second sentence, of the Basic Law in so far as the provisions in question also affect those freedoms.

...

The fact that the press fulfils the function of forming public opinion does not exclude entertainment from the functional guarantee under the Basic Law. The formation of opinions and entertainment are not opposites. Entertainment also plays a role in the formation of opinions. It can sometimes even stimulate or influence the formation of opinions more than purely factual information. Moreover, there is a growing tendency in the media to do away with the distinction between information and entertainment both as regards press coverage generally and individual contributions, and to disseminate information in the form of entertainment or mix it with entertainment ('infotainment'). Consequently, many readers obtain information they consider to be important or interesting from entertaining coverage ...

Nor can mere entertainment be denied any role in the formation of opinions. That would amount to unilaterally presuming that entertainment merely satisfies a desire for amusement, relaxation, escapism or diversion. Entertainment can also convey images of reality and propose subjects for debate that spark off a process of discussion and assimilation relating to philosophies of life, values and behaviour models. In that respect, it fulfils important social functions ... When measured against the aim of

protecting press freedom, entertainment in the press is neither negligible nor entirely worthless and therefore falls within the scope of application of fundamental rights ...

The same is true of information about people. Personalisation is an important journalistic means of attracting attention. Very often it is this which first arouses interest in a problem and stimulates a desire for factual information. Similarly, interest in a particular event or situation is usually stimulated by personalised accounts. Additionally, celebrities embody certain moral values and lifestyles. Many people base their choice of lifestyle on their example. They become points of crystallisation for adoption or rejection and act as examples or counter-examples. This is what explains the public interest in the various ups and downs occurring in their lives.

As regards politicians, this public interest has always been deemed to be legitimate from the point of view of transparency and democratic control. Nor can it in principle be disputed that it exists in respect of other public figures. To that extent it is the function of the press to show people in situations that are not limited to specific functions or events and this also falls within the sphere of protection of press freedom. It is only when a balancing exercise has to be done between competing personality rights that an issue arises as to whether matters of essential interest for the public are involved and treated seriously and objectively or whether private matters, designed merely to satisfy the public's curiosity, are being disseminated ...

(c) The decision of the Federal Court of Justice largely stands up to an examination of its compatibility with the constitutional rules.

(aa) The Federal Court of Justice cannot be criticised under constitutional law for assessing the conditions of application [*Tatbestandsvoraussetzungen*] of section 23(1) no. 1 of the KUG according to the criterion of the community's interest in being informed and deciding on that basis that the photos showing the appellant outside her representative function in the Principality of Monaco were lawful.

Under section 23(1) no. 1 of the KUG, the publication of pictures portraying an aspect of contemporary society are exempted from the obligation to obtain the consent of the person concerned within the meaning of section 22 of the KUG. Judging from the drafting history of the Act ... and from the meaning and purpose of the words used, the provision in question takes into consideration the community's interest in being informed and the freedom of the press. Accordingly, the interpretation of this element [*Tatbestandsmerkmal*] must take account of the interests of the public. Pictures of people who are of no significance in contemporary society should not be made freely accessible to the public: they require the prior consent of the person concerned. The other element that is affected by fundamental rights, that of a 'legitimate interest' for the purposes of section 23(2) of the KUG, concerns only – and this must be stressed at the outset – figures of contemporary society and cannot therefore take sufficient account of the interests of the freedom of the press if these have previously been neglected when the circle of the persons concerned was defined.

It is in keeping with the importance and scope of the freedom of the press, and not unreasonably restrictive of the protection of personality rights, that the concept of contemporary society referred to in section 23(1) no. 1 of the KUG should not only cover, in accordance with a definition given by the courts, events of historical or political significance, but be defined on the basis of the public interest in being informed ... The kernel of press freedom and the free formation of opinions requires the press to have, within legal limits, sufficient margin of manoeuvre to allow it to

decide, in accordance with its publishing criteria, what the public interest demands, and the process of forming opinion to establish what amounts to a matter of public interest. As has been stated, entertaining coverage is no exception to these principles.

Nor should the Federal Court of Justice be criticised for including in the 'domain of contemporary society', within the meaning of section 23(1) no. 1 of the KUG, pictures of people who have not only aroused public interest at a certain point on the occasion of a particular historical event but who, on account of their status and importance, attract the public's attention in general and not just on the odd occasion. Account should also be taken in this regard of the fact that, compared to the situation at the time the Copyright Act was passed, increased importance is given today to illustrated information. The concept of a 'figure of contemporary society "*par excellence*" ' [*'absolute' Person der Zeitgeschichte*], often employed in this respect in the case-law and legal theory, does not conclusively derive from statute or the Constitution. If, as was done by the Court of Appeal and the Federal Court of Justice, it is interpreted as a shortened expression designating people whose image is deemed by the public to be worthy of respect out of consideration for the people concerned, it is irreproachable from the point of view of constitutional law at least as long as a balancing exercise is carried out, in the light of the circumstances of the case, between the public's interest in being informed and the legitimate interests of the person concerned.

General personality rights do not require publications that are not subject to prior consent to be limited to pictures of figures of contemporary society in the exercise of their function in society. Very often the public interest aroused by such figures does not relate exclusively to the exercise of their function in the strict sense. It can, on the contrary, by virtue of the particular function and its impact, extend to information about the way in which these figures behave generally – that is, also outside their function – in public. The public has a legitimate interest in being allowed to judge whether the personal behaviour of the individuals in question, who are often regarded as idols or role models, convincingly tallies with their behaviour on their official engagements.

If, on the other hand, the right to publish pictures of people considered to be figures of contemporary society were to be limited to their official functions, insufficient account would be taken of the public interest properly aroused by such figures and this would, moreover, favour a selective presentation that would deprive the public of certain necessary judgmental possibilities in respect of figures of socio-political life, having regard to the function of role model of such figures and the influence they exert. The press is not, however, allowed to use every picture of figures of contemporary society. On the contrary, section 23(2) of the KUG gives the courts adequate opportunity to apply the protective provisions of Article 2 § 1 read in conjunction with Article 1 § 1 of the Basic Law ...

(bb) In theory the criteria established by the Federal Court of Justice for interpreting the concept of 'legitimate interest' used in section 23(2) of the KUG are irreproachable from the point of view of constitutional law.

According to the decision being appealed, the privacy meriting protection that must also be afforded to 'figures of contemporary society "*par excellence*" ' presupposes that they have retired to a secluded place with the objectively recognisable aim of being alone and where, confident of being alone, they behave in a manner in which they would not behave in public. The Federal Court of Justice accepted that there had

been a breach of sections 22 and 23 of the KUG where this type of picture was taken secretly or by catching the person unawares.

The criterion of a secluded place takes account of the aim, pursued by the general right to protection of personality rights, of allowing the individual a sphere, including outside the home, in which he does not feel himself to be the subject of permanent public attention – and relieves him of the obligation of behaving accordingly – and in which he can relax and enjoy some peace and quiet. This criterion does not excessively restrict press freedom because it does not impose a blanket ban on pictures of the daily or private life of figures of contemporary society, but allows them to be shown where they have appeared in public. In the event of an overriding public interest in being informed, the freedom of the press can even, in accordance with that case-law authority, be given priority over the protection of the private sphere ...

The Federal Court of Justice properly held that it is legitimate to draw conclusions from the behaviour adopted in a given situation by an individual who is clearly in a secluded spot. However, the protection against dissemination of photos taken in that context does not only apply where the individual behaves in a manner in which he would not behave in public. On the contrary, the development of the personality cannot be properly protected unless, irrespective of his behaviour, the individual has a space in which he can relax without having to tolerate the presence of photographers or cameramen. That is not in issue here, however, since, according to the findings on which the Federal Court of Justice based its decision, the first of the conditions to which protection of private life is subject has not been met.

Lastly, there is nothing unconstitutional, when balancing the public interest in being informed against the protection of private life, in attaching importance to the method used to obtain the information in question ... It is doubtful, however, that the mere fact of photographing the person secretly or catching them unawares can be deemed to infringe their privacy outside the home. Having regard to the function attributed to that privacy under constitutional law and to the fact that it is usually impossible to determine from a photo whether the person has been photographed secretly or caught unawares, the existence of unlawful interference with that privacy cannot in any case be made out merely because the photo was taken in those conditions. As, however, the Federal Court of Justice has already established in respect of the photographs in question that the appellant was not in a secluded place, the doubts expressed above have no bearing on the review of its decision.

(cc) However, the constitutional requirements have not been satisfied in so far as the decisions of which the appellant complains did not take account of the fact that the right to protection of personality rights of persons in the appellant's situation is strengthened by Article 6 of the Basic Law regarding those persons' intimate relations with their children.

(dd) The following conclusions can be drawn from the foregoing considerations with regard to the photographs in question:

The decision of the Federal Court of Justice cannot be criticised under constitutional law regarding the photos of the appellant at a market, doing her shopping at a market accompanied by her bodyguard or dining with a male companion at a well-attended restaurant. The first two cases concerned an open location frequented by the general public. The third case admittedly concerned a well-circumscribed location, spatially speaking, but one in which the appellant was exposed to the other people present. It is

for this reason, moreover, that the Federal Court of Justice deemed it legitimate to ban photos showing the appellant in a restaurant garden, which were the subject of the decision being appealed but are not the subject of the constitutional appeal. The presence of the appellant and her companion there presented all the features of seclusion. The fact that the photographs in question were evidently taken from a distance shows that the appellant could legitimately have assumed that she was not exposed to public view.

Nor can the decision being appealed be criticised regarding the photos of the appellant alone on horseback or riding a bicycle. In the Federal Court of Justice's view, the appellant had not been in a secluded place, but in a public one. That finding cannot attract criticism under constitutional law. The appellant herself describes the photos in question as belonging to the intimacy of her private sphere merely because they manifest her desire to be alone. In accordance with the criteria set out above, the mere desire of the person concerned is not relevant in any way.

The three photos of the appellant with her children require a fresh examination, however, in the light of the constitutional rules set out above. We cannot rule out the possibility that the review that needs to be carried out in the light of the relevant criteria will lead to a different result for one or other or all the photos. The decision must therefore be set aside in that respect and remitted to the Federal Court of Justice for a fresh decision.

(d) The decisions of the Regional Court and the Court of Appeal resulted in a violation of fundamental rights by limiting to the home the privacy protected by Article 2 § 1 read in conjunction with Article 1 § 1 of the Basic Law in accordance, moreover, with a rationale that was in keeping with the case-law at the time. The decisions in question do not need to be set aside, however, since the violation complained of has been remedied in part by the Federal Court of Justice and the remainder of the case remitted to that court.

..."

(e) Sequel to the proceedings

26. Following the remittal of the case to the Federal Court of Justice in connection with the three photos that had appeared in *Bunte* magazine (issue no. 32 of 5 August 1993 and no. 34 of 19 August 1993) showing the applicant with her children, the Burda publishing company undertook not to republish the photos (*Unterlassungserklärung*).

2. The second set of proceedings

(a) Judgment of the Hamburg Regional Court of 26 September 1997

27. On 14 May 1997 the applicant reapplied to the Hamburg Regional Court, seeking an injunction preventing the Burda publishing company from republishing the second series of photos on the ground that they infringed her right to protection of her personality rights, guaranteed by Articles 2 § 1

and 1 § 1 of the Basic Law, and her right to protection of her private life and to the control of the use of her image, guaranteed by sections 22 et seq. of the Copyright Act.

28. In a judgment of 26 September 1997, the Hamburg Regional Court rejected the application, referring in particular to the grounds of the Federal Court of Justice's judgment of 19 December 1995.

(b) Judgment of the Hamburg Court of Appeal of 10 March 1998

29. The applicant appealed against that judgment.

30. In a judgment of 10 March 1998, the Hamburg Court of Appeal dismissed the applicant's appeal for the same reasons.

(c) Decision of the Federal Constitutional Court of 4 April 2000

31. As the Court of Appeal did not grant leave to appeal on points of law to the Federal Court of Justice, the applicant lodged a constitutional appeal directly with the Federal Constitutional Court, relying on her earlier submissions.

32. In a decision of 4 April 2000, the Federal Constitutional Court, ruling as a panel of three judges, refused to entertain the appeal. It referred in particular to the Federal Court of Justice's judgment of 19 December 1995 and to its own landmark judgment of 15 December 1999.

3. The third set of proceedings

(a) Judgment of the Hamburg Regional Court of 24 April 1998

33. On 5 November 1997 the applicant reapplied to the Hamburg Regional Court, seeking an injunction preventing the Heinrich Bauer publishing company from republishing the third series of photos on the ground that they infringed her right to protection of her personality rights, guaranteed by Articles 2 § 1 and 1 § 1 of the Basic Law, and the right to protection of her private life and to the control of the use of her image, guaranteed by sections 22 et seq. of the Copyright (Arts Domain) Act.

The applicant submitted, among other things, a sworn attestation by the director of the Monte Carlo Beach Club to the effect that the swimming baths in question were a private establishment, access to which was subject to a high fee and strictly controlled and from which journalists and photographers were debarred unless they had the express permission of the owner of the establishment. The fact that the photos were very blurred showed that they had been taken secretly, at a distance of several hundred metres, from the window or roof of a neighbouring house.

34. In a judgment of 24 April 1998, the Hamburg Regional Court rejected the application, referring in particular to the grounds of the Federal Court of Justice's judgment of 19 December 1995. The court stated that the

Monte Carlo Beach Club had to be considered as an open-air swimming pool that was open to the public, even if an entry fee was charged and access restricted.

(b) Judgment of the Hamburg Court of Appeal of 13 October 1998

35. The applicant appealed against that judgment.

36. In a judgment of 13 October 1998, the Hamburg Court of Appeal dismissed the applicant's appeal for the same reasons.

The Court of Appeal found that a swimming pool or beach was not a secluded place and that the photos showing the applicant tripping over an obstacle and falling down were not such as to denigrate or demean her in the public's eyes.

(c) The decision of the Federal Constitutional Court of 13 April 2000

37. As the Court of Appeal did not grant the applicant leave to appeal on points of law to the Federal Court of Justice, the applicant lodged a constitutional appeal directly with the Federal Constitutional Court, relying on her earlier submissions.

38. In a decision of 13 April 2000, the Federal Constitutional Court, ruling as a panel of three judges, refused to entertain the appeal. It referred in particular to the Federal Court of Justice's judgment of 19 December 1995 and to its own landmark judgment of 15 December 1999.

The Constitutional Court held that the ordinary courts had properly found that the Monte Carlo Beach Club was not a secluded place and that the photos of the applicant wearing a swimsuit and falling down were not capable of constituting an infringement of her right to respect for her private life.

II. RELEVANT DOMESTIC AND EUROPEAN LAW

A. The Basic Law

39. The relevant provisions of the Basic Law are worded as follows:

Article 1 § 1

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

Article 2 § 1

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

Article 5 §§ 1 and 2

"1. Everyone shall have the right freely to express and disseminate his or her opinions in speech, writing and pictures and freely to obtain information from generally accessible sources. Freedom of the press and freedom of reporting on the radio and in films shall be guaranteed. There shall be no censorship.

2. These rights shall be subject to the limitations laid down by the provisions of the general laws and by statutory provisions aimed at protecting young people and to the obligation to respect personal honour [*Recht der persönlichen Ehre*]."

Article 6 §§ 1 and 2

"1. Marriage and the family enjoy the special protection of the State.

2. The care and upbringing of children is the natural right of parents and a duty primarily incumbent on them. The State community shall oversee the performance of that duty."

B. The Copyright (Arts Domain) Act

40. Section 22(1) of the Copyright (Arts Domain) Act provides that images can only be disseminated with the express approval of the person concerned.

41. Section 23(1) no. 1 of that Act provides for exceptions to that rule, particularly where the images portray an aspect of contemporary society (*Bildnisse aus dem Bereich der Zeitgeschichte*) on condition that publication does not interfere with a legitimate interest (*berechtigtes Interesse*) of the person concerned (section 23(2)).

C. Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy

42. The full text of this resolution, adopted by the Parliamentary Assembly on 26 June 1998, is worded as follows:

"1. The Assembly recalls the current affairs debate it held on the right to privacy during its September 1997 session, a few weeks after the accident which cost the Princess of Wales her life.

2. On that occasion, some people called for the protection of privacy, and in particular that of public figures, to be reinforced at the European level by means of a convention, while others believed that privacy was sufficiently protected by national legislation and the European Convention on Human Rights, and that freedom of expression should not be jeopardised.

3. In order to explore the matter further, the Committee on Legal Affairs and Human Rights organised a hearing in Paris on 16 December 1997 with the participation of public figures or their representatives and the media.

4. The right to privacy, guaranteed by Article 8 of the European Convention on Human Rights, has already been defined by the Assembly in the declaration on mass communication media and human rights, contained within Resolution 428 (1970), as 'the right to live one's own life with a minimum of interference'.

5. In view of the new communication technologies which make it possible to store and use personal data, the right to control one's own data should be added to this definition.

6. The Assembly is aware that personal privacy is often invaded, even in countries with specific legislation to protect it, as people's private lives have become a highly lucrative commodity for certain sectors of the media. The victims are essentially public figures, since details of their private lives serve as a stimulus to sales. At the same time, public figures must recognise that the special position they occupy in society - in many cases by choice - automatically entails increased pressure on their privacy.

7. Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.

8. It is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Article 10 of the European Convention on Human Rights, that the media invade people's privacy, claiming that their readers are entitled to know everything about public figures.

9. Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.

10. It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed by the European Convention on Human Rights: the right to respect for one's private life and the right to freedom of expression.

11. The Assembly reaffirms the importance of every person's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.

12. However, the Assembly points out that the right to privacy afforded by Article 8 of the European Convention on Human Rights should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media.

13. The Assembly believes that, since all member states have now ratified the European Convention on Human Rights, and since many systems of national legislation comprise provisions guaranteeing this protection, there is no need to propose that a new convention guaranteeing the right to privacy should be adopted.

14. The Assembly calls upon the governments of the member states to pass legislation, if no such legislation yet exists, guaranteeing the right to privacy containing the following guidelines, or if such legislation already exists, to supplement it with these guidelines:

(i) the possibility of taking an action under civil law should be guaranteed, to enable a victim to claim possible damages for invasion of privacy;

(ii) editors and journalists should be rendered liable for invasions of privacy by their publications, as they are for libel;

(iii) when editors have published information that proves to be false, they should be required to publish equally prominent corrections at the request of those concerned;

(iv) economic penalties should be envisaged for publishing groups which systematically invade people's privacy;

(v) following or chasing persons to photograph, film or record them, in such a manner that they are prevented from enjoying the normal peace and quiet they expect in their private lives or even such that they are caused actual physical harm, should be prohibited;

(vi) a civil action (private lawsuit) by the victim should be allowed against a photographer or a person directly involved, where paparazzi have trespassed or used 'visual or auditory enhancement devices' to capture recordings that they otherwise could not have captured without trespassing;

(vii) provision should be made for anyone who knows that information or images relating to his or her private life are about to be disseminated to initiate emergency judicial proceedings, such as summary applications for an interim order or an injunction postponing the dissemination of the information, subject to an assessment by the court as to the merits of the claim of an invasion of privacy;

(viii) the media should be encouraged to create their own guidelines for publication and to set up an institute with which an individual can lodge complaints of invasion of privacy and demand that a rectification be published.

15. It invites those governments which have not yet done so to ratify without delay the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

16. The Assembly also calls upon the governments of the member states to:

(i) encourage the professional bodies that represent journalists to draw up certain criteria for entry to the profession, as well as standards for self-regulation and a code of journalistic conduct;

(ii) promote the inclusion in journalism training programmes of a course in law, highlighting the importance of the right to privacy *vis-à-vis* society as a whole;

(iii) foster the development of media education on a wider scale, as part of education about human rights and responsibilities, in order to raise media users' awareness of what the right to privacy necessarily entails;

(iv) facilitate access to the courts and simplify the legal procedures relating to press offences, in order to ensure that victims' rights are better protected."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

43. The applicant submitted that the German court decisions had infringed her right to respect for her private and family life, guaranteed by Article 8 of the Convention, which is worded as follows:

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

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

A. Submissions of the parties and interveners

1. The applicant

44. The applicant stated that she had spent more than ten years in unsuccessful litigation in the German courts trying to establish her right to the protection of her private life. She alleged that as soon as she left her house she was constantly hounded by paparazzi who followed her every daily movement, be it crossing the road, fetching her children from school, doing her shopping, out walking, engaging in sport or going on holiday. In her submission, the protection afforded to the private life of a public figure like herself was minimal under German law because the concept of a "secluded place" as defined by the Federal Court of Justice and the Federal Constitutional Court was much too narrow in that respect. Furthermore, in order to benefit from that protection the onus was on her to establish every time that she had been in a secluded place. She was thus deprived of any privacy and could not move about freely without being a target for the

paparazzi. She affirmed that in France her prior agreement was necessary for the publication of any photos not showing her at an official event. Such photos were regularly taken in France and then sold and published in Germany. The protection of private life from which she benefited in France was therefore systematically circumvented by virtue of the decisions of the German courts. On the subject of the freedom of the press, the applicant stated that she was aware of the essential role played by the press in a democratic society in terms of informing and forming public opinion, but in her case it was just the entertainment press seeking to satisfy its readers' voyeuristic tendencies and make huge profits from generally innocuous photos showing her going about her daily business. Lastly, the applicant stressed that it was materially impossible to establish in respect of every photo whether or not she had been in a secluded place. As the judicial proceedings were generally held several months after publication of the photos, she was obliged to keep a permanent record of her every movement in order to protect herself from paparazzi who might photograph her. With regard to many of the photos that were the subject of this application, it was impossible to determine the exact time and place at which they had been taken.

2. The Government

45. The Government submitted that German law, while taking account of the fundamental role of the freedom of the press in a democratic society, contained sufficient safeguards to prevent any abuse and ensure the effective protection of the private life of even public figures. In their submission, the German courts had in the instant case struck a fair balance between the applicant's rights to respect for her private life guaranteed by Article 8 and the freedom of the press guaranteed by Article 10, having regard to the margin of appreciation available to the State in this area. The courts had found in the first place that the photos had not been taken in a secluded place and had, subsequently, examined the limits on the protection of private life, particularly in the light of the freedom of the press and even where the publication of photos by the entertainment press was concerned. The protection of the private life of a figure of contemporary society "*par excellence*" did not require the publication of photos without his or her authorisation to be limited to showing the person in question engaged in their official duties. The public had a legitimate interest in knowing how the person behaved generally in public. The Government submitted that this definition of the freedom of the press by the Federal Constitutional Court was compatible with Article 10 and the European Court's relevant case-law. Furthermore, the concept of a secluded place was only one factor, albeit an important one, of which the domestic courts took account when balancing the protection of private life against the freedom of the press. Accordingly, while private life was less well protected where a public figure was

photographed in a public place, other factors could also be taken into consideration, such as the nature of the photos, for example, which should not shock the public. Lastly, the Government observed that the decision of the Federal Court of Justice – which had held that the publication of photos of the applicant with the actor Vincent Lindon in a restaurant courtyard in Saint-Rémy-de-Provence were unlawful – showed that the applicant's private life was protected even outside her home.

3. The interveners

46. The Association of German Magazine Publishers submitted that German law, which was halfway between French law and United Kingdom law, struck a fair balance between the right to protection of private life and the freedom of the press. In its submission, it also complied with the principles set out in Resolution 1165 of the Parliamentary Assembly of the Council of Europe on the right to privacy and the European Court's case-law, which had always stressed the fundamental role of the press in a democratic society. The public's legitimate interest in being informed was not limited to politicians, but extended to public figures who had become known for other reasons. The press's role of "watchdog" could not be narrowly interpreted here. In that connection, account should also be taken of the fact that the boundary between political commentary and entertainment was becoming increasingly blurred. Given that there was no uniform European standard concerning the protection of private life, the State had a wide margin of appreciation in this area.

47. Burda joined the observations of the Association of German Magazine Publishers and stated that German law required the courts to balance the competing interests of informing the public and protecting the right to control the use of one's image very strictly and on a case-by-case basis. Even figures of contemporary society "*par excellence*" enjoyed a not inconsiderable degree of protection, and recent case-law had even tended towards reinforcing that protection. Since the death of her mother in 1982, the applicant had officially been First Lady of the reigning family in Monaco and was as such an example for the public (*Vorbildfunktion*). Moreover, the Grimaldi family had always sought to attract media attention and was therefore itself responsible for the public interest in it. The applicant could not therefore, especially if account were taken of her official functions, be regarded as a victim of the press. The publication of the photos in question had not infringed her right to control the use of her image because they had been taken while she was in public and had not been damaging to her reputation.

B. The Court's assessment

1. As regards the subject of the application

48. The Court notes at the outset that the photos of the applicant with her children are no longer the subject of this application, as it stated in its admissibility decision of 8 July 2003.

The same applies to the photos published in *Freizeit Revue* magazine (issue no. 30 of 22 July 1993) showing the applicant with Vincent Lindon at the far end of a restaurant courtyard in Saint-Rémy-de-Provence (see paragraph 11 above). In its judgment of 19 December 1995, the Federal Court of Justice prohibited any further publication of the photos on the ground that they infringed the applicant's right to respect for her private life (see paragraph 23 above).

49. Accordingly, the Court considers it important to specify that the present application concerns the following photos, which were published as part of a series of articles about the applicant:

(i) the photo published in *Bunte* magazine (issue no. 32 of 5 August 1993) showing the applicant on horseback (see paragraph 12 above)

(ii) the photos published in *Bunte* magazine (issue no. 34 of 19 August 1993) showing the applicant shopping on her own; with Mr Vincent Lindon in a restaurant; alone on a bicycle; and with her bodyguard at a market (see paragraph 13 above);

(iii) the photos published in *Bunte* magazine (issue no. 10 of 27 February 1997) showing the applicant on a skiing holiday in Austria (see paragraph 14 above);

(iv) the photos published in *Bunte* magazine (issue no. 12 of 13 March 1997) showing the applicant with Prince Ernst August von Hannover and alone leaving her Parisian residence (see paragraph 15 above);

(v) the photos published in *Bunte* magazine (issue no. 16 of 10 April 1997) showing the applicant playing tennis with Prince Ernst August von Hannover and both of them putting their bicycles down (see paragraph 16 above);

(vi) the photos published in *Neue Post* magazine (issue no. 35/97) showing the applicant tripping over an obstacle at the Monte Carlo Beach Club (see paragraph 17 above).

2. Applicability of Article 8

50. The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name (see *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24), or a person's picture (see *Schüssel v. Austria* (dec.), no. 42409/98, 21 February 2002).

Furthermore, private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings (see, *mutatis mutandis*, *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, § 29, and *Botta v. Italy*, judgment of 24 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 422, § 32). There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" (see, *mutatis mutandis*, *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 56, ECHR 2001-IX, and *Peck v. the United Kingdom*, no. 44647/98, § 57, ECHR 2003-I).

51. The Court has also indicated that, in certain circumstances, a person has a "legitimate expectation" of protection and respect for his or her private life. Accordingly, it has held in a case concerning the interception of telephone calls on business premises that the applicant "would have had a reasonable expectation of privacy for such calls" (see *Halford v. the United Kingdom*, judgment of 25 June 1997, *Reports* 1997-III, p. 1016, § 45).

52. As regards photos, with a view to defining the scope of the protection afforded by Article 8 against arbitrary interference by public authorities, the European Commission of Human Rights had regard to whether the photographs related to private or public matters and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public (see, *mutatis mutandis*, *Friedl v. Austria*, judgment of 31 January 1995, Series A no. 305-B, opinion of the Commission, p. 21, §§ 49-52; *P.G. and J.H. v. the United Kingdom*, cited above, § 58; and *Peck*, cited above, § 61).

53. In the present case there is no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life.

3. Compliance with Article 8

(a) The domestic courts' position

54. The Court notes that, in its landmark judgment of 15 December 1999, the Federal Constitutional Court interpreted sections 22 and 23 of the Copyright (Arts Domain) Act (see paragraphs 40-41 above) by balancing the requirements of the freedom of the press against those of the protection of private life, that is, the public interest in being informed against the legitimate interests of the applicant. In doing so the Federal Constitutional Court took account of two criteria under German law, one functional and the other spatial. It considered that the applicant, as a figure of contemporary society "*par excellence*", enjoyed the protection of her private life even outside her home but only if she was in a secluded place out of the

public eye to which persons retire "with the objectively recognisable aim of being alone and where, confident of being alone, they behave in a manner in which they would not behave in public". In the light of those criteria, the Federal Constitutional Court held that the Federal Court of Justice's judgment of 19 December 1995 regarding publication of the photos in question was compatible with the Basic Law. The court attached decisive weight to the freedom of the press, even the entertainment press, and to the public interest in knowing how the applicant behaved outside her representative functions (see paragraph 25 above).

55. Referring to its landmark judgment, the Federal Constitutional Court did not entertain the applicant's appeals in the subsequent proceedings brought by her (see paragraphs 32 and 38 above).

(b) General principles governing the protection of private life and the freedom of expression

56. In the present case the applicant did not complain of an action by the State, but rather of the lack of adequate State protection of her private life and her image.

57. The Court reiterates that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, *mutatis mutandis*, *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 23; *Stjerna v. Finland*, judgment of 25 November 1994, Series A no. 299-B, pp. 60-61, § 38; and *Verliere v. Switzerland* (dec.), no. 41953/98, ECHR 2001-VII). That also applies to the protection of a person's picture against abuse by others (see *Schüssel*, cited above).

The boundary between the State's positive and negative obligations under this provision does not lend itself to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among many other authorities, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49, and *Botta*, cited above, p. 427, § 33).

58. That protection of private life has to be balanced against the freedom of expression guaranteed by Article 10 of the Convention.

In that context, the Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or

"ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49).

In that connection, the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see, among many authorities, Observer *and* Guardian *v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, pp. 29-30, § 59, and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38; *Tammer v. Estonia*, no. 41205/98, §§ 59-63, ECHR 2001-I; and *Prisma Presse v. France* (dec.), nos. 66910/01 and 71612/01, 1 July 2003).

59. Although freedom of expression also extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the dissemination of "ideas", but of images containing very personal or even intimate "information" about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution.

60. In the cases in which the Court has had to balance the protection of private life against freedom of expression, it has always stressed the contribution made by photos or articles in the press to a debate of general interest (see, as a recent authority, *Tammer*, cited above, §§ 59 et seq.; *News Verlags GmbH & Co. KG v. Austria*, no. 31457/96, §§ 52 et seq., ECHR 2000-I; and *Krone Verlag GmbH & Co. KG v. Austria*, no. 34315/96, §§ 33 et seq., 26 February 2002). The Court thus found, in one case, that the use of certain terms in relation to an individual's private life was not "justified by considerations of public concern" and that those terms did not "[bear] on a matter of general importance" (see *Tammer*, cited above, § 68) and went on to hold that there had not been a violation of Article 10. In another case, however, the Court attached particular importance to the fact that the subject in question was a news item of "major public concern" and that the published photographs "did not disclose any details of [the] private life" of the person in question (see *Krone Verlag GmbH & Co. KG*, cited above, § 37) and held that there had been a violation of Article 10. Similarly, in a recent case concerning the publication by President Mitterrand's former private doctor of a book containing revelations about the President's state of

health, the Court held that "the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand's two terms of office prevailed over the requirements of protecting the President's rights with regard to medical confidentiality" (see *Editions Plon v. France*, no. 58148/00, § 53, ECHR 2004-IV) and held that there had been a breach of Article 10.

(c) Application of these general principles by the Court

61. The Court notes at the outset that in the present case the photos of the applicant in the various German magazines show her in scenes from her daily life, thus involving activities of a purely private nature such as engaging in sport, out walking, leaving a restaurant or on holiday. The photos, in which the applicant appears sometimes alone and sometimes in company, illustrate a series of articles with such innocuous titles as "Pure happiness", "Caroline... a woman returning to life", "Out and about with Princess Caroline in Paris" and "The kiss. Or: they are not hiding anymore" (see paragraphs 11-17 above).

62. The Court also notes that the applicant, as a member of the Prince of Monaco's family, represents the ruling family at certain cultural or charitable events. However, she does not exercise any function within or on behalf of the State of Monaco or any of its institutions (see paragraph 8 above).

63. The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "impart[ing] information and ideas on matters of public interest (see Observer *and* Guardian, loc. cit.), it does not do so in the latter case.

64. Similarly, although the public has a right to be informed, which is an essential right in a democratic society that, in certain special circumstances, can even extend to aspects of the private life of public figures, particularly where politicians are concerned (see *Editions Plon*, loc. cit.), this is not the case here. The situation here does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant's private life.

65. As in other similar cases it has examined, the Court considers that the publication of the photos and articles in question, the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the

public (see, *mutatis mutandis*, *Campmany y Diez de Revenga and Lopez Galiacho Perona v. Spain* (dec.), no. 54224/00, ECHR 2000-XII; *Julio Bou Gibert and El Hogar Y La Moda J.A. v. Spain* (dec.), no. 14929/02, 13 May 2003; and *Prisma Presse*, cited above).

66. In these conditions freedom of expression calls for a narrower interpretation (see *Prisma Presse*, cited above, and, by converse implication, *Krone Verlag GmbH & Co. KG*, cited above, § 37).

67. In that connection, the Court also takes account of the resolution of the Parliamentary Assembly of the Council of Europe on the right to privacy, which stresses the "one-sided interpretation of the right to freedom of expression" by certain media which attempt to justify an infringement of the rights protected by Article 8 of the Convention by claiming that "their readers are entitled to know everything about public figures" (see paragraph 42 above, and *Prisma Presse*, cited above).

68. The Court finds another point to be of importance: even though, strictly speaking, the present application concerns only the publication of the photos and articles by various German magazines, the context in which these photos were taken – without the applicant's knowledge or consent – and the harassment endured by many public figures in their daily lives cannot be fully disregarded (see paragraph 59 above).

In the present case this point is illustrated in particularly striking fashion by the photos taken of the applicant at the Monte Carlo Beach Club tripping over an obstacle and falling down (see paragraph 17 above). It appears that these photos were taken secretly at a distance of several hundred metres, probably from a neighbouring house, whereas journalists' and photographers' access to the club was strictly regulated (see paragraph 33 above).

69. The Court reiterates the fundamental importance of protecting private life from the point of view of the development of every human being's personality. That protection – as stated above – extends beyond the private family circle and also includes a social dimension. The Court considers that anyone, even if they are known to the general public, must be able to enjoy a "legitimate expectation" of protection of and respect for their private life (see paragraph 51 above and, *mutatis mutandis*, *Halford*, cited above, p. 1016, § 45).

70. Furthermore, increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data (see point 5 of the Parliamentary Assembly's resolution on the right to privacy, paragraph 42 above, and, *mutatis mutandis*, *Amann v. Switzerland* [GC], no. 27798/95, §§ 65-67, ECHR 2000-II; *Rotaru v. Romania* [GC], no. 28341/95, §§ 43-44, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, cited above, §§ 57-60; and *Peck*, cited above, §§ 59-63 and 78). This also applies to the

systematic taking of specific photos and their dissemination to a broad section of the public.

71. Lastly, the Court reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, pp. 15-16, § 33).

72. The Court finds it hard to agree with the domestic courts' interpretation of section 23(1) of the Copyright (Arts Domain) Act, which consists in describing a person as such as a figure of contemporary society "*par excellence*". Since that definition affords the person very limited protection of their private life or the right to control the use of their image, it could conceivably be appropriate for politicians exercising official functions. However, it cannot be justified for a "private" individual, such as the applicant, in whom the interest of the general public and the press is based solely on her membership of a reigning family, whereas she herself does not exercise any official functions.

In any event the Court considers that, in these conditions, the Act has to be interpreted narrowly to ensure that the State complies with its positive obligation under the Convention to protect private life and the right to control the use of one's image.

73. Lastly, the distinction drawn between figures of contemporary society "*par excellence*" and "relatively" public figures has to be clear and obvious so that, in a State governed by the rule of law, the individual has precise indications as to the behaviour he or she should adopt. Above all, they need to know exactly when and where they are in a protected sphere or, on the contrary, in a sphere in which they must expect interference from others, especially the tabloid press.

74. The Court therefore considers that the criteria on which the domestic courts based their decisions were not sufficient to protect the applicant's private life effectively. As a figure of contemporary society "*par excellence*" she cannot – in the name of freedom of the press and the public interest – rely on protection of her private life unless she is in a secluded place out of the public eye and, moreover, succeeds in proving it (which can be difficult). Where that is not the case, she has to accept that she might be photographed at almost any time, systematically, and that the photos are then very widely disseminated even if, as was the case here, the photos and accompanying articles relate exclusively to details of her private life.

75. In the Court's view, the criterion of spatial isolation, although apposite in theory, is in reality too vague and difficult for the person concerned to determine in advance. In the present case, merely classifying the applicant as a figure of contemporary society "*par excellence*" does not suffice to justify such an intrusion into her private life.

(d) Conclusion

76. As the Court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution, since the applicant exercises no official function and the photos and articles related exclusively to details of her private life.

77. Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.

Even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the Court's view, yield to the applicant's right to the effective protection of her private life.

78. Lastly, in the Court's opinion the criteria established by the domestic courts were not sufficient to ensure the effective protection of the applicant's private life and she should, in the circumstances of the case, have had a "legitimate expectation" of protection of her private life.

79. Having regard to all the foregoing factors, and despite the margin of appreciation afforded to the State in this area, the Court considers that the German courts did not strike a fair balance between the competing interests.

80. There has therefore been a breach of Article 8 of the Convention.

81. Having regard to that finding, the Court does not consider it necessary to rule on the applicant's complaint relating to her right to respect for her family life.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

83. The applicant claimed 50,000 euros (EUR) for non-pecuniary damage on the ground that the German courts' decisions prevented her from leading a normal life with her children without being hounded by the media. She also claimed EUR 142,851.31 in reimbursement of her costs and expenses for the many sets of proceedings she had had to bring in the German courts.

84. The Government contested the amounts claimed. As regards non-pecuniary damage, they reiterated that, under German law, the applicant enjoyed protection of her private life even outside her home, particularly where her children were concerned. With regard to costs and expenses, they submitted that not all the proceedings could be taken into account, that the value of parts of the subject matter was less than the amount stated, and that the legal fees being claimed, in view of the amount concerned, could not be reimbursed.

85. The Court considers that the question of the application of Article 41 is not ready for decision. Accordingly, it shall be reserved and the subsequent procedure fixed having regard to any agreement which might be reached between the Government and the applicant.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that the question of the application of Article 41 is not ready for decision; and accordingly,
   (a) *reserves* the said question in whole;
   (b) *invites* the Government and the applicant to submit, within six months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
   (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 June 2004.

Vincent BERGER Registrar	Ireneu CABRAL BARRETO President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) concurring opinion of Mr Cabral Barreto;
(b) concurring opinion of Mr Zupančič.

I.C.B.
V.B.

CONCURRING OPINION OF JUDGE CABRAL BARRETO

(Translation)

I am of the opinion that there has been a violation of Article 8 of the Convention, but am unable to follow the entire reasoning of the majority.

1. My colleagues state in their conclusions that "the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest" and that "the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and she is well known to the public".

In the majority's view the publication of the photos and articles in question was not such as to contribute to a debate of general interest because the applicant was not performing official functions and the published photos and accompanying commentaries related exclusively to details of her private life.

In my view, however, the applicant is a public figure and the public does have a right to be informed about her life.

The solution therefore needs to be found in the fair balance that has to be struck between the applicant's right to her private life and the public's right to be informed.

2. The applicant is a public figure, even if she does not perform any function within or on behalf of the State of Monaco or any of its institutions.

"Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain" – paragraph 7 of Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy (see paragraph 42 of the judgment).

It is well known that the applicant has for years played a role in European public life, even if she does not perform any official functions in her own country.

To measure the degree of public interest in her, it is sufficient to look at the amount of media coverage devoted to her public or private life.

Very recently the press drew attention to the fact that, on her arrival at the ceremony of the marriage of Crown Prince Felipe of Spain, the applicant was one of the people from Europe's and the world's high society to be the most widely greeted by the public.

The applicant is, in my view, a public figure and information about her life contributes to a debate of general interest.

The general interest does not have to be limited to political debate. As pointed out by the Parliamentary Assembly, "certain facts relating to the

private lives of public figures, particularly politicians, may indeed be of interest to citizens ...".

If that is true of politicians it is also true of all other public figures in whom the public takes an interest.

It is therefore necessary to strike a balance between two fundamental rights: the right of public figures to respect for their private life and everyone's right to freedom of expression, which embraces the right of the public to be informed.

I agree with the majority that the private life of a public figure does not stop at their front door.

However, it has to be acknowledged that, in view of their fame, a public figure's life outside their home, and particularly in public places, is inevitably subject to certain constraints.

Fame and public interest inevitably give rise to a difference in treatment of the private life of an ordinary person and that of a public figure.

As the Federal Constitutional Court pointed out, "the public has a legitimate interest in being allowed to judge whether the personal behaviour of the individuals in question, who are often regarded as idols or role models, convincingly tallies with their behaviour on their official engagements".

Admittedly, determining the limit of a public figure's private life is no easy task.

Furthermore, a strict criterion might lead to solutions that do not correspond to the "nature of things".

It is clear that if the person is in an isolated spot everything that happens there must be covered by the protection of private life.

It appears to me, however, that the criterion of spatial isolation used by the German courts is very restrictive.

In my view, whenever a public figure has a "legitimate expectation" of being safe from the media, his or her right to private life prevails over the right to freedom of expression or the right to be informed.

It will never be easy to define in concrete terms the situations that correspond to this "legitimate expectation" and a case-by-case approach is therefore justified.

This casuistic approach may also give rise to differences of opinion.

The majority attach importance, for example, to the fact that the photos at the Monte Carlo Beach Club had been taken secretly.

I do not dispute the need to take account of the fact that the photos were taken from a distance, particularly if the person was somewhere they could legitimately believe did not expose them to public view.

However, the Beach Club swimming pool was an open place frequented by the general public and, moreover, visible from the neighbouring buildings.

Is it possible in such a place to entertain a reasonable expectation of not being exposed to public view or to the media?

I do not think so.

I believe that this same criterion is valid for photos showing the applicant in other situations in her daily life in which she cannot expect her private life to be protected.

I have in mind the photos of her doing her shopping.

However, other photos – for example those of the applicant on horseback or playing tennis – were taken in places and circumstances that would call for the opposite approach.

It is thus in the knowledge of the limits to the exercise (I refer in this connection to Judge Zupančič's opinion) that I have found a violation of Article 8 of the Convention.

CONCURRING OPINION OF JUDGE ZUPANČIČ

I adhere to the hesitations raised by my colleague, Judge Cabral Barreto. And while I find the distinctions between the different levels of permitted exposure, as defined by the German legal system, too *Begriffsjurisprudenz*-like, I nevertheless believe that the balancing test between the public's right to know on the one hand and the affected person's right to privacy on the other hand must be adequately performed. He who willingly steps onto the public stage cannot claim to be a private person entitled to anonymity. Royalty, actors, academics, politicians, etc. perform whatever they perform publicly. They may not seek publicity, yet, by definition, their image is to some extent public property.

Here I intend to concentrate not so much on the public's right to know – this applies first and foremost to the issue of the freedom of the press and the constitutional doctrine concerning it – but rather on the simple fact that it is impossible to separate by an iron curtain private life from public performance. The absolute *incognito* existence is the privilege of Robinson; the rest of us all attract to a greater or smaller degree the interest of other people.

Privacy, on the other hand, is the right to be left alone. One has the right to be left alone precisely to the degree to which one's private life does not intersect with other people's private lives. In their own way, legal concepts such as libel, defamation, slander, etc. testify to this right and to the limits on other people's meddling with it. The German private-law doctrine of *Persönlichkeitsrecht* testifies to a broader concentric circle of protected privacy. Moreover, I believe that the courts have to some extent and under American influence made a fetish of the freedom of the press. The *Persönlichkeitsrecht* doctrine imparts a higher level of civilised interpersonal deportment.

It is time that the pendulum swung back to a different kind of balance between what is private and secluded and what is public and unshielded.

The question here is how to ascertain and assess this balance. I agree with the outcome of this case. However, I would suggest a different determinative test: the one we have used in *Halford v. the United Kingdom* (judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III), which speaks of "reasonable expectation of privacy".

The context of criminal procedure and the use of evidence obtained in violation of the reasonable expectation of privacy in *Halford* do not prevent us from employing the same test in cases such as the one before us. The dilemma as to whether the applicant here was or was not a public figure ceases to exist; the proposed criterion of reasonable expectation of privacy permits a nuanced approach to every new case. Perhaps this is what Judge

Cabral Barreto has in mind when he refers to the emerging case-law concerning the balancing exercise between the public's right to know and the private person's right to shield him- or herself.

Of course, one must avoid a circular reasoning here. The "reasonableness" of the expectation of privacy could be reduced to the aforementioned balancing test. But reasonableness is also an allusion to informed common sense, which tells us that he who lives in a glass house may not have the right to throw stones.

DOMSTOLENS DOM
den 12 juni 2003 *

I mål C-112/00,

angående en begäran enligt artikel 234 EG, från Oberlandesgericht Innsbruck (Österrike), att domstolen skall meddela ett förhandsavgörande i det vid den nationella domstolen anhängiga målet mellan

Eugen Schmidberger, Internationale Transporte und Planzüge

och

Republiken Österrike,

angående tolkningen av artiklarna 30, 34 och 36 i EG-fördraget (nu artiklarna 28 EG, 29 EG och 30 EG i ändrad lydelse), jämförda med artikel 5 i EG-fördraget (nu artikel 10 EG), samt om förutsättningarna för att en medlemsstat skall ådra sig skadeståndsansvar för skador som enskilda orsakats på grund av överträdelser av gemenskapsrätten,

* Rättegångsspråk: tyska.

meddelar

DOMSTOLEN

sammansatt av ordföranden G.C. Rodríguez Iglesias, avdelningsordförandena J.-P. Puissochet, M. Wathelet och R. Schintgen (referent) samt domarna C. Gulmann, D.A.O. Edward, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues och A. Rosas,

generaladvokat: F.G. Jacobs,
justitiesekreterare: avdelningsdirektören H.A. Rühl,

med beaktande av de skriftliga yttranden som har inkommit från:

— Eugen Schmidberger, Internationale Transporte und Planzüge, genom K.-H. Plankel, H. Mayrhofer och R. Schneider, Rechtsanwälte,

— Republiken Österrike, genom A. Riccabona, i egenskap av ombud,

— Österrikes regering, genom H. Dossi, i egenskap av ombud,

— Greklands regering, genom N. Dafniou och G. Karipsiadis, båda i egenskap av ombud,

— Italiens regering, genom U. Leanza, i egenskap av ombud, biträdd av O. Fiumara, vice avvocato generale dello Stato,

— Nederländernas regering, genom M.A. Fierstra, i egenskap av ombud,

— Europeiska gemenskapernas kommission, genom J.C. Schieferer, i egenskap av ombud,

med hänsyn till förhandlingsrapporten,

efter att muntliga yttranden har avgivits vid förhandlingen den 12 mars 2002 av: Eugen Schmidberger, Internationale Transporte und Planzüge, företrädd av R. Schneider, Republiken Österrike, företrädd av A. Riccabona, Österrikes regering, företrädd av E. Riedl, i egenskap av ombud, Greklands regering, företrädd av N. Dafniou och G. Karipsiadis, Italiens regering, företrädd av O. Fiumara, Nederländernas regering, företrädd av H. G. Sevenster, i egenskap av ombud, Finlands regering, företrädd av T. Pynnä, i egenskap av ombud, och kommissionen, företrädd av J.C. Schieferer och J. Grunwald, i egenskap av ombud,

och efter att den 11 juli 2002 ha hört generaladvokatens förslag till avgörande,

följande

Dom

1 Oberlandesgericht Innsbruck har, genom beslut av den 1 februari 2000 som inkom till domstolen den 24 mars samma år, i enlighet med artikel 234 EG ställt

sex frågor om tolkningen av artiklarna 30, 34 och 36 i EG-fördraget (nu artiklarna 28 EG, 29 EG och 30 EG i ändrad lydelse), jämförda med artikel 5 i EG-fördraget (nu artikel 10 EG), samt om förutsättningarna för att en medlemsstat skall ådra sig skadeståndsansvar för skador som enskilda orsakats på grund av överträdelser av gemenskapsrätten.

2 Frågorna har uppkommit i en tvist mellan Eugen Schmidberger, Internationale Transporte und Planzüge (nedan kallad Schmidberger) och Republik Österreich (nedan kallad Republiken Österrike) angående det underförstådda tillstånd att genomföra en sammankomst på Brennermotorvägen som den behöriga myndigheten i Österrike lämnade till en förening som huvudsakligen ägnar sig åt miljöfrågor. Sammankomsten ledde till att nämnda motorväg helt stängdes för trafik under nästan 30 timmar.

Tillämpliga nationella bestämmelser

3 I artikel 2 i Versammlungsgesetz från 1953 (österrikisk lag om mötesfrihet), i dess ändrade lydelse (nedan kallad VslgG), föreskrivs följande:

"1) Den som önskar anordna en offentlig sammankomst eller tillställning av något slag som är öppen för alla utan begränsning vad gäller antalet deltagare skall skriftligen underrätta behörig myndighet (artikel 16) senast 24 timmar före det att sammankomsten/tillställningen planeras äga rum. Underrättelsen skall innehålla uppgifter om syftet med sammankomsten/tillställningen samt om plats och tidpunkt för densamma. Underrättelsen skall vara behörig myndighet till handa senast 24 timmar före sammankomstens/tillställningens början.

2) Behörig myndighet skall på begäran genast utfärda ett intyg om att underrättelsen har inkommit..."

4 I artikel 6 VslgG föreskrivs följande:

"En sammankomst vars syfte strider mot straffrättsliga bestämmelser eller som utgör ett hot mot allmän säkerhet eller allmänintresset skall inte tillåtas av den behöriga myndigheten."

5 I artikel 16 VslgG föreskrivs följande:

"I förevarande lag skall begreppet 'behörig myndighet' som regel anses avse

a) federal polismyndighet i områden som omfattas av dess kompetens,

b) Sicherheitsdirektion (ledningsorgan inom polisväsendet) i områden med en Landeshauptmann (ministerpresidenten i en delstatsregering), när det i området saknas federal polismyndighet...

c) Bezirksverwaltungsbehörde (förvaltningsmyndighet med ansvar för ett bestämt geografiskt område på övriga områden."

6 Enligt 42 § punkt 1 i Straßenverkehrsordnung från 1960 (österrikisk vägtrafikförordning), i dess ändrade lydelse (nedan kallad StVO), får lastbilar med släp inte föras på allmän väg mellan klockan 15:00 och 24:00 på lördagar och mellan klockan 24:00 och 22:00 på söndagar och officiella helgdagar när den tillåtna totala maxvikten för lastbilen eller släpet överstiger 3,5 ton. Enligt 42 § punkt 2 StVO är trafik med lastbilar, ledade fordon och motorredskap förbjuden under de perioder som avses i 42 § punkt 1 StVO när fordonets tillåtna totala maxvikt överstiger 7,5 ton. Vissa undantag från huvudregeln medges i lagen, bland annat vid transporter av mjölk, känsliga livsmedel och slaktdjur (dock ej vid transporter av nötboskap på motorväg).

7 Enligt 42 § punkt 6 StVO är trafik med lastbil förbjuden mellan klockan 22:00 och 05:00 när fordonets tillåtna totala maxvikt överstiger 7,5 ton. Transporter med bland annat tystgående fordon berörs inte av detta förbud.

8 I enlighet med 45 § 2 och följande paragrafer StVO, kan undantag medges avseende trafik på allmän väg på enskilds begäran och under vissa villkor.

9 I § 86 StVO föreskrivs följande:

"Parader: Den berörda myndigheten skall underrättas tre dagar i förväg om tillställningar utomhus, officiella eller lokala parader, folkfester, processioner och liknande sammankomster när allmän väg tas i bruk. Denna bestämmelse påverkar inte tillämpningen av övriga bestämmelser..."

Målet vid den nationella domstolen och tolkningsfrågorna

10 Av handlingarna i målet vid den nationella domstolen framgår att Transitforum Austria Tirol (en förening vars målsättning är att "skydda den väsentliga miljön i alpregionen") den 15 maj 1998 i enlighet med § 2 VslgG och § 86 StVO informerade Bezirkshauptmannschaft Innsbruck om att en sammankomst skulle äga rum mellan klockan 11:00 fredagen den 12 juni 1998 och klockan 15:00 lördagen den 13 juni 1998 på Brennermotorvägen (A 13). Med anledning av sammankomsten skulle det bli nödvändigt att stänga motorvägen för trafik mellan rastplatsen Europabrücke och vägtullstationen Schönberg (Österrike).

11 Samma dag gav föreningens ordförande en presskonferens, efter vilken såväl österrikiska som tyska medier rapporterade om avstängningen av den aktuella motorvägen. Dessutom lämnade de motorklubbar i Österrike och Tyskland som hade erhållit information om den förestående avstängningen praktisk information till användare av motorvägen. Trafikanterna avråddes särskilt från att använda Brennermotorvägen under tidsperioden i fråga.

12 Bezirkshauptmannschaft bad den 21 maj 1998 Sicherheitsdirektion für Tirol om instruktioner avseende den aviserade sammankomsten. Den 3 juni 1998 instruerades Bezirkshauptmannschaft av Sicherheitsdirektor att inte förbjuda sammankomsten. Den 10 juni 1998 möttes tjänstemän från olika lokala myndigheter för att säkerställa att sammankomsten skulle kunna hållas utan problem.

13 Bezirkshauptmannschaft beslutade att inte förbjuda sammankomsten eftersom den bedömde att det saknades stöd härför i österrikisk lag. Myndigheten tog emellertid aldrig ställning till om beslutet var förenligt med gemenskapsrätten.

14 Sammankomsten ägde rum på den uppgivna platsen vid den aviserade tidpunkten. Därmed kom de lastbilar som normalt sett skulle ha trafikerat Brennermotorvägen att stå stilla från och med klockan 09:00 fredagen den 12 juni 1998. Motorvägen öppnades åter för trafik vid 15:30-tiden lördagen den 13 juni 1998. Lastbilar vars vikt översteg 7,5 ton var emellertid förhindrade från att trafikera motorvägen under ett antal timmar på lördagen och söndagen i enlighet med trafikförbudet i österrikisk lag.

15 Schmidberger är ett internationellt transportföretag med säte i Rot and der Rot (Tyskland). Företaget disponerar sex "tystgående och miljövänliga" långtradare med släp. Företagets huvudsakliga verksamhet består i att transportera trä från Tyskland till Italien och stål från Italien till Tyskland. Vid dessa transporter används huvudsakligen Brennermotorvägen.

16 Schmidberger väckte talan om skadestånd vid Landesgericht Innsbruck (Österrike). Företaget yrkade att domstolen skulle förplikta Republiken Österrike att till företaget utge ett skadestånd på 140 000 ATS med anledning av att fem av Schmidbergers lastbilar inte hade kunnat trafikera Brennermotorvägen under fyra dagar i rad. Detta berodde dels på att torsdagen den 11 juni 1998 var en helgdag i Österrike, medan den 13 och den 14 juni var en lördag respektive en söndag, dels på att österrikiska bestämmelser innehåller ett förbud mot lastbilstrafik under större delen av veckoslutet samt på helgdagar när fordonet väger mer än 7,5 ton. Enligt Schmidberger utgör nämnda motorväg för företagets fordon den enda möjliga transitvägen mellan Tyskland och Italien. De österrikiska myndigheterna åsidosatte enligt Schmidberger den fria rörligheten för varor genom att inte förbjuda sammankomsten och genom att inte ingripa mot avstängningen av en väsentlig transportled. Åsidosättandet kan inte motiveras med hänsyn till yttrande- eller mötesfriheten och strider därmed mot gemenskapsrätten. Följaktligen aktualiseras medlemsstatens skadeståndsansvar. Den skada som Schmidberger har lidit i förevarande fall består i att lastbilar inte har kunnat användas (50 000 ATS), fast ersättning till chaufförerna (5 000 ATS) och vinstbortfall orsakade av att företaget på grund av allvarligt försenade varutransporter och sex uteblivna resor mellan Tyskland och Italien inte erhöll den avtalade ersättningen från sina kunder (85 000 ATS).

17 Republiken Österrike yrkade att Schmidbergers talan skulle ogillas eftersom beslutet att inte förbjuda den aviserade sammankomsten fattades efter en ingående undersökning av de faktiska omständigheterna, eftersom information om tidpunkten för avstängningen av Brennermotorvägen utgick i förväg i Österrike, Tyskland samt Italien och eftersom sammankomsten inte gav upphov till allvarliga trafikstockningar eller andra incidenter. De hinder för den fria rörligheten som en demonstration ger upphov till är acceptabla så länge de inte är bestående eller allvarliga. Vid en avvägning mellan de intressen som gör sig gällande i förevarande fall bör yttrande- och mötesfriheten anses väga tyngre än principen om fri rörlighet för varor eftersom grundläggande rättigheter är okränkbara i en demokrati.

18 Landesgericht Innsbruck konstaterade att Schmidberger varken hade visat att det var nödvändigt att använda Brennermotorvägen den 12 och 13 juni 1998 eller att det inte gick att ändra transportväg i syfte att förebygga skada efter det att företaget hade underrättats om sammankomsten. Landesgericht Innsbruck ogillade Schmidbergers talan den 23 september 1999 med hänvisning till att transportföretaget dels hade underlåtit att åberopa vissa omständigheter och misslyckats med att lägga fram nödvändig bevisning avseende den åberopade ekonomiska skadan (bestämmelser om detta återfinns i den materiella rätten), dels hade åsidosatt sin skyldighet att redogöra för samtliga faktiska omständigheter som ligger till grund för talan och som är nödvändiga för lösandet av tvisten (bestämmelser om detta återfinns i processrätten).

19 Schmidberger överklagade domen till Oberlandesgericht Innsbruck. Denna domstol bedömde att det i målet var nödvändigt att beakta de krav som ställs i gemenskapsrätten när det, som i förevarande fall, är fråga om rättigheter som, åtminstone till viss del, grundas på denna rättsordning.

20 I första hand är det nödvändigt att fastställa huruvida medlemsstaterna — till följd av principen om fri rörlighet för varor, eventuellt jämförd med artikel 5 i fördraget — är skyldiga att hålla viktiga transitvägar fria från hinder och om denna skyldighet väger tyngre än grundläggande rättigheter såsom yttrande- och mötesfriheten. Dessa rättigheter garanteras i artiklarna 10 och 11 i Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna (nedan kallad Europakonventionen).

21 Om svaret på denna fråga är jakande frågar sig den hänskjutande domstolen i andra hand huruvida det är fråga om ett så klart åsidosättande av gemenskapsrätten att medlemsstatens skadeståndsansvar aktualiseras. Tolkningsfrågor uppkommer i synnerhet i fråga om fastställande av graden av precision och klarhet i artikel 5 samt artiklarna 30, 34 och 36 i fördraget.

22 I förevarande fall skulle medlemsstatens skadeståndsansvar antingen kunna aktualiseras till följd av ett culpöst beteende i lagstiftningssammanhang (Österrike har underlåtit att anpassa de nationella bestämmelserna om mötesfrihet till gemenskapsrätten, särskilt till principen om fri rörlighet för varor) eller till följd av att medlemsstaten har gjort sig skyldig till en överträdelse på administrativ nivå (den behöriga nationella myndigheten är i enlighet med föreskrifterna i artikel 5 i fördraget om samarbete och lojalitet skyldig att tolka den nationella rätten i enlighet med de krav som ställs i fördraget i fråga om fri rörlighet för varor, dock endast om de skyldigheter som följer av gemenskapsrätten har direkt effekt).

23 Den hänskjutande domstolen har i tredje hand begärt att EG-domstolen skall ta ställning till vilken slags rätt till ersättning som följer av medlemsstatens skadeståndsansvar och hur en sådan ersättning skall beräknas. Domstolen i fråga undrar vidare hur stränga beviskraven avseende orsaken till och omfattningen av en skada som orsakats av rättsstridig lagstiftning eller av en överträdelse på administrativ nivå av gemenskapsrätten är. Den önskar särskilt få klarhet i om rätt till ersättning också föreligger när omfattningen av skadan endast kan uppskattas på ett ungefär.

24 Avslutningsvis hyser den hänskjutande domstolen visst tvivel om huruvida de nationella regler genom vilka rätten till ersättning från medlemsstaten har genomförts är förenliga med gemenskapsrätten. Nämnda domstol frågade sig om de österrikiska bestämmelserna om skyldighet att åberopa vissa omständigheter, om bevisbördan vad avser rätten till skadestånd samt om skyldigheten att redogöra för alla de faktiska omständigheter som är nödvändiga för avgörandet av tvisten verkligen överensstämmer med effektivitetsprincipen i domstolens rättspraxis. Detta med tanke på att de rättigheter som grundas på gemenskaps-

rätten inte alltid omedelbart kan definieras i sin helhet och att det kan förekomma situationer i vilka den som anser sig ha rätt till skadestånd inte kan redogöra med exakthet för alla de faktiska omständigheter som krävs enligt österrikisk lag. Eftersom det i förevarande fall är oklart vilket innehåll som rätten till ersättning har och vilket ersättningsbelopp som skall utgå är det nödvändigt att rådfråga EG-domstolen härom. Det resonemang som den nationella domstolen i första instans förde gör det emellertid möjligt att avvisa talan angående rättigheter som grundas på gemenskapsrätten med stöd av principer i nationell rätt och på så sätt kringgå de relevanta gemenskapsrättsliga frågorna av rent formella skäl.

25 Eftersom Oberlandesgericht Innsbruck ansåg att det var nödvändigt att tolka gemenskapsrätten för att avgöra tvisten beslutade den att vilandeförklara målet och att ställa följande tolkningsfrågor till domstolen:

"1) Skall principen om fri rörlighet för varor, i den mening som avses i artikel 28 EG (tidigare artikel 30) och följande artiklar eller i andra gemenskapsbestämmelser, tolkas så, att en medlemsstat är skyldig att under alla omständigheter — eller åtminstone så långt det är möjligt och rimligt — hålla viktiga transitvägar fria från hinder, oavsett av vilket slag, bland annat genom att förbjuda en i förväg utannonserad sammankomst av politisk karaktär som planeras äga rum på en transitväg — eller åtminstone genom att senare upplösa sammankomsten — när sammankomsten kan hållas i närheten av transitvägen och få samma genomslagskraft?

2) Föreligger en så klar överträdelse av gemenskapsrätten att medlemsstatens skadeståndsansvar enligt principerna i gemenskapsrätten aktualiseras, förutsatt att övriga villkor är uppfyllda, när medlemsstaten har underlåtit att ange i sina nationella bestämmelser om mötesfrihet och rätten att utöva denna att det vid avvägningen mellan mötesfriheten och allmänintresset skall tas hänsyn även till principerna i gemenskapsrätten, särskilt till de grundläggande friheterna och i synnerhet till bestämmelserna om fri rörlighet för varor, när denna underlåtelse har medfört att en politisk sammankomst på över 28 timmar tillåtits äga rum, vilken i kombination med ett nationellt

körförbud på helgdagar har medfört att en för varutransporter inom gemenskapen viktig internationell transitväg spärrats av under fyra dagar — med ett avbrott på några få timmar — för bland annat nästan all lastbilstrafik?

3) Föreligger en så klar överträdelse av gemenskapsrätten att medlemsstatens skadeståndsansvar enligt principerna i gemenskapsrätten aktualiseras, förutsatt att övriga villkor är uppfyllda, när en nationell myndighet har beslutat att bestämmelserna i gemenskapsrätten, särskilt de om fri rörlighet för varor samt om samarbets- och lojalitetsplikt i artikel 10 EG (tidigare artikel 5), inte utgör hinder mot att en politisk sammankomst på över 28 timmar äger rum, vilken i kombination med ett nationellt körförbud på helgdagar medför att en för varutransporter inom gemenskapen viktig internationell transitväg spärras av under fyra dagar — med ett avbrott på några få timmar — för bland annat nästan all lastbilstrafik?

4) Skall syftet med en politisk sammankomst, för vilken tillstånd meddelats av en nationell myndighet, anses väga tyngre än bestämmelserna i gemenskapslagstiftningen om fri rörlighet för varor i den mening som avses i artikel 28 EG, när syftet är att främja en sund miljö och att göra allmänheten uppmärksam på hälsoriskerna med stadigt ökande lastbilstrafik?

5) Skall en skada som medför skadeståndsansvar för staten anses föreligga när ett skadelidande företag kan styrka att det skulle ha kunnat göra en viss vinst — i förevarande fall genom gränsöverskridande varutransporter med företagets lastbilar, vilka emellertid inte användes under fyra dagar på grund av sammankomsten på 28 timmar — men inte kan styrka att en konkret transport har förhindrats?

6) Om fråga 4 besvaras nekande:

Skall den samarbets- och lojalitetsplikt som nationella myndigheter, och i synnerhet domstolar, har enligt artikel 10 EG (tidigare artikel 5) samt effektivitetsprincipen anses medföra en skyldighet för dessa att avstå från att tillämpa nationella materiella eller processuella regler som begränsar möjligheten att göra gällande gemenskapsrättsliga rättigheter — i förevarande mål rätten till skadestånd från staten — till dess fullständig klarhet råder i fråga om innehållet i den på gemenskapsrätten grundade rättigheten, om nödvändigt till efter det att förhandsavgörande inhämtats från EG-domstolen?"

Upptagande till sakprövning

26 Republiken Österrike anser att det är tveksamt om domstolen bör ta upp förevarande begäran om förhandsavgörande till sakprövning. Enligt Republiken Österrike är de frågor som har ställts av Oberlandesgericht Innsbruck rent hypotetiska och saknar betydelse för avgörandet av tvisten vid den nationella domstolen.

27 Den talan som väckts av Schmidberger, rörande en medlemsstats skadeståndsansvar när gemenskapsrätten har åsidosatts, bygger nämligen på antagandet att nämnda företag har styrkt att åsidosättandet i fråga har gett upphov till verklig skada.

28 Schmidberger har emellertid inte i någon av de två nationella domstolar som har, eller har haft, att ta ställning till tvisten lyckats styrka att företaget verkligen lidit konkret skada. Företaget har nämligen inte visat att det var nödvändigt att använda Brennermotorvägen vid tidpunkten för sammankomsten för att genomföra transporter med företagets lastbilar mellan Tyskland och Italien. Företaget har inte heller uppgett några skäl till att det inte kunde använda en

annan transportväg än den avstängda och har således inte visat att det har uppfyllt sin skyldighet att vidta åtgärder för att begränsa den skada som det säger sig ha lidit.

29 Under dessa omständigheter är svaren på frågorna inte nödvändiga för att den hänskjutande domstolen skall kunna avgöra tvisten. Denna domstol skall under alla omständigheter anses ha framställt begäran om förhandsavgörande i ett för tidigt skede eftersom de faktiska omständigheterna och relevanta bevisfakta inte helt har klarlagts i det nationella målet.

30 Domstolen erinrar om att förfarandet i artikel 234 EG enligt fast rättspraxis utgör ett medel för samarbete mellan domstolen och de nationella domstolarna, vilket fungerar på så sätt att domstolen förser de nationella domstolarna med de uppgifter om gemenskapsrättens tolkning som de behöver för att kunna avgöra vid dem anhängiga tvister (se bland annat dom av den 18 oktober 1990 i de förenade målen C-297/88 och C-197/89, Dzodzi, REG 1990, s. I-3763, punkt 33, svensk specialutgåva, volym 10, s. 531, av den 8 november 1990 i mål C-231/89, Gmurzynska-Bscher, REG 1990, s. I-4003, punkt 18, av den 16 juli 1992 i mål C-83/91, Meilicke, REG 1992, s. I-4871, punkt 22, svensk specialutgåva, volym 13, s. I-105, och av den 17 september 2002 i mål C-413/99, Baumbast och R, REG 2002, s. I-7091, punkt 31).

31 Inom ramen för detta samarbete ankommer det på den nationella domstol vid vilken tvisten anhängiggjorts — som är ensam om att ha förstahandsinformation om de faktiska omständigheter som ligger till grund för tvisten — och som har ansvar för det rättsliga avgörandet, att mot bakgrund av de särskilda omständigheterna i varje enskilt mål bedöma såväl om ett förhandsavgörande är nödvändigt för att döma i saken som relevansen av de frågor som ställs till domstolen. Domstolen är följaktligen i princip skyldig att meddela ett förhandsavgörande när de frågor som ställts av den nationella domstolen avser tolkningen av gemenskapsrätten (se bland annat dom av den 15 december 1995 i mål C-415/93, Bosman, REG 1995, s. I-4921, punkt 59, av den 13 mars 2001 i mål C-379/98, PreussenElektra, REG 2001, s. I-2099, punkt 38, av den 10 december 2002 i mål C-153/00, Der Weduwe, REG 2002, s. I-11319, punkt 31, och av den 21 januari 2003 i mål C-318/00, Bacardi- Martini och Cellier des Dauphins, REG 2003, s. I-905, punkt 41).

32 Domstolen har likväl ansett att det i undantagsfall ankommer på den att undersöka de omständigheter under vilka den nationella domstolen anhängiggjort sin begäran om förhandsavgörande (se, för ett liknande resonemang, domen i det ovannämnda målet PreussenElektra, punkt 39). Den samarbetsanda som bör råda vid behandlingen av en begäran om förhandsavgörande innebär nämligen att den nationella domstolen skall ta hänsyn till den uppgift som EG-domstolen har anförtrotts, vilken är att bidra till rättskipningen i medlemsstaterna och inte att avfatta rådgivande yttranden i allmänna eller hypotetiska frågor (se domarna i de ovannämnda målen Bosman, punkt 6, Der Weduwe, punkt 32, och Bacardi-Martini och Cellier des Dauphins, punkt 42).

33 Domstolen har sålunda funnit att den inte kan besvara en tolkningsfråga som en nationell domstol har ställt då det är uppenbart att den av den nationella domstolen begärda tolkningen av en gemenskapsrättslig regel eller bedömningen av giltigheten av en sådan regel inte har något samband med de verkliga omständigheterna eller föremålet för tvisten i målet vid den nationella domstolen, eller då frågan är hypotetisk, eller då domstolen inte har tillgång till de uppgifter om de faktiska eller rättsliga förhållandena som är nödvändiga för att kunna ge ett användbart svar på de frågor som ställts till den (se domarna i de ovannämnda målen Bosman, punkt 61, och Bacardi-Martini och Cellier des Dauphins, punkt 43).

34 I förevarande fall är det emellertid inte uppenbart att de tolkningsfrågor som ställts av den nationella domstolen aktualiserar något av de fall som domstolen redogjort för i den rättspraxis som avses i punkten ovan.

35 Syftet med Schmidbergers talan är nämligen att Republiken Österrike skall förpliktas att ersätta den skada som företaget har lidit till följd av att gemenskapsrätten har åsidosatts. Enligt företaget består åsisdosättandet i att medlemsstatens myndigheter har underlåtit att förbjuda en sammankomst som ledde till att Brennermotorvägen helt stängdes för trafik under nästan 30 timmar i sträck.

36 Det råder ingen tvekan om att den begäran om tolkning av gemenskapsrätten som har framställts av den hänskjutande domstolen under rådande omständigheter skall anses vara kopplad till en verklig och faktisk tvist mellan parterna vid den nationella domstolen. Begäran kan därmed inte anses vara av hypotetisk karaktär.

37 Av den nationella domstolens beslut om hänskjutande framgår dessutom att domstolen i fråga, på ett precist och detaljerat sätt, har redogjort för varför tvisten inte kan lösas med mindre än att domstolen besvarar ett antal frågor avseende tolkningen av gemenskapsrätten. Frågorna rör bland annat de omständigheter som skall beaktas vid bevisningen av den skada som Schmidberger anser sig ha lidit.

38 Det följer dessutom av de yttranden som lämnades av medlemsstaterna efter det att de hade delgivits beslutet om hänskjutande och av kommissionens yttrande, i enlighet med artikel 23 i stadgan för domstolen, att uppgifterna i detta beslut gjorde det möjligt för dem att på ett användbart sätt ta ställning till samtliga frågor som har ställts till domstolen.

39 Domstolen erinrar vidare om att det av artikel 234 andra stycket EG klart och tydligt framgår att det ankommer på den nationella domstolen att avgöra i vilket skede av rättegången som hänskjutandet av tolkningsfrågan skall ske (se dom av den 10 mars 1981 i de förenade målen 36/80 och 71/80, Irish Creamery Milk Suppliers Association m.fl., REG 1981, s. 735, punkt 5, svensk specialutgåva, volym 6, s. 29, och av den 30 mars 2000 i mål C-236/98, JämO, REG 2000, s. I-2189, punkt 30).

40 Det är också klarlagt att den hänskjutande domstolen på ett tillfredsställande sätt redogjort för de faktiska och rättsliga omständigheter som ligger till grund för begäran om förhandsavgörande samt att domstolen har erhållit all den information från den hänskjutande domstolen som krävs för att på ett användbart sätt ta ställning till nämnda begäran.

41 Det är för övrigt inte heller orimligt att den hänskjutande domstolen ber domstolen att i ett inledande skede fastställa vilka typer av skador som kan beaktas när en medlemsstats skadeståndsskyldighet aktualiseras till följd av ett åsidosättande av gemenskapsrätten — och särskilt att svara på frågan huruvida ersättningen endast omfattar skada som verkligen har uppstått eller om den också omfattar schablonmässigt beräknad utebliven vinst samt om och i vilken utsträckning den skadelidande är skyldig att försöka undvika eller begränsa skadan — innan den hänskjutande domstolen yttrar sig om det konkreta bevismaterial som domstolen har bedömt vara av relevans inom ramen för utvärderingen av den skada som Schmidberger faktiskt har lidit.

42 Avslutningsvis har den hänskjutande domstolen, inom ramen för skadeståndstalan mot medlemsstaten, inte uteslutande ställt frågor om villkoren för att en skada skall anses föreligga, vilken form denna skada kan ha och om vilken slags bevisföring som kan komma i fråga. Den hänskjutande domstolen bedömde att det också var nödvändigt att ställa flera frågor angående andra villkor för skadeståndsansvarets aktualiserande och, i synnerhet, om de nationella myndigheterna i förevarande fall har gjort sig skyldiga till ett åsidosättande av gemenskapsrätten och huruvida åsidosättandet i så fall ger det företag som anser sig ha lidit skada rätt till ersättning.

43 Med hänsyn till vad som anförts ovan kan de ställda frågorna inte anses vara rent hypotetiska och sakna relevans för lösandet av tvisten vid den nationella domstolen.

44 Det framgår tvärtemot av det ovan anförda att den information som efterfrågats av den hänskjutande domstolen är nödvändig för att döma i tvisten. Den hänskjutande domstolen är vid avgörandet av tvisten tvungen att ta hänsyn till domstolens dom. Den information som den nationella domstolen har överlämnat till domstolen, bland annat i beslutet om hänskjutande, gör det vidare möjligt för den senare att ge ett användbart svar på de ställda frågorna.

45 Därmed skall den begäran om förhandsavgörande som inkommit från Oberlandesgericht Innsbruck tas upp till sakprövning.

Tolkningsfrågorna

46 Inledningsvis konstaterar domstolen att de ställda frågorna visserligen rör två relaterade problem, men att dessa likväl är skilda från varandra.

47 Den hänskjutande domstolen undrar nämligen å ena sidan huruvida den fullständiga avstängningen av Brennermotorvägen under nästan 30 timmar i sträck, under de aktuella omständigheterna, utgör ett hinder som är oförenligt med fri rörlighet för varor, varmed gemenskapsrätten skall anses ha åsidosatts. Å andra sidan önskar den hänskjutande domstolen få klarhet i under vilka villkor en medlemsstat är skyldig att ersätta skador som orsakats en enskild till följd av ett åsidosättande av gemenskapsrätten.

48 Avseende den senare frågan har den hänskjutande domstolen särskilt begärt att domstolen skall klargöra huruvida och, om nödvändigt, i vilken utsträckning, åsidosättandet av gemenskapsrätten (under förutsättning att ett sådant skall anses ha ägt rum), under de aktuella omständigheterna, är så klart och allvarligt att medlemsstaten har ådragit sig skadeståndsansvar. Den hänskjutande domstolen har också begärt information vad avser den ersättningsgilla skadans art och bevisningen härom.

49 Med hänsyn till att den andra frågeställningen logiskt sett endast behöver besvaras om den första frågeställningen, såsom den angetts i punkt 47 första meningen i förevarande dom, besvaras jakande, prövar domstolen inledningsvis de olika delarna av den första frågeställningen, som den första och den fjärde frågan rör.

50 Med hänsyn till vad som framkommit av de handlingar i målet vid den nationella domstolen som denna översänt och till de skriftliga och muntliga yttranden som lämnats till domstolen skall Oberlandesgericht Innsbrucks frågor tolkas så att denna rätt önskar få svar på huruvida en nationell behörig myndighets beslut att inte förbjuda en sammankomst rörande i huvudsak miljöfrågor, vilken ledde till att en viktig transportled som Brennermotorvägen helt stängdes av under nästan 30 timmar i sträck, utgör ett oacceptabelt åsidosättande av den grundläggande principen om fri rörlighet för varor i artiklarna 30 och 34 i fördraget, om nödvändigt jämförda med artikel 5 i fördraget.

Huruvida den fria rörligheten för varor har hindrats

51 Domstolen erinrar inledningsvis om att fri rörlighet för varor är en av gemenskapens grundläggande principer.

52 I artikel 3 i EG-fördraget (nu artikel 3 EG i ändrad lydelse), vilken ingår i fördragets första del med rubriken "principerna", föreskrivs att gemenskapens verksamhet, för att uppnå de mål som anges i artikel 2 i samma fördrag, skall innefatta en inre marknad som kännetecknas av att hindren för fri rörlighet för bland annat varor avskaffas mellan medlemsstaterna.

53 I artikel 7 A i EG-fördraget (nu artikel 14 EG i ändrad lydelse) föreskrivs att den inre marknaden skall omfatta ett område utan inre gränser, där bland annat fri rörlighet för varor säkerställs i enlighet med bestämmelserna i fördraget.

54 Denna grundläggande princip genomförs bland annat genom artiklarna 30 och 34 i fördraget.

55 I artikel 30 föreskrivs närmare bestämt att kvantitativa importrestriktioner och åtgärder med motsvarande verkan skall vara förbjudna mellan medlemsstaterna. På samma sätt förbjuds i artikel 34 kvantitativa exportrestriktioner samt åtgärder med motsvarande verkan mellan medlemsstaterna.

56 I enlighet med den fasta rättspraxis som vuxit fram sedan domstolens dom av den 11 juli 1974 i mål 8/74, Dassonville (REG 1974, s. 837, punkt 5), skall dessa bestämmelser, placerade i sitt sammanhang, anses innebära att varje hinder för handeln inom gemenskapen skall avskaffas, oavsett om det är direkt eller indirekt, faktiskt eller potentiellt (se, för ett liknande resonemang, dom av den 9 december 1997 i mål C-265/95, kommissionen mot Frankrike, REG 1997, s. I-6959, punkt 29).

57 Domstolen har särskilt uppgett att artikel 30 i fördraget, i egenskap av ett oundgängligt medel för förverkligandet av en marknad utan inre gränser, inte bara förbjuder offentligrättsliga åtgärder som i sig skapar hinder för handeln mellan medlemsstaterna, utan även kan vara tillämplig då en medlemsstat har underlåtit att vidta de åtgärder som erfordras för att eliminera sådana hinder för den fria rörligheten för varor som inte kan tillräknas staten (domen i det ovannämnda målet kommissionen mot Frankrike, punkt 30).

58 En medlemsstats underlåtenhet att handla eller, i förekommande fall, underlåtenhet att vidta åtgärder som är tillräckliga för att eliminera hinder för den fria rörligheten för varor, vilka bland annat uppkommit genom att enskilda inom dess territorium angriper produkter från andra medlemsstater, kan nämligen hindra handeln inom gemenskapen i samma utsträckning som en uttrycklig handling (domen i det ovannämnda målet kommissionen mot Frankrike, punkt 31).

59 Således förbjuds medlemsstaterna i artiklarna 30 och 34 i fördraget inte bara att själva anta rättsakter eller vidta åtgärder som kan hindra den fria rörligheten utan de åläggs även med beaktande av artikel 5 i fördraget att vidta alla åtgärder som är nödvändiga och lämpliga för att säkerställa att denna grundläggande frihet inte åsidosätts inom deras territorium (domen i det ovannämnda målet kommissionen mot Frankrike, punkt 32). Medlemsstaterna är nämligen enligt nämnda artikel 5 skyldiga att vidta alla lämpliga åtgärder, både allmänna och särskilda, för att säkerställa att de skyldigheter fullgörs som följer av fördraget och att avstå från varje åtgärd som kan äventyra att fördragets mål uppnås.

60 Med hänsyn till den väsentliga roll som den fria rörligheten för varor spelar i gemenskapssystemet och, i synnerhet, i förverkligandet av den inre marknaden, skall medlemsstatens skyldighet att säkerställa fri rörlighet för varor i det egna landet, genom att vidta de åtgärder som är nödvändiga och lämpliga för att förhindra att enskildas agerande orsakar hinder för denna rörlighet, anses vara tvingande utan att det är nödvändigt att skilja ageranden som påverkar importen från ageranden som påverkar exporten eller helt enkelt transiteringen av varor.

61 Det framgår nämligen av punkt 53 i domen i det ovannämnda målet kommissionen mot Frankrike att det målet inte endast gällde import, utan också transitering genom Frankrike av produkter med ursprung i andra medlemsstater.

62 Den behöriga nationella myndigheten är således i ett fall som det förevarande, när utövandet av en grundläggande frihet i fördraget (såsom fri rörlighet för varor) hindras till följd av åtgärder vidtagna av enskilda, skyldig att vidta adekvata åtgärder för att garantera friheten i den berörda medlemsstaten. Detta gäller även när varorna, såsom i förevarande fall, är på väg till Italien eller Tyskland och endast passerar genom Österrike.

63 Denna skyldighet gör sig gällande i ännu högre grad när det rör sig om en sådan mycket viktig transportväg som Brennermotorvägen, vilken utgör en av huvudtransportlederna för landtransporter mellan norra Europa och norra Italien.

64 Med hänsyn till det ovan anförda skall en nationell behörig myndighets beslut att inte förbjuda en sammankomst, vilken ledde till att en viktig transportled som Brennermotorvägen helt stängdes av under nästan 30 timmar i sträck, anses begränsa handeln med varor inom gemenskapen. Därmed föreligger en åtgärd med verkan motsvarande kvantitativa importrestriktioner, vilken i princip är oförenlig med de gemenskapsrättsliga skyldigheter som följer av artiklarna 30 och 34 i fördraget, jämförda med artikel 5 i fördraget, såvida beslutet inte kan motiveras på objektiva grunder.

Huruvida hindret eventuellt är motiverat

65 Genom den fjärde frågan önskar den hänskjutande domstolen få klarhet i om syftet med sammankomsten den 12 och den 13 juni 1998 — nämligen att uppmärksamma allmänheten på miljö- och hälsoriskerna med den tilltagande

lastbilstrafiken på Brennermotorvägen samt att motivera de behöriga myndigheterna att vidta ytterligare åtgärder för att begränsa denna trafik och de föroreningar som den ger upphov till i den känsliga alpregionen — väger tyngre än de skyldigheter som följer av gemenskapsbestämmelserna om fri rörlighet för varor.

66 Även om skyddet för miljö och allmänhetens hälsa under vissa omständigheter, särskilt i den nämnda regionen, kan utgöra en legitim målsättning av allmänintresse som motiverar inskränkningar i de grundläggande friheter som garanteras i fördraget, bland vilka den fria rörligheten för varor ingår, är syftena med nämnda sammankomst i sig, vilket generaladvokaten har påpekat i punkt 54 i förslaget till avgörande, inte avgörande i ett mål angående en sådan talan som den som väckts av Schmidberger. Syftet med Schmidbergers talan är att få skadestånd av medlemsstaten till följd av att den har åsidosatt gemenskapsrätten. Åsidosättandet består i att de nationella myndigheterna har underlåtit att agera för att förhindra trafikhinder på Brennermotorvägen.

67 Vid prövningen av huruvida förutsättningarna för en medlemsstats skadeståndsansvar föreligger och, i synnerhet, vid prövningen av om medlemsstaten har åsidosatt gemenskapsrätten skall nämligen endast medlemsstatens agerande eller underlåtenhet att agera beaktas.

68 Domstolen skall därför i förevarande fall endast beakta det syfte som låg till grund för myndighetens beslut att lämna ett underförstått tillstånd till sammankomsten alternativt att inte förbjuda densamma.

69 Av handlingarna i målet vid den nationella domstolen framgår att den österrikiska myndigheten vid beslutsfattandet tog hänsyn till demonstranternas grundläggande rättigheter såsom yttrande- och mötesfriheten. Dessa rättigheter garanteras i Europakonventionen och i Österrikes grundlag.

70 I beslutet om hänskjutande tog den nationella domstolen också upp frågan huruvida principen i fördraget om fri rörlighet för varor väger tyngre än de grundläggande rättigheterna i fråga.

71 Domstolen erinrar om att det följer av fast rättspraxis att de grundläggande rättigheterna utgör en integrerad del av de allmänna rättsprinciper som domstolen skall säkerställa efterlevnaden av, och att den därvid utgår från medlemsstaternas gemensamma konstitutionella traditioner samt från den vägledning som ges i de folkrättsliga dokument angående skydd för de mänskliga rättigheterna som medlemsstaterna varit med om att utarbeta eller har tillträtt. I detta sammanhang är Europakonventionen av särskild betydelse (se bland annat dom av den 18 juni 1991 i mål C-260/89, REG 1991, s. I-2925, punkt 41, svensk specialutgåva, volym 11, s. 209, av den 6 mars 2001 i mål C-274/99 P, Connolly mot kommissionen, REG 2001, s. I-1611, punkt 37, och av den 22 oktober 2002 i mål C-94/00, Roquette Frères, REG 2002, s. I-9011, punkt 25).

72 De principer som följer av denna rättspraxis stadfästes i ingressen till Europeiska enhetsakten och därefter i artikel F.2 i Fördraget om Europeiska unionen (se domen i det ovannämnda målet Bosman, punkt 79). I denna artikel föreskrivs att "[u]nionen skall som allmänna principer för gemenskapsrätten respektera de grundläggande rättigheterna, såsom de garanteras i Europakonventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna, undertecknad i Rom den 4 november 1950, och såsom de följer av medlemsstaternas gemensamma konstitutionella traditioner".

73 Av detta följer att det inom gemenskapen är förbjudet att vidta åtgärder som strider mot iakttagandet av de således erkända mänskliga rättigheterna (se bland annat domen i det ovannämnda målet ERT, punkt 41, och dom av den 29 maj 1997 i mål C-299/95, Kremzow, REG 1997, s. I-2629, punkt 14).

74 Eftersom såväl gemenskapen som medlemsstaterna är skyldiga att iaktta de mänskliga rättigheterna utgör skyddet av dessa ett legitimt intresse som i princip motiverar inskränkningar i de skyldigheter som följer av gemenskapsrätten. Detta gäller även för skyldigheter som följer av en i fördraget garanterad grundläggande frihet, såsom fri rörlighet för varor.

75 Enligt fast rättspraxis skall domstolen förse en nationell domstol, som har begärt ett förhandsavgörande, med de uppgifter om hur gemenskapsrätten skall tolkas som är nödvändiga för att den skall kunna bedöma huruvida en situation i medlemsstaten som, i likhet med situationen i det aktuella fallet, omfattas av gemenskapsrätten är förenlig med de grundläggande rättigheter som domstolen skall säkerställa efterlevnaden av, såsom det framgår av i synnerhet Europakonventionen (se, för ett liknande resonemang, dom av den 30 september 1987 i mål 12/86, Demirel, REG 1987, s. 3719, punkt 28; svensk specialutgåva, volym 9, s. 175).

76 I förevarande fall tillät den nationella myndigheten att inskränkningar gjordes i en av de grundläggande friheter som garanteras i fördraget med hänvisning till att det var nödvändigt att iaktta de grundläggande rättigheter som garanteras i Europakonventionen samt i den berörda medlemsstatens grundlag.

77 I förevarande mål är det således nödvändigt att sammanjämka de skyldigheter som följer av skyddet av de grundläggande rättigheterna inom gemenskapen med motsvarande skyldigheter till följd av en i fördraget garanterad grundläggande frihet och, närmare bestämt, att ta ställning till räckvidden av yttrande- och

mötesfriheten, garanterade i artiklarna 10 och 11 i Europakonventionen, respektive av den fria rörligheten för varor, när de tidigare friheterna åberopas till stöd för en inskränkning i den senare.

78 Domstolen erinrar om att den fria rörligheten för varor, å ena sidan, utgör en av de grundläggande principerna i fördragets system, men att denna frihet icke desto mindre kan inskränkas under vissa förutsättningar. I artikel 36 i fördraget anges vilka skäl som kan motivera detta. Inskränkningar kan också göras med hänvisning till tvingande krav av allmänintresse i enlighet med den fasta rättspraxis som domstolen utvecklat sedan domen av den 20 februari 1979 i mål 120/78, Rewe-Zentral, kallad Cassis de Dijon (REG 1979, s. 649; svensk specialutgåva, volym 4, s. 377).

79 De friheter som är aktuella i målet vid den nationella domstolen, det vill säga yttrande- och mötesfriheten, har uttryckligen erkänts i Europakonventionen och är en väsentlig förutsättning för ett demokratiskt samhälle. Även de kan emellertid bli föremål för vissa inskränkningar om allmänintresset påkallar detta, vilket framgår av själva lydelsen av artiklarna 10.2 och 11.2 i Europakonventionen. En förutsättning är dock att sådana undantag har stöd i lag, syftar till ett eller flera mål som är legitima enligt nämnda bestämmelser och är nödvändiga i ett demokratiskt samhälle, det vill säga motiverade av tvingande sociala hänsyn, samt bland annat står i proportion till det legitima mål som eftersträvas (se, för ett liknande resonemang, dom av den 26 juni 1997 i mål C-368/95, Familiapress, REG 1997, s. I-3689, punkt 26, och av den 11 juli 2002 i mål C-60/00, Carpenter, REG 2002, s. I-6279, punkt 42, samt Europadomstolen, domen i målet Steel m.fl. mot Förenade kungariket av den 23 september 1998, *Recueil des arrêts et décisions* 1998-VII, 101 §).

80 Sålunda utgör de i Europakonventionen garanterade yttrande- och mötesfriheterna, när de utövas under fredliga former, inte heller — i motsats till andra grundläggande rättigheter i konventionen, såsom alla människors rätt till liv samt förbudet mot tortyr och omänsklig eller förnedrande behandling eller bestraffning, från vilka undantag aldrig kan göras — absoluta rättigheter, utan skall beaktas i förhållande till deras funktion i samhället. Utövandet av dessa rättigheter kan således begränsas, under förutsättning att dessa begränsningar

faktiskt svarar mot mål av allmänintresse och att de, med beaktande av det mål som skall förverkligas, inte utgör ett orimligt och oacceptabelt ingripande som kränker själva kärnan i den skyddade rättigheten (se, för ett liknande resonemang, dom av den 8 april 1992 i mål C-62/90, kommissionen mot Tyskland, REG 1992, s. I-2575, punkt 23, svensk specialutgåva, volym 12, s. I-41, och av den 5 oktober 1994 i mål C-404/92 P, X mot kommissionen, REG 1994, s. I-4737, punkt 18).

81 Under sådana omständigheter skall de aktuella intressena vägas mot varandra varpå det skall fastställas, med beaktande av samtliga omständigheter i det enskilda fallet, huruvida en riktig balans har uppnåtts mellan dessa.

82 Den behöriga myndigheten förfogar härvid över ett stort utrymme för skönsmässiga bedömningar. Icke desto mindre skall det kontrolleras om de inskränkningar som gjorts i handeln inom gemenskapen är proportionerliga med hänsyn till syftet med desamma, i förevarande fall skyddet av grundläggande rättigheter.

83 Domstolen erinrar inledningsvis om att de omständigheter som utmärker målet vid den nationella domstolen klart skiljer sig från omständigheterna i det ovannämnda målet kommissionen mot Frankrike. Domen i det sistnämnda målet har åberopats av Schmidberger som anser att det har relevans för den talan som företaget väckt mot Republiken Österrike.

84 Domstolen erinrar för det första om att sammankomsten i förevarande fall ägde rum efter det att en ansökan i enlighet med gällande nationella bestämmelser hade lämnats till den behöriga myndigheten. Denna valde att inte förbjuda sammankomsten. Så var däremot inte fallet i målet kommissionen mot Frankrike, vilket framgår av domstolens beskrivning av de faktiska omständigheterna i punkterna 38—53 i denna dom.

85 För det andra ledde sammankomsten på Brennermotorvägen endast till att en transportled stängdes för trafik, vid ett enda tillfälle och under nästan 30 timmar. De hinder för den fria rörligheten för varor som sammankomsten gav upphov till var vidare begränsade, såväl geografiskt som i svårighetsgrad, i jämförelse med de hinder som var aktuella i det ovannämnda målet kommissionen mot Frankrike.

86 För det tredje är det klarlagt att medborgarna vid den aktuella sammankomsten utövade sina grundläggande rättigheter genom att offentligt ge uttryck åt, i deras ögon, för allmänheten viktiga åsikter. Det är vidare klarlagt att syftet med sammankomsten inte var att hindra handeln med en viss typ av varor eller med varor av ett visst ursprung. I det ovannämnda målet kommissionen mot Frankrike rådde det däremot ingen tvekan om att demonstranterna önskade hindra handeln med vissa varor från andra medlemsstater än Republiken Frankrike. I detta syfte hindrade demonstranterna inte bara transporter med berörda varor, utan utsatte också transporter på väg till eller genom Frankrike för sabotage. Det förekom till och med sabotage efter det att varorna hade nått affärernas skyltfönster.

87 För det fjärde erinrar domstolen om att den behöriga myndigheten i förevarande fall vidtog olika slags informations- och organisationsåtgärder i syfte att begränsa störningarna i trafiken så långt som möjligt. Således samarbetade nämnda myndighet, inklusive polisen, med organisatörerna av sammankomsten och olika sammanslutningar av bilister i syfte att säkerställa att sammankomsten avlöpte utan problem. I god tid före sammankomsten lanserade media och flera motorklubbar en omfattande informationskampanj i såväl Österrike som i

angränsande länder. Flera alternativa transportvägar ställdes till förfogande. Näringsidkarna var således underrättade om inskränkningarna i trafiken och om tidpunkten och platsen för den planerade sammankomsten och hade möjlighet att i god tid vidta åtgärder för att parera dessa. Dessutom sändes säkerhetspersonal till platsen för sammankomsten.

88 Det är vidare klart att den isolerade händelse som det är fråga om i förevarande fall inte gav upphov till en allmän känsla av osäkerhet med en negativ inverkan på handeln inom gemenskapen i sin helhet, vilket var fallet med de allvarliga och upprepade störningarna av allmän ordning som var aktuella i det ovannämnda målet kommissionen mot Frankrike.

89 Domstolen konstaterar avslutningsvis, avseende de alternativa lösningar som har föreslagits av Schmidberger, att den behöriga nationella myndigheten, med hänsyn till det stora utrymme för skönsmässiga bedömningar som medlemsstaterna förfogar över, under rådande omständigheter kunde anse att ett förbud skulle ha inneburit ett oacceptabelt ingrepp i demonstranternas grundläggande rättighet att mötas och under fredliga former offentligt ge uttryck för sina åsikter.

90 Om den nationella myndigheten hade tillåtit sammankomsten under för demonstranterna mindre förmånliga former, vad avser platsen (sammankomsten hade kunnat äga rum vid sidan av Brennermotorvägen) eller tidsfristen (sammankomsten hade kunnat begränsas till några timmar), hade detta kunnat uppfattas som en alltför ingripande begränsning vilken skulle ha berövat sammankomsten en stor del av dess genomslagskraft. Den nationella behöriga myndigheten skall visserligen sträva efter att begränsa de negativa följder som en demonstration på allmän väg kan få för rörelsefriheten. Nämnda myndighet är emellertid skyldig att väga detta intresse mot demonstranternas intresse av att uppmärksamma allmänheten på syftena med demonstrationen.

91 Handlingar av detta slag medför som regel visserligen visst besvär för dem som inte själva deltar i dem, i synnerhet vad gäller rörelsefriheten. Icke desto mindre kan dessa handlingar i princip tillåtas när syftet med desamma huvudsakligen är att offentligt och under lagliga former ge uttryck för en åsikt.

92 Republiken Österrike har gjort gällande, utan att mötas av protester, att alla tänkbara alternativ skulle ha kunnat medföra svårkontrollerbara reaktioner, vilka hade kunnat få andra ännu allvarligare konsekvenser för handeln inom gemenskapen och för den allmänna ordningen. Man kan exempelvis tänka sig "vilda" demonstrationer, konfrontationer mellan anhängare av och motståndare till den aktuella intresseorganisationen eller våldshandlingar av demonstranter som anser att deras grundläggande rättigheter har kränkts.

93 Av detta följer att den nationella myndigheten, med hänsyn till det stora utrymme för skönsmässiga bedömningar som den förfogar över på detta område, skäligen kunde anse att det legala syftet med sammankomsten i förevarande fall inte kunde uppnås med åtgärder av mindre ingripande verkan på handeln inom gemenskapen.

94 Med hänsyn till vad som framkommit ovan är svaret på den första och den fjärde frågan att en nationell behörig myndighets beslut att inte förbjuda en sammankomst, under omständigheter som dem i målet vid den nationella domstolen, är förenligt med artiklarna 30 och 34 i fördraget, jämförda med artikel 5 i samma fördrag.

Förutsättningarna för medlemsstatens skadeståndsansvar

95 Av svaret på den första och den fjärde frågan följer att den behöriga nationella myndigheten, med beaktande av samtliga i förevarande fall föreliggande omständigheter, inte kan anses ha åsidosatt gemenskapsrätten på ett sätt som aktualiserar den berörda medlemsstatens ansvar.

96 Under dessa omständigheter är det inte nödvändigt att besvara de frågor som gäller förutsättningarna för en medlemsstats skadeståndsansvar, till följd av skador som har drabbat en enskild med anledning av att medlemsstaten har åsidosatt gemenskapsrätten.

Rättegångskostnader

97 De kostnader som har förorsakats den österrikiska, den grekiska, den italienska, den nederländska och den finska regeringen samt kommissionen, vilka har inkommit med yttranden till domstolen, är inte ersättningsgilla. Eftersom förfarandet i förhållande till parterna i målet vid den nationella domstolen utgör ett led i beredningen av samma mål, ankommer det på den nationella domstolen att besluta om rättegångskostnaderna.

På dessa grunder beslutar

DOMSTOLEN

— angående de frågor som genom beslut av den 1 februari 2000 har ställts av Oberlandesgericht Innsbruck — följande dom:

En nationell behörig myndighets beslut att inte förbjuda en sammankomst, under omständigheter som dem i målet vid den nationella domstolen, är förenligt med artiklarna 30 och 34 i EG-fördraget (nu artiklarna 28 EG och 29 EG i ändrad lydelse), jämförda med artikel 5 i EG-fördraget (nu artikel 10 EG).

Rodríguez Iglesias Puissochet Wathelet

Schintgen Gulmann Edward

Jann Skouris Macken

Colneric von Bahr

Cunha Rodrigues Rosas

Avkunnad vid offentligt sammanträde i Luxemburg den 12 juni 2003.

R. Grass G.C. Rodríguez Iglesias

Justitiesekreterare Ordförande

Rättsfallssamlingen

DOMSTOLENS DOM (stora avdelningen)

den 24 juni 2019*

”Fördragsbrott – Artikel 19.1 andra stycket FEU – Rättsstatsprincipen – Effektivt domstolsskydd inom de områden som omfattas av unionsrätten – Principerna om domares oavsättlighet och oavhängighet – Sänkning av pensionsåldern för domare vid Högsta domstolen – Tillämpning av den sänkta pensionsåldern på domare i tjänst – Möjlighet att fortsätta tjänstgöringen som domare efter uppnådd pensionsålder under förutsättning att Republiken Polens president lämnar sitt samtycke, varvid presidenten kan göra detta efter eget skön”

I mål C-619/18,

angående en talan om fördragsbrott enligt artikel 258 FEUF, som väckts den 2 oktober 2018,

Europeiska kommissionen, företrädd av K. Banks, H. Krämer och S. L. Kalėda, samtliga i egenskap av ombud,

sökande,

mot

Republiken Polen, företrädd av B. Majczyna, K. Majcher och S. Żyrek, samtliga i egenskap av ombud,

svarande,

med stöd av

Ungern, företrädd av M. Z. Fehér, i egenskap av ombud,

intervenient,

meddelar

DOMSTOLEN (stora avdelningen)

sammansatt av ordföranden K. Lenaerts, vice-ordföranden R. Silva de Lapuerta, avdelningsordförandena A. Prechal (referent), M. Vilaras och E. Regan samt domarna E. Juhász, M. Ilešič, J. Malenovský, L. Bay Larsen, D. Šváby, C. Vajda, P. G. Xuereb, N. Piçarra, L. S. Rossi och I. Jarukaitis,

generaladvokat: E. Tanchev,

justitiesekreterare: enhetschefen M. Aleksejev,

* Rättegångsspråk: polska.

efter det skriftliga förfarandet och förhandlingen den 12 februari 2019,

och efter att den 11 april 2019 ha hört generaladvokatens förslag till avgörande,

följande

Dom

1 Europeiska kommissionen har yrkat att domstolen ska fastställa att Republiken Polen har underlåtit att uppfylla sina skyldigheter enligt artikel 19.1 andra stycket FEU i förening med artikel 47 i Europeiska unionens stadga om de grundläggande rättigheterna (nedan kallad stadgan), genom att sänka pensionsåldern för domare vid Sąd Najwyższy (Högsta domstolen, Polen) och genom att tillämpa denna sänkta pensionsålder på domare i tjänst vilka tillsatts vid nämnda domstol före den 3 april 2018, samt genom att ge Republiken Polens president rätt att efter eget skön förlänga förordnandet för domare vid Sąd Najwyższy efter att den nyligen fastställda pensionsåldern uppnåtts.

Tillämpliga bestämmelser

Unionsrätt

EU-fördraget

2 Artikel 2 FEU har följande lydelse:

”Unionen ska bygga på värdena respekt för människans värdighet, frihet, demokrati, jämlikhet, rättsstaten och respekt för de mänskliga rättigheterna, inklusive rättigheter för personer som tillhör minoriteter. Dessa värden ska vara gemensamma för medlemsstaterna i ett samhälle som kännetecknas av mångfald, icke-diskriminering, tolerans, rättvisa, solidaritet och principen om jämställdhet mellan kvinnor och män.”

3 I artikel 19.1 FEU föreskrivs följande:

”Europeiska unionens domstol ska bestå av domstolen, tribunalen och specialdomstolar. Den ska säkerställa att lag och rätt följs vid tolkning och tillämpning av fördragen.

Medlemsstaterna ska fastställa de möjligheter till överklagande som behövs för att säkerställa ett effektivt domstolsskydd inom de områden som omfattas av unionsrätten.”

Stadgan

4 Avdelning VI i stadgan har rubriken ”Rättskipning”. I denna avdelning återfinns artikel 47 som har rubriken ”Rätt till ett effektivt rättsmedel och till en opartisk domstol”. Artikel 47 har följande lydelse:

”Var och en vars unionsrättsligt garanterade fri- och rättigheter har kränkts har rätt till ett effektivt rättsmedel inför en domstol, med beaktande av de villkor som föreskrivs i denna artikel.

Var och en har rätt att inom skälig tid få sin sak prövad i en rättvis och offentlig rättegång och inför en oavhängig och opartisk domstol som har inrättats enligt lag. …

…”

5 I artikel 51 i stadgan föreskrivs följande:

”1. Bestämmelserna i denna stadga riktar sig, med beaktande av subsidiaritetsprincipen, till unionens institutioner, organ och byråer samt till medlemsstaterna endast när dessa tillämpar unionsrätten. Institutionerna, organen, byråerna och medlemsstaterna ska därför respektera rättigheterna, iaktta principerna och främja tillämpningen av dem i enlighet med sina respektive befogenheter och under iakttagande av gränserna för unionens befogenheter enligt fördragen.

2. Denna stadga innebär inte någon utvidgning av tillämpningsområdet för unionsrätten utanför unionens befogenheter, medför varken någon ny befogenhet eller någon ny uppgift för unionen och ändrar heller inte de befogenheter och uppgifter som fastställs i fördragen.”

Polsk rätt

Konstitutionen

6 I artikel 183.3 i konstitutionen föreskrivs att förste ordföranden för Sąd Najwyższy (Högsta domstolen) tillsätts för en ämbetstid om sex år.

7 I artikel 186.1 i konstitutionen föreskrivs följande:

”Krajowa Rada Sądownictwa [Nationella domstolsrådet] är det organ som ska värna domstolars och domares oavhängighet.”

8 Artikel 187 i konstitutionen har följande lydelse:

”1. Nationella domstolsrådet ska bestå av följande ledamöter:

1) förste ordföranden för [Sąd Najwyższy (Högsta domstolen)], justitieministern, ordföranden för [Naczelny Sąd Administracyjny (Högsta förvaltningsdomstolen)] och en person som utses av Republiken Polens president,

2) femton ledamöter som väljs bland domarna vid [Sąd Najwyższy (Högsta domstolen)], vid de allmänna domstolarna, vid förvaltningsdomstolarna och vid militärdomstolarna,

3) fyra ledamöter som väljs av [sejmen (en av kamrarna vid polska nationalförsamlingen)] bland sejmens ledamöter samt två ledamöter som väljs av senaten bland senatorerna.

…

3. Ämbetstiden för de valda ledamöterna i Nationella domstolsrådet är fyra år.

4. Föreskrifter, uppgiftsområde och arbetssätt för Nationella domstolsrådet, liksom regler för hur rådets ledamöter väljs, föreskrivs i lag.”

Den nya lagen om Högsta domstolen

9 I artikel 30 i ustawa o Sądzie Najwyższym (lag om Högsta domstolen), av den 23 november 2002 (Dz. U., 2002, position 240), fastställdes pensionsåldern för domare vid Sąd Najwyższy (Högsta domstolen) till 70 år. Enligt denna bestämmelse hade domare vid nämnda domstol även möjlighet att senast 6 månader före 70-årsdagen inge, jämte ett intyg om att de med hänsyn till hälsotillstånd kan tjänstgöra

som domare, en förklaring till förste ordföranden för Högsta domstolen om att vederbörande önskade fortsätta sin domartjänstgöring. I sådant fall kunde domarna automatiskt utöva domarämbetet fram till 72 års ålder.

10 Den 20 december 2017 undertecknade Republiken Polens president ustawa o Sądzie Najwyższym (lagen om Högsta domstolen), av den 8 december 2017 (Dz. U., 2018, position 5, nedan kallad den nya lagen om Högsta domstolen), vilken trädde i kraft den 3 april 2018. Denna lag har ändrats vid flera tillfällen, bland annat genom ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (lag om ändring av lagen om allmänna domstolars organisation, av lagen om Högsta domstolen och av vissa andra lagar), av den 10 maj 2018 (Dz.U., 2018, position 1045, nedan kallad ändringslagen av den 10 maj 2018).

11 I artikel 37 i den nya lagen om Högsta domstolen föreskrivs följande:

”§ 1. Domare vid [Sąd Najwyższy (Högsta domstolen)] pensioneras den dag de fyller 65 år, såvida de inte senare än 6 månader och inte tidigare än 12 månader innan de uppnår denna ålder [på 65 år] förklarar att de önskar behålla tjänsten som domare och inger ett intyg om att de med hänsyn till hälsotillstånd kan tjänstgöra som domare, vilket utfärdats i enlighet med de villkor som fastställts för en sökande till tjänsten som domare i Högsta domstolen, och Republiken Polens president samtycker till att vederbörande får förlängt förordnande som domare vid [Sąd Najwyższy (Högsta domstolen)].

§ 1a. Republiken Polens president ska innan samtycke lämnas inhämta ett utlåtande från Nationella domstolsrådet. Nationella domstolsrådet ska översända utlåtandet till Republiken Polens president inom 30 dagar från tidpunkten för begäran om att inkomma med utlåtande. För det fall att ett utlåtande inte inlämnas inom den frist som anges i den andra meningen ska Nationella domstolsrådet anses ha avgett ett positivt utlåtande.

§ 1b. Vid utarbetandet av det utlåtande som avses i § 1a ska Nationella domstolsrådet ta hänsyn till rättskipningens intresse och viktiga allmänintressen, i synnerhet rationell användning av personalen vid [Sąd Najwyższy (Högsta domstolen)] och de behov som följer av arbetsbelastningen vid vissa avdelningar i [Sąd Najwyższy (Högsta domstolen)].

§ 2. De förklaringar och intyg som avses i § 1 ska inges till förste ordföranden för [Sąd Najwyższy (Högsta domstolen)], som tillsammans med sitt yttrande utan dröjsmål ska överlämna dessa till Republiken Polens president. Förste ordföranden för [Sąd Najwyższy (Högsta domstolen)] ska överlämna sin förklaring och ett intyg tillsammans med det utlåtande som avgetts av Högsta domstolens kollegium till Republiken Polens president.

§ 3. Republiken Polens president kan samtycka till att en domare vid [Sąd Najwyższy (Högsta domstolen)] ska behålla sin tjänst som domare senast tre månader efter mottagandet av Nationella domstolsrådets utlåtande som avses i § 1a, eller senast tre månader efter det att fristen för inlämnande av detta utlåtande löpt ut. Om samtycke inte lämnas inom den frist som anges i den första meningen innebär detta att domaren ska anses gå i pension den dag han eller hon fyller 65 år. Om förfarandet om förlängt förordnande som domare vid [Sąd Najwyższy (Högsta domstolen)] inte har avslutats efter den ålder som anges i § 1 behåller domaren sin tjänst som domare tills förfarandet har avslutats.

§ 4. Samtycke enligt § 1 meddelas för 3 år och kan förnyas en gång. Bestämmelserna i § 3 ska gälla i tillämpliga delar. …”

12 I artikel 39 i nämnda lag föreskrivs följande:

”Den tidpunkt vid vilken en domare vid [Sąd Najwyższy (Högsta domstolen)] skiljs från sin anställning eller pensioneras fastställs av Republiken Polens president.”

13 I artikel 111 i nämnda lag föreskrivs följande:

”§ 1. De domare vid [Sąd Najwyższy (Högsta domstolen)] som vid tidpunkten för ikraftträdandet av denna lag fyllt 65 år eller fyller 65 år inom tre månader från ikraftträdandet av denna lag ska pensioneras dagen efter utgången av 3 månader från ikraftträdandet av denna lag, såvida de inte inom 1 månad från det att denna lag har trätt i kraft lämnar in den förklaring och det intyg som avses i artikel 37 § 1 och Republiken Polens president samtycker till att vederbörande behåller tjänsten som domare vid [Sąd Najwyższy (Högsta domstolen)]. Bestämmelserna i artikel 37 §§ 2–4 ska gälla i tillämpliga delar.

§ 1a. En domare vid [Sąd Najwyższy (Högsta domstolen)] som fyller 65 år efter utgången av en frist på tre månader och före utgången av tolv månader från ikraftträdandet av denna lag ska pensioneras tolv månader efter det att denna lag har trätt i kraft, såvida domaren inte inom denna frist lämnat in en sådan förklaring och ett sådant intyg som avses i artikel 37 § 1, och Republiken Polens president samtycker till att vederbörande behåller tjänsten som domare vid [Sąd Najwyższy (Högsta domstolen)]. Bestämmelserna i artikel 37 §§ 1a–4 ska gälla i tillämpliga delar.”

14 Ändringslagen av den 10 maj 2018 innehåller, utöver bestämmelserna om ändring av den nya lagen om Högsta domstolen, vissa självständiga bestämmelser som reglerar handläggningen av ärenden om förlängt förordnande för domare i tjänst vid Sąd Najwyższy (Högsta domstolen) som har uppnått pensionsåldern senast den 3 juli 2018. I artikel 5 i denna ändringslag föreskrivs följande:

”Republiken Polens president ska omedelbart till Nationella domstolsrådet för utlåtande vidarebefordra de förklaringar som avses i artikel 37 § 1 och i artikel 111 § 1 i [den nya lagen om Högsta domstolen] som ännu inte prövats av presidenten vid den tidpunkt då denna lag träder i kraft. Nationella domstolsrådet ska avge sitt utlåtande inom 30 dagar från och med den dag Republiken Polens president beredde rådet tillfälle att yttra sig. Republiken Polens president får samtycka till att en domare vid [Sąd Najwyższy (Högsta domstolen)] fortsätter sin tjänstgöring inom 60 dagar från och med den dag då utlåtandet från Nationella domstolsrådet kom in eller från och med utgången av den frist då detta utlåtande skulle avges. Bestämmelserna i artikel 37 §§ 2–4 i [den nya lagen om Högsta domstolen], i dess enligt denna lag ändrade lydelse, ska gälla i tillämpliga delar.”

Det administrativa förfarandet

15 Kommissionen ansåg att Republiken Polen hade underlåtit att uppfylla sina skyldigheter enligt artikel 19.1 andra stycket FEU i förening med artikel 47 i stadgan genom att anta den nya lagen om Högsta domstolen och därpå följande lagar om ändring av den lagen. Kommissionen sände därför den 2 juli 2018 en formell underrättelse till Republiken Polen. I en skrivelse av den 2 augusti 2018 uppgav sig Polen inte ha åsidosatt unionsrätten.

16 Den 14 augusti 2018 riktade kommissionen ett motiverat yttrande till Republiken Polen, och hävdade att Polen genom den i föregående punkt nämnda nationella lagstiftningen hade underlåtit att uppfylla sina skyldigheter enligt nämnda unionsbestämmelser. Kommissionen uppmanade därför Republiken Polen att vidta erforderliga åtgärder för att rätta sig efter det motiverade yttrandet inom en månad från mottagandet av detsamma. Den 14 september 2018 besvarade Polen det motiverade yttrandet, och vidhöll sin ståndpunkt att det påstådda fördragsbrottet var ogrundat.

17 Mot denna bakgrund beslutade kommissionen att väcka förevarande talan.

Förfarandet vid domstolen

18 Genom särskild handling, som inkom till domstolens kansli den 2 oktober 2018, ingav kommissionen en ansökan om interimistiska åtgärder enligt artikel 279 FEUF och artikel 160.2 i domstolens rättegångsregler. Kommissionen yrkade därvid att domstolen skulle förplikta Republiken Polen att, fram till dess att domstolen meddelar dom i sak,

– tills vidare underlåta att tillämpa bestämmelserna i artikel 37 §§ 1–4 och artikel 111 § 1 och artikel 111 § 1a i den nya lagen om Högsta domstolen, i artikel 5 i ändringslagen av den 10 maj 2018, samt varje annan åtgärd som vidtagits med tillämpning av dessa bestämmelser,

– vidta de åtgärder som erfordras för att säkerställa att de domare vid Sąd Najwyższy (Högsta domstolen) som berörs av de omtvistade nationella bestämmelserna kan fortsätta att tjänstgöra som domare på samma tjänst som den 3 april 2018, och därvid ha samma ställning och samma rättigheter och anställningsvillkor som de hade fram till den 3 april 2018, det vill säga den dag då den nya lagen om Högsta domstolen trädde i kraft,

– underlåta att vidta åtgärder för att tillsätta domare vid Sąd Najwyższy (Högsta domstolen) i stället för de domare som berörs av de omtvistade nationella bestämmelserna, liksom varje annan åtgärd för att tillsätta en ny förste ordförande för nämnda domstol eller utse någon som har till uppgift att leda domstolen i stället för den förste ordföranden fram till dess att den nya förste ordföranden utses, och

– underrätta kommissionen – senast en månad efter delgivningen av domstolens beslut med de yrkade interimistiska åtgärderna och därefter regelbundet varje månad – om alla de åtgärder som Polen kommer att ha vidtagit för att fullt ut följa detta beslut.

19 Kommissionen yrkade även – med stöd av artikel 160.7 i rättegångsreglerna – att domstolen skulle förordna om de i punkten ovan nämnda interimistiska åtgärderna innan Polen hade inkommit med yttrande, med hänsyn till att det förelåg en omedelbar risk för allvarlig och irreparabel skada med avseende på rätten till ett effektivt domstolsskydd inom ramen för tillämpningen av unionsrätten.

20 Genom beslut av den 19 oktober 2018, kommissionen/Polen (C-619/18 R, ej publicerat, EU:C:2018:852) biföll domstolens vice ordförande interimistiskt sistnämnda yrkande i avvaktan på antagandet av det beslut som skulle avsluta det interimistiska förfarandet.

21 Den 23 oktober 2018 beslutade domstolens vice ordförande, i enlighet med artikel 161.1 i rättegångsreglerna, att hänskjuta ansökan om interimistiska åtgärder till domstolen, vilken med hänsyn till ansökans betydelse hänsköt den till stora avdelningen i enlighet med artikel 60.1 i rättegångsreglerna.

22 Genom beslut av den 17 december 2018, kommissionen/Polen (C-619/18 R, EU:C:2018:1021), biföll domstolen kommissionens ansökan om interimistiska åtgärder fram till dess att slutlig dom meddelas i förevarande mål.

23 Genom beslut av den 15 november 2018, kommissionen/Polen (C-619/18, EU:C:2018:910), beslutade domstolens ordförande – efter att kommissionen framställt yrkande därom – att målet skulle handläggas skyndsamt enligt artikel 23a i stadgan för Europeiska unionens domstol och artikel 133 i rättegångsreglerna.

24 Domstolens ordförande har i beslut av den 9 januari 2019 tillåtit Ungern att intervenera i målet till stöd för Republiken Polens yrkanden.

Prövning av talan

25 Kommissionen har i sin talan framställt två anmärkningar. Kommissionen har därvid gjort gällande att Republiken Polen underlåtit att uppfylla de skyldigheter som åligger medlemsstaterna enligt artikel 19.1 andra stycket FEU i förening med artikel 47 i stadgan.

26 I den första anmärkningen har kommissionen gjort gällande följande. Republiken Polen har underlåtit att uppfylla dessa skyldigheter på så sätt att den nya lagen om Högsta domstolen – i strid med principen om domares oavhängighet och särskilt i strid med principen om domares oavsättlighet – innehåller bestämmelser om sänkning av pensionsåldern för domare vid Sąd Najwyższy (Högsta domstolen) som ska tillämpas på domare i tjänst vid Sąd Najwyższy vilka tillsatts före den 3 april 2018, det vill säga den dag då lagen trädde i kraft. I den andra anmärkningen har kommissionen vidare anfört följande. Republiken Polen har underlåtit att uppfylla dessa skyldigheter på så sätt att denna lag – i strid med principen om domares oavhängighet – ger Republiken Polens president rätt att efter eget skön, vid två tillfällen och varje gång för tre år, förlänga förordnandet för domare i tjänst vid Sąd Najwyższy (Högsta domstolen) efter att den nyligen fastställda pensionsåldern uppnåtts.

Huruvida saken i målet består

27 Republiken Polen uppgav vid förhandlingen att samtliga av de av kommissionen i målet påtalade nationella bestämmelserna har upphävts och att verkan därav undanröjts genom ustawa o zmianie ustawy o Sądzie Najwyższym (lag om ändring av den nya lagen om Högsta domstolen), av den 21 november 2018 (Dz. U., 2018, position 2507), vilken undertecknades av Republiken Polens president den 17 december 2018 och trädde i kraft den 1 januari 2019.

28 Republiken Polen har även anfört följande. Enligt denna lag har de domare i tjänst vid Sąd Najwyższy (Högsta domstolen) som redan berörts av den i den nya lagen om Högsta domstolen föreskrivna sänkningen av pensionsåldern behållit sin tjänst eller återinträtt i tjänst vid domstolen på de villkor som gällde innan den nya lagen om Högsta domstolen antogs. Dessutom anses de ha fortsatt sin tjänstgöring utan avbrott. Även de bestämmelser som gör det möjligt för Republiken Polens president att besluta om förlängt förordnande för domare vid Sąd Najwyższy (Högsta domstolen) efter uppnådd normal pensionsålder har upphävts. Därför har själva syftet med detta fördragsbrottsmål förfallit.

29 Kommissionen har vid förhandlingen uppgett sig vidhålla talan.

30 Domstolen gör i denna del följande bedömning. Förekomsten av ett fördragsbrott ska enligt fast rättspraxis bedömas mot bakgrund av den situation som rådde i medlemsstaten vid utgången av den frist som har angetts i det motiverade yttrandet och senare förändringar kan inte beaktas av domstolen (se, bland annat, dom av den 6 november 2012, kommissionen/Ungern, C-286/12, EU:C:2012:687, punkt 41 och där angiven rättspraxis).

31 Det är i målet utrett att vid utgången av den frist som angetts av kommissionen i det motiverade yttrandet var de av kommissionen påtalade bestämmelserna i den nya lagen om Högsta domstolen fortfarande i kraft. Domstolen ska därför pröva talan, trots att ikraftträdandet av lagen om ändring av den nya lagen om Högsta domstolen av den 21 november 2018 inneburit att samtliga verkningar av de av kommissionen påtalade nationella bestämmelserna undanröjts med retroaktiv verkan; domstolen får nämligen inte beakta denna omständighet då den inträffat efter utgången av den frist som angetts i det motiverade yttrandet (se, för ett liknande resonemang, dom av den 6 november 2012, kommissionen/Ungern, C-286/12, EU:C:2012:687, punkt 45).

Omfattningen av talan

32 Kommissionen uppgav vid förhandlingen att kommissionen yrkar att domstolen fastställer att Republiken Polen åsidosatt artikel 19.1 andra stycket FEU jämförd med artikel 47 i stadgan. Enligt kommissionen ska begreppet effektivt domstolsskydd i artikel 19.1 andra stycket FEU tolkas mot bakgrund av vad som anges i artikel 47 i stadgan, och särskilt mot bakgrund av de skyddsregler som uppställs med avseende på den i artikel 47 i stadgan föreskrivna rätten till ett effektivt rättsmedel. Detta innebär enligt kommissionen att det utifrån artikel 19.1 andra stycket FEU är påkallat att säkerställa oavhängigheten hos en domstol som Sąd Najwyższy (Högsta domstolen), som bland annat har till uppgift att tolka och tillämpa unionsrätten.

33 I målet kommer domstolen därför att pröva om Republiken Polen har underlåtit att uppfylla sina skyldigheter enligt artikel 19.1 andra stycket FEU.

Tillämpligheten och räckvidden av artikel 19.1 andra stycket FEU

Parternas argument

34 Kommissionen har – särskilt med hänvisning till domen av den 27 februari 2018, Associação Sindical dos Juízes Portugueses (C-64/16, EU:C:2018:117), och domen av den 25 juli 2018, Minister for Justice and Equality (brister i domstolssystemet) (C-216/18 PPU, EU:C:2018:586) – gjort gällande följande. Det åligger medlemsstaterna – vid fullgörandet av deras skyldighet enligt artikel 19.1 andra stycket FEU att inrätta ett system med rättsmedel som säkerställer ett effektivt domstolsskydd inom de områden som omfattas av unionsrätten – bland annat att se till att de nationella domstolar som har att ta ställning till frågor rörande tillämpningen eller tolkningen av unionsrätten uppfyller kravet på oavhängiga domare. Detta krav ingår i kärninnehållet i den grundläggande rätt till en rättvis rättegång som garanteras bland annat i artikel 47 andra stycket i stadgan.

35 Sąd Najwyższy (Högsta domstolen) är enligt kommissionen att anse som en sådan domstol. Detta innebär att nationella bestämmelser om domstolens sammansättning, organisatoriska struktur och funktionssätt ska kunna garantera att detta oavhängighetskrav iakttas.

36 Oavhängighetskravet äger nämligen tillämpning inte bara vid handläggningen av en viss ärendetyp, utan även när det gäller det sätt på vilket domstolsväsendet har organiserats. En nationell åtgärd som allmänt sett påverkar de nationella domstolarnas oavhängighet innebär att det inte längre går att garantera att det finns effektiva rättsmedel inför domstol, bland annat när dessa nationella domstolar har att tillämpa eller tolka unionsrätten.

37 Republiken Polen har med stöd av Ungern gjort gällande att sådana nationella bestämmelser som de som i målet påtalats av kommissionen inte kan bli föremål för prövning utifrån artikel 19.1 andra stycket FEU och artikel 47 i stadgan.

38 Dessa unionsbestämmelser innebär nämligen inte något avsteg från den fördelningsprincip som gäller för unionens befogenhet och som följer av artiklarna 4.1, 5.1, 5.2 och 13.2 FEU. Det är vedertaget att medlemsstaterna har exklusiv befogenhet när det gäller organisationen av det nationella rättsväsendet, vilket innebär att unionen inte har någon befogenhet på detta område.

39 Vidare kan artikel 19.1 andra stycket FEU och artikel 47 i stadgan, liksom allmänna unionsrättsliga principer såsom principen om domares oavhängighet, endast tillämpas i sådana situationer som regleras av unionsrätten.

40 De av kommissionen i målet påtalade nationella bestämmelserna har inte någon koppling till unionsrätten. Dessutom skiljer sig dessa bestämmelser från de nationella bestämmelser som var föremål för prövning i domen av den 27 februari 2018, Associação Sindical dos Juízes Portugueses (C-64/16, EU:C:2018:117); bestämmelserna i det målet var kopplade till ekonomiskt bistånd från unionen till en medlemsstat inom ramen för åtgärder mot ett alltför stort budgetunderskott, och dessa bestämmelser hade således antagits med tillämpning av unionsrätten.

41 Ej heller kan artikel 47 i stadgan tillämpas i målet, mot bakgrund av att det inte är fråga om tillämpning av unionsrätten i den mening som avses i artikel 51.1 i stadgan. Dessutom framgår det av artikel 6.1 FEU, av artikel 51.2 i stadgan och av protokoll (nr 30) om Republiken Polens och Förenade kungarikets tillämpning av stadgan (EUT C 83, 2010, s. 313) att stadgan inte utvidgar tillämpningsområdet för unionsrätten utöver det område som omfattas av unionens befogenhet.

Domstolens bedömning

42 Såsom framgår av artikel 49 FEU, enligt vilken varje europeisk stat får ansöka om att bli medlem av unionen, är unionen en sammanslutning av stater som fritt och frivilligt har anslutit sig till samt respekterar och förbinder sig att främja de gemensamma värden som avses i artikel 2 FEU, och unionsrätten bygger således på den grundläggande premissen att varje medlemsstat delar nämnda värden med alla andra medlemsstater och erkänner att de andra medlemsstaterna delar dessa värden med den (se, för ett liknande resonemang, dom av den 10 december 2018, Wightman m.fl., C-621/18, EU:C:2018:999, punkt 63 och där angiven rättspraxis).

43 Denna premiss innebär och motiverar att medlemsstaterna, och särskilt deras domstolar, hyser ett ömsesidigt förtroende för att de värden – däribland rättsstatsprincipen – som unionen bygger på erkänns och således att den unionsrätt iakttas genom vilken de genomförs (se, för ett liknande resonemang, dom av den 27 februari 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, punkt 30, och dom av den 25 juli 2018, Minister for Justice and Equality (brister i domstolssystemet), C-216/18 PPU, EU:C:2018:586, punkt 35).

44 För att säkerställa att de särskilda egenskaperna och autonomin i unionens rättsordning bevaras, har ett domstolssystem införts genom fördragen som är avsett att säkerställa att unionslagstiftningen tolkas konsekvent och enhetligt (dom av den 6 mars 2018, Achmea, C-284/16, EU:C:2018:158, punkt 35 och där angiven rättspraxis).

45 Kärnan i det sålunda utformade domstolssystemet utgörs av förfarandet för förhandsavgörande enligt artikel 267 FEUF som, genom att det inrättas en dialog mellan EU-domstolen och domstolarna i medlemsstaterna, syftar till att säkerställa en konsekvent och enhetlig tolkning av unionsrätten och därigenom göra det möjligt att säkerställa unionsrättens fulla verkan och autonomi och, till sist, den specifika karaktären hos den rättsordning som inrättats genom fördragen (se, för ett liknande resonemang, dom av den 6 mars 2018, Achmea, C-284/16, EU:C:2018:158, punkt 37).

46 Det framgår av fast rättspraxis att unionen är en rättsunion i vilken enskilda har rätt att vid domstol ifrågasätta lagenligheten av varje beslut eller annan åtgärd på nationell nivå som, i förhållande till dem, rör tillämpningen av en unionsakt (dom av den 27 februari 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, punkt 31 och där angiven rättspraxis, och dom av den 25 juli 2018, Minister for Justice and Equality (brister i domstolssystemet), C-216/18 PPU, EU:C:2018:586, punkt 49).

47 Det ankommer på de nationella domstolarna och på EU-domstolen att i enlighet med artikel 19 FEU, som ger uttryck för det värde som rättsstaten utgör enligt artikel 2 FEU, säkerställa att unionsrätten tillämpas fullt ut i samtliga medlemsstater och att säkerställa domstolsskyddet för enskildas rättigheter enligt unionsrätten (se, för ett liknande resonemang, dom av den 27 februari 2018, Associação Sindical

dos Juízes Portugueses, C-64/16, EU:C:2018:117, punkt 32, och dom av den 25 juli 2018, Minister for Justice and Equality (brister i domstolssystemet), C-216/18 PPU, EU:C:2018:586, punkt 50 och där angiven rättspraxis).

48 Medlemsstaterna ska i detta syfte, och såsom föreskrivs i artikel 19.1 andra stycket FEU, fastställa de möjligheter till överklagande som behövs för att säkerställa ett effektivt domstolsskydd för enskilda rättssubjekt inom de områden som omfattas av unionsrätten. Det ankommer härvid på medlemsstaterna att inrätta ett system med rättsmedel och förfaranden som garanterar en effektiv domstolsprövning på dessa områden (dom av den 27 februari 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, punkt 34 och där angiven rättspraxis).

49 Principen om ett effektivt domstolsskydd för de rättigheter som enskilda har enligt unionsrätten, som det hänvisas till i artikel 19.1 andra stycket FEU, utgör nämligen en allmän princip i unionsrätten. Denna princip följer av medlemsstaternas gemensamma konstitutionella traditioner och den har kommit till uttryck i artiklarna 6 och 13 i Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna, undertecknad i Rom den 4 november 1950, och den har numera även stadfästs i artikel 47 i stadgan (dom av den 27 februari 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, punkt 35 och där angiven rättspraxis).

50 Det ska påpekas, beträffande det materiella tillämpningsområdet för artikel 19.1 andra stycket FEU, att denna bestämmelse avser ”de områden som omfattas av unionsrätten”, oavsett i vilken situation medlemsstaterna tillämpar unionsrätten, i den mening som avses i artikel 51.1 i stadgan (dom av den 27 februari 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, punkt 29).

51 Den omständigheten att de nationella lönesänkningsåtgärder som var föremål för prövning i det mål som avgjordes genom domen av den 27 februari 2018, Associação Sindical dos Juízes Portugueses (C-64/16, EU:C:2018:117) vidtogs med anledning av att det var nödvändigt att eliminera den aktuella medlemsstatens alltför stora budgetunderskott och inom ramen för ett program för ekonomiskt bistånd från unionen till medlemsstaten, har – såsom framgår av punkterna 29–40 ovan, och till skillnad från vad som gjorts gällande av Republiken Polen och Ungern – inte haft någon betydelse för EU-domstolens tolkning och slutsatser att artikel 19.1 andra stycket FEU var tillämplig i det målet. EU-domstolens slutsatser i det målet byggde nämligen på att det i det målet aktuella nationella organet, det vill säga Tribunal de Contas (Revisionsrätten, Portugal), i egenskap av domstol kunde pröva frågor om tillämpning eller tolkning av unionsrätten och därmed frågor som omfattas av unionsrätten, vilket det dock ankom på den hänskjutande domstolen att kontrollera (se, för ett liknande resonemang, dom av den 27 februari 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, punkt 40).

52 EU-domstolen delar visserligen Republiken Polens och Ungerns bedömning att det är medlemsstaterna som har befogenhet att organisera domstolsväsendet i respektive land. Medlemsstaterna är dock skyldiga att därvid iaktta de skyldigheter som åligger dem enligt unionsrätten (se, analogt, dom av den 13 november 2018, Raugevicius, C-247/17, EU:C:2018:898, punkt 45, och dom av den 26 februari 2019, Rimšēvičs och ECB/Lettland, C-202/18 och C-238/18, EU:C:2019:139, punkt 57) och särskilt enligt artikel 19.1 andra stycket FEU (se, för ett liknande resonemang, dom av den 27 februari 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, punkt 40). Att det erfordras att medlemsstaterna på detta sätt iakttar sina skyldigheter innebär ingalunda att unionen gör anspråk på att själv utöva denna befogenhet, och därmed ej heller att unionen försöker tillskansa sig denna befogenhet, till skillnad från vad som gjorts gällande av Republiken Polen.

53 Vad slutligen gäller protokoll (nr 30) påpekar EU-domstolen att detta protokoll inte avser artikel 19.1 andra stycket FEU. Detta protokoll kan inte heller anses innebär att stadgan inte skulle vara tillämplig i Polen, och syftet med protokollet är inte att frita Republiken Polen från skyldigheten att iaktta de bestämmelser som återfinns i stadgan (se, för ett liknande resonemang, dom av den 21 december 2011, N. S. m.fl., C-411/10 och C-493/10, EU:C:2011:865, punkterna 119 och 120).

54 Enligt artikel 19.1 andra stycket FEU ska medlemsstaterna således tillhandahålla sådana möjligheter till överklagande som behövs för att säkerställa ett effektivt domstolsskydd, i den mening som avses i bland annat artikel 47 i stadgan, inom de områden som omfattas av unionsrätten (dom av den 14 juni 2017, Online Games m.fl., C-685/15, EU:C:2017:452, punkt 54 och där angiven rättspraxis).

55 Varje medlemsstat ska enligt artikel 19.1 andra stycket FEU säkerställa att de instanser som i egenskap av ”domstol”, i den mening som avses i unionsrätten, hör till dess system med rättsmedel inom de områden som omfattas av unionsrätten uppfyller kraven på ett effektivt domstolsskydd (dom av den 27 februari 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, punkt 37, och dom av den 25 juli 2018, Minister for Justice and Equality (brister i domstolssystemet), C-216/18 PPU, EU:C:2018:586, punkt 52).

56 Det är i målet utrett att Sąd Najwyższy (Högsta domstolen) kan ha att avgöra frågor som avser tillämpningen eller tolkningen av unionsrätten. Sąd Najwyższy (Högsta domstolen) ingår därmed – såsom en ”domstol” i den mening som avses i unionsrätten – i det polska rättsmedelssystemet inom ”de områden som omfattas av unionsrätten”, i den mening som avses i artikel 19.1 andra stycket FEU, och nämnda domstol ska således uppfylla uppställda krav på ett effektivt domstolsskydd (beslut av den 17 december 2018, kommissionen/Polen, C-619/18 R, EU:C:2018:1021, punkt 43).

57 En grundförutsättning för att detta skydd ska kunna säkerställas av en sådan domstol som Sąd Najwyższy (Högsta domstolen) är att nämnda domstols oavhängighet upprätthålls, såsom detta bekräftas i artikel 47 andra stycket i stadgan, i vilken tillgången till en ”oavhängig” domstol anges som ett av de krav som hänför sig till den grundläggande rätten till ett effektivt rättsmedel (se, för ett liknande resonemang, dom av den 27 februari 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, punkt 41, och dom av den 25 juli 2018, Minister for Justice and Equality (brister i domstolssystemet), C-216/18 PPU, EU:C:2018:586, punkt 53).

58 Detta krav på oavhängiga domstolar – vilket är oupplösligt förbundet med rättskipningsuppdraget – är en del av kärninnehållet i rätten till ett effektivt domstolsskydd och i den grundläggande rätten till en rättvis rättegång, och denna är av vital betydelse för att garantera att samtliga de rättigheter som enskilda tillerkänns enligt unionsrätten skyddas och att medlemsstaternas gemensamma värden som anges i artikel 2 FEU, bland annat rättsstatsprincipen, upprätthålls (se, för ett liknande resonemang, dom av den 25 juli 2018, Minister for Justice and Equality (brister i domstolssystemet), C-216/18 PPU, EU:C:2018:586, punkterna 48 och 63).

59 De av kommissionen i målet påtalade nationella reglerna kan mot denna bakgrund prövas utifrån artikel 19.1 andra stycket FEU. EU-domstolen kommer därför att pröva om det har visats att denna bestämmelse åsidosatts på sätt som gjorts gällande av kommissionen.

Den första anmärkningen

Parternas argument

60 Kommissionen har i den första anmärkningen gjort gällande att Republiken Polen har åsidosatt artikel 19.1 andra stycket FEU i det att den nya lagen om Högsta domstolen föreskriver att den sänkta pensionsåldern för domare vid Sąd Najwyższy (Högsta domstolen) ska tillämpas på domare i tjänst som tillsatts före den 3 april 2018, det vill säga den dag då nämnda lag trädde i kraft. Därigenom har Republiken Polen enligt kommissionen åsidosatt principen om domares oavhängighet och särskilt principen om domares oavsättlighet.

61 Kommissionen har i denna del anfört följande. Artikel 37 § 1 och artikel 111 § 1 och artikel 111 § 1a i den nya lagen om Högsta domstolen innebär att de domare vid nämnda domstol som fyllt 65 år innan nämnda lag trädde i kraft, det vill säga den 3 april 2018, eller senast den 3 juli 2018 i princip ska pensioneras den 4 juli 2018, samt att de domare som fyllt 65 år mellan den 4 juli 2018 och den 3 april 2019 i princip ska pensioneras den 3 april 2019. De domare som fyller 65 år efter den 3 april 2019 ska i princip pensioneras på 65-årsdagen.

62 Kommissionen har framhållit att dessa nationella bestämmelser med omedelbar verkan har berört 27 av de 72 domare vid Sąd Najwyższy (Högsta domstolen) som var i tjänst per den dag då den nya lagen om Högsta domstolen trädde i kraft; bland dessa återfinns förste ordföranden för Sąd Najwyższy (Högsta domstolen). I enlighet med artikel 183.3 i den polska konstitutionen har förste ordföranden för Sąd Najwyższy (Högsta domstolen) tillsatts för en ämbetstid om sex år, och denna ämbetstid skulle löpa ut den 30 april 2020.

63 Kommissionen anser att Republiken Polen – genom att på detta sätt sänka pensionsåldern för domare i tjänst vid Sąd Najwyższy (Högsta domstolen) och samtidigt i enlighet med artiklarna 112 och 112 a i den nya lagen om Högsta domstolen låta Republiken Polens president efter eget skön, fram till och med den 3 april 2019, fatta beslut om att öka antalet ledamöter vid nämnda domstol – påbörjat en djupgående omstrukturering av Sąd Najwyższy (Högsta domstolen) med omedelbar verkan. Republiken Polen har därigenom åsidosatt principen om domares oavsättlighet som utgör en del av principen om domares oavhängighet, och därmed artikel 19.1 andra stycket FEU.

64 Kommissionen har vidare anfört följande. Om det är så att det inte kan vara helt och hållet uteslutet att sänka pensionsåldern för domarna, så är det i vart fall nödvändigt att i samband därmed vidta lämpliga åtgärder; det kan då vara fråga om en övergångsperiod eller åtgärder som vidtas stegvis för att hindra att den sänkta pensionsåldern används som ett medel för att dölja att det i själva verket är fråga om att ändra domstolarnas sammansättning. Sådana lämpliga åtgärder är nödvändiga bland annat för att förhindra att det framstår som om en förkortad ämbetstid för de berörda domarna i själva verket kan motiveras av de göromål som domarna ägnar sig åt i sin domartjänstgöring samt för att inte rubba domarnas förvissning om att de kan fortsätta sin ämbetsutövning.

65 Enligt Republiken Polen är det inte utifrån artikel 19.1 andra stycket FEU – för att garantera domarnas oavhängighet – påkallat med en övergångsperiod för domare i aktiv tjänst i samband med att åtgärder vidtas för att sänka pensionsåldern. En sådan sänkt pensionsålder tillämpas nämligen generellt och automatiskt på samtliga berörda domare, och den kan inte anses vara ett påtryckningsmedel för att påverka berörda personers tjänsteutövning såsom domare.

66 Inom den polska rättsordningen säkerställs skyddet för domstolsväsendets oavhängighet huvudsakligen genom att man skyddar rättskipningens stadigvarande karaktär, och det är därvid fråga om bland annat skyddsregler för oavsättlighet, immunitet, skälig lön, sekretess vid överläggningar, oförenlighet mellan dömande uppgifter och annan offentlig tjänsteutövning, skyldighet att vara neutral i politiska sammanhang och förbud mot att idka näring. En domare får skiljas från sin tjänst endast efter att denne å det grövsta åsidosatt sina disciplinära åligganden eller fällts till ansvar i en lagakraftvunnen brottmålsdom. Att en domare pensioneras kan enligt Republiken Polen inte likställas med att domaren entledigats, eftersom vederbörande behåller sin domartitel och därmed sin immunitet och rätt till skälig lön samtidigt som domaren fortsätter att omfattas av olika yrkesetiska regler.

67 Enligt Republiken Polen framgår det dessutom av dom av den 21 juli 2011, Fuchs och Köhler (C-159/10 och C-160/10, EU:C:2011:508), och dom av den 27 februari 2018, Associação Sindical dos Juízes Portugueses (C-64/16, EU:C:2018:117) att medlemsstaterna även fortsättningsvis är behöriga att justera domarnas arbetsvillkor och därmed deras pensionsålder, bland annat – såsom är fallet i förevarande mål – för att anpassa domarnas pensionsålder så att den överensstämmer med den i landet föreskrivna allmänna pensionsåldern och därvid optimera åldersstrukturen hos de tjänstemän som tjänstgör vid berörd domstol.

68 Om pensionsåldern för en domare ska fastställas utifrån gällande rätt den dag då den aktuella domaren påbörjade sin tjänstgöring, anser Republiken Polen slutligen att hänsyn måste tas till att pensionsåldern för domare vid Sąd Najwyższy (Högsta domstolen) blev föremål för översyn under år 2002 och därvid åter fastställdes till 70 år efter att ha varit 65 år mellan åren 1990 och 2002. 17 av de 27 domare i tjänst vid nämnda domstol som berörs av den i den nya lagen om Högsta domstolen föreskrivna sänkta pensionsåldern tillsattes mellan åren 1990 och 2002, vilket innebär att dessa inte fått se sin pensionsålder sänkt jämfört med vad som föreskrevs då de påbörjade sin tjänstgöring.

69 Om man utgår från att det är den dag då domarna tillsattes såsom domare vid Sąd Najwyższy (Högsta domstolen) som utgör kriteriet för att bestämma domarnas pensionsålder, finns det en risk för att domarna diskrimineras inbördes. Vissa av domarna – särskilt de som tillsattes efter det att den nya lagen om Högsta domstolen trädde i kraft – kommer nämligen att pensioneras tidigare än de som tillsattes innan nämnda lag trädde i kraft, det vill säga vid en tidpunkt då pensionsåldern var 70 år.

70 Ungern har gjort gällande att kommissionen inte styrkt att den sänkta pensionsåldern för domarna vid Sąd Najwyższy (Högsta domstolen) och den faktiska pensionering av vissa domare som genomförts på grund av den sänkta pensionsåldern kan anses påverka Sąd Najwyższys (Högsta domstolen) förmåga att säkerställa ett effektivt domstolsskydd inom de områden som omfattas av unionsrätten.

Domstolens bedömning

71 Två olika aspekter aktualiseras när det gäller det krav på domstolars oavhängighet som medlemsstaterna ska iaktta enligt artikel 19.1 andra stycket FEU och såsom även framgår av punkterna 42–59 i det föregående, såvitt gäller nationella domstolar som – i likhet med Sąd Najwyższy (Högsta domstolen) – har att avgöra frågor som rör tolkning och tillämpning av unionsrätten.

72 För det första finns det en extern aspekt som förutsätter att den aktuella domstolsinstansen fullgör sina uppgifter helt självständigt, utan att vara underställd någon annan och utan att ta emot order eller instruktioner från något håll och att den således är skyddad mot yttre inblandning eller påtryckningar som kan äventyra dess ledamöters oberoende prövning och påverka deras avgöranden (dom av den 27 februari 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, punkt 44 och där angiven rättspraxis).

73 För det andra finns det en intern aspekt som sammanfaller med begreppet opartiskhet och som handlar om att avståndet gentemot parterna och deras respektive intressen vad gäller saken i målet ska vara detsamma. Denna aspekt förutsätter att objektivitet iakttas och att det inte föreligger något annat intresse vad gäller utgången i målet än vad som följer av en strikt tillämpning av rättsreglerna (dom av den 25 juli 2018, Minister for Justice and Equality (brister i domstolssystemet), C-216/18 PPU, EU:C:2018:586, punkt 65 och där angiven rättspraxis).

74 Dessa skyddsregler för oavhängighet och opartiskhet förutsätter att det finns regler, särskilt vad gäller organets sammansättning, utnämningar, tjänsternas varaktighet och grunderna för medlemmarnas röstnedläggelse, jäv och återkallande av röst, som utesluter allt rimligt tvivel som enskilda rättssubjekt skulle kunna hysa beträffande organets pålitlighet i förhållande till yttre omständigheter och organets neutralitet i förhållande till de intressen som konfronteras (dom av den 19 september 2006, Wilson, C-506/04, EU:C:2006:587, punkt 53 och där angiven rättspraxis, och dom av den 25 juli 2018, Minister for Justice and Equality (brister i domstolssystemet), C-216/18 PPU, EU:C:2018:586, punkt 66 och där angiven rättspraxis).

75 Denna absolut nödvändiga frihet för domarna i förhållande till yttre ingripanden eller påtryckningar förutsätter – såsom slagits fast av EU-domstolen vid upprepade tillfällen – vissa skyddsregler för att skydda integriteten hos dem som har till uppgift att döma, såsom att de är oavsättliga (se, för ett liknande resonemang, dom av den 25 juli 2018, Minister for Justice and Equality (brister i domstolssystemet), C-216/18 PPU, EU:C:2018:586, punkt 64 och där angiven rättspraxis).

76 Det är utifrån principen om domares oavsättlighet bland annat påkallat att domarna kan kvarstå i tjänst så länge som de inte uppnått obligatorisk pensionsålder eller fram till dess att deras förordnande löper ut då de tjänstgör enligt ett visstidsförordnande. Denna princip är inte absolut, men avsteg från principen får göras endast om det kan anses motiverat utifrån legitima och tvingande skäl, dock med iakttagande av proportionalitetsprincipen. Således är det vedertaget att domare får skiljas från sin tjänst om de har visat sig vara olämpliga att inneha tjänsten på grund av arbetsoförmåga eller på grund av att de grovt åsidosatt sina tjänsteåligganden; därvid ska förfarandet genomföras enligt adekvata handläggningsregler.

77 I sistnämnda avseende förutsätter oavhängighetskravet enligt EU-domstolens praxis närmare bestämt att det disciplinära systemet – och således reglerna om när de personer som har i uppdrag att utöva rättskipning eventuellt får skiljas från sin tjänst – innehåller de skyddsregler som behövs för att helt förhindra risken för att ett sådant system används som ett system för politisk kontroll över innehållet i domstolarnas avgöranden. Regler som bland annat anger vilka handlingar som kan föranleda disciplinära åtgärder och vilka disciplinära åtgärder som konkret är tillämpliga, som föreskriver att disciplinära beslut fattas av ett oavhängigt organ i enlighet med ett förfarande som till fullo garanterar att rättigheterna enligt artiklarna 47 och 48 i stadgan respekteras – bland annat rätten till försvar – och som gör det möjligt att överklaga besluten från de disciplinära organen till domstol, är alla skyddsregler som är av grundläggande betydelse för att domstolsväsendets oavhängighet ska upprätthållas (dom av den 25 juli 2018, Minister for Justice and Equality (brister i domstolssystemet), C-216/18 PPU, EU:C:2018:586, punkt 67).

78 EU-domstolen konstaterar att den i målet påtalade reformen – som medför att den för domare vid Sąd Najwyższy (Högsta domstolen) föreskrivna sänkta pensionsåldern ska tillämpas på de domare som redan var i tjänst vid nämnda domstol – innebär att dessa domare i förtid måste skiljas från sina rättskipningsuppgifter. EU-domstolen konstaterar vidare att denna reform därmed är ägnad att ge upphov till legitima farhågor om huruvida principen om domares oavsättlighet har iakttagits.

79 Mot denna bakgrund finner EU-domstolen – med beaktande av att nämnda princip är av grundläggande betydelse (se punkterna 75–77 i det föregående) – att den sänkta pensionsåldern får tillämpas på detta sätt endast om det kan anses motiverat utifrån en legitim målsättning och om det är proportionerligt i förhållande till denna målsättning och såvitt enskilda rättssubjekt inte hyser några rimliga tvivel beträffande den aktuella domstolens pålitlighet i förhållande till yttre omständigheter och organets neutralitet i förhållande till de intressen som konfronteras.

80 Republiken Polen har i målet gjort gällande att sänkningen av pensionsåldern till 65 år för domare vid Sąd Najwyższy (Högsta domstolen) har föranletts av att det funnits en avsikt att anpassa domarnas pensionsålder så att den överensstämmer med den allmänna pensionsåldern för samtliga anställda i Polen, och därigenom optimera åldersstrukturen hos de tjänstemän som tjänstgör vid denna domstol.

81 För det första har EU-domstolen visserligen slagit fast att målsättningar som går ut på att göra åldersgränsen för obligatorisk pensionering enhetlig inom den offentliga sektorn och att främja en jämnare åldersstruktur mellan yngre och äldre tjänstemän för att på så sätt underlätta anställning och sysselsättning av unga personer, särskilt som domare, kan utgöra ett berättigat mål för sysselsättningspolitiken (se, för ett liknande resonemang, dom av den 21 juli 2011, Fuchs och Köhler, C-159/10 och C-160/10, EU:C:2011:508, punkt 50, och dom av den 6 november 2012, kommissionen/Ungern, C-286/12, EU:C:2012:687, punkterna 61 och 62).

82 EU-domstolen finner emellertid – såsom även gjorts gällande av kommissionen och såsom redan påpekats av Europeiska kommissionen för demokrati genom lag (även kallad Venedigkommissionen) i punkterna 33 och 47 i yttrande nr 904/2017 (CDL-AD(2017)031) – att det i förslaget till ny lag om Högsta domstolen redovisas omständigheter som föranleder tvivel om att det verkligen var sådana målsättningar som var vägledande då en översyn gjordes av pensionsåldern för domare i tjänst vid Sąd Najwyższy (Högsta domstolen), och inte avsikten att få bort en viss domargrupp från domstolen.

83 Vidare erinrar EU-domstolen om följande. Åtgärden att sänka pensionsåldern för de domare vid Sąd Najwyższy (Högsta domstolen) som var i tjänst då den nya lagen om Högsta domstolen trädde i kraft åtföljdes av en ny mekanism; denna mekanism innebar att Republiken Polens president fick befogenhet att efter eget skön förlänga – med två på varandra följande perioder om vardera tre år – förordnandet för de domare som fått se sin ämbetstid förkortad.

84 Åtgärden att införa en sådan möjlighet att förlänga domarförordnandet med upp till sex år, jämte sänkningen med fem år av pensionsåldern för de domare vid Sąd Najwyższy (Högsta domstolen) som var i tjänst då den nya lagen om Högsta domstolen trädde i kraft, föranleder tvivel om att syftet med den genomförda reformen verkligen var att harmonisera pensionsåldern för dessa domare med pensionsåldern för alla anställda i Polen och att optimera åldersstrukturen hos tjänstemännen vid denna domstol.

85 Dessa båda åtgärder sammantagna kan dessutom förstärka intrycket av att det i själva verket skulle kunna vara fråga om åtgärder som vidtagits för att få bort en i förväg bestämd krets av domare vid Sąd Najwyższy (Högsta domstolen). Även om den sänkta pensionsåldern tillämpas på samtliga domare vid Sąd Najwyższy (Högsta domstolen) som var i tjänst då den nya lagen om Högsta domstolen trädde i kraft, så behåller Republiken Polens president nämligen behörigheten att efter eget skön fatta beslut om att vissa av de berörda domarna ska få kvarstå i tjänst.

86 Vidare konstaterar EU-domstolen att den med fem år sänkta pensionsåldern för de domare vid Sąd Najwyższy (Högsta domstolen) som var i tjänst då den nya lagen om Högsta domstolen trädde i kraft, och verkan därav som består i att domarnas ämbetstid har förkortats, har med omedelbar verkan berört nästan en tredjedel av de ledamöter vid domstolen som då var i tjänst. Bland dessa ledamöter återfinns bland annat förste ordföranden för Sąd Najwyższy (Högsta domstolen), vars konstitutionsfästa sexåriga ämbetstid därigenom också har förkortats. EU-domstolen finner därvid – i likhet med vad som gjorts gällande av kommissionen – att detta vittnar om den potentiellt avsevärda inverkan som den aktuella reformen får på sammansättningen av och den funktionella kontinuiteten hos Sąd Najwyższy (Högsta domstolen). Såsom även framhållits av generaladvokaten i punkt 76 i förslaget till avgörande kan en sådan genomgripande förändring av sammansättningen hos en högsta domstol – som blir följden av en reform som specifikt berör den högsta domstolsinstansen – i sin tur föranleda tvivel om reformens verkliga natur och om vilka målsättningar som egentligen eftersträvas med reformen.

87 De argument som framförts av Republiken Polen – nämligen dels att vissa av de domare i tjänst vid Sąd Najwyższy (Högsta domstolen) som berörts av reformen tillsattes vid en tidpunkt då pensionsåldern för domare vid Sąd Najwyższy (Högsta domstolen) var 65 år, dels att en pensionerad domare behåller sin domartitel och därmed sin immunitet och rätt till arvode samtidigt som domaren fortsätter att omfattas av olika yrkesetiska regler – kan inte skingra de tvivel som på så sätt kringgärdar reformens egentliga målsättningar och som framgår av vad som angetts i punkterna 82–86 ovan.

88 Dessa omständigheter – om det antas att de verkligen är för handen – föranleder nämligen inte EU-domstolen att göra någon annan bedömning än att pensioneringen av de aktuella domarna innebär att de med omedelbar verkan och i förtid, jämfört med vad som var fallet enligt de regler som gällde innan den aktuella reformen genomfördes, skiljs från sina rättskipningsuppgifter.

89 För det andra konstaterar EU-domstolen att – vilket även vitsordats av Republiken Polen under förhandlingen – den allmänna pensionsålder för anställda till vilken Polen uppgett sig vilja anpassa pensionsåldern för domare vid Sąd Najwyższy (Högsta domstolen), inte innebär att dessa vanliga anställda ex officio skiljs från sin tjänst med ålderspension. Istället är det så att de får, men de måste inte, upphöra med sin förvärvsverksamhet och därmed få ålderspension.

90 Mot denna bakgrund har Republiken Polen inte visat att den påtalade åtgärden utgör ett lämpligt medel för att minska skillnaderna när det gäller vid vilken ålder som samtliga berörda yrkesgrupper måste upphöra med sin förvärvsverksamhet. Republiken Polen har därvid inte anfört några sakliga skäl till att det – för att anpassa pensionsåldern för domarna vid Sąd Najwyższy (Högsta domstolen) till den allmänna pensionsåldern för samtliga anställda i Polen – var nödvändigt att ex officio skilja domarna från deras anställning med ålderspension, dock med förbehåll för att Republiken Polens president efter eget skön beslutar om förlängt förordnande, medan det för övriga anställda var fakultativt att gå i pension vid i lag föreskriven ålder.

91 För det tredje har EU-domstolen – såvitt gäller målet att göra pensionsåldern mer enhetlig – redan förklarat att nationella bestämmelser som innebär en plötslig och betydande sänkning av åldersgränsen för obligatorisk pensionering såsom domare, utan att det föreskrivs några övergångsbestämmelser ägnade att skydda de berättigade förväntningarna för de som var i tjänst då dessa bestämmelser trädde i kraft, strider mot proportionalitetsprincipen (se, för ett liknande resonemang, dom av den 6 november 2012, kommissionen/Ungern, C-286/12, EU:C:2012:687, punkterna 68 och 80).

92 Republiken Polen har även hänvisat till domen av den 27 februari 2018, Associação Sindical dos Juízes Portugueses (C-64/16, EU:C:2018:117) och därvid anfört att det finns godtagbara skäl för den av kommissionen i den första anmärkningen påtalade nationella åtgärden. Vad beträffar denna dom erinrar EU-domstolen om att den handlade om sänkta löner för domare. Efter att ha konstaterat att den aktuella lönesänkningsåtgärden var begränsad både till belopp och i tid och att den inte specifikt hade vidtagits gentemot ledamöterna i Tribunal de Contas (Revisionsrätten, Portugal), utan att det tvärtom var fråga om en generellt tillämplig åtgärd, fann EU-domstolen i nämnda dom att artikel 19 FEU ska tolkas på så sätt att principen om domares oavhängighet inte utgör hinder för att vidta en sådan åtgärd.

93 EU-domstolen finner emellertid att verkningarna av en sådan begränsad och tillfällig lönesänkningsåtgärd – då man bedömer dessa verkningar utifrån skyddet för domarnas oavhängighet – inte kan anses jämförbara med verkningarna av en åtgärd som består i sänkt pensionsålder för domare som är i tjänst. En sådan sänkt pensionsålder innebär för sin del att berörda domare i förväg och slutgiltigt skiljs från sina domarämbeten.

94 För det fjärde finner EU-domstolen att en omedelbar tillämpning av den påtalade reformen på de domare vid Sąd Najwyższy (Högsta domstolen) som var i tjänst då den nya lagen om Högsta domstolen trädde i kraft, inte heller kan motiveras av att Republiken Polen uppgett sig vilja förhindra en eventuell diskriminering – med avseende på domarämbetets längd – mellan dessa domare och de domare som tillsatts vid nämnda domstol efter denna tidpunkt.

95 EU-domstolen delar den bedömning som gjorts av kommissionen, det vill säga att domarna i dessa båda kategorier inte kan anses befinna sig i jämförbara situationer. Det är nämligen endast domarna i den första kategorin som fått se sin ämbetsperiod förkortas under sin tjänstgöringstid vid Sąd Najwyższy (Högsta domstolen), medan domarna i den andra kategorin utnämnts som domare vid Sąd Najwyższy (Högsta domstolen) enligt den nya lag som fastställer pensionsåldern till 65 år. EU-domstolen finner dessutom – i det att Republiken Polen hävdat att de domare som redan var i tjänst vid Sąd Najwyższy (Högsta domstolen), till skillnad från de kolleger som tillsatts efter det att den nya lagen om Högsta domstolen trätt i kraft, inte skulle få någon möjlighet att gå i pension vid

den i nämnda lag föreskrivna nya pensionsåldern – att det i så fall, såsom framhållits av kommissionen, hade varit lämpligt att ge berörda personer möjlighet att på frivillig basis skiljas från sin anställning då de uppnår den nya lagstadgade pensionsåldern utan att därvid tvinga dem att göra detta.

96 Vid en sammantagen bedömning konstaterar EU-domstolen således att det inte finns någon legitim målsättning som motiverar att den sänkta pensionsåldern för domare vid Sąd Najwyższy (Högsta domstolen) tillämpas på domare i tjänst vid nämnda domstol. En sådan åtgärd strider således mot principen om domares oavsättlighet som utgör en del av principen om domares oavhängighet.

97 EU-domstolen godtar således kommissionens första anmärkning om att Republiken Polen har åsidosatt artikel 19.1 andra stycket FEU.

Den andra anmärkningen

Parternas argument

98 Kommissionen har i den andra anmärkningen gjort gällande att Republiken Polen har åsidosatt artikel 19.1 andra stycket FEU i det att den nya lagen om Högsta domstolen föreskriver att Republiken Polens president har rätt att efter eget skön förlänga – med två perioder om vardera tre år – förordnandet för domare i tjänst vid Sąd Najwyższy (Högsta domstolen) efter att den i nämnda lag nya fastställda pensionsåldern uppnåtts.

99 Kommissionen har i denna del gjort gällande följande. I och med att det inte finns några kriterier som måste följas i samband med att beslut fattas om att förlänga ett domarförordnande eller ej, och i och med att det inte finns någon skyldighet att motivera sådana beslut och att det inte finns någon möjlighet att vid domstol få till stånd en prövning av besluten, så kan Republiken Polens president utöva påtryckningar gentemot domarna vid Sąd Najwyższy (Högsta domstolen). Att domaren i fråga måste ge in en ansökan till Republiken Polens president för att få förlängt domarförordnande och därefter – när en sådan ansökan väl getts in – vänta på att beslut meddelas av presidenten, kan innebära att domaren upplever sig vara utsatt för påtryckningar; dessa påtryckningar kan i sin tur innebära att domaren fogar sig efter eventuella önskemål från presidents sida när det gäller mål som handläggs av domaren, även i sådana mål där domaren har att tolka och tillämpa unionsbestämmelser.

100 Den i artikel 37 §§ 1a och 1b och i artikel 111a i den nya lagen om Högsta domstolen samt i artikel 5 i ändringslagen av den 10 maj 2018 föreskrivna skyldigheten för Republiken Polens president att inhämta utlåtande från Nationella domstolsrådet, föranleder enligt kommissionen inte någon annan bedömning. De kriterier som ska följas av Nationella domstolsrådet i samband med att utlåtande avges är nämligen alltför allmänt formulerade, och dessutom är utlåtandet inte bindande för presidenten. Mot bakgrund av den nyligen genomförda ändringen av ustawa o Krajowej Radzie Sądownictwa (lagen om Nationella domstolsrådet), av den 12 maj 2011 (Dz. U., 2011, position 714), vilken ändring genomförts genom ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (lagen om ändring av lagen om Nationella domstolsrådet och av vissa andra lagar), av den 8 december 2017 (Dz. U., 2018, position 3), är det dessutom så, att de femton av totalt tjugosju ledamöter i rådet som ska väljas bland domare hädanefter inte kommer att väljas av sina domarkolleger (såsom tidigare varit fallet) utan av sejmen. Enligt kommissionen finns det mot denna bakgrund skäl att hysa farhågor om huruvida ledamöterna är oavhängiga.

101 Kommissionen har slutligen gjort gällande att det – med avseende på de domare vid Sąd Najwyższy (Högsta domstolen) som fyller 65 år efter den 3 juli 2018 – inte fastställts någon frist inom vilken Republiken Polens president ska inhämta utlåtande från Nationella domstolsrådet. Detta kan enligt kommissionen eventuellt förlänga den faktiska period då det är presidenten som efter eget skön äger frågan om den aktuella domaren ska kvarstå i tjänst.

102 Dessa olika omständigheter innebär enligt kommissionen att Sąd Najwyższy (Högsta domstolen) inte längre kan anses kunna säkerställa att domstolen under alla omständigheter bedriver sin verksamhet på ett opartiskt och oavhängigt sätt.

103 Republiken Polen har gjort gällande följande. Den behörighet som tillkommer Republiken Polens president att fatta beslut om eventuellt förlängt förordnande för de domare vid Sąd Najwyższy (Högsta domstolen) som uppnått pensionsåldern, utgör en behörighet som följer av den behörighet som presidenten har enligt konstitutionen att tillsätta domare. Syftet med denna behörighet är just att skydda den dömande makten från påtryckningar från den lagstiftande och den verkställande makten, och det är Republiken Polens president som personligen har att utöva denna behörighet enbart med iakttagande av i konstitutionen stadfästa regler och principer. Presidentens beslut att inte utnämna en sökande till domare utgör enligt fast rättspraxis icke-förvaltningsrättsliga beslut som inte får överklagas till domstol.

104 Såsom framgår av artikel 37 § 1b i den nya lagen om Högsta domstolen ska Nationella domstolsrådet emellertid i sina utlåtanden till Republiken Polens president ta hänsyn till rättskipningens intresse och viktiga allmänintressen, i synnerhet rationellt utnyttjande av personalen vid Sąd Najwyższy (Högsta domstolen) och de behov som följer av arbetsbelastningen vid vissa avdelningar i nämnda domstol. Det är visserligen riktigt att Republiken Polens president inte är bunden av dessa utlåtanden vid äventyr av att presidentens konstitutionella behörighet (se föregående punkt) annars skulle trädas förnär, men det är uppenbart att presidenten i praktiken beaktar dessa utlåtanden vid sin bedömning. Likaså är det enligt Republiken Polen klart att även om det i lagen inte anges någon tidsfrist i denna del, så inhämtar Republiken Polens president utlåtande från Nationella domstolsrådet så snart presidenten tar del av en ansökan om förlängt domarförordnande från en domare vid Sąd Najwyższy (Högsta domstolen).

105 Vad gäller sammansättningen i Nationella domstolsrådet har Republiken Polen uppgett sig inte dela de farhågor som framförts av kommissionen. Enligt Republiken Polen är sådana farhågor dessutom ovidkommande vid prövningen av detta mål. Kommissionen har nämligen i målet i huvudsak påtalat att Polen överlämnat åt Republiken Polens president att efter eget skön fatta beslut om eventuellt förlängt domarförordnande för domare vid Sąd Najwyższy (Högsta domstolen) efter uppnådd lagstadgad pensionsålder utan möjlighet för berörd part att överklaga beslutet till domstol. Kommissionen har även påtalat att Republiken Polens president under alla omständigheter inte är bunden av utlåtanden från Nationella domstolsrådet.

106 Republiken Polen anser slutligen att domarna vid Sąd Najwyższy (Högsta domstolen) i praktiken inte låter sig påverkas av Republiken Polens president bara för att de ska kunna få sitt domarförordnande förlängt i stället för att skiljas från tjänsten med en väl tilltagen ålderspension. Dessutom är överläggningarna vid domstolen hemliga, vilket innebär att det inte finns någon möjlighet för presidenten att ta del av information om hur varje domstolsledamot har röstat. Vidare har Republiken Polens president att ta ställning till en domares ansökan om förlängt förordnande inom ungefär fyra månader, vilket är en ganska kort frist.

107 Dessutom finns det i andra medlemsstater än Republiken Polen liknande regelverk för förlängda domarförordnanden efter den dag då domaren i fråga uppnått normal pensionsålder. Vad sedan gäller domare vid Europeiska unionens domstol är det regeringen i den medlemsstat som domaren är medborgare i som efter eget skön fattar beslut om huruvida domarförordnandet ska förnyas eller ej.

Domstolens bedömning

108 Såsom påpekats i punkterna 72–74 ovan är det utifrån skyddsreglerna för domstolarnas oavhängighet och opartiskhet påkallat att den aktuella domstolsinstansen fullgör sina uppgifter helt självständigt, att den därvid är skyddad mot yttre inblandning eller påtryckningar som kan äventyra dess ledamöters

oberoende prövning och påverka deras avgöranden, att objektivitet iakttas och att det inte föreligger något intresse vad gäller utgången i målet. Skyddsreglerna för domstolarnas oavhängighet och opartiskhet ska vara utformade på så sätt att de utesluter allt rimligt tvivel som enskilda rättssubjekt skulle kunna hysa beträffande organets pålitlighet i förhållande till yttre omständigheter och organets neutralitet i förhållande till de intressen som konfronteras.

109 EU-domstolen påpekar inledningsvis att den av kommissionen i den andra anmärkningen påtalade nationella bestämmelsen inte avser förfarandet för utnämning av domare. Den påtalade bestämmelsen handlar i stället om möjligheten för tjänstgörande domare som således omfattas av de skyddsregler som följer av domarämbetet att fortsätta sin domartjänstgöring efter uppnådd normal pensionsålder. Bestämmelsen handlar därmed om villkoren för domarnas tjänsteutövning och villkoren för hur de skiljs från sin anställning.

110 Visserligen ankommer det endast på medlemsstaterna att avgöra om ett förlängt domarförordnande ska kunna beviljas efter den dag då domarna uppnått normal pensionsålder. Om medlemsstaterna bestämmer att en sådan möjlighet ska finnas, är de emellertid skyldiga att utforma villkoren och formerna för ett sådant förlängt förordnande på så sätt att principen om domares oavhängighet inte åsidosätts.

111 Att ett organ som Republiken Polens president ges behörighet att fatta beslut om huruvida ett eventuellt förlängt domarförordnande ska beviljas eller ej är visserligen inte i sig en tillräcklig omständighet för att det ska anses att nämnda princip har åsidosatts. Det är emellertid viktigt att försäkra sig om att de materiella rekvisit och de handläggningsregler som är tillämpliga då sådana beslut ska fattas är utformade på ett sådant sätt att de utesluter allt rimligt tvivel som enskilda rättssubjekt skulle kunna hysa beträffande de aktuella domarnas pålitlighet i förhållande till yttre omständigheter och deras neutralitet i förhållande till de intressen som konfronteras.

112 Dessa materiella rekvisit och handläggningsregler ska därvid utformas på ett sådant sätt att de motverkar att domarna ger efter för yttre inblandning eller påtryckningar som skulle kunna äventyra deras oavhängighet (se, för ett liknande resonemang, dom av den 31 januari 2013, D. och A., C-175/11, EU:C:2013:45, punkt 103). Sådana handläggningsregler ska särskilt göra det möjligt att utesluta inte bara all direkt påverkan i form av instruktioner utan även mer indirekt påverkan som kan inverka på domarnas beslutsfattande (se, analogt, dom av den 16 oktober 2012, kommissionen/Österrike, C-614/10, EU:C:2012:631, punkt 43, och dom av den 8 april 2014, kommissionen/Ungern, C-288/12, EU:C:2014:237, punkt 51).

113 EU-domstolen finner emellertid att de rekvisit och handläggningsregler som enligt den nya lagen om Högsta domstolen ska följas för att en domare eventuellt ska få sitt domarförordnande vid Sąd Najwyższy (Högsta domstolen) förlängt efter uppnådd normal pensionsålder, inte uppfyller dessa krav.

114 EU-domstolen konstaterar för det första att för att ett sådant förlängt förordnande ska meddelas så måste Republiken Polens president enligt den nya lagen om Högsta domstolen hädanefter meddela beslut i frågan. Presidenten har därvid ett utrymme för eget skön eftersom själva beslutsfattandet i sig inte är föremål för några kontrollerbara och objektiva kriterier, och presidenten behöver inte heller motivera sitt beslut. Dessutom går det inte att överklaga ett sådant beslut till domstol.

115 Vad för det andra gäller den omständigheten att Nationella domstolsrådet, enligt den nya lagen om Högsta domstolen, ska lämna ett utlåtande till Republiken Polens president innan presidenten meddelar sitt beslut, konstaterar EU-domstolen följande. Det är visserligen riktigt att ett sådant organs deltagande i handläggningen av ett ärende om förlängt domarförordnande för en domare som uppnått normal pensionsålder i princip kan visa sig vara ägnat att främja att ärendet handläggs på ett opartiskt sätt.

116 Detta är emellertid fallet endast om vissa villkor är uppfyllda. Ett av dessa villkor är att organet i sig är oavhängigt i förhållande till den lagstiftande och den verkställande makten och att det är oavhängigt i förhållande till den myndighet till vilken organet ska lämna sitt utlåtande. Andra villkor är att utlåtandet ska lämnas utifrån helt objektiva och relevanta kriterier och att det motiveras i vederbörlig ordning, så att utlåtandet på ett objektivt sätt är ägnat att vägleda myndigheten då den fattar sitt beslut.

117 EU-domstolen finner i denna del att det är tillräckligt att konstatera – i likhet med vad som även uppgetts av Republiken Polen vid förhandlingen – att Nationella domstolsrådet i ärenden då det haft att lämna utlåtanden till Republiken Polens president, som huvudregel och i avsaknad av bestämmelser som tvingar rådet att motivera sina utlåtanden, nöjt sig med att lämna utlåtanden som oavsett om de är betungande eller gynnande för sökanden antingen saknar motivering eller endast innehåller en rent formell motivering som endast allmänt hänvisar till ordalydelsen av rekvisiten i artikel 37 § 1b i den nya lagen om Högsta domstolen. Mot denna bakgrund finner EU-domstolen – varvid det saknas anledning att pröva om de i nämnda bestämmelse angivna rekvisiten är tillräckligt transparenta, objektiva och kontrollerbara – att sådana utlåtanden inte kan anses vara ägnade att på ett objektivt sätt vägleda Republiken Polens president då denne meddelar beslut i frågan om en domare ska få förlängt förordnande att tjänstgöra som domare vid Sąd Najwyższy (Högsta domstolen) efter uppnådd normal pensionsålder.

118 Vid en samlad bedömning finner EU-domstolen att det utrymme för skönsmässig bedömning, som tillkommer Republiken Polens president att vid två tillfällen och varje gång för tre år, mellan en uppnådd ålder om 65 och 71 år, förlänga förordnandet för domare vid en nationell högsta domstolsinstans såsom Sąd Najwyższy (Högsta domstolen), är ägnat att föranleda rimligt tvivel hos bland annat enskilda rättssubjekt beträffande domarnas pålitlighet i förhållande till yttre omständigheter och beträffande domarnas neutralitet i förhållande till de intressen som konfronteras.

119 Slutligen finner EU-domstolen att Republiken Polen inte kan vinna framgång med argumentet att de påtalade nationella bestämmelserna skulle likna de handläggningsregler som är tillämpliga i andra medlemsstater eller i samband med att domarförordnanden vid Europeiska unionens domstol eventuellt förlängs.

120 Även om det antas – vilket dock inte har styrkts – att ett förfarande i en annan medlemsstat utifrån artikel 19.1 andra stycket FEU skulle vara bristfälligt utformat på ett liknande sätt som de i detta mål aktuella nationella bestämmelserna, så kan en medlemsstat nämligen inte stödja sig på att en annan medlemsstat eventuellt har brutit mot unionsbestämmelserna för att rättfärdiga sitt eget fördragsbrott (se, för ett liknande resonemang, dom av den 6 juni 1996, kommissionen/Italien, C-101/94, EU:C:1996:221, punkt 27 och där angiven rättspraxis).

121 Vidare erinrar EU-domstolen om följande. Till skillnad från vad som är fallet beträffande nationella domare som tillsätts för tjänstgöring fram till dess att de uppnår lagstadgad pensionsålder, så utses domarna vid Europeiska unionens domstol, i enlighet med vad som föreskrivs i artikel 253 FEUF, för viss tid om sex år. För övrigt krävs det enligt nämnda artikel att för att en avgående domare på nytt ska kunna utses så ska – vilket även gäller då domare utses för första gången – detta beslutas av medlemsstaternas regeringar i samförstånd, efter det att den kommitté som föreskrivs i artikel 255 FEUF har hörts.

122 De sålunda fastställda villkoren i fördragen kan inte påverka omfattningen av de skyldigheter som medlemsstaterna har med tillämpning av artikel 19.1 andra stycket FEU.

123 EU-domstolen godtar således kommissionens andra anmärkning om att Republiken Polen har åsidosatt artikel 19.1 andra stycket FEU. Talan ska därför bifallas i sin helhet.

124 Mot denna bakgrund fastställer EU-domstolen att Republiken Polen har underlåtit att uppfylla sina skyldigheter enligt artikel 19.1 andra stycket FEU, genom att föreskriva att den sänkta pensionsåldern för domare vid Sąd Najwyższy (Högsta domstolen) ska tillämpas på domare i tjänst vilka tillsatts vid nämnda domstol före den 3 april 2018, samt genom att ge Republiken Polens president rätt att efter eget skön förlänga förordnandet för domare vid Sąd Najwyższy efter att den nyligen fastställda pensionsåldern uppnåtts.

Rättegångskostnader

125 Enligt artikel 138.1 i domstolens rättegångsregler ska tappande part förpliktas att ersätta rättegångskostnaderna, om detta har yrkats. Kommissionen har yrkat att Republiken Polen ska ersätta rättegångskostnaderna. Eftersom Republiken Polen har tappat målet, ska kommissionens yrkande bifallas.

126 Enligt artikel 140.1 i rättegångsreglerna ska Ungern bära sina rättegångskostnader.

Mot denna bakgrund beslutar domstolen (stora avdelningen) följande:

1) Republiken Polen har underlåtit att uppfylla sina skyldigheter enligt artikel 19.1 andra stycket FEU, genom att föreskriva att den sänkta pensionsåldern för domare vid Sąd Najwyższy (Högsta domstolen, Polen) ska tillämpas på domare i tjänst vilka tillsatts vid nämnda domstol före den 3 april 2018, samt genom att ge Republiken Polens president rätt att efter eget skön förlänga förordnandet för domare vid Sąd Najwyższy efter att den nyligen fastställda pensionsåldern uppnåtts.

2) Republiken Polen ska ersätta rättegångskostnaderna.

3) Ungern ska bära sina rättegångskostnader.

Underskrifter