HORIZONTAL FACILITY
FOR THE WESTERN BALKANS AND TÜRKIYE

FOR YOUR RIGHTS: TOWARDS EUROPEAN STANDARDS

DECIDING ADMINISTRATIVE CLAIMS: THE IMPORTANCE OF REASONING

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Deciding administrative claims: The importance of reasoning

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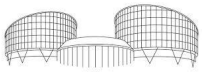
Table of contents

List of acronyms

CCJE	Consultative Council of European Judges
CEPEJ	Council of Europe European Commission for the Efficiency ofJustice
CM	Committee of Ministers of the CoE
CoE	Council of Europe
ECHR	European Convention on Human Rights (the Convention)
ECtHR	European Court of Human Rights (the Court)
ENCJ	European Network of Councils for the Judiciary

List of symbols and their explanation

Indicates a question followed by the answer



Indicates the explication of an ECtHR judgment

Indicates practical tips for writing a judgment or the reasoning provided by national courts in a case decided by the ECtHR

Executive summary

Administrative law regulates a variety of areas of life. When individuals or entities resort to administrative justice, they expect their reasons to be heard and considered. Recognizing the profound impact that judicial reasoning has on people's lives, and aiming to ensure that every decision reflects justice, respect for rights, and adherence to the principles of the rule of law, this Handbook serves as a practical and comprehensive guide. It is designed to help judges, legal advisors, and judicial assistants craft clear, fair, and well-reasoned decisions. For those just starting their careers in the judiciary, it provides a step-by-step approach to mastering one of the most important aspects of their role. More experienced professionals will also find valuable tips and insights drawn from the case law of the European Court of Human Rights (ECtHR) and other international standards.

Writing a judgment is both an art and a discipline. This Handbook provides practical advice to make the process more manageable. It encourages judges to present facts clearly, address key arguments made by the parties, organize facts by importance, and explain conclusions logically and respectfully. Simplicity and clarity are emphasized, particularly in light of the right to reasonable length of proceedings.

Drawing from ECtHR case law related to "qualified" or "relative" rights—namely Article 8 (Right to private and family life), Article 9 (Freedom of thought, conscience, and religion), Article 10 (Freedom of expression), Article 11 (Freedom of assembly and association), Article 1 of Protocol No. 1 (Right to property), and Article 2 of Protocol No. 4 (Freedom of movement)—this Handbook highlights the importance of applying the test developed by the ECtHR when balancing individual rights against broader public interests. Ensuring that judgments reflect the practical application of the 3-step test, which evaluates legality, legitimacy, necessity, and proportionality, guarantees that any restriction of rights is not arbitrary but grounded in law and reason.

The 3-step test is more than a theoretical exercise; it is a practical tool for ensuring accountability and fairness in administrative law. It obligates courts to rigorously examine the reasoning behind administrative decisions, fostering transparency and reducing the likelihood of arbitrariness. Moreover, it empowers individuals to challenge decisions that infringe on their rights, knowing that a consistent and principled framework guides judicial review. By embedding the 3-step test into their reasoning, judges not only protect individual rights but also strengthen the legitimacy of public institutions. In a democratic society, where trust in government and public authorities is paramount, this approach reinforces the idea that even the most powerful administrative actions are bound by law and subject to reasoned scrutiny. It ensures that the public interest is pursued responsibly, with genuine respect for the dignity and autonomy of individuals.

The Handbook is enriched with key findings from landmark cases adjudicated by the ECtHR. These examples, carefully selected from cases where the reasoning of national courts is reported verbatim, illustrate what works and what does not, as well as the consequences of inadequate reasoning. They offer valuable lessons for improving judicial practice, addressing issues such as the dangers of judicial deference to administrative assessments without independent scrutiny and the importance of coherence and logical reasoning in resolving disputes over residency registration.

To aid readers in crafting effective judgments, this Handbook offers practical guidance on structuring and writing judicial decisions. It advocates for a logical and systematic approach, where facts are clearly presented, arguments are addressed, and conclusions are thoroughly justified. It suggests the best expressions to ensure that judgments are assertive, decisive, detached, and technical, while simultaneously ensuring their accessibility and understandability to a broader audience.

Ultimately, this Handbook demonstrates that quality judicial reasoning extends beyond individual cases. Well-reasoned decisions not only enhance the likelihood of acceptance by the parties but also reduce appeals and

serve as benchmarks for judicial excellence. By contributing to the development of a consistent and transparent legal framework, this work seeks to strengthen the integrity and effectiveness of the judicial system. It is about more than just improving individual judgments—it is about strengthening the justice system as a whole. When decisions are well-reasoned and transparent, people are more likely to accept them, even if the outcome is not in their favor. This builds trust in the courts and reduces unnecessary appeals. By setting a high standard for judicial reasoning, the handbook contributes to a legal system that is fair, consistent, and accessible to everyone.

Introduction

Scope and structure of the Handbook

The relationship between administrative authorities and private individuals/entities is complex and encompasses a wide range of issues touching on social and economic matters, from urban planning to allocation of social housing, from elections to health care, from issuance of business licences to the protection of the environment, from access to information to freedom of expression, just to name a few. In most cases, rights at stake fall within the categories of fundamental freedoms guaranteed by the European Convention on Human Rights (ECHR), called "qualified" or relative rights, namely Article 8 (Right to private and family life), Article 9 (Freedom of thought, conscience and religion), Article 10 (Freedom of expression), Article 11 (Freedom of assembly and association), Article 1 of Protocol no. 1 (Right to property), and Article 2 of Protocol no. 4 (Freedom of movement). In these areas, administrative authorities are often the main interfaces between the State and private individuals/entities: the latter rely on public authorities for many aspects of their lives and existence, from birth until the end of life; state bodies are often entitled to determine the extent of obligations and of enjoyment of rights and define their prerogatives, claims, duties and responsibilities vis-à-vis the individuals. In many cases, decisions taken by public authorities bear important consequences on an individual's economic and social well-being. Given the impact of administrative acts on daily life, it is fundamental that legal and justice systems provide and apply principles of administrative law that serve protection of fundamental rights and liberties and maintain public trust that the work of public authorities act within the boundaries of their legal authority.

With a view to providing **practical and easy-to-use guidelines** to administrative judges, judicial assistants and advisors in drafting good quality reasons supporting their decisions, the Council of Europe (CoE) developed this practical Handbook in the framework of the project "Strengthening accountability of the judicial system and enhancing protection of victims' rights in Montenegro". Whilst this Handbook can be used by anyone involved in judgment craftmanship who is interested in refining drafting skills, those entering the profession will find it particularly relevant: its aim is to provide a step-by-step approach to what is one of the most crucial activities within the administration of justice, summarising the most essential ideas and tools relating to the drafting and reasoning of judicial decisions.

This work is structured around three main substantive parts. The first part explores the main Council of Europe (CoE) legal instruments and standards applicable to reasoning of administrative judgments. Part one includes a few Questions and Answers on the topic: this format has the advantage of having bite-size content that can be easily processed by the readers. The second part contains practical guidelines on how to illustrate the logic of judicial decisions, including with reference to the balancing exercise national courts are asked to perform when determining the breath of the margin of appreciation of the State in connection with "qualified" or relative rights under the ECHR. Recourse to real examples of wording of judgments, both at ECtHR and national level, will help the users assess the peculiarities of each step of the drafting process. The second part contains a short overview of ECtHR judgments where the reasoning put forward by the national court (which is reproduced verbatim) was scrutinized by the ECtHR. Cases are divided by theme and were selected based on the availability of the exact reasoning used by national courts to justify decisions. Additional information on where and how to find ECtHR case-law is also included.

Writing comprehensive and good judgment is a skill that can be acquired through practice and guidance. Hopefully, this Handbook will contribute to this result.

Part I
The reasoning of administrative judicial decisions
Basic standards

1. Introduction

The possibility to challenge administrative decisions touches on the right to access to court and certain aspects of the right to a fair trial, as enshrined in Article 6 ECHR (Right to a fair trial).

When administrative review proceedings are initiated, the judicial body entrusted with the process is asked not only to determine the lawfulness and/or appropriateness of an administrative act, and to adopt suitable measures that can be executed within a reasonable time, but also to assess whether a fair balance was struck between individual and public interests and to weight the exercise of the discretionary power that States are entitled to in connection with the so-called "qualified" or relative rights under the ECHR such as Articles 8 (Right to private and family life), Article 9 (Freedom of thought, conscience and religion), Article 10 (Freedom of expression), Article 11 (Freedom of assembly and association), Article 1 of Protocol no. 1 (Right to property), Article 2 of Protocol no. 4 (Freedom of movement).

Judgments represent the authority of the court and the way in which courts communicate with the public and the parties to the proceedings. Therefore, it is of utmost importance that judgments are not only fair and correct but, most and foremost, that they are adequately reasoned and easily understandable. The words used to explain a decision are as important as the decision itself, both for the recipients and the judges. Recipients must be satisfied that the decision is principled and fair; judges build their trustworthiness and authority with judgments that are accepted by the parties, so as to dissuade them from appealing them and, in case of the latter, to ensure that their decisions are able to survive judicial review.

1.1 International standards related to reasoning of judgments

Before delving into the specificities of writing, it is important to be familiar with the standards that judicial bodies are asked to abide by when drafting judgments and other judicial decisions. These can derive from national legislation or international standards. In this part, this Handbook focuses solely on the latter.

Moving to specific international tools, the main principles upon which this Handbook is built are those enshrined in **CoE legal instruments** relevant to relations between public authorities and the people they serve. Whilst some of these instruments are binding (ECHR), others (Committee of Ministers recommendations), though not legally binding, have significant political and moral authority by virtue of each member state's endorsement at the time of their adoption.

1.1.1 Reasoning and the rule of law

Given the central role that public authorities play in democratic societies, the **rule of law** represents the foundations of this Handbook. Rule of law ensures that everyone is subject to the law; that there is legal certainty and that everyone knows what his or her rights and duties are under the law; that public authorities cannot act in an arbitrary manner; that proper application of the law is ensured by an independent and impartial judiciary whose judgments are enforced; and that human rights are respected, especially the principles of non-discrimination and equality of treatment.

What are the human rights dimensions underpinning the obligation to provide for quality judicial decisions?

Looking at reasoning of judgments mainly from the perspective of the parties to a procedure is limiting. Indeed, proper reasoning is relevant for a variety of different interests and fulfils numerous human rights and rule of law dimensions. These are:

- Uniform application of the law and legal certainty
- Possibility to effectively defend oneself
- Good administration of justice
- Protection against arbitrariness
- Independence and the rule of law
- Shared responsibility for the protection of human rights

What is the link between reasoning of judgments and legal certainty?

The uniform application of the law is essential for the principle of the equality before the law. Certain divergences in interpretation can be accepted as an inherent trait of any judicial system. Different tribunals may thus arrive at divergent but nevertheless rational and reasoned conclusions regarding the same legal issue raised under similar factual circumstances. Considerations of legal certainty and predictability are an inherent part of the rule of law. In a state governed by the rule of law, **parties to a case justifiably expect to be treated as others and can rely on the previous decisions in comparable cases** so that they can predict the legal effects of their acts or omissions. On the other hand, when a court decides to depart from previous case law, this should clearly be stated in its decision.

It should follow from the reasoning that the judge knew that the settled case-law on the point was different, and it should thoroughly be explained why the previously adopted position should not stand.

What is the impact of reasoned judgments on parties?

Parties to the case are probably the main stakeholder when it comes to a reasoned judgment, and this is why we talk about the human right to it. Parties to the case have placed their disagreement before the court: not only they are entitled to a decision, but also to the detailed arguments upon which the decision is built and explanations as to how the court values the validity of evidence which they have placed before it and of the evaluation of the disputed facts. The demand for an adequately reasoned judgment entails the court's opinion as to which facts are relevant and assumed proven or not, as well as its opinion on the submissions and legal arguments. A coherent, well-structured, clear decision fulfils the requirement of fair trial and demonstrates that a case has been heard properly, thereby contributing to a more willing acceptance of the decision on their part. It also serves the purpose of enabling them to consider the opportunity of an appeal and, in case they decide to impugn the decision, formulate an appropriate and effective defence.

Well-reasoned judgments are **more likely to be accepted by the parties and thus, less likely to be appealed.** In such cases, however, the adequate reasoning enhances the odds for the relevant court of appeal to reach a correct decision, in line with the impugned decision.

Not only parties to the case, but also the **general public** must be able to understand judgments issued by courts and realize on which arguments a certain decision was based. This is a vital safeguard against arbitrariness. The rule of law and the avoidance of arbitrary power serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society. Moreover, public scrutiny of the administration of justice, increases the diligence of the tribunals in drafting their reasoning.

Is there a link between reasoning of judgments and impartiality of the judiciary?

In relation to the independence and impartiality of judges, it is worth recalling Point 15 of Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states "Judges: independence, efficiency and responsibilities" according to which:

"Judgments should be reasoned and pronounced publicly. Judges should not otherwise be obliged to justify the reasons for their judgments."

Whilst all necessary measures should be taken to respect, protect and promote the independence and impartiality of judges, these are prerogatives or privileges granted not only in the judges' own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law. Judges' impartiality and independence are essential to guarantee the equality of parties before the courts.

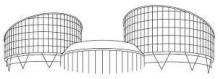
Are judges the only responsible for reasoned judgments?

Responsibility of a reasoned judgments is **a primary responsibility of the judge**, for which s/he can be held accountable. Judges, however, are not the only ones responsible for the quality of the performance of the judicial system, as this depends on the interaction of many actors, including prosecutors and lawyers. The idea of **shared responsibility for the protection of human rights** is inherently linked with the ECHR architecture and the principle of subsidiarity it is built upon This means that all judicial actors are linked by a shared responsibility for the protection of human rights. Within the Convention system there are no outsiders or insiders, and responsibility is not shifted.

1.1.2 Reasoning and the ECHR

Article 6 ECHR guarantees the right to a fair and public hearing in both criminal and civil cases. This right encompasses, prior to the establishment of proceedings, the right of access to court and, as a result of it, the right of the parties to have a reasoned judgment. This, irrespective of whether the decision is "right" or "wrong". In connection with administrative law the first issue that arises under Article 6 ECHR is that of its applicability as not issues are covered by the scope of application of Article 6 but only those that can fall within the "civil" limb of the provision. The scope of application of Article 6 ECHR is a complex issue and those interested can check the relevant Case-law Guide.

The second issue of relevance is that of the **powers of the judicial bodies intrusted with the review of the administrative act.**



In Fazliyski v. Bulgaria (2013) the applicant was dismissed from his job in the Ministry of Internal Affairs on the ground of a psychological assessment report conducted by an institute subordinate to the Ministry. Before the Supreme administrative court, the applicant challenged the credibility of the psychological assessment statement. The complaint was dismissed, and the court refused to review the psychological assessment report on the ground that such assessments are non-reviewable. No reasoning was provided for such position. The ECtHR first reviewed the **applicability of Article 6.1 ECHR to the case** and recalled that (emphasis added):

"51. For Article 6 § 1 of the Convention to be applicable under its civil limb, there must be a genuine and serious dispute over a right that can be said, at least on arguable grounds, to be recognised in domestic law. The dispute may relate not only to the actual existence of the right but also to its scope and the manner of its exercise. Moreover, the outcome of the proceedings must be directly decisive for that right (see, among many other authorities, Efendiyeva v. Azerbaijan, no. 31556/03, § 39, 25 October 2007).

52. In the present case, it is uncontested that there was ***a dispute over a right recognised under Bulgarian law – the right not to be unfairly dismissed from one's employment –,*** *that the dispute was* ***genuine and serious****, and that the* ***outcome of the proceedings before the Supreme Administrative Court was directly decisive for the right concerned*** *(contrast Čavajda v. Slovakia, no. 65416/01, §§ 61-64, 14 October 2008). The fact that the dispute revolved around the question whether the applicant was mentally fit to work at the Ministry of Internal Affairs does not detract from that conclusion (see Stefan v. the United Kingdom, no. 29419/95, Commission decision of 9 December 1997, unreported).*

53. It remains to be established whether that right can be characterised as "civil" within the meaning of Article 6 § 1 of the Convention. In this connection, it should be noted that the applicant was an officer holding a post at the National Security Directorate of the Ministry of Internal Affairs, and that the dispute that he sought to have resolved in the proceedings he brought before the Supreme Administrative Court concerned the lawfulness of his dismissal from that post (see paragraphs 6 and 16 above).

54. In its judgment in the case of Vilho Eskelinen and Others (cited above, § 62), the Court's Grand Chamber laid down new criteria regarding the applicability of Article 6 § 1 of the Convention to disputes concerning the

employment of civil servants. It ruled that this provision applies under its civil limb to all disputes involving civil servants unless (a) the domestic law of the State concerned expressly excludes access to a court for the post or category of staff in question, and (b) that exclusion is justified on objective grounds. If domestic law does not bar access to a court, the Court does not need to go into the second of these criteria (see Rizhamadze v. Georgia, no. 2745/03, §§ 27-28, 31 July 2007; Efendiyeva, cited above, § 41; and Romuald Kozłowski v. Poland, no. 46601/06, § 24, 20 January 2009).

55. In the present case, ***Bulgarian law expressly allowed judicial review of the dismissal*** *of officers employed by the Ministry of Internal Affairs (see paragraph 30 in fine above), and the applicant's legal challenge to his dismissal was in fact examined by the Supreme Administrative Court (see paragraphs 21 and 23 above). It follows that Article 6 § 1 of the Convention, under its civil limb, was applicable to the proceedings before that court (see Redka v. Ukraine, no. 17788/02, § 25, 21 June 2007; Chukhas v. Ukraine, no. 4078/03, § 20, 12 July 2007; Blandeau v. France, no. 9090/06, § 21, 10 July 2008; Iordan Iordanov and Others v. Bulgaria, no. 23530/02, § 44, 2 July 2009; and Vanjak v. Croatia, no. 29889/04, §§ 32-33, 14 January 2010). The fact that the proceedings concerned the applicant's dismissal from his post rather than a question relating to his salary, allowances or similar entitlements does not alter that conclusion (see Cvetković v. Serbia, no. 17271/04, § 38, 10 June 2008; Romuald Kozłowski, cited above, § 24; and Bayer v. Germany, no. 8453/04, §§ 38-39, 16 July 2009)."*

Secondly, it examined the scope of competence of the Supreme Administrative Court in light of the requirements of Article 6.1 on the right of access to court and and observed that

59. […] However, the ***reasoning of the three-member and five-member panels of the Supreme Administrative Court shows that they did not simply take into account the assessment carried out by the Institute, but considered themselves bound by it and refused to scrutinise it in any way*** *(see paragraphs 21 and 23 above, and contrast Stefan, cited above). Those rulings were fully in line with the Supreme Administrative Court's case-law predating its judgment of 8 February 2005 in which it partly struck down regulation 251(1)(6) of the implementing regulations of the 1997 Act. In that case-law,* ***that court consistently held that the Institute's assessments were not amenable to judicial scrutiny and could not be contested through any means*** *(see paragraph 34 above). This Court, for its part, finds that in its exclusive reliance on that assessment in the applicant's case the Supreme Administrative Court refused independently to scrutinise a point which was crucial for the determination of the case, and thus deprived itself of jurisdiction to examine the dispute before it (see, mutatis mutandis, I.D. v. Bulgaria, cited above, § 50).*

60. It follows that the conditions laid down in Article 6 § 1 are met only if the Institute's assessment was made in conformity with the requirements of that provision (see, mutatis mutandis, Obermeier v. Austria, 28 June 1990, § 70, Series A no. 179; I.D. v. Bulgaria, cited above, § 51; and Capital Bank AD, cited above, § 102). In the Court's judgment, the proceedings before the Institute cannot be regarded as complying with the requirements of that provision. The Institute was an expert body directly subordinate to the Minister of Internal Affairs (see paragraph 33 above), and at the Institute the applicant was merely subjected to a psychological examination whose results were not communicated to him (see paragraphs 11 and 12 above)."

Since the Institute that had conducted the assessment was subordinate to the Ministry of Internal Affairs and did not possess the judicial functions characteristic of judicial bodies nor was it independent of the executive, the Supreme Administrative Court could not refuse to enter into the merit of the case, as this was the only possibility for the applicant to have the merit of its claim reviewed with the guarantees foreseen by Article 6.1 ECHR. Whilst it is true that applicant was a major at the National Security Directorate of the Ministry of Internal Affairs and that his duties related to the gathering and processing of intelligence, under the ECHR legitimate national security considerations may justify limitations on the rights enshrined in Article 6 § 1 only in exceptional circumstances, which could not be established in this case, neither in terms of legitimacy of the aim pursued or its proportionality.

Similarly, in the case of I.D. v. Bulgaria (2005), the Court clarified that where the national courts are bound by the decisions of the administrative authorities who do not themselves meet the requirements of a "tribunal" under Article 6.1, judicial authorities entrusted with the review of the case must enjoy **full jurisdiction to try both issues of law and fact.** In this case, the national courts showed **great deference to administrative authorities' findings of fact and declined to review the facts decisive for the resolution of the case,** leading to a breach of Article 6.1 ECHR.

What is the extent of the reasoning that courts need to provide to comply with Article 6 ECHR requirements?

Judgments of courts and tribunals should adequately state the reasons on which they are based. This is well established in the ECtHR's case-law and reflects a basic principle linked to the proper administration of justice. Failure to do so will thus result in a trial being "unfair". The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case.

Without requiring a detailed answer to every argument advanced by the complainant, this obligation presupposes that parties to judicial proceedings can expect to receive a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings.

Generally, a domestic judicial decision will only be described as arbitrary, thus prejudicing proceedings, where there are no reasons provided for it at all, or where the reasons provided are based on manifest factual or legal error committed by the domestic court, resulting in a "denial of justice".[1]

The case of Hirvisaari v. Finland (2001) concerned the decision by the Insurance Court of the claim brought by an individual whose disability pension was changed from full to partial one by the Pension Fund. The decision of the Pension Board, to which the applicant appealed in the first place stated that:

"An employee is entitled to a full disability pension provided that his or her ability to work has continuously been reduced by at least three fifths for a minimum of one year and that this reduction has been caused by an illness, a defect or an injury. The employee's remaining ability to earn income by carrying out work that would be available to him or her and that he or she could reasonably be expected to perform must be taken into account when assessing the reduction in the employee's ability to work. Furthermore, the employee's education, previous activities, age, living conditions and other comparable factors must be taken into consideration. According to the statements on [the applicant's] state of health, [the applicant] suffers from depression that has become more difficult during the autumn of 1997. However, [the applicant's] symptoms must be considered as mild. Therefore, the Pension Board finds [the applicant] still partly capable of working as from 1 June 1997."

Following an appeal to the Insurance Court, the latter dismissed the appeal with the following reasoning:

"[The Insurance Court refers to] the reasons given in the Pension Board's decision. The new material filed while the case was pending [before the Insurance Court] does not change the evaluation of [the applicant's] disability."

The ECtHR, in finding a violation of Article 6 ECHR observed as follows (emphasis added):

"30. The Court reiterates that, according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. Although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument. Thus, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision (see the García Ruiz v. Spain judgment of 21 January 1999, Reports of Judgments and Decisions1999-I, § 26; and the Helle v. Finland judgment of 19 December 1997, Reports 1997-VIII, §§ 59 and 60). A lower court or authority in turn must give such reasons as to enable the parties to make effective use of any existing right of appeal.

[1] Khamidov v. Russia, judgment of 15 November 2007, no. 72118/01, § 170; Moreira Ferreira v. Portugal (No. 2), Grand Chamber judgment of 11 July 2017, no. 19867/12).

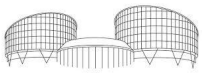
31. In the present case, the Court observes that ***the first part of the reasons given by the Pension Board merely referred to the relevant provisions of law, indicating the general conditions under which an employee is entitled to receive pension. In the second part of the reasoning it was mentioned that the applicant's mental state had deteriorated during the autumn of 1997, the symptoms of his illness, however, being considered mild. On these grounds the Pension Board found the applicant partly capable of working as from 1 June 1997.*** *While this brevity of the reasoning would not necessarily as such be incompatible with Article 6, in the circumstances of the present case the decision of the Board failed to satisfy the requirements of a fair trial. In view of the fact that the applicant had earlier received a full invalidity pension, the reference to his deteriorating state of health in a decision confirming his right to only a partial pension* **must have left the applicant with a certain sensation of confusion.** *In these circumstances the reasoning cannot be regarded as adequate.*

32. Nor was the inadequacy of the Board's reasoning corrected by the Insurance Court which simply endorsed the reasons for the lower body's decision. While such a technique of reasoning by an appellate court is, in principle, acceptable, in the circumstances of the present case it failed to satisfy the requirements of a fair trial. As the applicant's main complaint in his appeal had been the inadequacy of the Pension Board's reasoning, the more important was it that the Insurance Court give proper reasons of its own.

33. Taking into account what was at stake for the applicant, the Court considers that **the prima facie contradictory reasoning by the Pension Board and the subsequent approval of such inadequate reasoning by the Insurance Court as an appellate body failed to fulfil one of the requirements of a fair trial.** *There has accordingly been a violation of Article 6 § 1 of the Convention."*

What are the standards applicable to the examination of factual issues?

In terms of content, judicial decisions include **an examination of the factual issues** lying at the heart of the dispute. When examining factual issues, the judge may have to address objections to the evidence, especially in terms of its admissibility. The judge will also consider the weight of the factual evidence likely to be relevant for the resolution of the dispute.



In the case of Užukauskas v. Lithuania (2010) the applicant held a firearms licence which was revoked by the Lithuanian authorities on the ground that he was listed in the operational records file compiled by law-enforcement officers which contained information about his alleged risk to society. He was required to hand in his arms to the police in return for payment. He challenged the entry of his name in the operational records file. The Regional Administrative Court dismissed the appeal and found that the entry of his name to the operational list was lawful. The basis of the decision was the classified information submitted by the police to the Administrative Court, a piece of secrete information that could not have been disclosed to the applicant. To determine whether the **principle of equality of arms and of adversarial proceedings** had been complied with, the ECtHR analysed the domestic decision-making process as a whole. The Court first noted that in accordance with domestic law and judicial practice, classified state secrets could not be used against individuals as evidence until they are declassified. Even after declassification, such evidence could not be the sole evidence forming the basis of a judgment. However, it appeared that in this case the only evidence of the applicant's alleged danger to society was the operational records file. Secondly, there was a **dispute between the police and the applicant about a fact**, namely the reasons justifying the inclusion of his name in the list. Examination of these reasons by the Administrative Court, would be decisive for the applicant's case because the applicant would have an opportunity to persuade the domestic courts that the inclusion of his name in the list was not necessary. However, the applicant was not afforded such opportunity in the case.

What are the standards applicable to the examination of legal issues?

Examining the legal issues entails applying relevant rules of national, European and international law. In common law countries, decisions of higher courts that settle a legal issue serve as binding precedents in identical disputes thereafter. In civil law countries, decisions do not have this effect but can nevertheless provide valuable guidelines to other judges dealing with a similar case or issue, in cases that raise a broad social or major legal issue.

Legal certainty guarantees the predictability of the content and application of the legal rules, thus contributing to ensuring a high-quality judicial system.

Do all decisions need to be reasoned?

According to the ECHR case-law, courts should give sufficient reasons for their judgments. This raises the question whether all decisions rendered by courts should be reasoned. This depends on the provisions of each domestic law but, as a general guideline, it may be considered that, unless otherwise stated, decisions involving the management of the case (for example, a decision adjourning the hearing) do not need specific reasons. In principle, **the obligation to state reasons should be reserved to interlocutory and final decisions.** The extent of the obligation to give reasons varies according to the nature of a decision and the circumstances of a case.

For example, an appellate court could comply with their obligation to provide sufficient reasoning, simply by incorporating or endorsing the reasoning of a lower court when dismissing an appeal.[2] This, however, would require two pre-requisites: a) the previous decision was already sufficiently reasoned, allowing parties to make effective use of their right of appeal and b) the lower court decision addressed the essential issues which were submitted to the appellate jurisdiction.

Article 6 ECHR is not the only source of the obligation of courts to provide for a reasoned judgment. **Similar obligations can be derived from other ECHR provisions**, for instance in the criminal sphere in connection with Articles 2 (Right to life) and 3 (Prohibition of torture) – an example of which could be the need that a decision not to launch an investigation into suspicious deaths or allegations of ill-treatment be adequately reasoned - or Article 5 ECHR (Right to liberty and security), where lack of reasoning in connection with a deprivation of liberty can determine the unlawfulness of the detention ordered. As these circumstances are not relevant for the purpose of this Handbook, they will not be examined.

How to reconcile the right/obligation to a reasoned judgment and reasonable length of proceedings?

One aspect of this obligation seems to be particularly relevant for judges: how to ensure the quality of judicial decisions with the equally important requirement to examine cases within reasonable time. It is recalled in this context that the Consultative Council of European Judges (CCJE) indicated in its Opinion No. 11 that:

"to achieve quality decisions in a way which is proportionate to the interests at stake, judges need to operate within a legislative and procedural framework that permits them to decide freely on and to dispose effectively of (for example) the time resourcesneeded to deal properly with the case."

The CCJE refers to the discussion of "case management" in its Opinion No. 6 (2004). Reference can also be made to the practice of the European Commission for the Efficiency of Justice (CEPEJ), which has developed useful tools of case management, including as regards the dealing with cases within reasonable time.

[2] Ruiz Torija v. Spain, judgment of 9 December 1994, no. 18390/91, §§ 29-30; Van de Hurk v. the Netherlands, judgment of 19 April 1994, no. 16034/90, § 61; Sale v. France, judgment of 21 March 2006, no. 39765/04, § 17; Helle v. Finland, judgment of 19 December 1997, no. 20772/92

How to assess the lawfulness of the interference with the qualified rights?

As already mentioned, administrative law touches on a wide range of issues related to social and economic matters. These are in most cases guaranteed by the so-called "qualified" or relative rights under the ECHR. These rights, protected primarily by Articles 8 (Right to private and family life), 9 (Freedom of thought, conscience and religion), 10 (Freedom of expression), 11 (Freedom of assembly and association), 1 of Protocol no. 1 (Right to property), 2 of Protocol no. 4 (Freedom of movement). The distinctive nature of the qualified rights is that they require authorities to conduct a **balancing exercise between conflicting rights** – those of the individual and of the community at large. Guidance to public administrations on how to determine the extent of the interference (that is representing, for instance, by the refusal to issue a licence or to register a business) can be found on Recommendation CM/Rec(2007)7 on good administration, whose article 5 entitled Principle of proportionality reads as follows:

1. Public authorities shall act in accordance with the principle of proportionality.
2. They shall impose measures affecting the rights or interests of private persons only where necessary and to the extent required to achieve the aim pursued.
3. When exercising their discretion, they shall maintain a proper balance between any adverse effects which their decision has on the rights or interests of private persons and the purpose they pursue. Any measures taken by them shall not be excessive.

The principle of proportionality, an all-embracing requirement in a state governed by the rule of law, requires that public authorities curtail the rights of individuals vis-à-vis the state only to the extent required for the protection of the public interest. A "fair balance" should be struck between the general interest of the community and the requirement to protect the fundamental rights of individuals.

Two are the main criteria against which the principle of proportionality is assessed:

- first, there should be a **reasonable relationship between the purpose of the objectives pursued by a public authority and the means chosen to achieve them.** Any restriction or interference with the rights of an individual should be appropriate and strictly necessary, and the objectives cannot be achieved by any other means. The prohibition against using excessive means obliges public authorities to use only those means that are necessary to achieve the desired result;

- secondly, there should be a **reasonable relationship between the restriction imposed on an individual and the public interest to be protected.** This restriction imposed on an individual should reasonably relate to the benefit enjoyed by the public.

What is the standard of reasoning obligations when assessing the compatibility of an interference with qualified rights?

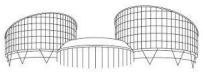
In order to facilitate the balancing exercise, the ECtHR has developed the so called **"3-part-test" (also known as the 3-step test),** which is composed of a series of questions to be run in sequence. Should the answer be negative to any of the questions, the ECtHR stops the examination of the case and establishes a breach of the provision at stake.

1.1.3 The 3-step test

What follows is the algorithm used by the ECtHR when applying the 3-sep test.

1. **Requisite of legality:** was the interference conducted in accordance with law?

The term "law" has an autonomous meaning under the Convention and is interpreted in a substantive, rather than formalistic designation of the legal act. This requisite of legality does not only necessitate compliance with domestic law but also relates to the quality of that law, requiring it to be compatible with the rule of law. The national law must be clear, foreseeable, adequately accessible, and must contains safeguards against arbitrariness.



The requisite of legality in connection with administrative proceedings was examined by the ECtHR in the case of Tatishvili v. Russia (2000). There the applicant was born in Georgia. She was, however, a citizen of the former USSR until 31 December 2000 when she became stateless. She lived in Moscow at the material time. Pursuant to legislation and regulations introduced in the 1990s persons residing in Russia were under a general duty under the *Propiska* (internal registration) system to register themselves as resident at any address where they intended to stay for more than ten days. A failure to register could result in a fine and the loss of access to social rights such as medical assistance, social security or an old-age pension. However, a ruling by the Constitutional Court in 1998 made it clear that registration was a purely formal process and that upon presentation of an identity document and a document confirming the right to reside at the chosen address, the registration authority was under an obligation to register the person concerned as resident at the address stated. The complaint was raised under Article 2 of Protocol No. 4, that protect freedom of movement.

In applying the 3-step test, the ECtHR looked at first at the requirement of legality. A **violation of Article 2 of Protocol no. 4 ECHR** (Freedom of movement) was found on the following grounds (emphasis added):

"50. The Court notes that the Regulations on registering residence required an applicant to submit a completed application form accompanied by an identity document and a document showing the legal basis for residing at the indicated address (see paragraph 30 above).
51. The applicant submitted to the "Filevskiy Park" passport department a completed application form, her passport and a document from the flat owner, duly signed and certified and indicating his consent to her residence, as well as certain other documents not required by law (see paragraph 8 above). Her application was nevertheless refused for a failure to submit a complete set of documents. It has never been specified which of the documents required by law were missing (see paragraph 10 above).
52. In this connection the Court reiterates that if the applicant's application was not deemed complete, it was the national authorities' task to elucidate the applicable legal requirements and thus give the applicant clear notice how to prepare the documents in order to be able to obtain residence registration (see Tsonev v. Bulgaria, no. 45963/99, § 55, 13 April 2006). This had not, however, been done. Accordingly, the Court considers that this ground for refusing registration has not been made out.
53. The Court pays special attention to the authoritative interpretation of the Regulations for registering residence given by the Constitutional Court of the Russian Federation in 1998 (see paragraph 31 above). That court held that the registration authority had a duty to certify an applicant's intention to live at a specified address and that it should have no discretion for reviewing the authenticity of the submitted documents or their compliance with Russian law. It determined that any such grounds for refusal would not be compatible with the Constitution. It appears, however, that the binding interpretation of the Constitutional Court was disregarded by the domestic authorities in the applicant's case.
54. In these circumstances, the Court finds **that the interference with the applicant's right to freedom to choose her residence was not "in accordance with law".** *This finding makes it unnecessary to determine whether it pursued a legitimate aim and was necessary in a democratic society (see Gartukayev v. Russia, no. 71933/01, § 21, 13 December 2005).*

2. **Legitimacy**: does the interference pursue legitimate aims?

Note: the list of legitimate aims is included in the second paragraph of each qualified right.

3. **Necessity and proportionality**: was the interference necessary in a democratic society? Was it proportionate to the aim pursued?

Of the three aspects of the test, **the last is certainly the one that is most linked with reasoning obligations.** Here the basic question is whether the disputed interference is "proportionate to the legitimate aim pursued" and whether there are "sufficient and relevant" reasons that may justify the interference with the right. Within the **proportionality test,** the ECtHR analyses first how and to what extent the applicant was

restricted in the exercise of the right affected by the interference complained of as well as what were the adverse consequences of the restriction imposed on the exercise of the applicant's right on his/her situation. Subsequently, this impact is balanced against the importance of the legitimate public interest served by the interference or the rights of others. Numerous factors are taken into consideration by the ECtHR when applying the proportionality test. Unfortunately, we cannot rely on a pre-established list of such factors. **These vary from case to case,** depending on the rights at stake, on the facts of the case and on the nature of the interference under examination.

However, the following factors can also be cited:

- adequacy
- severity of interference/sanction
- duration
- alternatives
- procedural fairness

The "proportionality" aspect requires that State authorities, namely domestic courts, either at first instance or in the context of judicial review, have struck a fair balance among conflicting interests within their margin of appreciation (whose magnitude varies also in the light of a European consensus[3]). This entails that **all the relevant factors have been duly taken into account and weighted.** This process must be fully reflected in the reasoning of the relevant decisions.

Is the notion of fairness applicable to the 3-step test?

Certainly. The application of the 3-step test, however, is not only relevant from a **"material or substantive" perspective, but also from a "procedural" perspective.** This refers to the manner in which a domestic court reasoned a judgment can prove that a **procedural right,** as set forth in the ECHR, or a **procedural obligation** stemming from a material right set forth in the ECHR, has been respected. Under this angle, when analysing restrictions established by statutes, attention must be paid to whether the **process of their adoption** was adequate and allowed for all relevant interests to be taken into account.

Secondly in determining whether a measure is proportionate, the ECtHR analyses if the persons affected in exercising their rights had a **reasonable opportunity to present their case** before national authorities and/or jurisdictions, in the course of proceedings respecting some essential guarantees, in the view to annul or review those measures.

For instance, in G.I.E.M. S.R.L. and Others v. Italy [GC] (2018) the applicants complained that they had been affected by confiscation measures without having been formally convicted. This was possible as under Italian planning law, where the offence of "unlawful site development" is materially made out, the criminal court is bound, whether or not the defendants have been convicted, to confiscate the developed land, and any buildings thereon, even when it is in the possession of a third party, except one proving to have acted in good faith. At para. 302, the ECtHR stated:

"*the importance of the procedural obligations under Article 1 of Protocol No. 1 must not be overlooked. Thus, the Court has, on many occasions, noted that, although Article 1 of Protocol No. 1 contains no explicit procedural requirements, judicial proceedings concerning the right to the peaceful enjoyment of one's possessions must also afford the individual a reasonable opportunity of putting his or her case to the competent authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision*".

[3] The "European consensus" standard is a generic label used to describe the Court's inquiry into the existence or non-existence of a common ground, mostly in the law and practice of the Member States. This standard has played a key-role in the wider or narrower character the application of the margin of appreciation adopts in practice. Generally speaking, the existence of similar patterns of practice or regulation across the different Member States will legitimize a wider margin of appreciation for the State that stays within that framework and delegitimize attempts to part ways with them.

What is the nexus between quality judicial decision and their enforcement?

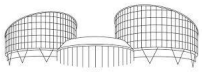
In Opinion No. 11 (2008), the CCJE stated that to be of high quality, a judicial decision must be perceived by the parties and by society in general as being the result of a correct application of legal rules, of a fair proceeding and a proper factual evaluation, as well as being effectively enforceable. Only then will the parties be convinced that their case has been properly considered and dealt with and will society perceive the decision as a factor for restoring social harmony.

According to Recommendation CM/Rec(2007)7 on good administration (Article 23.3) and Recommendation Rec(2003)16 on the execution of administrative and judicial decisions in the field of administrative law (Principles II.1, II.2), where a public authority has not implemented a court order following a successful appeal by an individual, an appropriate procedure shall be put in place to ensure its proper execution (Agrokompleks v. Ukraine, 2011). Orders for compensation shall be executed within a reasonable time (Principle 16). Provision should also be made in national law to make public officials in charge of the implementation of judicial decisions in respect of administrative decisions individually liable in disciplinary, civil or criminal proceedings should they fail to implement them.

Principle 14 of Recommendation Rec(2004)20 of the Committee of Ministers to Member States on Judicial Review of Administrative Acts deals with the implementation of administrative decisions. In certain administrative law systems, it is usual to refer to the "execution" or "enforcement" of the formal administrative decision taken by the public authority rather than its implementation. In other systems or contexts, the term "implementation" of the decision of the public authority is more appropriate. Implementation, enforcement or execution (including forced execution) of an administrative decision may itself require one or more subsequent decisions (including physical acts).

Public authorities shall allow individuals a reasonable period of time to perform the obligations imposed on them by administrative decisions, except in urgent cases where they shall duly state the reasons for this. In cases where a decision confers rights or benefits on an individual, it shall be implemented by the public authority as soon as possible. Failing to do so can itself be subject to review. Unless otherwise provided for by law, the lodging of an appeal automatically suspends the implementation or execution of the decision pending the outcome of the appeal.

Implementation or execution of administrative decisions by public authorities should be subject to various guarantees – for example, be expressly provided for by law and be proportionate. Administrative decisions should also clearly set out the action to be taken for their implementation or execution. Administrative decisions should not have retroactive effect and should not be effective any earlier than the date of their adoption or publication. In exceptional circumstances, some countries (such as France) allow a judge to authorise the retrospective application of an administrative decision within limits prescribed by national law. Except in urgent cases, administrative decisions only become operative when they have been appropriately published. Responsibility for giving effect to an administrative decision lies with the public authority that has made it.



In Dubetska and Others v. Ukraine (2011), the ECtHR found Article 8 ECHR had been violated on account of, inter alia, the government's delay in executing a decision of the local authority to move the applicants' families from an area affected by industrial pollution. In Hornsby v. Greece (1998), the applicants complained that refusal by the administrative authorities to comply with the Supreme Administrative Court's judgments had infringed their right to effective judicial protection of their civil rights. The ECtHR found that by refraining for more than five years from taking necessary measures to comply with a final, enforceable judicial decision the Greek authorities had deprived Article 6.1 ECHR of all useful effect.

Part II
The reasoning of administrative judicial decisions

The drafting process

2. Structure of a judgment

Under the Law on Administrative Disputes (LAD) of Montenegro, administrative courts can decide the disputes they are invested with either with a judgment or a decision. The judgment rules on the merits of the claim, whereas the decisions are meant for procedural issues. For the purpose of this Handbook, only **reasoning of judgments** will be reviewed.

Article 39 LAD outlines the formal elements of a judgments. These include the designation of the Court; the indication that it is pronounced in the name of the people; the name and surname of the presiding judge, members of the panel of judges, and recording secretary; the name and surname, occupation and place of residence or domicile of the parties, their representatives and proxies; short description of the matter of the dispute proceedings; the day when the decision was entered and published; **the disposition, exposition** and notice of right to appeal if the decision can be impugned.

The provision clarifies that the disposition must be given separately from the exposition. In the context of the present Handbook, attention will be specifically paid to the **exposition**, that is the reasoning underlying the disposition, and the disposition (also called operative part of the judgment), whereas all other formal elements will not be examined.

Although succinct, the **disposition** is one of the most important elements of the judgment, as it presents the concrete result of the dispute. It must be consistent with the reasoning and must be complete. As it will be explained later, all questions raised by the parties, as well as those raised ex officio by the court, must find an answer, and be reflected in it. It is important to remember that the operative part only deals with questions or complaints, not with exceptions raised by the parties. Indeed, exceptions on the merit that are grounded, result in a judgment upholding them. Procedural exceptions, on the other hand, are dealt with a decision and not with a judgment.

What are the criteria against which the quality of a judicial decision can be checked?

The quality of judicial decisions relates not only to its substantive aspects. It also concerns **the accessibility** and **clearness** of the language used by the judge and the internal structure of the decision. These formal aspects are as important as the substance for two main reasons. Firstly, this allows **better understanding – and, thus, acceptance** – of judicial decisions by the parties. Consequently, there should be less appeals against judicial decisions, which in turn reduces the pressure on the judicial system as a whole. Additionally, clear and accessible reasoning enables any person other than the parties to better understand the case and, eventually, to use it in separate proceedings.

- ***CEPEJ had developed the following questions as part of a checklist to guide judges in the assessment of the quality of a judicial decision: Are the pronouncement and the reasons for the decision made by the judge comprehensible?***
- ***Are the reasons for the decision detailed and systematic?***
- ***Do the reasons for the decisions demonstrate a clear guidance for the parties and legal professionals of the fairness and lawfulness of the decision?***
- ***Are there specific rules and standards used for the presentation of judicial decisions?***
- ***Are the expectations of the parties, the lawyers, the lower or higher courts sufficiently taken into account when drafting judicial decisions? Are "standard" decisions and rules used for "bulk" cases?***[4]

[4] This is a particularly relevant point in connection with the obligation to decide cases speedily, enshrined in Article 6 ECHR.

What does clarity entail?

Clarity entails that **a decision must be intelligible and drafted in clear and simple language** so that the parties and the general public are able to understand it. Of course, each judge can opt for a personal style and structure. However, judicial authorities should compile good practices or render models available in order to facilitate the drafting of decisions and ensure that reasons are coherently organised in a clear style which is accessible to everyone.

According to the European Network of Councils for the Judiciary (ENCJ)[5] it is desirable that a judicial decision is **as concise as possible.** For a decision to be read, understood and have impact it has to be sharp and focused and to refrain from unnecessary detail and an academic approach.

What about the content of the "reasons"?

With the reasoning the judge responds to the parties' submissions and specifies the points that justify the decision and make it lawful. This is a guarantee against arbitrariness. Without affecting the possibility or even the obligation for judges to act on their own motion in certain contexts, judges need only respond to relevant arguments capable of influencing the resolution of the dispute.

The reasons must be **consistent, clear, unambiguous, not contradictory, and linear,** so that any reader can follow the line of thought. To assess the content of a decision, several **internal and external characteristics** can be considered. They partly depend on the specific national legal order.

As regards the **internal characteristics**, the main indicators of quality will relate to the lawfulness of the decision and the correctness of the legal analysis conducted by the judge in the process of resolving the case.

As regards the **external characteristics**, the quality will be assessed against the clearness of the language used by the judge; the appropriate formatting style of the judgment and the use of headings, paragraphs, and subparagraphs; the appropriate length of the judgement; the use of correct proper, geographical and other names, the appropriate translation in the language that he/she understands (in multilingual settings).

Can the quality of a decision be assessed on the basis of its components?

The quality of judicial decisions should be understood as the quality of the decision as a whole. Thus, it would not be conceivable to assess the qualities of only certain parts of the decisions (the clear language, the sound legal reasoning, the presentation of facts or the assessment of evidence). All the parts of the judgment are interdependent and cannot be artificially separated for the purposes of the assessment of their quality.

[5] Independence, Accountability and Quality of the Judiciary, Measuring for improvement, ENCJ Report 2019-2020, page 58.

Writing a judgment

3. Introduction

Drafting of judicial decisions is a process that involves two major phases: the preparatory (judicial investigation) and the drafting of the decision. This Handbook concentrates only on the second part. Needless to say, however, that the **preparatory phase** is key as it provides the factual and legal grounds that will have to be elicited in the reasoning During this phase, the judge might have preliminary or final opinion of the case and of the way to resolve it. However, owing to the principles of fair trial, s/he would normally avoid voice his or her ideas before the phase is completed. In the course of this phase, the judge might need to draft some provisional or procedural decisions (for instance, on the issue of the provisional measures; the suspension of the proceedings..).

When the preliminary phase is concluded then the **drafting phase** starts. Depending on the type of proceedings, each stage might have different duration and require uneven intellectual efforts: there are cases where the legal issue at stake is rather straightforward, and others where the evidence to reach the right conclusion might be controversial, partial or otherwise difficult to assess. However, the legal issue might warrant extensive research and balancing of arguments.

The knowledge of the case is closely related to the knowledge of the applicable legal framework on the basis of which the case will be decided. Thus, it is important to make sure that the drafter has in his or her possession all the legal provisions applicable to the disputed issue, and that this legal framework is still in force and is updated[6].

As trivial as it may appear, the organisation of the material conditions of the work during this stage might have significant influence on its results. The work will certainly be better performed in the adequate conditions of silence, lighting and space.

3.1 Legal logic

When drafting a judicial decision, it is fundamental to strictly abide by the rules of legal logic. In this context, it is important to note that the legal writing is primarily logical writing, and the legal reasoning is logical reasoning. The drafting of any legal text will be successful if general principles of legal logic are observed.

By contrast, if the legal document contains logical errors, this might jeopardise the very purpose of legal drafting. Therefore, the legal text shall be drafted in accordance with the rules of logic (principle of identity, the law of contradiction, the law of excluded middle (or third), the law of reason and consequent, or of sufficient season). Where there is a collision of legal rules, the drafter shall determine the applicable provision on the basis of the collisional rules (*lex specialis, lex posterior, lex superior*).

The process of judging is a logical process:
First, the judge identifies the facts relevant for the resolution of the case;

Then, s/he identifies the legal issues that need to be resolved and the applicable legal framework;

Finally, by confronting the circumstances of the case with the applicable legal provision, the judge reaches the conclusion and, thereby, resolves the dispute.

The legal logic is guiding the judge when s/he is making a reasoned link between the argument of one of the parties whereby s/he is convinced, and the evidence that was established in the course of the case examination.

[6] In Barać and Others v. Montenegro (application No. 47974/06, judgment of 13.12.2011) when examining the applicants' cases relating to employment disputes, the domestic courts rrelied on a law which had previously been declared unconstitutional and a relevant decision to that effect already published in the Official Gazette.

In this context, it should be noted that the rules of legal logic warrant that the judge uses only straightforward expressions when describing its conclusions ("the court established that…", "on the basis of this evidence, the court found that…", "therefore, the court concluded that…").

Legal logic rules are also helpful to dismiss certain arguments of the parties. Thus, the judge might identify in those arguments logical contradictions or inconsistences which are mutually irreconcilable.

Pertaining to the **administration of evidence**, the legal rules require that the judge makes a logical distinction between the circumstances that need to be proven and those which do not; from the circumstances whose existence is disputed and those in which certain details are disputed. For each situation, this logical exercise will enable the judge to determine what kind of evidence is needed and how such evidence could be obtained.

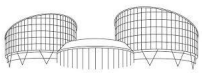
In most cases, the judge will rely on the deductive argumentation (the idea – the list of arguments in support of it – the available evidence – the conclusion). But in certain cases, the analysis can be based on the inductive argumentation (the description of situations or cases with common factual or legal characteristics – the conclusion that these situations or cases belong to the same type - the conclusion that the same legal provisions shall apply to each of those situations or cases).

Legal logic is also indispensable to judges when dealing with the collision of legal norms. In such situations, the judge should give the priority to the most recent law over the old one; to the law having the higher authority (the ECHR over the domestic law), and to the special law over the general one.

3.2 Writing the judgment

3.2.1 The disposition

In this part of the judgment, which under the LAD precedes the actual reasoning and is recalled again at the end of the judgment, the judge uses his or her judicial power to order certain modification to the established legal situation. This part of the judgment must be exhaustive and unambiguous. If the court decides to grant the claim partially, there should be a clear indication which part is granted, and which one is dismissed. In this part of the judgment the court might also be required to settle the issue of judicial fees and certain other issues. As noted above, this part is crucial for the effective enforcement of the judgment.



In Nekvedavičius v. Lithuania (2015) the applicant had been granted by the Regional Administrative Court partial restitution of property rights over a parcel of land, but did not specify the form of restitution or any deadline. This decision was not appealed and became final. The writ of execution was issued on 27 March 2002. On 13 July 2007 the county governor adopted a decision on restoring the applicant's property rights over the disputed land by providing the applicant with compensation in the form of Lithuanian government bonds. As a result of the applicant's appeal, the Supreme Administrative Court quashed this decision for lack of competence by the county governor. The applicant was included in the list of persons eligible for compensation and whose property rights had not been available to restitution in nature since 2000. At the time of the determination of the present case by the Court, it was not clear whether the applicant's property rights had been restored. The Court's main task in this case concerning the complaint of non-execution was whether or not the administrative authorities took speedy and necessary measures in a diligent manner to comply with the binding final judgment. The Court acknowledged the complexities of executing a restitution judgment. However, it listed a number of actions taken by the administrative authorities in the execution of the mentioned judgment and qualified them as unnecessary, superfluous, repetitive and ineffective, resulting in the delay of the execution process. The Court refrained from assessing the adequacy of government bonds as a method of compensation chosen by the authorities, but it noted that this decision was also procedurally flawed because it was set aside by the domestic courts, which consequently prolonged the period of non-enforcement. The Court emphasised that when individuals obtain a judgment against a state it is primarily for the state authorities to use all appropriate means to execute it. In finding a breach of Article 6.1 ECHR, the Court also stressed the fact that even though the applicant was included in the list of persons eligible for a new plot of land as restitution, no further efforts had been made in that regard.

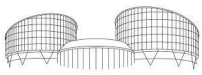
3.2.2 The context of the case

As regards **the context of the case**, a short description of the underlying issues enables the external reader to quickly understand the genesis of the dispute and its background and the surrounding factors. The purpose of the descriptive part is to present the factual circumstances of the case and the parties' contentions.

It is noteworthy that the presentation of the facts of the case at this stage should not be equal to their interpretation. This part of the judgment is a basis for the subsequent analysis in light of the applicable legal norms. That is the reason why it is important that the facts indicated in the descriptive part are those which were established by the judge independently of the position of a particular party.

Where there is a dispute as to the establishment of certain facts, the descriptive part should reflect the existence of such dispute (while the conclusion will be reached in the next part of the exposition). As parties to the judicial proceedings do not always present the facts of their case in a structured and easily accessible way, it is up to the judge to display good analytical skills with a view to summarising the facts.

The exposition should be complete yet concise and **only relevant facts**, functional to the resolution of the dispute, should be included. If there is a need, all other facts might be summarised under the heading "other facts", with a very short description, possibly with a clear indication that those facts are not relevant for the case. This is the approach adopted recently by the ECtHR in the majority of judgments, that are decided in a simplified manner.



Tatishvili v. Russia (2007) concerned the domestic court's incoherent and inadequate reasoning. The applicant, who was born in Georgia and was a stateless person residing in Moscow, submitted five documents to the passport department of the Moscow police for the purpose of residence registration: a USSR passport; a consent form signed by the flat owner and certified by the housing maintenance authority; an application form for residence registration; a document showing payment of housing maintenance charges; and an extract from the residents list. The registration was denied on the grounds that she had failed to file a complete set of the required documents, but did not specify which document was missing. The applicant appealed the rejection before the court. While dismissing the applicant's claim, the first instance court reasoned, inter alia, that the applicant was not a Russian citizen, did not state an intention to become one, and was not in possession of an entry visa to Russia, given that there was "a treaty" between Georgia and Russia requiring a visa for entry. The appellate instance dismissed the applicant's appeal by endorsing the reasoning of the lower court and without answering the arguments of the applicant's representative. The ECtHR observed that the first reason in the judgment of the first instance court was inadequate, because **it failed to justify its finding that there was a dispute between the applicant and the flat owner.** The applicant produced the written consent of the flat owner for her registration in the flat, who later confirmed it before the courts, which should have indicated to the court the absence of any civil law or housing dispute between them. The ECtHR noted that the second reason of the first instance court was also inadequate because the **national court had failed to verify whether or not such "a treaty" had ever existed or whether the applicant was a Georgian citizen.**

"61. As to the domestic courts' reliance on "a treaty" between Russia and Georgia on visa requirements, the Court observes that they omitted to verify whether such a treaty was in existence. In fact, the visa requirement for Georgian citizens had not been introduced by a treaty as the District Court maintained, but had resulted from the denunciation by Russia of the Bishkek Agreement in the absence of a separate treaty on visa-free movement between Russia and Georgia (see paragraph 28 above). The Court is not convinced that this discrepancy could have been the result of a mere difference in terms because the text of the "treaty on visa-based exchanges" was never produced in the domestic proceedings. The domestic courts appear to have taken the reference to it from the passport department's submissions. Furthermore, the Court finds it anomalous that the District Court relied on a treaty governing the conditions of entry and stay for Georgian citizens without giving any reasons for the assumption that the applicant was a Georgian citizen. As the Court has found above, no evidence to that effect has been produced either in the domestic proceedings or before it.
62. Nor was the inadequacy of the District Court's reasoning corrected by the Moscow City Court, which simply endorsed the reasons for the lower court's decision. While such a technique of reasoning by an appellate court

is, in principle, acceptable, in the circumstances of the present case it failed to satisfy the requirements of a fair trial. As the applicant's statement of appeal indicated that the District Court's findings had been devoid of a factual and/or legal basis, it was all the more important that the City Court give proper reasons of its own (see Hirvisaari, cited above, § 32). Nevertheless, the City Court endorsed the District Court's findings in a summary fashion, without reviewing the arguments in the applicant's statement of appeal."

As the appellate instance had not only failed to correct the inadequacies of the first instance judgment but had also failed to answer the arguments of the statement of appeal submitted by the applicant's representative, a violation of Article 6 ECHR was found.

Can ECtHR decisions be used as a model for drafting quality decisions?

The ECtHR is a unique source of standards for drafting judicial decisions. Judgments and decisions of the ECtHR, which are easily accessible and translated into several languages of the member states of the CoE, can be regarded as the "standards-settler" for the quality of judicial decisions in Europe and beyond. Irrespective of the member state against which the application is lodged, the ECtHR applies similar formatting and drafting style in its decisions. Furthermore, the case-law of the ECtHR defines the scope of each right enshrined in the Convention, helping national judges to apply the Convention properly.

3.2.3 The structure of the judgment

From an editorial perspective, two options appear to be possible: the "edictal" or "direct" styles. The first is the one that begins with "Considering" or similar expressions, followed by a list of items. The Second, that appears to be the one currently used by the courts in Montenegro, is the style that French Administrative courts are obliged to follow since 2019. The Vademecum (Guidelines) issued by the French Council of State indicate that judgements must be free of obsolete or Latin words and expressions, incomprehensible to the majority of people. In the Guidelines, the Council of State indicates that "**The drafter [of administrative judgements] must also bear in mind that the decision s/he is preparing may be read by different circles of readers. S/he must therefore strive to write for all audiences"**. The ECtHR, with its more recent "simplified" decisions, appears also to have embraced this approach.

The direct style can be articulated in various manners, often depending on the judges' preferences:

- some judges use the technique of motivation as "a single body" without subdivisions;
- Other divide the reasoning into numbered paragraphs. The technique of numbering the paragraphs is also not uniform:
  - some judges use the technique of progressive numbering for each syntactic period;
  - others divide the reasoning into paragraphs corresponding to the various issues addressed; not infrequently, in this case, the paragraphs are divided into subparagraphs;
  - others also add to the division into paragraphs a title of the paragraph, to point out to the reader the passage from one topic to another. This often happens in very complex judgments.

Another important stylistic element is its **sobriety and neutrality** which, on closer inspection, mirrors the principles of impartiality and equidistance of the judge, and of his subjection to the law only. This means, in practice, **that the words used in a judgment do not amount to value judgments with regard to the laws or the positions of the parties**, reproaches to the parties or lawyers, useless irony, sterile polemics, offensive or vulgar expressions. It is also recommended that the drafter refrains from the use of excessive emphasis, by means of exclamation or question marks, or the use of aggressive graphic characters such as underlining, capital letters, bold.

The reasoning ordinarily follows the logical order of the questions. For each issue/complaint, the motivation ordinarily states:

a) in summary or in detail of the issue or reason;
b) a summary of the provisions of law or regulation relevant to the specific case;
c) the relevant interpretation of the provisions, citing case law precedents where appropriate;
d) the application of the provisions to the specific case and therefore the solution of the case.

For example:
1. With the first ground of appeal, the applicant argues that (...). 1.2. In law, the provisions governing the case are ... 1.3. Those provisions must be interpreted as meaning that ... The following precedents are cited: (...) 1.4. Applying the provisions, as thus interpreted, to the present case, it follows that the application/request is ...].

This scheme is not fixed as some judges might prefer to stare from the concrete fact rather than premise the reconstruction of the normative sources.

When it comes to the presentation of the relevant legal or regulatory provisions, **there are three main options**:
a) that of citing only the details of the relevant provision without reporting its content (i.e. Article XX of the Law…);
b) that of citing the details of the relevant provision by summarizing its content (i.e. Article XX of the Law that foresees the principle of…);
c) that of citing the details of the relevant provision by transcribing its literal content in full, preceded, or not, by a summary (i.e. Article XX of Law … [affirming the principle of ….] provides that: "All citizens… *").*

The first and second solutions are more functional to the brevity of the judgment, whereas the third option makes the judgment longer, but also **clearer and more understandable by third parties.** This option might also be used when the legal issues concern the literal interpretation of a legal provision or its application.

Whatever the drafting technique use, it is important to remember that **brevity** shortens the phase of writing the decision, not the **study of the case and the verification of the legal accuracy** of the party's argument to which reference is made. Moreover, **brevity cannot go to the detriment of completeness** of the judgement and response to all the relevant questions raised by the parties.

Tips for drafting the context of the case

Facts should be presented in **order of importance**. Such a hierarchy of facts would provide any reader with intuitively suggested importance of each fact of the case. Similarly to the ECtHR, facts sharing similarities could be grouped on the basis of their relevance and presented in order of importance. The ECtHR often uses the references to the "background of the case" or the "genesis of the case". For instance:

"The claimant also indicated that he purchased in the past several other vehicles from the same vendor and provided supporting documents in that relation. These purchases, however, do not pertain to the present dispute".

In describing the facts of the case, the ECtHR always uses the past tense, as it is reporting submissions from either the applicant or the respondent. These argumentations are not the object of any assessment.

Parties' contentions should be presented in summary with references to the evidence on which the parties rely. This presentation should be made with the aim to focus only on the most relevant and tangible arguments expressed by the parties. Rather than repeating them, the judge, just like the ECtHR, might wish to summarize the essential ideas relating to each argument using suitable expressions ("the claimant argued…", "he further contended…", "additionally, he submitted…", "the respondent disagreed…", "he pointed out that…"…). By reformulating the parties' contentions, the judge will always conduct a **logical operation of separating important facts or complaints from the less important**, and otherwise structure them. The precise quotation of the parties' submissions, however, might be justified in certain cases, for instance if the judge wishes to emphasize the language used by the party (if it is offensive), or if it relates to the listing of certain items which cannot be easily summarized (the list of author's songs allegedly aired in violation of the copyright). Also, judges should bear in mind that even though their judgments are published, the parties' submissions are typically not. That is why it is important to faithfully reflect in the judgment the essence of the parties' submissions.

3.2.4 The reasons for the decision

During this stage the national judge enjoys full liberty to resolve the case according to his or her convictions. The only limits to this liberty are those enshrined in Article 6 ECHR.

In most legal orders this part of the judgment will contain the factual circumstances of the case as established by the court (and which might be different from the presentation submitted by the parties); the evidence supporting the conclusions of the court; the reasons why the court is not accepting certain types of evidence or certain arguments of the parties, and the reference to the applicable legal provisions.

As already clarified by the ECtHR, the national judge is not required to reply to every argument raised by the parties in support of their claim. But s/he is **expected to reply to the most essential of them, and to provide clear reasons why certain other arguments cannot be accepted.** The reasoning cannot avoid responding to those arguments which are obviously decisive for the outcome of the case. Most importantly, it should clearly transpire from the judgment that the judge examined all the main issues of the case and analysed all the arguments the parties presented to him or to her. Failure to do so might leave the impression that the judge only partially read the submissions and omitted to respond to some of them. That would leave the parties, or at least one of them, dissatisfied with the outcome of proceedings and be the ground for lodging an appeal or an appeal in cassation.

Tips for drafting the reasoning part:

When reaching a conclusion grounded on the analysis conducted, the judge might test it against a counterargument opposite to the decision reached. Then, s/he would conduct a new analysis in a reversed manner with a view to demonstrating that this counterargument is not viable, and, therefore, any other solution would be unsubstantiated and wrong.

In the reasoning part, the arguments analysed by the ECtHR are the ones that defend or contest the impugned decision. They are mainly written in present tense. These arguments are the most important ones and ground the final decision.

Without entering into the merits of a judgments, it is worth nothing that the **words** used by the drafter can very well trigger issues related to the impartiality of the judge. As clarified by the ECtHR has noted, Article 6 ECHR calls for subjective and objective impartiality. The former is related to "to ascertain the personal conviction of a given judge in a given case", whereas the latter aims at "determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect".[7] This is means, in practice, that when drafting a judgment "judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence" (statute of judges) and "must be alert to avoid behaviour that may be perceived as an expression of bias or prejudice" which includes "statements evidencing prejudgments". (Bangalore principles of Judicial Conduct)

3.2.5. Writing style

When writing a judgment, the style is necessarily assertive, decisive, detached and technical. Value or moral judgments, opinions on the effectiveness or quality of a law, political or sociological considerations are to be avoided.

In a judgment **statements such as**:

"it appears opportune to opt for this thesis"

"It appears that"

should be not be chosen. In terms of language, the one used in the judgment must be **assertive.** This because a judgement "decides". Therefore, there is no space for doubts.

Formulas to be adopted, therefore, must be peremptory and indicate that the court has taken a clear

[7] Inn the case Daktaras v. Lithuania, 2000, the ECtHR also clarified that personal impartiality of the judge is presumed unless there is evidence to the contrary.

position. So the sentences mentioned above should therefore be
“it is preferable to opt for this thesis”
“the court considers”

In case of **diverging case-law**, it is fundamental that the judgment indicates clearly one which one of the possible interpretations it embraces. In such cases, it is important to briefly indicate the reasons. The following formulas indicate that the court is aware of the different interpretations and provide a solid foundation for its decision:

The issue raised by the applicant with the second complaint is the object of conflicting case-law. According to the position of ….. The court, however, considers preferable the other option, according to which….. on the basis of the following considerations….

An alternative could be:

The court cannot ignore the existence of conflicting case-law on the matter, according to which…. It considers, however, that such interpretation cannot be subscribed for the following reasons…..

In order to render the judgment linear and logic, especially when multiple issues are raised, it might be helpful to divide the reasoning into numbered paragraphs and subparagraphs.

In order to respect the principle of conciseness, which is also partly functional to achieving a trial in a reasonable time, the judgment can certainly skip the reasoning on some issues, especially when they are procedural. This is the case, for the example, for the order of examination of exceptions as, naturally, issues related to jurisdiction and admissibility come first.

Recent tendencies in judgment craftsmanship, also embraced by the ECtHR, suggest that in principle judgments should in principle be concise and dry, rather than lengthy and prolix. The choice depends on the importance and complexity of the case but also by the which is intended to be attributed to the judgment, namely **intra-procedural, as a rule between the parties** (which justifies the conciseness or even the omission of the part in fact), or **extra-procedural (as a precedent for similar cases)** (which postulates greater analyticity to make the facts understandable by third parties).

Once the draft judgment is finalized, is there a need for a further control?

Once the drafting stage is finished, it is advisable can be advised to perform a control of the final draft. This control is different from the one consciously or unconsciously conducted while drafting. The idea of the final control is based on the presumption that any legal text, even the most successful one, can be improved if reviewed by another person, or from another perspective.

As regards the review by other persons, the limits for this method of control are inherent to the functions of judges who are independent and, as such, cannot be subject to control outside the established procedural forms (appeals, appeals in cassation…). In view of the above considerations, the only viable solution is **to review the draft judgment from another perspective.**

The first option is **to review the draft judgement from the point of view of the superior court.** In doing so, the drafter might first wish to imagine which grounds of appeal the losing party might most likely rely on. This, in turn, would require reviewing once again the submissions ofthis party with a view to identifying the arguments that might had been overlooked or insufficiently addressed. In most jurisdictions the new arguments cannot be raised in appeal, even less in cassation. Therefore, the judge should ascertain that the most relevant and decisive arguments, as required by Article 6 ECHR, are addressed. Special explanation can be added to explain why certain other arguments are not relevant for the outcome of the proceedings. Where possible, the judge might wish to check the relevant case-law of the superior courtwith which the appeal or the appeal in cassation might be lodged. In order to reinforce the authority of the judgement and to avoid the risk of its quashing, the judge might wish to specifically quote the case-law of the superior court applicable to the dispute at issue.

The second option is **to review the draft judgment from the point of view of the losing party**. This method is similar to the previous one. The difference relates mostly to the fact that the losing party would most likely rely on much larger set of grounds of appeal than the superior court will be able, or willing, to examine. The main task during this exercise is to identify whatwas at stake for the losing party, and which complaints it is most likely to bring to the attention of the superior court.

What is the nexus between legal writing and legal reasoning?

There is a strong interdependence between legal writing and legal reasoning. As a particular form of human writing, legal writing operates within the system of specific rules and limits. This concerns the compliance with the rules of logic, the adherence to a certain style of legal documents existing in each country, the conformity with the legislative requirements set out in the domestic legislation and so on. If these rules are not followed, the legal drafter might reach wrong conclusions, and, thereby, affect the substantial quality of the document. These considerations are even more indispensable for judges.

By contrasts to the predictive legal writing[8], which is used, notably, by lawyers, their drafting is objective. This means that the judicial decision is supposed to reflect the assessment of facts and evidence in accordance with the applicable legal framework in neutral and objective manner. Where lawyers would be permitted, within the rules set out in the legislation and their professional codes of conduct, to argue the case in a way the most beneficial to their clients, judges would have much less room for "creativity". Instead, they would be expected to assess the evidence presented to them in objective and impartial way with a view to finding the only just and lawful decision.

The above does not imply to suggest that all judges should adhere to any style of drafting. Some judges would tend to describe facts, complaints, and reasons for their decisions at some length, while others would tend to be short. Some judges would quote extensively case-law of superior courts or international sources, while others would never or rarely do it. Although domestic law typically provides some guidance to this situation, it appears that appropriate arrangements between judges are necessary to improve the interaction between them. In those countries where the separate of judges are accepted by legal tradition, dissenting judges have the floor to express their disagreement with the majority's findings.

What are the external factors that can influence the quality of judicial decisions?

As Opinion No. 11 of the CCJE points out, the quality of a judicial decision "depends not only on the individual judge involved, but also on a number of variables external to the process of administering justice such as the quality of legislation, the adequacy of the resources provided to the judicial system and the quality of legal training" (para. 10).

The quality of legislation has special importance for the quality of judicial decisions becauseit affects them in the most direct way. Inadequate quality of legislation warrants judges to spend additional time on dealing with cases and might lead to the wrong decisions.

[8] This type of legal writing reflects the situations in which the author aims at suggesting to the reader his or her ideas. The typical example is the writings of lawyers. The lawyer is not bound by the obligation to be objective. Instead, the lawyer would generally present the facts of the case and the arguments in the manner the most favorable for his or her client.

Part III
Thematic case-law examples

4. Introduction

As already mentioned, administrative decisions touch on a wide range of issues related to many spheres of the life of an individual. These areas are often covered by the so-called "qualified" or relative rights under the ECHR, distinctive nature of the qualified rights is that they require authorities to assess the interference (demolition ordered by local/governmental administrative bodies, conduct a balancing exercise between conflicting rights – those of the individual and of the community at large. Administrative courts are asked to **strike a balance between these rights using the 3-step test** that was been delineated in the previous pages. As this balancing exercise must be properly reflected in the reasoning of the judgment, this part is devoted to a review of some notable case-law of the ECtHR in selected relevant areas of law where failure to strike a fair balance and to properly reason it resulted in a violation of the ECHR.

In order to better understand the cases that will be presented, it is important to remember the reasoning of judicial decisions can be analysed using **two different perspectives:**

"Material/substantive" perspective

The manner in which a domestic court reasoned a judgment is relevant to establish if **an interference**, at the national level, with one or more **material rights** enshrined in the ECHR or its Protocols **is compatible with** the ECHR. Indeed, an interference with a right does not automatically amount to a violation of that right.

"Procedural" perspective;

The manner in which a domestic court reasoned a judgment can prove that **a procedural right,** as set forth in the ECHR, or a **procedural obligation** stemming from a material right set forth in the ECHR, has been respected. Under this angle, it must also be recalled that any restriction of right must be adopted following a process that was adequate and allowed for all relevant interests to be taken into account. Therefore, when determining whether a measure is proportionate the ECtHR analyses if the persons affected in exercising their rights had a reasonable opportunity to present their case before national authorities and/or jurisdictions, in the course of proceedings respecting some essential guarantees, in the view to annul or review those measures.

Migration

Example 1
Statutory three-year waiting period for family reunification of persons benefitting from subsidiary or temporary protection, not allowing individualised assessment.

Case of M.A. v. Denmark [GC], 2021

The applicant, a Syrian national who fled the country in 2015, was granted in Denmark "temporary protection status" for one year under the Aliens Act ("the Act"). His residence permit was renewed annually. The Immigration Service did not find that he had fulfilled the requirements for being granted special "Convention status" or "protection status", for which residence permits were normally granted for five years. After five months of residing in Denmark, the applicant requested family reunification with his wife and two adult children. **His request was rejected because he had not been in possession of a residence permit for the last three years, as required in law, and because there were no exceptional reasons to otherwise justify family reunification.** The applicant unsuccessfully appealed against the refusal to grant him family reunification with his wife up to the Supreme Court, where a panel of 7 judges handed down its decision, that, in the relevant parts, reads as follows:

"The case involves judicial review of the decision made by the Immigration Appeals Board on 16 September 2016, in which the application for residence in Denmark for [G.M.], the spouse of [M.A.], was rejected. [G.M.] had applied for a residence permit based on her marriage to [M.A.], who had been granted residence in Denmark under section 7(3) of the Aliens Act (temporary protection status due to the general situation in Syria, his country of origin)

.

The reason for the decision is that [M.A.] had not yet had his residence permit issued under section 7(3) of the Aliens Act for at least the last three years, see section 9(1)(i)(d), and that there were no exceptional reasons, including regard for family unity, for issuing a residence permit under section 9c(1) of the Aliens Act.
[M.A.] has submitted that the refusal of his application for family reunification was contrary to Article 8 read alone and to Article 14 of the European Convention on Human Rights read in conjunction with Article 8, when the decision of the Immigration Appeals Board was made, or at least the refusal is contrary to the Convention at the present time.

The Supreme Court notes in this respect that a judicial review of the Immigration Appeals Board's decision under section 63 of the Danish Constitution (grundloven) must be based on the circumstances existing at the time when the decision was made, see, inter alia, the Supreme Court decision reproduced on p. 639 of the Weekly Law Reports for 2006 (UfR 2006.639 H).

The issue of the right to respect for family life under Article 8
... According to the case-law of the European Court of Human Rights, any State is entitled to control immigration into its territory provided that the State complies with its international obligations. Article 8 does not imply a general obligation on the part of a State to respect immigrants' choice of their country of residence or to grant them the right to family reunification on its territory. In a case which concerns family life as well as immigration, the extent of a State's obligations will vary according to the particular circumstances of the person involved and the general interest, see, for example, paras 43 and 44 of the judgment delivered by the Court of Human Rights on 10 July 2014 in Mugenzi v. France.

The decision in the case at hand was made in accordance with the provision that persons who are not recognised as refugees according to the UN Refugee Convention, but who cannot return because they risk ill-treatment falling within Article 3 of the Convention on Human Rights because of the general conditions in their country of origin, must normally have held a residence permit for three years before they become eligible for family reunification. A number of other signatory countries to the Convention on Human Rights also have rules stipulating that persons who are granted protection status without being UN Convention refugees can only be granted family reunification after the expiry of a certain period. The European Court of Human Rights has not yet considered to what extent such statutory waiting periods applicable to persons who are granted protection status without being UN Convention refugees are compatible with Article 8.

The Court said in its judgments of 10 July 2014 in Tanda-Muzinga v. France and Mugenzi v. France that refugees need to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens and that such applications must be examined promptly, attentively and with particular diligence. The applicants in the above two cases were not persons granted temporary protection status, but refugees recognised under the UN Refugee Convention. As a matter of fact, the cases did not concern a statutory waiting period as in the case at hand, but situations in which the visa application examination procedure had been unreasonably lengthy. The Court of Human Rights found in its judgment of the same date (10 July 2014) in Senigo Longue and Others v. France that Article 8 had been violated in a situation in which the French authorities had, in connection with the examination of an application for family reunification, doubted the applicant's maternal relationship with two children who had been left alone in Cameroon and had taken four years to reach a decision. In that case, the Court said that, despite the margin of appreciation enjoyed by the State, the decision-making process did not sufficiently safeguard the flexibility, speed and efficiency required to observe the right to respect for family life. The applicant in that case was not a refugee but had come to France as a result of family reunification with her spouse. The case did not concern the period of 18 months that she had to wait under French law before being able to apply for family reunification, but only the long processing time after the application had been lodged.
It follows from the ... Court's case-law that the factors to be taken into account when determining whether a State is obliged to grant family reunification are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control or considerations of public order weighing in favour of exclusion, see, inter alia, § 70 of the judgment delivered on 28 September 2011 in Nunez v. Norway.

It appears from the preparatory notes of section 7(3) and section 9(1)(i)(d) of the Aliens Act that the separate treatment of this group of people whose need for protection is based on the general situation in their country of origin (temporary protection status under section 7(3) and the limited right to family reunification afforded to this group were introduced in the light of the conflict in Syria, which has caused millions of people to flee and has led to a significant increase in the number of new asylum-seekers in Denmark. It also appears from the preparatory notes that the Government is ready to assume joint responsibility and safeguard the protection of this group of asylum-seekers for as long as they need protection, but that Denmark is not to accept so many refugees that it will threaten national cohesion. Moreover, it appears that the number of newcomers determines whether the subsequent integration becomes successful and that it is necessary to strike the right balance to maintain a good and safe society.

Against this background, the Supreme Court finds that the restriction on the eligibility for family reunification is justified by interests to be safeguarded under Article 8 of the Convention.
The question is now whether the restriction is necessary in a democratic society in order to safeguard the said interests.

The Supreme Court finds that the situation of [M.A.] is not comparable with the situations considered by the European Court in Tanda-Muzinga v. France, Mugenzi v. France and Senigo Longue and Others v. France. The first two cases concerned UN Convention refugees, and all three cases concerned long processing times.
The assessment of whether the decision of the Immigration Appeals Board to refuse family reunification is compatible with Article 8 must therefore be based on the general criteria listed by the European Court of Human Rights, see Nunez v. Norway (cited above).

[M.A.] had held a residence permit for Denmark for about one year and three months when the application was refused by the Immigration Appeals Board. Accordingly, he had limited ties in Denmark, and [G.M.], his spouse, has no ties in Denmark.

The Supreme Court accepts as a fact that the couple face insurmountable obstacles to cohabiting in Syria because [M.A.] risks ill-treatment falling within Article 3 if returned to Syria due to the particularly serious situation characterised by arbitrary violence and ill-treatment of civilians. In reality, the refusal of the application for family reunification therefore implies that he is prevented from cohabiting with his spouse, although the barrier to his right to exercise his family life is only temporary.

It follows from the decision of the Refugee Appeals Board of 9 December 2015 that [M.A.] has not placed himself in an adversarial position to the Syrian authorities or to the opposition of the regime due to his specific and

personal circumstances so that he risks persecution or ill-treatment falling within section 7(1) or section 7(2) of the Aliens Act and that he has not caught the attention of the Syrian authorities or others in such manner as to fall within those provisions. Therefore, he can return to Syria when the general situation in the country improves. If there is no such improvement within three years from the date on which [M.A.] was granted residence in Denmark, he will normally be eligible for family reunification with his spouse. An application to this effect can be lodged two months prior to expiry of the three-year period, and the Supreme Court accepts as a fact that, in that case, the application will be examined as set out in the preparatory notes of the Act as quickly as possible when he has resided in Denmark for three years and a decision has been made to renew his temporary residence permit under section 7(3). Should exceptional circumstances emerge before the expiry of the three-year period, such as serious illness, which will make the separation from his spouse particularly severe, it will be possible to be granted family reunification under section 9c(1) of the Aliens Act.

Against this background, the Supreme Court finds that the condition that [M.A.] must normally have been resident in Denmark for three years before he can be granted family reunification with his spouse falls within the margin of appreciation enjoyed by the State when balancing the regard for the respect for his family life and the regard for the interests of society, which can be safeguarded according to Article 8.

The Supreme Court finds that the decrease in the number of asylum-seekers in 2016 and 2017 cannot result in a different outcome of the assessment of whether the decision made by the Immigration Appeals Board in the case of [M.A.] was justified. The Supreme Court observes in this respect that it was decided by Law no. 153 of 18 February 2015 [the 2015 Act], which introduced the one-year residence permit requirement as a condition for the right to family reunification, that a review of the Aliens Act should be introduced in the Parliamentary year 2017/18 at the latest. By Law no. 102 of 3 February 2016 [the 2016 Act], which amended the three-year residence permit requirement, this review clause was maintained. The reason for this amendment given in the preparatory notes is that the Government found that the extraordinary situation with a very large number of asylum-seekers and applications for family reunification in Denmark had made it necessary to tighten rules as proposed.

The Supreme Court therefore concurs in the view that the decision made by the Immigration Appeals Board is not contrary to Article 8 of the European Convention on Human Rights.

The issue of differential treatment under Article 14 of the European Convention on Human Rights read in conjunction with Article 8

The requirement of three years' residence as a condition for family reunification applies to persons like [M.A.] issued with a residence permit under section 7(3) of the Aliens Act who risk ill-treatment falling within Article 3 of the Convention on Human Rights if returned to their country of origin because the situation in the country of origin is generally characterised by arbitrary violence against civilians. As opposed to those situations, the three-year residence requirement does not apply to aliens issued with a residence permit under section 7(1), because they fall within the Refugee Convention, or under section 7(2), because they risk ill-treatment falling within Article 3 if returned to their country of origin due to their personal circumstances.

Article 14 of the Convention ... prohibits differential treatment based on the rights protected by the Convention, such as sex, race, colour, language, religion, etc. or 'other status'.
[M.A.] had not experienced differential treatment based on sex, race or any other status as expressly listed in Article 14 by the date of the decision made by the Immigration Appeals Board. However, it appears from the ... Court's case-law that a person's immigration status can be any 'other status' falling within Article 14, see § 45 of the judgment of 27 September 2011 in Bah v. the United Kingdom and §§ 44 to 47 of the judgment of 6 November 2012 in Hode and Abdi v. the United Kingdom. It further appears that differential treatment contrary to Article 14 occurs if persons in similar or comparable situations are afforded a more favourable treatment in terms of the rights protected by the Convention and such differential treatment is not based on objective and fair reasons, that is, if the differential treatment is disproportionate to the legitimate aim pursued and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. Finally, it appears that the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment and that the scope of this margin will vary according to the circumstances, the subject matter and the background.

According to the preparatory notes to section 9(1)(i)(d) of the Aliens Act, the different rules on family reunification applicable to aliens granted residence under section 7(1) and (2) and aliens like [M.A.] who are granted residence under section 7(3) are justified by the circumstance that aliens granted residence under section 7(1) and (2) are subjected to personal persecution, usually because of a conflict with the authorities or others in their country of origin, whereas aliens granted residence under section 7(3) are not subject to personal persecution but have fled due to the general situation, such as war, in their country of origin. Those individuals therefore do not have a specific conflict with anybody in their country of origin, and the preparatory notes considered it a fact that, in general, this group of individuals have a more temporary need for protection than persons subjected to personal persecution as the situation in their country of origin may quickly change in nature and become more peaceful.
The Supreme Court considers it doubtful whether the situation of [M.A.] is comparable with the situation of aliens granted residence under section 7(1) and (2) of the Aliens Act because they risk persecution due to their personal circumstances if returned to their country of origin. Despite this assumption, the Supreme Court finds that the difference in the right to family reunification, which is, as already mentioned, based on an assessment of the need for protection among different groups of individuals, must be deemed to have been based on objective and fair reasons falling within the margin of appreciation enjoyed by the State in a case concerning differential treatment based on immigration status.

Accordingly, the Supreme Court finds no basis for dismissing the assessment made by the Danish Parliament, according to which, from a general perspective, the need for protection of persons falling within section 7(3) of the Aliens Act is more temporary than that of persons falling within section 7(1) and (2). The general situation in a person's country of origin, which has justified a temporary need for protection, may quickly change. This is illustrated by the judgments delivered by the Court of Human Rights on 28 June 2011 in Sufi and Elmi v. the United Kingdom and on 5 September 2013 in K.A.B. v. Sweden.

In assessing whether the restriction on the right of [M.A.] to be granted family reunification in Denmark with his spouse is compatible with Article 14, taken in conjunction with Article 8, the Supreme Court has also emphasised that his separation from his spouse, as mentioned in the above paragraph on Article 8, is only temporary and that he can be granted family reunification at a later point if exceptional reasons apply.
Against this background, the Supreme Court concurs with the view that the decision made by the Immigration Appeals Board is not contrary to Article 14 of the Convention ... taken together with Article 8, either."

This was the first time when the ECtHR was called to consider whether, and to what extent, the imposition of a statutory waiting period for granting family reunification to persons who benefit from subsidiary or temporary protection status was compatible with Article 8. The **crux of the matter was whether the Danish authorities, in September 2016, when refusing the applicant's request for family reunion, owing to the three-year waiting period, had struck a fair balance between the competing interests of the individual and of the community as a whole**. The applicant had had an interest in being reunited with his wife as soon as possible, whereas the Danish State had had an interest in controlling immigration as a means of serving the general interests of the economic wellbeing of the country, and of ensuring the effective integration of those granted protection with a view to preserving social cohesion. However, on the latter point, it should be borne in mind that family reunification might also favour preserving social cohesion and facilitate integration. In its judgment refusing to grant the applicant family reunification with his wife, the Supreme Court had had regard to the applicable principles under Article 8 and the relevant case-law on family reunification. It had noted that a number of other member States had similar rules, and that the European Court had not yet considered to what extent such statutory waiting periods would be compatible with Article 8. The Supreme Court had also had regard to the preparatory notes to the legislative amendments leading to the three-year waiting period and had noted the background of the amendment. It had accepted that the spouses had faced insurmountable obstacles to cohabiting in Syria, but had emphasised that the obstacle to their exercise of family life together had only been temporary. The applicant could return to Syria when the general situation in the country improved. If there was no such improvement within three years from the date on which he was granted residence in Denmark, he would normally be eligible for family reunification with his spouse. Should exceptional circumstances emerge before the expiry of the three-year period, he could be granted family reunification. Against that background, the Supreme Court had found that the three-year waiting period had fallen within the margin of appreciation enjoyed by the State when balancing the relevant interests at stake.

The Court could not but note that, as amended, **the Act did not allow for an individualised assessment of the interest of family unity in the light of the concrete situation of the persons concerned beyond very limited exceptions.** Nor had it provided for a review of the situation in the country of origin with a view to determine the actual prospect of return or obstacles thereto. Thus, for the applicant, the statutory framework and three-year waiting period had operated as a strict requirement for him to endure a prolonged separation from his wife, irrespective of considerations of family unity in the light of the likely duration of the obstacles. It could not be said that the applicant had been afforded a real possibility under the applicable law of having an individualised assessment of whether a shorter waiting period than three years had been warranted by considerations of family unity. Having regard to the above considerations, **the Court was not satisfied, notwithstanding the margin of appreciation, that the authorities had struck a fair balance between the relevant interests at stake and therefore found a violation of Article 8 ECHR.**

Example 2
Expulsion on national security grounds decided by court on the basis of classified information not disclosed to applicants, without sufficient counterbalancing safeguards.

Muhammad and Muhammad v. Romania [GC], 2020

The applicants, Pakistani nationals living in Romania on student visas, were deported on national security grounds. The relevant decision was based on classified documents. The applicants neither had access to those, nor were provided with any specific information as to the facts and grounds underlying that decision.

In a judgment delivered in private, the Court of Appeal declared the applicants undesirable for a fifteen-year period and ordered that they be placed in administrative custody pending their deportation. The motivation reads as follows:

"... Ramzan Muhammad and Adeel Muhammad, Pakistani nationals, are in Romania on student visas, both having 'Erasmus Mundus' scholarships to study in the economic sciences faculty of Lucian Blaga University in Sibiu.

After examining the information transmitted by the SRI, classified for State secrecy purposes at the 'secret' level, the Court [of Appeal] regards it as proof that the aliens [in question] are engaging in activities capable of endangering national security.

Account should be taken of the provisions of section 3 points (i) and (l) of Law no. 51/1991 [on national security] under which the following acts represent threats for the national security of Romania: (i) terrorist acts, and any planning or suspicion [sic] related thereto, by any means whatsoever; ... (l) the creation or constitution of an organisation or group, or the fact of belonging to one or supporting one by any means, in pursuit of any of the activities listed in points (a) to (k) ..., and the covert pursuit of such activities by lawfully established organisations or groups.

The Court [of Appeal] also takes into consideration section 44 of Law no. 535/2004 [on the prevention and countering of terrorism], which provides that foreign nationals or stateless persons concerning whom there are data or serious indications that they intend to engage in terrorist activities or to promote terrorism are to be declared undesirable in Romania and that their leave to remain may be curtailed, if they have not been prohibited from leaving the country, in accordance with the law on immigration status in Romania.

The Court [of Appeal] also has regard to the fact that Romania, as a member of the United Nations, has undertaken to deny leave to remain to anyone who finances, prepare or commits terrorist acts, or who supports such acts.

The measure ordered [in the present case] does not breach Article 8 of the [European] Convention [on Human Rights] given that, even if this measure constitutes an interference with [the right to] private and family life [of those concerned] it is in accordance with the law, pursues a legitimate aim and is necessary in a democratic society.

The measure is indeed provided for by Article 85 of OUG no. 194/2002, which authorises the ordering of an alien's removal or exclusion from the country, [namely by a] normative instrument published in the Official Gazette, which thus satisfies the condition of accessibility of the law.

Similarly, procedural safeguards are upheld for an alien who is declared undesirable, as the measure is ordered by a tribunal within the meaning of Article 6 of the ECHR, ensuring due respect for the adversarial principle and for defence rights.
A measure declaring aliens undesirable pursues a legitimate aim, namely the prevention of serious acts that are capable of endangering the national security of the Romanian State.
As to the need to adopt such a measure in respect of aliens, it is justified by the nature and seriousness of the activities carried out [by them], in respect of which it should be verified that the measure is proportionate to the aim pursued.
Having regard to these considerations and in the light of the provisions of Article 85 § 5 of OUG no. 194/2002 to the effect that, where an alien is declared undesirable for national security reasons, the judgment does not mention the data or intelligence underlying its decision, the Court [of Appeal] grants the application and declares [the applicants] undesirable in Romania, on national security grounds, for a fifteen-year period.
In the meantime, the placement of the aliens in administrative detention is hereby ordered, in accordance with Article 97 § 3 of OUG no. 194/2002, pending their deportation, [without this detention exceeding] eighteen months."
In a final judgment of 20 December 2012 the High Court dismissed the applicants' appeal. After summing up the decision of the Court of Appeal, the High Court found that it could be seen from the classified documents available to it that the court below had rightly taken account of the existence of indications that the applicants had intended to engage in activities capable of endangering national security. It further observed that, pursuant to the law, where a decision to declare an alien undesirable was based on reasons of national security, the data and information, together with the factual grounds underlying the judges' opinion, could not be mentioned in the judgment. It added as follows:

"The applicants' arguments about their good conduct at university cannot prosper and fail to rebut the conviction of the court, based as it is on the classified documents containing information which is necessary and sufficient to prove the existence of strong indications that they intended to engage in activities that were capable of endangering national security."

As to the alleged breach of their fundamental rights and procedural safeguards during the first-instance proceedings, the High Court found as follows:
"The measures of expulsion, administrative detention and removal under escort of aliens who have been declared undesirable in Romania are legitimate, being governed in domestic law by the provisions of Chapter V ('Rules governing the removal of aliens from Romania') of OUG no. 194/2002; [they] are necessary and proportionate to the aim pursued in so far as the court [instanța de judecată] has found that the evidence gathered proves that there are strong indications [indicii temeinice] that the persons concerned intend to engage in activities that are capable of endangering national security."

The High Court further noted that the provisions of Article 1 of Protocol No. 7 to the Convention were applicable to the case. The applicants were legally in Romania when the expulsion procedure was initiated but that the provisions of paragraph 2 of that Article were not applicable to them, given that they had not been expelled before the exercise of their rights. After referring to the Court's findings in *Ahmed v. Romania* (no. 34621/03, 13 July 2010), *Kaya v. Romania* (no. 33970/05, 12 October 2006), and *Lupsa v. Romania* (no. 10337/04, ECHR 2006-VII), where a breach of Article 1 of Protocol No. 7 to the Convention had been found because the competent authorities had not notified the aliens concerned of the document initiating the proceedings or of the slightest information as to the accusations against them, the High Court found that the circumstances of the present case were different.

The High Court noted that, in the present case, the applicants had been notified of the public prosecutor's initiating application and had been allotted the necessary time, with the assistance of an interpreter, to study its content and the supporting documents in the file. They had thus been in a position to know the reason why they had been summoned to court in the exclusion and expulsion proceedings. It gave the following reasoning:

"It is true that the documents classified as 'secret' in the file, [which] were available to the court [which examined the case], were not disclosed to the appellants.

The lack of direct and specific disclosure of the information contained in the documents classified as a State secret at the level 'secret' is consistent with the statutory obligation, binding on the court.

Compliance with the safeguard imposed by Article 1 of Protocol No. 7 to the Convention, [namely that of] ensuring the protection of the person (being deported) against any arbitrary interference by the authorities with his or her Convention rights (see ECtHR, Ahmed case, cited above, § 52), is secured in the present case by the fact that both the first-instance court and the appellate court had the possibility of examining the validity of the existence of the indications [that those concerned] 'intended to engage in activities capable of endangering national security' (within the meaning of Article 85 § 1 of OUG no. 194/2002); the case has thus been examined at two levels of jurisdiction before an 'independent and impartial tribunal' within the meaning of Article 6 § 1 of the Convention.

If it were considered that the need to inform the deportee of the grounds for his deportation entailed, unequivocally, the direct, effective, concrete and timely presentation of the indications ... this would be tantamount – in the High Court's opinion and in relation to its obligation not to disclose or encourage the disclosure of information which could cause serious harm to national security – to calling into question the very notion of national security together with all the measures aimed at protecting information falling within this concept.

The [High Court] notes that [in the present case] the rights secured by Article 1 of Protocol No. 7 to the Convention were upheld in the judicial proceedings: [the appellants] had the genuine possibility of being present both before the first-instance court and the appeal court, assisted by lawyers of their choosing; [they were able to submit] reasons against their expulsion; their case was examined directly and effectively by an independent and impartial tribunal; [and] they were represented by lawyers of their choosing.

Having regard to the arguments set out above, the High Court takes the view that there has not been – contrary to the grounds of appeal – any breach of the right to an effective remedy or the right of access to a court, as guaranteed by Article 6 of the Convention, nor has there been any disregard of the non-discrimination principle guaranteed by Article 14 of the Convention and Article 1 of Protocol No. 12, as prohibited by Article 18 § 1 of the Constitution.

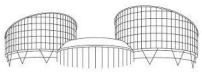
The fact that, after the delivery of the Court of Appeal's judgment, the press and broadcasting media revealed information on which the expulsion decision was based does not lead to the conclusion that the right of access to a court or the right to a fair hearing have been breached. For the same reasons as those given above, the [appellants'] argument that their right of access to a court was only nominally respected cannot prosper.
The [appellants'] argument as to the protection of individuals under Article 3 of the Convention is also ill-founded since the risk of being subjected to inhuman or degrading treatment in the country of destination has not been proved by documents emanating from State authorities [statale]; [the appellants] merely adduced a report by the Romanian National Council for Refugees drawn up on the basis of certain 'public information, selected and translated following an on-line search'.

Also ill-founded is the argument raised by [the appellant] Muhammad Ramzan under Article 8 of the Convention on the basis of the presence in Romania of his wife, who is nine months' pregnant and is dependent on his doctoral grant. Even though his deportation constitutes an interference with the exercise of his right to respect for his family life, the [High Court] takes the view that, for the reasons given above, this interference meets the requirements of Article 8 § 2 of the Convention, being in accordance with the law and necessary in the interest of national security.

As to the upholding of the [appellants'] defence rights before the Court of Appeal, the High Court notes that [they] had the possibility of submitting arguments against their expulsion and were able to express themselves in their mother tongue, through an interpreter. Moreover, it should be noted that, pursuant to the law [în mod legal] the Court of Appeal had declared out of time their request for assistance by officially assigned counsel, on the ground that this request had been submitted once the merits of the case had been put to adversarial debate, not at the earlier stage of the proceedings. In addition, before the appellate court, they have been assisted by lawyers of their choosing and have been able to submit all their arguments in their defence. Consequently, it cannot be admitted that there has been a breach of the right to a fair trial, as protected by Article 21 § 3 of the Constitution and by Article 6 § 1 of the Convention.

The [appellants'] arguments to the effect that the Court of Appeal had written [that they had] 'engaged in activities' [desfășurarea de activități], whereas the public prosecutor's application had referred to an 'intention

to engage in certain activities', and had erroneously cited the text of section 3 point (i) of Law no. 51/1991, are not capable of negating the lawfulness and validity of the decision delivered.
Having regard to the foregoing, ... the High Court dismisses the appeal as unfounded ..."



In establishing a **violation of Article 1 of Protocol no. 7 ECHR**, the ECtHR observed that there had been a significant limitation of the applicants' right to be informed of the factual elements submitted in support of their expulsion and the content of the relevant documents. However, **the domestic courts had neither carried out any examination of the need for such a limitation, nor clarified the actual national security reasons in issue, as domestic law did not allow them to examine such issues of their own motion.** The fact that a press release published by the Romanian Intelligence Service had contained more detailed factual information than that provided to the applicants during earlier proceedings contradicted the alleged need to deprive them of the specific information. Consequently, the Court had to exercise strict scrutiny with regard to the counterbalancing factors put in place. The applicants had received only very general information about the legal characterisation of the accusations against them, while none of their specific acts which had allegedly endangered national security could be seen from the file. **A mere enumeration of the numbers of legal provisions invoked could not suffice to constitute adequate information** about the accusations. Moreover, a press release could not be an appropriate means of providing information with a level of specificity and precision that was adapted to the particular features of the dispute and to the scope of the parties' procedural rights. Furthermore, the applicants had not been provided with any information about the key stages in the proceedings or about the possibility of accessing classified documents in the file through a specialised lawyer. As their lawyers did not have an authorisation to access classified documents, their mere presence before the domestic court, without any possibility of ascertaining the accusations against their clients, had not been capable of ensuring the latter's effective defence. Finally, it was not clear whether the domestic courts had actually had access to all the classified information or verified the credibility and veracity of the underlying facts: the nature and the degree of their scrutiny did not transpire, at least summarily, from the reasoning of their decisions. Therefore, the mere fact that the expulsion decision had been taken by independent judicial authorities at a high level, without it being possible to establish that they had actually used the powers vested in them under Romanian law, did not suffice to counterbalance the limitations that the applicants had sustained in the exercise of their procedural rights.

Employment in the public sector

Example 1
Inadequate judicial review of the dismissal of an employee of a public institute, under an emergency legislative decree, on account of his alleged links with a terrorist organisation.

Pişkin v. Turkey, 2020

The applicant was dismissed from his post as an expert at a Development Agency (hereafter "the agency") on the basis of presumed links with a terrorist organisation which the national authorities considered as having instigated the military coup of 15 July 2016, pursuant to Emergency Legislation. The applicant applied to the Labour Court to set aside the decision to terminate his contract. Before that court he argued, in particular, that his dismissal had not been based on any valid reason and had therefore been unfair and invalid. Moreover, he submitted that his employer had not complied with the dismissal procedure laid down in the law. The Labour Court dismisses the appeal with the following reasons:

"... The defendant employer is an agency ... set up under Law No. 5449. It is essential that ... persons with links to illegal organisations should not be employed in public institutions. It is undisputed that pursuant to Law No. 5449 the governing board of the [defendant] agency has power to terminate employment contracts .... At its meeting on 26 July 2016 the governing board ... decided to terminate the employment contracts of six persons, including the applicant, pursuant to section 4 (1) (g) of the emergency legislative decree .... The appeal must be rejected inasmuch as the termination of the employment contract [should be considered as] a valid termination on the grounds that it was ordered by the governing board of the defendant agency, which is competent in matters of termination of contract, under the provisions of Emergency Legislative Decree No. 667."

At second instance the Court of Appeal decided as follows:
"... Having examined the dispute on the basis of the case file, our court must dismiss the appeal because it transpires from the parties' submissions and the documents presented in support [of the latter] that the termination of the employment contract had been based on a valid reason (geçerli neden) [inasmuch as] the applicant's contract had been terminated pursuant to Emergency Legislative Decree No. 667 issued following the failed military coup of 15 July 2016; section 4 of the Legislative Decree, headed 'measures relating to civil servants', provides as follows: persons 'considered as belonging, affiliated or linked to terrorist organisations or to organisations, structures or groups whose involvement in activities prejudicial to the State's national security had been established by the National Security Council' will be excluded from the 'civil service ... on the approval of the departmental director' and will no longer be employed directly or indirectly in the civil service ...".

In finding a violation of Article 6.1 ECHR, the ECtHR observed that the national courts had dismissed the applicant's appeal on the grounds that the termination of his contract was to be considered as a valid termination based on the Legislative Decree, without considering "termination with a just reason" within the meaning of the Labour Code. Furthermore, the domestic courts had exclusively assessed whether the dismissal had been decided by the competent authority and whether the impugned decision had had been based on law. **The national court had at no stage considered whether the termination of the applicant's employment contract on grounds of his presumed links with an illegal structure had been justified by his behaviour or other relevant evidence or information.** Moreover, the applicant's grounds of appeal had not been duly examined by the courts in question. The fact that the Constitutional Court had adopted a summary decision of inadmissibility showed that it had failed to analyse the legal and factual issues.
The domestic courts' findings failed to demonstrate that they had conducted any in-depth, thorough examination of the applicant's pleas, had based their reasoning on the evidence which he had presented, or had provided valid reasons for dismissing his arguments. The shortcomings noted had placed the applicant at a clear disadvantage *vis-à-vis* his opponent.

Despite the fact that, theoretically, the national courts had had full jurisdiction to adjudicate the dispute between the applicant and the authorities, they had declined jurisdiction to consider all the factual and legal

issues relevant to the case before them. Accordingly, the applicant had not been properly heard by the domestic courts, which had failed to ensure his right to a fair trial.

As regards Article 15 (Derogations in time of emergency) ECHR, even though procedures such as those which had been implemented under the Legislative Decree could have been accepted as being justified in the light of the very specific circumstances of the state of emergency, that Legislative Decree had placed no restrictions on the judicial review to be conducted by the courts following the termination of persons' employment contracts. In view of the importance of the issue at stake for the Convention rights of litigants, where an emergency legislative decree lacked any clear and explicit provision ruling out any possibility of judicial review of measures adopted for its execution, it should always be interpreted as authorising the respondent State's courts to conduct a mode of review sufficient to avoid arbitrariness. In the circumstances of the present case, the failure to comply with the requirements of fair proceedings could not have been justified by the Turkish derogation.

Example 2
Non-renewal by hospital of contract of employment on account of refusal to remove headscarf.

Ebrahimian v. France**,** 2016

After a year from her recruitement with a fixed-term contract as social worker in a public hospital (psychiatric departement), the applicant was informed that her contract would not be renewed. That decision was based on her refusal to remove her veil and complaints made by a number of patients at the centre. The non-renewal of the contract was based on an opinion of the *Conseil d'État* indicating that the principle of the secular nature of the State and that of the neutrality of public services applied to all public services. It observed that civil servants had to enjoy freedom of conscience but that this freedom had to be reconciled, in terms of its expression, with the principle of neutrality of the public service, which precluded the wearing of a symbol displaying one's religious affiliation. Furthermore, in the event of a breach of that obligation of neutrality, it stated that the consequences in terms of disciplinary proceedings had to be assessed on a case-by-case basis according to the particular circumstances. Appeals lodged by the applicant were dismissed.10.

In response to a letter from the applicant alleging the illegality of the refusal to renew her contract in that it was motivated by her convictions and her affiliation to the Muslim faith, the Director of Human Resources indicated that at the meeting that had preceded the administration's decision, she had not been criticised for her religious beliefs, but merely reminded of the rights and duties of public employees, namely the ban on manifesting such beliefs. He continued as follows:

"I emphasised that I had been required to have a meeting with you following complaints made to Ms M., manager of the welfare and education unit, both by patients who were refusing to meet you on account of this display [of your beliefs] and by social workers for whom it was becoming increasingly difficult to operate in this very delicate situation. It should be noted that Ms M. raised these difficulties with you and tried to persuade you not to manifest your religious beliefs, even before the complaints reached HR. Indeed, it was only shortly before the meeting with you on 30 November that the unit managers were officially informed of the problem created by the fact of your head covering.

With regard to your head covering at the time of recruitment: as you are aware, the recruitment interview lasts, at the most, one hour. Individuals attend wearing ordinary "street" clothes, and do not necessarily have to remove their coats or scarves. The fact that your head was covered during that interview was not interpreted as a possible sign of [religious] affiliation, but simply as a form of attire.
The termination of your contract has a legal basis, and does not result from a discriminatory situation."

Following **an appeal, the Administrative Court** held that the decision not to renew the contract had been compatible with the principles of secularism and the neutrality of public services.

"... In view of the applicable Law [laying down the rights and duties of civil servants,] ... Although civil-service employees, like all citizens, enjoy the freedom of conscience and of religion laid down in the constitutional, legislative and convention texts, which prohibit any discrimination based on their religious beliefs or their atheism, particularly in terms of access to positions, career progress and the disciplinary system, the principles of the secular nature of the State and the bodies to which its powers are delegated and of neutrality in public

services preclude those employees, in the exercise of their duties, from being entitled to manifest their religious belief, especially through external sartorial expression; this principle, which is intended to protect the users of the service from any risk of influence or of interference with their own freedom of conscience, concerns all public services and not only the education service; this obligation must be applied with particular stringency in those public services where the users are in a fragile or dependent state;" It dismissed the applicant's action, pointing out that the decision not to renew her contract had been taken on account of her refusal to remove her veil *"following complaints submitted by certain patients in the care centre and in spite of repeated warnings by her line managers and friendly advice from her colleagues".*

The court considered that on the basis of the above-mentioned principles concerning the expression of religious opinions within the public services, the administrative authorities had not committed an error of assessment in refusing to renew the contract on the implied ground of her wearing of *"attire manifesting, in an ostensible manner, allegiance to a religion".* It concluded

"thus, even though [the applicant's] employer tolerated the wearing of this veil for several months and [her] conduct cannot be considered as deliberately provocative or proselytising, the hospital has not acted illegally in deciding not to renew the contract following her refusal to stop wearing the veil".

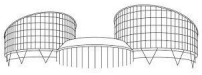
In execution of the Court of Appeal's judgment, the Director of the hospital invited the applicant to inspect the case file. By a reasoned judgment of 13 May 2005, he confirmed that her contract would not be renewed in the following terms.

"As a result of the judgment of the Paris Administrative Court of Appeal dated 2 February 2004, which held that the non-renewal of your fixed-term contract which expired on 31 December 2000 had been disciplinary in nature, we invited you again to inspect your administrative file on 10 May 2005, in order to bring the procedure into line with the regulations. As required in execution of the same judicial decision, we hereby inform you that the disciplinary basis for the non-renewal of your contract is your refusal to remove your veil, in that it ostensibly manifests your religious affiliation. In application of the principles of the secular nature of the State and the neutrality of public services, which underlie the duty of discretion imposed on every State employee, even those employed under contract, your refusal to remove your head covering when carrying out your duties effectively amounts to a breach of your obligations, thus exposing you to a legitimate disciplinary sanction, as the Conseil d'État held, with regard to the principle, in its Opinion concerning Ms Marteaux, dated 3 May 2000. Our decision not to renew the contract is all the more justified in the present case in that you were required to be in contact with patients when carrying out your duties."

A subsequent appeal by the applicant was dismissed by the Administrative Court on these grounds:

"... However, while the Conseil d'État's Opinion of 3 May 2000 specifically concerns the case of an employee in the public education service, it also clearly states that the constitutional and legislative texts show that the principles of freedom of conscience, State secularism and the neutrality of public services apply to the public services in their entirety; although civil-service employees, like all citizens, enjoy the freedom of conscience and of religion laid down in the constitutional, legislative and convention texts, which prohibit any discrimination based on their religious beliefs or their atheism, particularly with regard to access to positions, career progress and also the disciplinary system, the principles of the secular nature of the State and the bodies to which its powers are delegated and of neutrality in public services preclude those employees, in the exercise of their duties, from being entitled to manifest their religious belief, especially through external sartorial expression; this principle is intended to protect the users of the service from any risk of influence being exerted or of interference with their own freedom of conscience.

In view of the above-mentioned principles concerning the manifestation of religious opinions within the public service, the administrative body did not act illegally in refusing to renew the [applicant's] contract on the implied ground of her wearing attire manifesting, in an ostensible manner, allegiance to a religion."



In finding that the facts of the case did not disclose a violation of Article 9 ECHR (Freedom of thought, conscience and religion), the ECtHR observed that the interference had a legal basis and pursued the legitimate aim of protecting the "rights and freedoms of others". In connection with **the necessity and proportionality** of the interference in a democratic society it observed that:

"60. The Court notes at the outset that, in addition to reminding the applicant of the principle of the neutrality of public services, the authorities had indicated to her the reasons for which this principle justified special application with regard to a social worker in the psychiatric unit of a hospital. The authorities had identified the problems to which her attitude had given rise within the unit in question and had attempted to persuade her to refrain from displaying her religious beliefs (see paragraph 8 above).
61. The Court observes that the national courts validated the refusal to renew the applicant's contract, explicitly stating that the principle of the neutrality of public employees applied to all the public services, and not solely to education, and that it was intended to protect users from any risk of being influenced or infringement of their own freedom of conscience. In its judgment of 17 October 2002, the Administrative Court had attached importance to the fragility of these users, and held that the requirement of neutrality imposed on the applicant was all the more pressing in that she was in contact with patients who were fragile or dependent (see paragraph 11 above).
62. The Court further observes that the applicant has not been accused of acts of pressure, provocation or proselytism with regard to hospital patients or colleagues. However, the fact of wearing her veil was perceived as an ostentatious manifestation of her religion, incompatible in this case with the neutral environment required in a public service. It was thus decided not to renew her contract and to bring disciplinary proceedings against her on account of her persistence in wearing the veil while on duty.
63. The principle of secularism within the meaning of Article 1 of the French Constitution, and the resultant principle of neutrality in public services, were the arguments used against the applicant, on account of the need to ensure equal treatment for the users of the public establishment which employed her and which required, whatever her religious beliefs or her sex, that she comply with the strict duty of neutrality in carrying out her duties. According to the domestic courts, this entailed ensuring the State's neutrality in order to guarantee its secular nature and thus protect the users of the service, namely the hospital's patients, from any risk of influence or partiality, in the name of their right to freedom of conscience (see paragraphs 11, 16 and 25 above; see also the wording subsequently used in the circular on secularism in health institutions, paragraph 30 above). Thus, it is clear from the case file that it was indeed the requirement of protection of the rights and freedoms of others, that is, respect for the freedom of religion of everyone, and not the applicant's religious beliefs, which lay behind the contested decision.
64. The Court has already accepted that States may rely on the principles of State secularism and neutrality to justify restrictions on the wearing of religious symbols by civil servants, particularly teachers working in the public sector (see paragraph 57 above). It is the latter's status as public employees which distinguishes them from ordinary citizens – "who are by no means representatives of the State engaged in public service" and are not "bound, on account of any official status, by a duty of discretion in the public expression of their religious beliefs" (see Ahmet Arslan and Others, cited above, § 48) – and which imposes on them religious neutrality vis-à-vis their students. Likewise, the Court can accept in the circumstances of the present case that the State, which employs the applicant in a public hospital where she is in contact with patients, is entitled to require that she refrain from manifesting her religious beliefs when carrying out her duties, in order to guarantee equality of treatment for the individuals concerned. From this perspective, the neutrality of the public hospital service may be regarded as linked to the attitude of its staff, and requires that patients cannot harbour any doubts as to the impartiality of those treating them.
65. It thus remains for the Court to verify that the impugned interference is proportionate to that aim. With regard to the margin of appreciation left to the State in the present case, the Court notes that a majority of the Council of Europe member States do not regulate the wearing of religious clothing or symbols in the workplace, including for civil servants (see paragraph 32 above) and that only five States (out of twenty-six), one of them France, have been identified as prohibiting completely the wearing of religious signs by civil servants. However, as pointed out above (see paragraph 56), consideration must be given to the national context of State-Church relations, which evolve over time in line with changes in society. Thus, the Court notes that France has reconciled the principle of the neutrality of the public authorities with religious freedom, thus determining the balance that the State must strike between the competing private and public interests or competing Convention rights (see paragraphs 21-28 above), and that this left the respondent State a large margin of appreciation (see Leyla Şahin,

cited above, § 109, and Obst v. Germany, no. 425/03, § 42, 23 September 2010). Equally, the Court has already indicated that in the hospital environment the domestic authorities must be allowed a wide margin of appreciation, as hospital managers are better placed to take decisions in their establishments than a court, particularly an international court (see Eweida and Others, cited above, § 99).

66. The main question which arises in the present case is therefore whether the State overstepped its margin of appreciation in deciding not to renew the applicant's contract. On this point, the Court notes that public employees in France enjoy the right to respect for their freedom of conscience, which entails, in particular, a ban on any faith-based discrimination in access to posts or in career development. This freedom is guaranteed, in particular, by section 6 of the Law of 13 July 1983 laying down the rights and duties of civil servants, and is to be reconciled with the requirements of the proper functioning of the service (see paragraph 25 above). However, they are prohibited from manifesting their religious beliefs while carrying out their duties (see paragraphs 25-26 above). Thus, the Opinion of 3 May 2000, cited above, clearly states that public employees' freedom of conscience must be reconciled, albeit solely in terms of how it is given expression, with the obligation of neutrality. The Court reiterates that the reason for this restriction lies in the principle of State secularism, which, according to the Conseil d'État, "concerns the relations between the public authorities and private persons" (see paragraph 28 above), and the principle of the neutrality of public services, a corollary of the principle of equality which governs the functioning of these services and is intended to ensure respect for all beliefs.

67. The Court emphasises, however, that it has already approved strict implementation of the principles of secularism (now included among the rights and freedoms safeguarded by the Constitution, see paragraph 24 above) and neutrality, where this involved a fundamental principle of the State, as in France (see, mutatis mutandis, Kurtulmuş, and Dalhab, both cited above). The principles of secularism and neutrality give expression to one of the rules governing the State's relations with religious bodies, a rule which implies impartiality towards all religious beliefs on the basis of respect for pluralism and diversity. The Court considers that the fact that the domestic courts attached greater weight to this principle and to the State's interests than to the applicant's interest in not limiting the expression of her religious beliefs does not give rise to an issue under the Convention (see paragraphs 54-55 above).

68. It observes in this connection that the obligation of neutrality applies to all public services, as reiterated on numerous occasions by the Conseil d'Étatand, recently, by the Court of Cassation (see paragraphs 26-27 above), and that the fact of employees wearing a sign of religious affiliation in the course of their duties amounts, as a matter of principle, to a breach of their obligations (see paragraphs 25-26 above). There is no indication in any text or decision by the Conseil d'État that the impugned obligation of neutrality could be adjusted depending on the employee and his or her duties (see paragraphs 26 and 31 above). The Court is mindful that this is a strict obligation which has its roots in the traditional relationship between State secularism and freedom of conscience as this is set out in Article 1 of the Constitution (see paragraph 21 above). Under the French model, which it is not the Court's role to assess as such, the State's neutrality is incumbent on the employees representing it. The Court notes, however, that it is the duty of the administrative courts to verify that the authorities do not disproportionately interfere with public employees' freedom of conscience when State neutrality is relied upon (see paragraphs 26 and 28 above).

69. In this context, the Court notes that the disciplinary consequences of the applicant's refusal to remove her veil during her working hours were assessed by the authorities "with due regard to the nature and degree of ostentatiousness of the sign in question, and of the other circumstances" (see paragraph 26 above). In this respect, the authorities usefully pointed out that the imposed requirement of neutrality was non-negotiable in view of her contact with patients (see paragraph 13 above). Moreover, in a passage which it would have been worth expanding on, they referred to difficulties in the relevant unit (see paragraph 8 above). For their part, the courts dealing with the case accepted, in essence, the French concept of the public service and the ostentatious nature of the veil, concluding that there had not been an excessive interference with the applicant's religious freedom. Thus, while the applicant's wearing of a religious symbol amounted to a culpable breach of her duty of neutrality, the impact of this attire on the exercise of her duties was taken into consideration in evaluating the seriousness of that fault and in deciding not to renew her contract. The Court notes that section 29 of the Law of 13 July 1983 does not define the fault (see paragraph 41 above) and that the authorities have discretion in this area. It observes that they obtained witness statements before finding that they had sufficient information to bring disciplinary proceedings against the applicant (see paragraph 8 above). Furthermore, the Administrative Court did not criticise the sanction of non-renewal of her contract, finding that – having regard to public employees' duty of neutrality – it was proportionate to the fault. The Court considers that the national authorities are best placed to assess the proportionality of the sanction, which must be determined in the light of all of the circumstances in which a fault was found, in order to comply with Article 9 of the Convention.

70. The Court notes that the applicant, whose religious beliefs meant that it was important for her to manifest her religion by visibly wearing a veil, was rendering herself liable to the serious consequence of disciplinary proceedings. However, there can be no doubt that, after the publication of the Conseil d'État's Opinion of 3 May 2000, she was aware that she was required to comply with the obligation of neutrality in her attire while at work (see paragraphs 26 and 51 above). The authorities reminded her of this obligation and asked her to reconsider wearing her veil. It was on account of her refusal to comply with this obligation that the applicant was notified that disciplinary proceedings had been opened, notwithstanding her professional abilities. She had subsequently had access to the safeguards of the disciplinary proceedings and to the remedies available before the administrative courts. Moreover, she had chosen not to take part in the recruitment test for social workers organised by the CASH, although she had been included in the list of candidates drawn up by that establishment in full cognisance of the situation (see paragraph 10 above). In those circumstances, the Court considers that the domestic authorities did not exceed their margin of appreciation in finding that it was impossible to reconcile the applicant's religious beliefs and the obligation not to manifest them, and subsequently in deciding to give priority to the requirement of State neutrality and impartiality.

71. It appears from the report by the Secularism Observatory, in the section entitled "Overview of secularism in health establishments" (see paragraph 29 above), that disputes arising from the religious beliefs of persons working within hospital services are assessed on a case-by-case basis, and that the authorities attempt to reconcile the interests at stake in a bid to find friendly settlements. This desire for conciliation is confirmed by the small number of similar disputes brought before the courts, as indicated in the 2005 circular or recent studies on secularism (see paragraphs 26 and 30 above). Lastly, the Court observes that a hospital is a place where users, who for their part have equal freedom to express their religious beliefs, are also requested to assist in implementing the principle of secularism, by refraining from any form of proselytism and respecting the manner in which the service is organised and, in particular, the health and safety regulations (see paragraphs 23 and 29-30 above); in other words, the regulations of the respondent State place greater emphasis on the rights of others, equal treatment for patients and the proper functioning of the service than on the manifestation of religious beliefs, and the Court takes note of this."

Private and family life

Example 1
Refusal to grant legal recognition in France to parent-child relationships that had been legally established in the United States between children born as a result of surrogacy arrangement and the couples who had had recourse to such arrangements.

Mennesson v. France, 2015

The applicant are twins born in the US from a surrogate mother, in whose uterus the sperm of Mr Mennesson and Mr Labassee (the French parents), were implanted. French authorities, suspecting that the cases involved surrogacy arrangements, brought proceedings against the couple with a view to having the entry of the birth certificates into the municipal registry annulled.

The Court of Appeal, invested of the matter by the Court of Cassation, ruled on the merits as follows: *"... The birth certificates were drawn up on the basis of the Supreme Court of California's judgment of 14 July 2000 which declared [the first applicant] the genetic father and [the second applicant] the legal mother of any child to which [the surrogate mother] gave birth between 15 August and 15 December 2000. The civil-status documents are therefore indissociable from the decision underlying them and the effectiveness of that decision remains conditional on its international lawfulness.*

Recognition, on national territory, of a decision delivered by a court of a State that is not bound to France by any convention is subject to three conditions: the indirect jurisdiction of the foreign court based on the connection between the court and the case; compliance of the merits and procedure with international public policy; and absence of circumvention of the law.

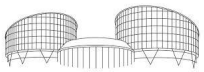
It has been established in the present case that following a surrogacy agreement [the surrogate mother] gave birth to twins who were conceived from the gametes of [the first applicant] and of a third party and were relinquished to [the first and second applicants].

Under Article 16-7 of the Civil Code, whose provisions deriving from Law no. 94-653 of 29 July 1994, and not amended by Law no. 2004-800 of 6 August 2004, are a matter of public policy by virtue of Article 16-9 of the same Code, any agreement concerning reproductive or gestational surrogacy is null and void. Accordingly, the judgment of the Californian Supreme Court, which indirectly validated a surrogacy agreement, contravenes the French concept of international public policy. Consequently, without having to ascertain whether the law has been circumvented, the entries in the French central register of births, marriages and deaths of the particulars of the US birth certificates naming [the second applicant] as the mother of the children must be annulled and the present judgment recorded in the margin of the invalidated birth certificates.

[The applicants] cannot seriously claim that they have not had a fair hearing; nor do they have justifiable grounds for arguing that this measure contravenes provisions laid down in international conventions and domestic law. The concepts to which they refer, in particular the child's best interests, cannot allow them – despite the practical difficulties engendered by the situation – to validate ex post facto a process whose illegality, established first in the case-law and subsequently by the French legislature, is currently enshrined in positive law. Furthermore, non-registration does not have the effect of depriving the two children of their US civil status or calling into question their legal parent-child relationship with [the first and second applicants] recognised under Californian law ..."

Following an appeal of point of law by the applicants, the Court of Cassation rules as follows:
" ... the refusal to register the particulars of a birth certificate drawn up in execution of a foreign court decision, based on the incompatibility of that decision with French international public policy, is justified where that decision contains provisions which conflict with essential principles of French law. According to the current position under domestic law, it is contrary to the principle of inalienability of civil status – a fundamental principle of French law – to give effect, in terms of the legal parent-child relationship, to a surrogacy agreement, which, while it may be lawful in another country, is null and void on public-policy grounds under Articles 16-7 and 16-9 of the Civil Code.
Accordingly, the Court of Appeal correctly held that, in giving effect to an agreement of this nature, the "American" judgment of 14 July 2000 conflicted with the French concept of international public policy, with the

result that registration of the details of the birth certificates in question, which had been drawn up in application of that judgment, should be annulled. This does not deprive the children of the legal parent-child relationship recognised under Californian law and does not prevent them from living with Mr and Mrs Mennesson in France; nor does it infringe the children's right to respect for their private and family life within the meaning of Article 8 of the Convention ..., or the principle that their best interests are paramount as laid down in Article 3 § 1 of the International Convention on the Rights of the Child ..."



The ECtHR observed that the interference had a legal basis and pursued the legitimate aim of "protection of health" and "the protection of the rights and freedoms of others". In connection with **the necessity and proportionality** of the interference in a democratic society it observed that there was no consensus in Europe either on the lawfulness of surrogacy arrangements or on the legal recognition of the relationship between intended parents and children lawfully conceived abroad as a result of such arrangements. This lack of consensus reflected the fact that recourse to surrogacy raised difficult ethical issues. Accordingly, States had to be allowed a wide margin of appreciation in making surrogacy-related decisions. Nevertheless, that margin of appreciation was necessarily narrow when it came to parentage, which involved a key aspect of individuals' identity. The Court also had to ascertain whether a fair balance had been struck between the State's interests and those of the individuals directly concerned, with particular reference to the fundamental principle according to which, whenever children were involved, their best interests must prevail.

(a) The applicants' right to respect for their family life - The lack of recognition in French law of the parent-child relationship between the applicants affected their family life on various levels. The applicants were obliged to produce the American civil-status documents – which had not been entered in the register – accompanied by a sworn translation whenever access to a right or a service required proof of parentage. Furthermore, the applicant children had not obtained French nationality to date, a situation which affected the families' travels and caused concern regarding the children's right of residence in France once they became adults and hence regarding the stability of the family unit. There were also concerns as to the continuation of family life in the event of the death of one of the biological fathers or the separation of one of the couples.

Nevertheless, irrespective of the extent of the potential risks to the applicants' family life, the Court considered that its decision must be based on the actual obstacles they had faced as a result of the lack of recognition in French law of the parent-child relationship between the biological fathers and the children. The applicants had not claimed that the difficulties they referred to had been insurmountable, nor had they demonstrated that their inability to secure recognition in French law of a legal parent-child relationship had prevented them from exercising in France their right to respect for their family life. They had been able to settle in France shortly after the birth of the children, they were able to live there together in circumstances which, by and large, were comparable to those of other families, and there was nothing to suggest that they were at risk of being separated by the authorities because of their situation in the eyes of French law.

In addition, in rejecting the applicants' Convention-based arguments, the Court of Cassation had not omitted to examine their specific situation, as the judges had found – implicitly but necessarily – that the practical difficulties which the applicants were liable to face in their family life in the absence of recognition under French law of the parent-child relationship established between them abroad would not exceed the limits imposed by compliance with Article 8 ECHR.

Hence, given the practical implications for the applicants' family life of the lack of recognition in French law of the parent-child relationship, and the respondent State's margin of appreciation, the situation stemming from the findings of the Court of Cassation in the instant case struck a fair balance between the applicants' interests and those of the State in so far as the applicants' right to respect for their family life was concerned. Therefore **no violation of Article 8 ECHR could be established.**

(b) Right of the applicant children to respect for their private life – The French authorities, although aware that the applicant children had been identified elsewhere as the children of the intended parents, had nevertheless denied them that status in the French legal system. This contradiction undermined their identity within French society. Furthermore, although Article 8 of the Convention did not guarantee a right to obtain a particular nationality, the fact remained that nationality was a component of individual identity. Although their

biological fathers were French, the applicant children faced worrying uncertainty as to the possibility of obtaining French nationality, a situation that was liable to have negative repercussions on the definition of their own identity. Furthermore, the fact that the applicant children were not identified under French law as the children of the intended parents had implications in terms of their inheritance rights.

France might conceivably wish to discourage its nationals from having recourse abroad to a reproductive technique that was prohibited inside the country. However, it followed from the above considerations that the effects of the refusal to recognise a parent-child relationship in French law between children conceived in this way and the intended parents were not confined to the situation of the latter, who alone had chosen the reproductive techniques complained of by the French authorities. The effects also extended to the situation of the children themselves, whose right to respect for their private life – which implied that everyone should be able to establish the essence of his or her identity, including his or her parentage – was significantly affected.

There was therefore a serious issue as to the compatibility of that situation with the children's best interests, which must guide any decision concerning them.

This analysis took on particular significance when, as in the present case, one of the intended parents was also the child's biological father. Given the importance of biological parentage as a component of each individual's identity, it could not be said to be in the child's best interests to deprive him or her of a legal tie of this nature when the biological reality of that tie was established and the child and the parent concerned sought its full recognition. Not only had the tie between the children and their biological fathers not been acknowledged when the request was made for the birth certificates to be entered in the register; in addition, the recognition of that tie by means of a declaration of paternity or adoption, or on the basis of *de facto*enjoyment of status, would fall foul of the prohibition established by the case-law of the Court of Cassation in that regard. Given the implications of this serious restriction in terms of the identity of the applicant children and their right to respect for their private life, the European Court held that, in thus preventing the recognition and establishment in domestic law of the children's relationship with their biological fathers, the respondent State had overstepped its permissible margin of appreciation. In view also of the importance to be attached to the child's best interests in weighing up the interests at stake, there had been a breach of the applicant children's right to respect for their private life. **A violation of Article 8 ECHR, therefore, was found.**

Example 2
Removal of a child born abroad as a result of a surrogacy arrangement entered into by a couple later found to have no biological link with the child.

Paradiso and Campanelli v. Italy [GC], 2017

The applicants, a married couple, after having attempting unsuccessfully to have a child through *in vitro* fertilisation, decided to resort to surrogacy in the Russian Federation After a successful *in vitro* fertilisation in May 2010 – purportedly carried out using the second applicant's sperm – two embryos "belonging to them" were implanted in the womb of a surrogate mother. A child was born in February 2011. The surrogate mother gave her written consent to the child being registered as the applicants' son. In accordance with Russian law, the applicants were registered as the baby's parents. The Russian birth certificate did not contain any reference to the gestational surrogacy. In May 2011, after having requested the registratino of the birth certificate, the applicants were placed under investigation for "misrepresentation of civil status" and violation of the adoption legislation, in that they had brought the child into the country in breach of the law and of their previous authorisation to adopt, which had ruled out the adoption of such a young child. The prosecutor requested that the child be put up for adoption. A few months later, a DNA test showed the absence of any genetic link between the "father" and the child. The child was later adopted by another family.

In its decision, the minor's court, who had jurisdiction of the case observed that *"... In their evidence Mr Campanelli and Mrs Paradiso stated that Mrs Paradiso had travelled to Russia carrying her husband's semen in a special container, and had there entered into an agreement with the company Rosjurconsulting. Under this agreement, Mrs Paradiso had delivered her husband's semen to a pre-determined clinic. One or more eggs from an unknown female donor had been fertilised in vitro with this semen, and then implanted into another woman, whose identity is known and who had subsequently given birth to the child in question on 27 February 2011. In exchange, Mr Campanelli and Mrs Paradiso had paid a large amount of money. Mrs Paradiso stated that the woman who had given birth to the*

child had waived her rights to him and had consented to him being referred to on the birth certificate, drawn up in Russia, as the son of Mr Campanelli and Mrs Paradiso (a copy of the informed consent, given on 27 February 2011 by the woman who gave birth to the child, is on file in these proceedings).

A court-appointed expert witness was then instructed to establish whether the minor child was the biological son of Giovanni Campanelli. In her report the court-appointed expert witness, Ms [L.S.], concluded that the results obtained by means of typing of the DNA of Giovanni Campanelli and the DNA of the minor child [T.C.] rule out Giovanni Campanelli as the child's biological father.

In today's hearing Mr Campanelli and Mrs Paradiso referred to their previous evidence and Mrs Paradiso repeated that she had taken her husband's semen to Russia to be used for the purpose of the intended fertilisation.

However, the conclusions of the court-appointed expert witness have not been challenged.

At the close of the hearing, the Public Prosecutor requested that the application by Mr Campanelli and Mrs Paradiso be refused, that the minor child be placed in the care of third parties and that a temporary guardian be appointed for him. The child's guardian ad litem asked that the child be placed in care under section 2 of the Adoption Act and that a guardian be appointed. Mr Campanelli and Mrs Paradiso requested primarily that the court award them temporary care of the child with a view to subsequent adoption; in the alternative, they requested the suspension of these proceedings pending the criminal classification of the offences, and the suspension of the above-mentioned criminal proceedings against them and of the proceedings before the Campobasso Court of Appeal to challenge the refusal to register the child's birth certificate; again in the alternative, they requested the suspension of these proceedings under section 14 of Law no. 184/1983 for the purpose of a possible repatriation of the minor child to Russia, or, failing that, for the child to be placed with them under section 2 of the cited law.

That being the case, the court finds that the statements by Mr Campanelli and Mrs Paradiso regarding the delivery to Russia of Giovanni Campanelli's genetic material are not supported by any evidence. On the other hand, it has been established that the minor [T.C.] is neither the biological son of Donatina Paradiso, nor, given the evidence of the expert report, of Giovanni Campanelli. At the present time the only certainty is the identity of the woman who gave birth to the baby. The biological parents of the baby, that is, the man and the woman who provided the gametes, remain unknown.

In the light of this evidence, the present case cannot be viewed as a case of so-called gestational surrogacy, which is the case where the surrogate mother who gives birth to the baby has no genetic link to him or her, the fertilisation having taken place with the egg(s) of a third woman. Indeed, in order to be able to talk of gestational or traditional surrogacy (in the latter, the surrogate mother makes her own ovules available) there must be a biological link between the child and at least one of the two intended parents (in this specific case, Mr Campanelli and Mrs Paradiso), a biological link which, as has been seen, is non-existent."

In the court's view, the applicants had thus placed themselves in an unlawful situation:
"It follows that by bringing a baby to Italy, passing him off as their own son, in blatant infringement of the provisions of our legislation (Law no. 184 of 4 May 1983) governing inter-country adoption of children, Mr Campanelli and Mrs Paradiso have acted unlawfully. Besides any criminal offences which may have been committed (infringement of section 72(2) of Law no. 184/1983), which are not within the jurisdiction of this court, it is noted that the agreement entered into between Mrs Paradiso and the company Rosjurconsulting had unlawful elements since, given the terms of the agreement (the delivery of Mr Campanelli's genetic material for the fertilisation of another woman's ovules), it was in breach of the ban on the use of assisted reproductive technology (A.R.T.) of a heterologous type laid down by section 4 of Law no. 40 of 19 February 2004.

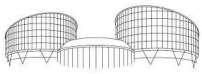
In any event, it is pointed out that despite being in possession of the authorisation for inter-country adoption issued by order of this court on 7 December 2006, Mr Campanelli and Mrs Paradiso, as has been stated, intentionally evaded the provisions of Law no. 184/1983, which provide not only that the intended adoptive parents must apply to an authorised body (section 31) but also for the involvement of the Commission for Inter-country Adoption (section 38), the only body competent to authorise entry and permanent residence of a foreign child in Italy (section 32)."

The court therefore found it necessary, first and foremost, to put an end to this unlawful situation:
"It is therefore necessary, above all, to prevent this unlawful situation from continuing, since to maintain it would be equivalent to ratifying unlawful conduct in open violation of the provisions of our legislation.

Accordingly, it is necessary to remove the minor child from Mr Campanelli and Mrs Paradiso and place him in an appropriate structure with a view to identifying a suitable couple to foster the child as soon as possible. The Social Services Department of the Municipality of Colletorto is therefore instructed to identify an appropriate structure and to place the child in it. The Italian legislation on adoption applies to this child in accordance with section 37a of Law No. 184/1983, there being no doubt that he is in Italy in a state of abandonment, having been deprived of his biological parents and other relatives, and the mother who gave birth to him having renounced him.

Admittedly, it cannot be denied that the child will in all likelihood suffer harm from being separated from Mr Campanelli and Mrs Paradiso. However, given the age of the child and the short time he has spent with them, the court cannot agree with the conclusions of the report by psychologist [Dr I.] (instructed by Mr Campanelli and Mrs Paradiso), finding that it is certain that the child's separation from them would entail devastating consequences. Indeed, according to the literature on this subject, the mere separation from the main care-givers is not a causal agent of a psychopathological state in a child unless other causal factors are present. The trauma caused by the separation from Mr Campanelli and Mrs Paradiso will not be irreparable, given that a search will begin immediately for a couple able to attenuate the consequences of the trauma, through a compensatory process that will encourage a new adaptation.
It is also pointed out that the fact that Mr Campanelli and Mrs Paradiso (and in particular Mrs Paradiso) have put up with the hardships and the difficulties of A.R.T (Mrs Paradiso has also stated that during one of these interventions her life was at risk) and have preferred, despite being in possession of an approval for inter-country adoption, to circumvent Italian legislation on this subject gives rise to the doubt and the fear that the minor child may be an instrument to fulfil a narcissistic desire of Mr Campanelli and Mrs Paradiso or to exorcise an individual or joint problem. In the light of the conduct of Mr Campanelli and Mrs Paradiso during the events under examination, all of this throws a consistent shadow over their possession of genuine affective and educational abilities and of the instinct of human solidarity which must be present in any person wishing to bring the children of others into their lives as their own children.

The separation of the minor child from Mr Campanelli and Mrs Paradiso thus corresponds to the best interests of the child."



After the ECtHR Chamber found a violation of Article 8 (Right to private and family life) ECHR, the case was referred to the Grand Chamber, that reversed it and concluded that no violation of Article 8 ECHR was to be established. The ECtHR observed that the interference had a legal basis and pursued the legitimate aims of prevention of disorder and the protection of the rights and freedoms of others. Under the angle of **necessity of the interference,** the Grand Chamber observed that the national courts had based their decisions on the absence of any genetic ties between the applicants and the child and on the breach of domestic legislation concerning international adoption and on medically assisted reproduction. The measures taken by the authorities had been intended to ensure the immediate and permanent rupture of any contact between the applicants and the child, and the latter's placement in a home and under guardianship.

The facts of the case touched on ethically sensitive issues – adoption, the taking of a child into care, medically assisted reproduction and surrogate motherhood – in which member States enjoyed a wide margin of appreciation. The domestic authorities had relied in particular on two strands of argument: the illegality of the applicants' conduct and the urgency of taking measures in respect of the child, whom they considered to be "in a state of abandonment" within the meaning of section 8 of the Adoption Act.
The reasons advanced by the domestic courts were directly linked to the legitimate aim of preventing disorder, and also that of protecting children – in the present case but also more generally – having regard to the State's prerogative to establish descent through adoption and through the prohibition of certain techniques of medically assisted reproduction.

As the case was to be examined from the angle of the applicants' right to respect for their private life, bearing in mind that what was at stake was their right to personal development through their relationship with the child, the reasons given by the domestic courts, which had concentrated on the situation of the child and the illegality of the applicants' conduct, had been sufficient.

The domestic courts had attached considerable weight to the applicants' failure to comply with the Adoption Act and to the fact that they had recourse abroad to methods of medically assisted reproduction that were prohibited in Italy. In the domestic proceedings, the courts, focused as they were on the imperative need to take urgent measures, had not expanded on the public interests involved; nor had they explicitly addressed the sensitive ethical issues underlying the legal provisions breached by the applicants.

For the domestic courts the primary concern had been to put an end to an illegal situation. The laws which had been contravened by the applicants and the measures which were taken in response to their conduct served to protect very weighty public interests.

In respect of the child's interests, the minors court had had regard to the fact that there was no biological link between the applicants and the child and had held that a suitable couple should be identified as soon as possible to take care of him. Given the child's young age and the short period spent with the applicants, the court had not agreed with the psychologist's report submitted by the applicants, suggesting that the separation would have devastating consequences for the child. It had concluded that the trauma caused by the separation would not be irreparable.

As to the applicants' interest in continuing their relationship with the child, the minors court had noted that there was no evidence in the file to support their claim that they had provided the Russian clinic with the second applicant's genetic material. Having obtained approval for inter-country adoption, they had circumvented the Adoption Act by bringing the child to Italy without the approval of the Commission for Inter-Country Adoption. Having regard to that conduct, the minors court had expressed concern that the child might be an instrument to fulfil a narcissistic desire of the applicants or to exorcise an individual or joint problem. Furthermore, the applicants' conduct had thrown a "consistent shadow on their possession of genuine affective and educational abilities and of the instinct of human solidarity which must be present in any person wishing to bring the children of others into their lives as their own children".

The child was not an applicant in the present case. In addition, he was not a member of the applicants' family within the meaning of Article 8 of the Convention. This did not mean however, that the child's best interests and the way in which these had been addressed by the domestic courts were of no relevance.

The domestic courts had not been obliged to give priority to the preservation of the relationship between the applicants and the child. Rather, they had had to make a difficult choice between allowing the applicants to continue their relationship with the child, thereby legalising the unlawful situation created by them as a *fait accompli* or taking measures with a view to providing the child with a family in accordance with the legislation on adoption.

The Italian courts had attached little weight to the applicants' interest in continuing to develop their relationship with a child whose parents they wished to be. They had not explicitly addressed the impact which the immediate and irreversible separation from the child would have on their private life. However, this had to be seen against the background of the illegality of the applicants' conduct and the fact that their relationship with the child had been precarious from the very moment that they had decided to take up residence with him in Italy. The relationship had become even more tenuous once it had turned out, as a result of the DNA test, that there was no biological link between the second applicant and the child.

The proceedings had been of an urgent nature. Any measure prolonging the child's stay with the applicants, such as placing him in their temporary care, would have carried the risk that the mere passage of time would have determined the outcome of the case.

The Court did not underestimate the impact which the immediate and irreversible separation from the child must have had on the applicants' private life. While the Convention did not recognise a right to become a parent, the Court could not ignore the emotional hardship suffered by those whose desire to become parents had not

been or could not be fulfilled. However, the public interests at stake weighed heavily in the balance, while comparatively less weight was to be attached to the applicants' interest in their personal development by continuing their relationship with the child. Agreeing to let the child stay with the applicants, possibly with a view to their becoming his adoptive parents, would have been tantamount to legalising the situation created by them in breach of important rules of Italian law. The Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, had struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them in the present case.

Education

Example 1
Refusal by academy of music to enrol blind person despite her having passed competitive entrance examination. Prohibition of discrimination.

Çam v. Turkey, 2016

The applicant, who was blind, passed the entrance examination for a music academy after having successfully taken the practical tests for mastery of the Turkish lute. According to a report drawn up by a medical board and transmitted to the music academy, she could attend lessons in the sections of the academy where eyesight was not required. At the request of the director of the music academy, the report was amended to mention the fact that the applicant "could not receive education or training". The academy rejected the applicant's request for enrolment. Her appeal against that decision was dismissed by the domestic courts. The applicant submitted to the European Court that the rejection of her request for enrolment in the music academy had been discriminatory because it had been based on her blindness.

In rejecting the appeal, the Administrative Court considered that:
"... The principles governing entrance competitions and enrolments at the Turkish National Music Academy attached to Istanbul University were adopted by the University Senate ... at the request of the section assembly, after having been debated in the Music Academy assembly and deemed lawful by the University's Educational Board. ... Those principles include the condition that applicants who have passed the competition for enrolment in the Music Academy should not suffer from any physical disability impeding education in the section [to which they have been admitted]. Furthermore, that condition is mentioned on the form distributed to applicants listing the documents required for final enrolment. The submission of a report drawn up by a fully equipped hospital and stating 'is capable of studying at the Music Academy' is mandatory.
It transpired from the assessment of the application that [the applicant] passed the entrance examination and secured the right to be enrolled. However, whereas the report prepared by Büyükçekmece Public Hospital had concluded that a report should be requested from a higher medical board, she requested a report from an equivalent medical board, namely Bakırköy Research and Training Hospital. It transpires from the defence of the respondent administration that in the 1970s, when the Music Academy was set up, it had enrolled a number of blind students on a trial basis, but, in the absence of teaching staff conversant with the braille alphabet and having regard to the various difficulties encountered, that experiment was discontinued. No further blind students were admitted. It has been established that the administration wrote to the Chief Medical Officer of Bakırköy Hospital requesting information on the interpretation of the medical report which it had issued and that the conclusions of that report had subsequently been amended. The respondent administration's decision to refuse to enrol the applicant was not unlawful as she had been unable to provide a report drawn up by a fully equipped public hospital and stating that she was capable of studying at the Music Academy. The applicant's allegations to the contrary are ill-founded ..."

The Council of State dismissed the subsequent appeal on points of law having found that the impugned had not been unlawful and had complied with the procedural rules. However, in his opinion on the appeal, the State Prosecutor with the Council of State, also stated that educational establishments were required to take into account persons who required specialist teaching and to adopt the necessary measures to guarantee their education. In the circumstances of the present case, he considered that the decision not to enrol the applicant – who had passed the entrance examination for the Music Academy and met all the legal conditions – flouted the relevant constitutional and legislative provisions and should therefore be set aside.

In finding a **violation of Article 14 (Prohibition of discrimination) in conjunction with Article 2 of Protocol No. 1 (Right to education) ECHR** the ECtHR observed that various legislative provisions in force at the material time enshrined the right of children with disabilities to education without discrimination. Therefore, the origin of the applicant's exclusion from education in the music academy lay not in the legislation but in the academy's rules, which required all applicants for enrolment to provide a medical certificate of physical ability. The Court did not overlook the effects of such a requirement on persons like the applicant with a physical disability. Noting the ease with which the music academy had secured a revision of the medical report provided by the applicant,

there could be no doubt that her blindness had been the sole reason for refusing to enrol her. At any event the applicant would have been unable to meet the physical ability requirement, as the definition of the latter had been left to the academy's discretion. Although the domestic authorities **undeniably enjoyed a margin of discretion** in defining the skills required of applicants to music academies, that argument did not apply to the present case. By passing the entrance examination before requesting enrolment, the applicant had demonstrated that she was fully qualified for such enrolment.

In the educational sphere, **reasonable accommodation** could take a variety of forms, whether physical, non-physical, educational or organisational, or in terms of the architectural accessibility of schools and colleges, teacher training, curricular adaptation or the provision of appropriate amenities. However it was not the Court's task to define the manner and means of meeting the educational needs of children with disabilities, because the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries were in principle better placed than an international court to evaluate local needs and conditions in this area. Nevertheless, the Court considered it important for States to take special care in making their choices in this field because of the impact such choices have on children with disabilities, whose particular vulnerability cannot be overlooked. The Court consequently held that **discrimination based on disability extended to any refusal to provide reasonable accommodation.** In this case the ECtHR considered that competent national authorities made no effort to identify the applicant's needs and failed to explain how or why her blindness could impede her access to musical education. Nor did they attempt to consider new amenities to meet the specific educational needs arising from the applicant's blindness. The music academy had never made any attempt since 1976 to adjust its educational approach in order to make it accessible to blind students. Therefore the applicant had been denied, without objective and reasonable justification, the benefit of education in the music academy solely on account of her visual disability.

Right to property

Example 1
Failure to give reasons for refusing to grant a broadcasting licence and lack of judicial review of that decision. Procedural rights

Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria, 2007

In 2000 the applicant company was refused by the State Telecommunications Commission (STC) a broadcasting licence on the basis of a decision by the National Radio and Television Committee (NRTC) which found that the proposed radio station failed to meet fully its requirements, as listed in "Programme criteria for the licensing of regional over-the-air radio operators" and published in its Bullettin. The applicants unsuccessfully sought judicial review of this decision before the Supreme Administrative Court which held that the **NRTC's discretion was not open to judicial scrutiny.**

The applicant lodged an application for judicial review of the STC's decision with the Supreme Administrative Court. It submitted that, since it was not clear whether the NRTC's decision was subject to direct review, the court should first examine its lawfulness before ruling on the lawfulness of the STC's decision. The fact that no reasons had been given on how, in the NRTC's view, the documents provided by the applicant failed to meet the criteria, was in breach of the rules of procedure and the requirement that administrative decisions be reasoned. The decisions had also been in breach of the substantive law and did not correspond to the latter's object and purpose. In a supplementary memorial Glas Nadezhda EOOD made detailed submissions in respect of each of its alleged failures to comply with the relevant NRTC criteria.

A three-member panel of the Supreme Administrative Court dismissed the application. It held that the NRTC's decision was subject to review in separate proceedings. However, the applicant had not sought such review, **whereas indirect review of that decision in proceedings against the STC's decision was impossible.** The court went on to say that the STC's decision concerned the allocation of the radio spectrum, whereas the NRTC's decision related to the broadcasting content. It was therefore impossible to grant a broadcasting licence without a prior finding by the NRTC that it would be used for broadcasting quality programmes. In issuing its decision, the STC was therefore bound by the NRTC's decision and the latter's refusal had effectively precluded the former from granting the requested licence.

In finding a violation of Article 10 (Freedom of expression) ECHR, the ECtHR observed that the interference with the applicants' rights had stemmed from the NTRC's decision. The NRTC had not held any form of public hearing and its deliberations had been kept secret, despite a court order obliging it to provide the applicants with a copy of its minutes. Nor had it given reasons explaining why it considered that the applicant company had failed to meet its requirements. This lack of reasons had not been made good in the ensuing **judicial review proceedings, because the Supreme Administrative Court had held that the NTRC's discretion was not reviewable.** This, coupled with the vagueness of some of the NRTC's criteria, had denied the applicants legal protection against arbitrary interference with their freedom of expression. In this connection, the guidelines adopted by the Committee of Ministers of the Council of Europe in the broadcasting regulation domain called for open and transparent application of the regulations governing the licensing procedure and specifically recommended that all decisions taken by the regulatory authorities be duly reasoned and open to review by the competent jurisdictions. Consequently, the interference with the applicants' freedom of expression had not been lawful.

Example 2
No distinction made in favour of certain categories of vulnerable social housing tenants (carer of a person with disability and victim of domestic/gender-based violence) in the application of amended housing benefit scheme.

J.D. and A v. the United Kingdom, 2019

The two applicants were tenants of social housing. Following a change to a statutory scheme, payments of housing benefit – to which the two applicants had previously been entitled in order to subsidise their rental costs – were reduced, as the amended scheme categorised them both as having an extra bedroom. Most of the shortfall between their rent and the reduced rate of housing benefit was replaced by payments under a discretionary housing benefit scheme, for which they had to apply. They argued that these changes put them in a more precarious position than others affected by the reduction because of their personal circumstances – the first applicant cared for her disabled child full time and the second had been included in a "sanctuary scheme" designed to protect those who had experienced and remained at risk of serious domestic violence.

First applicant

In deciding the first applicant's complaint, the first instance court considered that the relevant Regulations did discriminate against those who had a need to occupy accommodation with a greater number of bedrooms than they were entitled to because of their own **disability** or that of a family or household member. However, they considered that there was no "precise class of persons" who could be identified as affected by the measure, by reason of their disability. Moreover, such discrimination would only breach Article 14 taken together with Article 8 and/or Article 1 of Protocol No. 1 ECHR, if it were "manifestly without reasonable foundation", and that test was not satisfied in the case. This was confirmed by the Court of Appeal that considered that the differential treatment was justified for three reasons:

A) because the applicant did not form a very limited class, and to include an imprecise class to whom the Regulations would not apply would introduce more complexity into the assessment and be administratively intensive and costly;

B) discretionary payments were suitable to deal with disability-related needs as they can be imposed for shorter periods and demanded more rigorous financial discipline from local authorities;

C) The Secretary of State was entitled to take the view that there were certain groups of persons whose needs for assistance with payment of their rent are better dealt with by discretionary payments rather than Housing Benefits.

Second applicant

The applicant has been living in a 3 bedroom house for more than 25 years. The apartment in the social rented sector. She lives there with her son, who was conceived as a result of a rape by her then partner. Following domestic violence, she was referred by the police to the "Sanctuary Scheme". As provided by the rules of her placement in the scheme, the applicant's home was adapted to include the modification of the attic to render it a "panic room" where A and her son can retreat in the event of an attempted attack by her ex partner. brought a claim for judicial review on the basis of **gender discrimination.**

She lost her case in first instance on the basis of a judgment whose core reasoning was the following:

"A Sanctuary Scheme provides for the adaption of a property to make it secure. In particular there may be a secured room or space. The safe room provides a place to which the person can retreat if violence occurs or they are in fear of attack whilst they call the police and wait for assistance. The address is 'tagged' on police computer systems to ensure a quick response to a 999 call or the activation of a panic button. Specialist, tailored support is also provided, and A has (what is termed) a "complex package of multi-agency support".

These Schemes have been successfully established across the country since 2006. Even a brief explanation of their aims and scope are sufficient to demonstrate what a good idea they are. One of the obvious benefits is that victims of domestic violence and the like can remain in their own homes (if they want to) rather than being forced out by the fear of violence. Leaving their home as a result of domestic violence can have serious consequences for the stability of their lives. Government statutory homelessness statistics show that domestic violence is consistently reported as the main reason for the loss of a last settled home for 12-13% of homelessness acceptances in England; see the witness statement of [P.N.] of Women's Aid at [C4]. [the applicant's representative] submitted that Sanctuary Schemes are a means of homelessness prevention. Whilst the work costs money, it avoids the expense and upheaval of re-housing and (as A's case well illustrates) of losing the support network of friends and neighbours that takes years to build up and which is so important for the continued safety and general wellbeing of people in A's position. It is these people who help provide her with the day to day friendship and sense of community that she needs. […]

None of that is particularly controversial. However, there is one further piece of evidence provided by the replies to these requests which was the subject of some argument. Local authorities were asked for the number of households in Sanctuary Schemes affected by the under-occupancy provisions. The answer was 120. The average gap in funding was £16.70 per week (above the average figure). Of that group of 120, the number receiving DHPs was 24 (or 20%). The Claimant relies upon that statistic to show that DHPs are not being provided to 80% of households in Sanctuary Schemes which are affected by these regulations and who should be receiving DHPs. The Defendant says that it proves nothing of the sort. [...] I observed during the course of argument that I would need to know more about the 80% before I could draw any conclusions from these figures. That remains my view. The statistic shows that DHPs are being paid to people in Sanctuary Schemes. Indeed that is A's experience. What we do not know is why they are not being paid. It may be that it is because applications are being refused. Or it may be because claimants are bridging the gap in other ways."

The applicant appealed to the Court of Appeal who that the discrimination against the second applicant was not justified, and was unlawful. The primary question before the court was therefore whether that discrimination had been justified. The court set out the situation of the second applicant:

"A has lived in a three bedroom house rented from the local council since 1989. In 1993-4 she had a brief, casual relationship with a man, X, who was subsequently convicted of attempted murder; he has been exceptionally violent to her. Whilst in prison he started to harass her and in 2002 he sought her out. A child was conceived as a result of his rape of her and was born in 2003. The child lives with her. The courts have refused contact between the son and X.
In 2012, X contacted A again and made threats of violence to her. The police and other agencies took the threats seriously and under one of the schemes which are known as the "Sanctuary Schemes" her property was adapted. She is protected under that scheme with the support of the police. In consequence of the violence of X and the continued threats from him, she suffers from PTSD and has suicidal ideation.
Sanctuary Schemes, which have been operating since 2006, provide for the adaptation of a house or flat to make it secure and for on-going security monitoring to enable people who have been subjected to violence, including what is often referred to a "domestic violence", to remain in their own home. There was powerful evidence before the judge from [P.N.], the Chief Executive of Women's Aid, about the benefits and importance of Sanctuary Schemes."

In its conclusions under Article 14, the Court of Appeal commented:

"A and those in a similar position to A, who have suffered from serious violence, require the kind of protection offered by the Sanctuary Schemes in order to mitigate the serious effects of such violence and the continued threats of such violence. It cannot seriously be disputed that A and those in a similar position, who are within the Sanctuary Schemes and in need of an adapted "safe" room, are few in number and capable of easy recognition. There would be little prospect of abuse by including them within the defined categories in Regulation B13 and little need for monitoring. Moreover, with careful drafting, Regulation B13 could be amended to identify them as a discernible and certain class. […]
In these circumstances, whilst we saw great force in the Secretary of State's arguments, which we subjected to serious scrutiny, we feel constrained not to accept them. We acknowledge in particular that DHPs are discretionary, but that that discretion has to be exercised lawfully and in accordance with the guidance issued by the Secretary of State. If they were to be withheld inappropriately, the decision would be subject to review. We acknowledge that the evidence shows that the DHPs would cover the full deficit in Housing Benefit. We acknowledge that, even though the fund for DHPs is capped and may in theory be insufficient, there is no clear evidence that it will be; on the contrary, so far it has been sufficient. Thus, the evidence is that A has received what she would have received had those in her position been brought within a defined class in Regulation B13; she has not been disadvantaged. But that was the position in Burnip, and the same justification was not accepted.[…]
In these circumstances, we have concluded that the appeal in A must be allowed on the ground that the Secretary of State has failed to show that his reasons amount to an objective and reasonable justification for the admitted discrimination in Regulation B13."

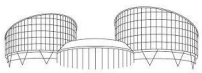
Supreme Court proceedings
The proceedings were joined in front of the Supreme Court that dismissed the claims. It did so by observing that:
"The fundamental reason for applying the manifestly without reasonable foundation test in cases about

inequality in welfare systems was given by the Grand Chamber [of the European Court of Human Rights] in Stec (para 52). Choices about welfare systems involve policy decisions on economic and social matters which are pre-eminently matters for national authorities. […] There was certainly a reasonable foundation for the Secretary of State's decision not to create a blanket exception for anyone suffering from a disability within the meaning of the Equality Act (which covers anyone who has a physical or mental impairment that has a more than minimal long term effect on the ability to do normal daily activities) and to regard a DHP scheme as more appropriate than an exhaustive set of bright line rules to cover every contingency. However, that is not the end of the matter, for there are some people who suffer from disabilities such that they have a transparent medical need for an additional bedroom..."

In examining the case of the **first applicant**, the conclusion was as follows:
"*JD lives with [her] adult daughter, AD, who is severely disabled, in a specially constructed three-bedroom property. They have no objective need for that number of bedrooms. Because the property has been specially designed to meet [ADs] complex needs, there may be strong reasons for JD to receive state benefits to cover the full rent, but again it is not unreasonable for that to be considered under the DHP scheme."*

In respect of the **second applicant**, the court considered that whilst A had a strong case for staying where she needed to be, she had no need for a three-bedroom property. In particular it was observed that:
"Notwithstanding my considerable sympathy for A and other women in her predicament, I would allow the Secretary of State's appeal in A's case. I add that for as long as A. and others in a similar situation are in need of the protection of Sanctuary Scheme housing, they must of course receive it; but that does not require the court to hold that A has a valid claim against the Secretary of State for unlawful sex discrimination."
In addition:
While I agree that there would have been no insuperable practical difficulty in drafting an exemption from the size criteria for victims of gender violence who are in a sanctuary scheme and who need for that reason to stay where they are, deciding whether they really needed to stay in that particular property would at least in some cases require some form of evaluation. I leave aside the question debated in the evidence about whether some people in a sanctuary scheme might safely be able to make use of a spare room by taking in someone else such as a family member. Likewise I do not suppose that there would be insuperable practical difficulties in drafting exemptions to meet other categories of people who may justifiably claim to have a need to remain where they are for reasons unconnected with the size of the accommodation, but this would again require an evaluative process."

The issue of positive obligation of the State to provide effective protection to victims of gender-based violence was not examined as this would not mandate the means by which such protection is provided.



In examining the issue from the perspective of Article 14 (Prohibition of discrimination) ECHR in relation to Article 1 Protocolo no. 1 ECHR, the ECtHR observed that the changes made had applied to all beneficiaries under the scheme without any distinction by reference to their characteristics such as disability or gender. The applicants had been treated in the same way as other recipients of housing benefit in that their entitlements had been reduced on the same grounds and according to the same criteria as those of other recipients. Thus, the issue arising was one of alleged indirect discrimination. The question, therefore, was **whether there had been a discriminatory failure by the authorities to make a distinction in the applicants' favour** on the basis that their relevant circumstances were significantly different from those of other recipients of housing benefit who had been adversely affected by the contested policy.

It had been an anticipated consequence of the reduction of housing benefit that all benefit recipients who had experienced such a reduction could be at risk of losing their homes. Indeed, the Government had argued that that precarity had been the intention of the scheme: to incentivise families to move. The applicants were in a significantly different situation and had been particularly prejudiced by the policy because they had a particular need to be able to remain in their specifically adapted homes for reasons directly related to their status.

Having established that the applicants – who had been treated in the same way as other recipients of the housing benefit even though their circumstances were significantly different – were particularly prejudiced by the

impugned measure, the Court had to ask whether the failure to take account of that difference was discriminatory. In the circumstances of the applicants' cases – where the alleged discrimination was on the basis of disability and gender and had not resulted from a transitional measure carried out in good faith in order to correct an inequality – very weighty reasons would be required to justify the impugned measure in respect of the applicants.

The first applicant – Whilst it had been acknowledged that any move would be extremely disruptive and highly undesirable for the first applicant, it would not be in fundamental opposition to the recognised needs of disabled persons in specially adapted accommodation, but without a medical need for an "extra" bedroom, to move into smaller, appropriately adapted accommodation. The discretionary housing payments scheme had a number of significant disadvantages including, *inter alia*, that the awards of those payments were purely discretionary in nature and their duration uncertain. The first applicant had in fact been awarded the payment for several years following the changes to the housing benefit legislation. Whilst the discretionary housing payments scheme could not be characterised as ensuring the same level of certainty and stability as the previous, unreduced housing benefit, its provision with attendant safeguards had amounted to a sufficiently weighty reason to satisfy the Court that the means employed to implement the measure had a reasonable relationship of proportionality to its legitimate aim. Accordingly, the difference in treatment identified in the case of the first applicant had been justified and no violation could be established.

The second applicant – In this case the legitimate aim of the scheme – to incentivise those with "extra" bedrooms to leave their homes for smaller ones – was in conflict with the aim of sanctuary schemes, which was to enable those at serious risk of domestic violence to remain in their own homes safely, should they wish to do so. Given those two legitimate but conflicting aims, the Court considered that the impact of treating the second applicant – or others housed in sanctuary schemes – in the same way as any other housing benefit recipient affected by the impugned measure was disproportionate in the sense of not corresponding to the legitimate aim of the measure. No weighty reasons had been given to justify the prioritisation of the aim of the scheme over that of enabling victims of domestic violence who had benefited from protection in sanctuary schemes to remain in their own homes safely. In that context, the provision of discretionary housing payments could not render proportionate the relationship between the means employed and the aim sought to be realised where it formed part of the scheme aimed at incentivising residents to *leave* their homes, as demonstrated by its identified disadvantages. **Accordingly, the imposition of the statutory change on that small and easily identifiable group had not been justified and was discriminatory.**

Resources

Where can I find the ECtHR's case-law?

Judgments of the Strasbourg Court are readily available in English and French. The Court maintains an excellent database (known as HUDOC: https://hudoc.echr.coe.int/). HUDOC provides access to the case-law of the Court (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), the European Commission of Human Rights (decisions and reports) and the Committee of Ministers (resolutions).

On the website of the ECtHR there are two tutorials on how to use HUDOC. The database allows for both a simple and advanced search of the Court's case-law. There are also a number of manuals and a compendium of Frequently Asked Questions. For the time being, they are only in English.

How do I search HUDOC for a particular issue?

The legal issues dealt with in each case are summarised in a list of keywords, chosen from a thesaurus of terms taken (in most cases) directly from the text of the Convention and the Protocols thereto. Searching with these keywords will enable you to find a group of documents with similar legal content. A list of keywords is available via the Keywords tab on the HUDOC search portal.

How do I search practice of administrative courts in Europe?

ACA-Europe is a European association composed of the Court of Justice of the European Union as well as the Councils of State and the Supreme administrative jurisdictions of each of the members of the European Union. The supreme administrative jurisdictions of Albania, Montenegro, Serbia and Türkiye have an observer status, while those of Norway, Switzerland and the United Kingdom are invited to participate in the activities of the Association as guests. Thus, ACA-Europe is a unique network of Supreme Administrative Jurisdictions, that extends across 34 European states.

How to recognize the importance of an ECtHR's judgment?

The ECtHR classifies judgments according to their importance and helpfully categorizes its case-law within the database as having one of three levels of importance.
Here is the key:

1 = High importance. Judgments which the Court considers make a significant contribution to the development, clarification or modification of its case-law, either generally or in relation to a particular State.
2 = Medium importance. Judgments which do not make a significant contribution to the case-law but nevertheless do not merely apply existing case-law.
3 = Low importance. Judgments with little legal interest— those applying existing case-law, friendly settlements and striking out judgments (unless these have any particular point of interest).

In which languages is the case-law available?

Judgments, decisions and other texts are available in HUDOC in one or both of the Court's official languages (English and French).

Translations into non-official languages have also been added to HUDOC. Unless otherwise indicated, translations into non-official languages are not produced by the Registry of the Court and the Registry does not check their accuracy or linguistic quality. These translations are published in HUDOC for information purposes only. Multiple translations into the same language of individual judgments or decisions may
appear.

What would be the best way to search the Court's case-law?

If you already know the case:

- HUDOC database, using Case Title or Application Number

If you are looking for cases by Article, keyword or theme

- HUDOC database
- Case-law Information Note, its annual Index and all legal summaries uploaded in the HUDOC database
- Case-law guides, based on specific Articles
- Case-law research reports
- European law handbooks
- Factsheets

If you want to know the most important cases examined each month

- Case-law Information Note

If you want to know the most important cases delivered for each year

- Selection of key cases
- Overview of the Court's case-law
- Annual Index of the Case-law Information Notes

The above tools, available mainly in English, allow you to read summaries of the case-law to decide whether the case you are looking at is relevant for your decision.

All these materials are accessible from the newly developed ECHR Knowledge Sharing platform.

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Ivana Roagna is a practising criminal defence attorney/immigration lawyer and a Human Rights/Rule of Law Expert from Italy, with more than 25 years of professional experience. She worked at the European Court of Human Rights and served as officer for the Council of Europe (CoE) in Strasbourg and in the Balkans, and for the Organization for Security and Cooperation in Europe (OSCE) Mission to Bosnia Herzegovina. As an independent consultant, Ivana has advised the CoE, the International Organization for Migration (IOM), the OSCE Office for Democratic Institutions and Human Rights (ODHIR), the United Nations Interregional Crime and Justice Research Institute (UNICRI), the United Nations Office on Drugs and Crime (UNODC) and the Embassy of Italy to Afghanistan on a range of human-rights and rule of law related issues such as independence of the judiciary, trafficking in persons, witness protection and International Criminal Law. She also produced expert's opinions and legislative expertise related to human rights legislation in the Balkans, the Caucasus and South-East Europe. Ivana also regularly works for the European Commission (DG Justice). An expert on the European Convention on Human Rights (ECHR) and the European Social Charter (ESC), Ivana has provided extensive human rights training for lawyers, judges, prosecutors, law enforcement professionals and NGO activists in more than 20 countries and has been actively engaged in on-line education, contributing to a variety of courses currently available on the CoE's HELP platform. Currently Senior Training Specialist at UNICRI, she has developed training curricula and trained in Human Rights Law and European Standards professionals coming from all over the world, as well as members of UN and EU peacekeeping operations.

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