



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

FOURTH SECTION

**CASE OF TCHANKOTADZE v. GEORGIA**

*(Application no. 15256/05)*

JUDGMENT

STRASBOURG

21 June 2016

**FINAL**

**12/09/2016**

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Tchankotadze v. Georgia,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

András Sajó, *President*,

Vincent A. De Gaetano,

Boštjan M. Zupančič,

Nona Tsotsoria,

Paulo Pinto de Albuquerque,

Egidijus Kūris,

Gabriele Kucsko-Stadlmayer, *judges*,

and Marialena Tsirli, *Section Registrar*,

Having deliberated in private on 17 May 2016,

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

**PROCEDURE**

1. The case originated in an application (no. 15256/05) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Georgian national, Mr Zurab Tchankotadze (“the applicant”), on 12 March 2005.

2. The applicant was represented by Mr G. Svanidze (“the first representative”) and Mr A. Baramidze (“the second representative”), lawyers practising in Tbilisi. The Georgian Government (“the Government”) were represented by their Agent, Mr L. Meskhoradze, of the Ministry of Justice.

3. The applicant alleged, in particular, that a period of his pre-trial detention had been unlawful and that the criminal proceedings against him had been unfair, in breach of Article 5 § 1 and Article 6 § 1 of the Convention respectively. He also complained that the initiation of the criminal proceedings against him and his pre-trial detention had been prompted by improper ulterior motives, in breach of Article 18 of the Convention.

4. On 16 September 2008 the application was communicated to the Government.

5. The applicants and the Government each filed written observations on the admissibility and merits of the application.

6. On 1 November 2012, after the parties had filed with the Court all their submissions on the admissibility and merits of the case and the application of Article 41 of the Convention, the applicant’s second representative, Mr A. Baramidze, informed the Court that he could no

longer represent his client on account of his recent appointment as Deputy Minister Justice of Georgia.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1952 and lives in Tbilisi.

8. The applicant was chairperson of the Civil Aviation Agency of Georgia (“the CAA”) between 12 March 2002 and 13 March 2004, when he resigned. The CAA has legal personality under public law.

#### **A. Background of the case – the Constitutional Court judgment of 10 January 2003**

9. By a judgment dated 10 January 2003, delivered in the case of *Airzena Georgian Airlines Ltd. v. Parliament and the Ministry for Transport and Communications*, the Constitutional Court declared that it was unconstitutional to use the legal term “annual regulation fee for transport activities” (*რეგულირების საფასური*), which appeared in various relevant legal acts – the Act of 20 July 2001 on the Rules of State Management and Regulation of Transport and Communications (“the Regulation Act”), and the Orders of 28 December 2001, nos. 109 and 110, of the Minister for Transport and Communications (see paragraphs 59-80 below).

10. The Constitutional Court considered that the aforementioned “annual regulation fee for transport activities”, which was a compulsory payment provided for in section 9(5) of the Regulation Act, was strictly speaking neither a tax nor a levy. However, Article 94 of the Constitution only recognised the latter two kinds of compulsory payment to the State. Furthermore, unlike taxes and levies, the regulation fee was not paid into the State’s coffers or to a local authority, but directly to the CAA. The Constitutional Court considered that in those circumstances the fee amounted to a special form of tax, which was a compulsory payment and which had the features of both a traditional levy (payable in exchange for a service or the granting of a right) and of a tax (payable on the annual income of the body concerned).

11. The defendant authorities – Parliament and the Ministry for Transport and Communications – argued before the Constitutional Court that there was a need for some kind of compulsory regulation fee for transport activities because it was not possible for the CAA to sign contracts with civil aviation companies. The Constitutional Court dismissed that

argument, pointing out that the regulation of transport activities meant the provision of a service by a public authority in exchange for the payment of a fee for that service. Such relationships could only arise within the framework of a mutual contract, freely entered into by the parties concerned. A fee received by a public authority for a service should therefore take the form of income received for work carried out on a contractual basis, in accordance with section 13(d) of the Public-Law Entities Act.

12. The Constitutional Court further observed that the claimant, a private airline, would obviously never be able to carry out its business without the transport service provided by the CAA. However, regard being had to the principle of the freedom to choose services, even an undeniably necessary service should be the subject of a free agreement between the parties. The Constitutional Court thus concluded that if the matter at issue were settled in that way, then future situations in which the payment of considerable amounts imposed unilaterally by a public authority, in total disregard of the opinions of the companies concerned, would be avoided. The Constitutional Court emphasised that not even constitutional provisions could prevent a public authority in charge of the regulation of civil aviation from signing a contract with a private entity which included conditions and rules for services to be provided under that contract.

13. The Constitutional Court ruled that its judgment of 10 January 2003 would become effective on 1 April 2003.

## **B. Criminal proceedings against the applicant**

14. On 13 February 2004 criminal proceedings were instituted for abuse of power against unnamed officers of the Ministry of Transport and Communications, the CAA and two State-owned civil aviation companies. That decision was taken on the basis of information provided by “an investigative journalism organisation carrying out research into corruption”.

15. On 16 March 2004 a charge of repeated abuse of power was brought against the applicant himself, under Article 332 §§ 1 and 3 (a) of the Criminal Code, by the General Public Prosecutor’s Office (“the GPPO”). He was accused in particular of having entered into civil contracts in his capacity as chairperson of the CAA on 28 March and 13 August 2003 with three civil aviation companies – Sakaeronavigatsia, Tbilisi International Airport and Air-GP-Georgia – which undertook to pay the CAA on a monthly basis a “fee for services rendered in relation to the regulation of activities” (*მომსახურების საფასური*). Accordingly, between April and September 2003 the CAA received 600,000 Georgian laris (GEL) (about 280,000 euros (EUR)). According to the investigator, the applicant’s actions in using the words “fee for services rendered in relation to the regulation of activities” (hereinafter “fee for services”) had concealed what had actually

in fact amounted to the old “annual regulation fee for transport activities”, a legal term and obligation which had become unconstitutional after 1 April 2003, when the Constitutional Court judgment of 10 January 2003 had entered into force (see paragraph 13 above).

16. The applicant was further accused of having issued Order no. 1 of 25 November 2003, and of applying it retroactively, again in breach of the Constitutional Court’s judgment of 10 January 2003 (see paragraph 81 below). The order had allowed the CAA to charge Sakaeronavigatsia and Tbilisi International Airport the sum of GEL 134,609 (about EUR 64,000) between 1 October and 5 December 2003 in respect of the regulation fee.

17. Thus, by having wilfully circumvented the legal effects of the Constitutional Court’s judgment of 10 January 2003, the applicant “had acted unlawfully and had therefore committed an abuse of power”.

18. The applicant was arrested on 16 March 2004. He was charged on 17 March 2004 but pleaded not guilty.

#### *1. Pre-trial proceedings*

19. On 19 March 2004 the Krtsanisi-Mtatsminda District Court of First Instance in Tbilisi (“the Krtsanisi-Mtatsminda Court”), allowing an application by the GPPO, ordered the applicant’s detention for three months, pending investigation and trial.

20. By a final decision of 25 March 2004, the Tbilisi Regional Court dismissed an appeal by the applicant as inadmissible and upheld the detention order of 19 March 2004.

21. On 14 June 2004 the Tbilisi Regional Court, after hearing both parties’ arguments, allowed an application by the GPPO to extend the applicant’s pre-trial detention until 16 September 2004. No appeal lay against that decision, and it was therefore final.

22. On 20 July 2004 an accountancy expert from the crime detection department of the Ministry of the Interior, whose services had been solicited by the GPPO as part of the investigation of the applicant’s case, drew up an audit of the CAA’s regulatory activities (“the audit report of 20 July 2004”). Firstly, the expert listed the acts which constituted the legal basis for the activities of the CAA and which were in force before and after 1 April 2003, when the Constitutional Court’s judgment of 10 January 2003 had entered into force. He then distinguished three periods of activity: (i) the period between 1 January 2002 and 1 April 2003, corresponding to the imposition of “the annual regulation fee for transport activities” by the CAA on the civil aviation companies concerned; (ii) the period between 1 April and 1 October 2003, corresponding to the regulation by the CAA of the activities of the companies in question in accordance with conditions negotiated as part of the contracts it entered into; and (iii) the period between 1 October 2003 and 13 March 2004, when the CAA had collected

regulation fees on the basis of Order no. 1, which had been issued by its chairperson, the applicant, on 25 November 2003.

23. The expert noted that the adoption of the Constitutional Court's judgment of 10 January 2003 had led to "the suppression of the imposition by the CAA, in the form of an order, of the 'annual regulation fee for transport activities' on companies operating within civil aviation and the removal of the compulsory nature of the payment of that fee". However, "the judgment in question had not declared that it was unlawful for the CAA to provide its services to the companies concerned on the basis of negotiated contracts". According to the expert, the judgment indicated, on the contrary, that there was a "need for such contracts and a legal settlement of the issue in this way". The expert assumed that the applicant had taken the latter route, "which had been suggested to him by the Constitutional Court". That had brought him to sign the impugned contracts with Sakaeronavigatsia and Tbilisi International Airport on 28 March 2003, that is to say, three days before the entry into force of the judgment in question. On 13 August 2003 the applicant had signed the same kind of contract with Air-GP-Georgia. In each case, the CAA's remuneration had been calculated on a monthly basis and was referred to as a fee for services provided in the field of regulation. The three contracts had been terminated on 1 October 2003.

24. As regarded Order no. 1, which had been issued by the applicant on 25 November 2003, the expert noted that the order, approved for entry into force by the Ministry of Justice on 27 November 2003, had been able to be applied retrospectively, that is as of 1 October 2003, which was the date of the termination of the three above-mentioned contracts. He said the order showed good conduct in the financial activities relating to the functioning of civil aviation in the country which, by its very nature, had to be a continuous process.

25. After examining the available evidence, the expert concluded that the CAA's charging of the fees for the three above-mentioned periods of activity "was based on the relevant laws and regulatory acts". He established, moreover, that the regulation fee at that time constituted the sole source of revenue for the CAA, a public-law entity not financed by the State. Had it not charged those amounts, the CAA would have been obliged to continue functioning without, though, paying its employees' salaries. The expert reiterated that the regulation fee paid to the CAA by the companies concerned was included in the price for the service that those companies offered to individuals (air travel tickets) or other companies (carriage of goods). Payment of the fee to the CAA did not therefore cause them any financial damage and, even if there had nevertheless been a loss, it would in the end have been passed on to the consumer.

26. Generally, the expert established that the CAA had received, between 1 April 2003 and 13 March 2004, GEL 630,000 (some 310,000 euros (EUR)) in fees for the regulatory services provided under the

three impugned contracts with Tbilisi International Airport, Air-BP-Georgia and Sakaeronavigatsia, and GEL 774,376 (some EUR 380,000) by way of the fee collected on the basis of Order no. 1. In any event, the expert emphasised that the charging of those sums by the CAA to the various private companies had been continuous in time and had been based on valid legal acts (either statutes or other legal instruments). Out of all the above-mentioned amounts received by the CAA between 1 April 2003 and 13 March 2004, the applicant had made a personal profit of GEL 15,618 and 17,090 (some EUR 7,500 and 8,200) by way of, respectively, the salary and business trips allowances he had received over the same period of time. A further GEL 490,473.40 (some EUR 225,000) had been paid to the State Budget in income tax and social security charges, while the remaining funds had been spent on the salaries of other CAA employees and various business trips and management expenses.

27. On 31 August 2004 the preliminary investigation was terminated and a bill of indictment was served on the applicant. According to the bill, between 1 April and 1 October 2003 the CAA had carried out three unlawful activities: (i) firstly, it had received, in breach of the judgment of the Constitutional Court of 10 January 2003, a regulation fee from eight civil aviation companies; (ii) secondly, twenty-two companies had paid the CAA the same regulation fee on the basis of Order no. 1, issued by the applicant; (iii) and, thirdly, the three companies – Sakaeronavigatsia (a government-owned undertaking), Tbilisi International Airport and Air-BP-Georgia – had paid the fee for services to the CAA on the basis of contracts concluded by the applicant. The pecuniary damage thus incurred by the companies concerned amounted to GEL one million, of which GEL 517,341.51 (some EUR 250,000) was caused to Sakaeronavigatsia. The applicant had used the amounts received to pay salaries and expenses for the management and business trips.

28. On 15 September 2004 the applicant challenged the indictment before the investigator of the Chief Prosecutor's Office handling the case, arguing that the evidence that had been gathered did not support the charges. In particular, the investigation authorities had not explained how, within the meaning of Article 332 of the Criminal Code, the acts committed had damaged the "interests of the civil service"; what unlawful "personal profit" he had derived; what unlawful personal profit had been derived by third parties and who those people actually were; which of the rights of the companies concerned had been breached by his action; what legal interests of the State had been disregarded; and in what way that "disregard" had been "substantial" (see Article 332 of the Criminal Code, at paragraph 58 below). He again pointed out that the judgment of the Constitutional Court at issue authorised the CAA to continue to charge the fee for services, provided that the payment was based on negotiated contracts and not imposed, as hitherto. Contrary to the argument put



forward by the investigator, the companies concerned could not be deemed to have incurred any substantial losses simply by having fulfilled contractual obligations which had been freely negotiated with the CAA. Moreover, those companies had never complained of the unlawfulness of the contracts in question. Lastly, the applicant argued that “none of the State’s legal interests” had been disregarded, given that the State could not claim to be a victim of contractual relationships between two entities which were independent of it.

29. On 16 September 2004 the investigator rejected that complaint as ill-founded. He pointed out that the indictment of 31 August 2004 had been based on evidence gathered during the investigation, and that such evidence was sufficient to dispel any doubts that the applicant had committed the offence provided for in Article 332 §§ 1 and 3 (a) of the Criminal Code. In particular, the investigator pointed out that everyone had to comply with the judgment of the Constitutional Court of 10 January 2003, which had the force of law, but which the applicant had failed to do. After 1 April 2003, the date of entry into force of that judgment, the applicant had continued to charge the regulation fee, referring to it as a “fee for services provided in the field of the regulation of activities” in order to conceal the nature of the activity. The Constitutional Court had considered, however, that revenues gained by the CAA in the form of a regulation fee were unconstitutional. The applicant and his employees had derived a personal profit from the amounts at issue in the form of salaries, and management and business trip fees. For example, the applicant had received total salary of GEL 15,618 (some EUR 7,500). According to the investigator, even if most of the companies concerned had declared that they had not incurred any loss from the applicant’s activities, the charging by the CAA of the disguised regulation fee in breach of the judgment of the Constitutional Court had damaged the legal interests of the State. Furthermore, by giving retrospective effect to Order no. 1, registered by the Ministry of Justice on 27 November 2003, the applicant had jeopardised the well-being of the companies concerned.

30. On 18 September 2004 the applicant lodged an appeal against that decision with the Chief Prosecutor. He stated that the investigator had failed properly to assess the circumstances of the case. He reiterated the arguments made in his complaint of 15 September 2004 (see paragraph 28 above).

31. On 18 September 2004 a prosecutor from the Chief Prosecutor’s Office replied to the applicant, stating that his appeal had been rejected because the decision of 16 September 2004 had properly and exhaustively addressed all his claims.

32. On 20 September 2004 the indictment was approved by a deputy chief prosecutor and the case sent for trial before the Vake-Saburtalo District Court of First Instance in Tbilisi (“the Vake-Saburtalo Court”).

33. On 1 February 2005 the applicant applied to the Vake-Saburtalo Court, claiming that he had been unlawfully detained since 16 September 2004. In particular, the period of his pre-trial detention had expired on that date and had not been extended. He asked that he be released immediately.

34. On 16 March 2005 the Vake-Saburtalo Court held a pre-trial conference hearing in the case, ruling to commit the applicant for trial as a defendant (Article 417 §§ 1 and 3 of the CCP). Without replying to the applicant's complaint of 1 February 2005 of the unlawfulness of his pre-trial detention, the court upheld the restraint measure on the basis of the "nature of the charges" and the inability to conduct a comprehensive judicial assessment of his arguments for release at the admissibility stage.

35. On an unspecified date, subsequent to a reform of the judicial system and the associated liquidation of the Vake-Saburtalo District Court, the applicant's case was assigned for trial to the newly created Tbilisi City Court.

*2. Trial conducted by the Tbilisi City Court between 23 March and 3 August 2005*

36. When questioned by the Tbilisi City Court during the trial, the acting director and the chief accountant of Sakaeronavigatsia confirmed that their company had paid the relevant fee to the CAA even after the Constitutional Court's judgment of 10 January 2003, either on the basis of a contract or on the basis of Order no. 1. They did not know at the time that they were exempted from paying the fee by the Constitutional Court's ruling.

37. The managers of Tbilisi International Airport and Air-BP-Georgia, which specialised in fuel distribution, confirmed to the trial court that their companies had paid the amounts at issue pursuant to contracts that they had freely entered into with the CAA. They specified that in exchange for the fee the CAA licensed their companies' activities, and that without such certification it would have been impossible for Tbilisi International Airport to host international flights.

38. When questioned by the trial court, Mr Dj.K., the first deputy chairperson of the CAA, explained that at the material time, a new law, which should have been passed following the judgment of the Constitutional Court of 10 January 2003, had been delayed and that, if the applicant had not decided to enter into contracts with companies whose activities were subject to regulation, the CAA, which received no funding from the State, would have had to cease operations. That would have meant that employees of Georgian airports would no longer have been certified, that no aircraft would have been able to land at those airports and that no country would have allowed aircraft that had taken off from those airports onto its territory. By way of an example, Airzena, the airline behind the request which had resulted in the judgment of the Constitutional Court of

10 January 2003, leased its aircraft in Germany on the condition that the CAA, under an agreement entered into with the German civil aviation authority, assumed responsibility for supervising those aircraft and regulating the corresponding activities. If the CAA were to cease operations, Germany would no longer lease its aircraft to Airzena. It was to prevent any such blockages in the field of civil aviation in Georgia that the applicant had entered into the contracts, in accordance with the Public-Law Entities Act and the judgment of the Constitutional Court at issue.

39. The second deputy chairperson of the CAA told the court that he had personally worked on drafting contracts which were subsequently entered into with the three civil aviation companies. He maintained that those contracts, which had become the only source of funding for the CAA, had become necessary after the Constitutional Court had invalidated the relevant legal provisions by declaring them unconstitutional.

40. The CAA's accountant explained before the trial court that on 1 January 2002 the CAA had been split from the Ministry of Transport, on the recommendation of the World Bank, and that it had become legally fully independent. The exercise of public duties had been delegated to it, including the supervision of flight safety. Since that date, the CAA had not been funded from the State budget, and had therefore been obliged to collect duties from the various private companies working in civil aviation. However, since the relevant legal provisions regulating the collection of "the annual collection fee for transport activities" had been declared invalid by the Constitutional Court, the CAA, pending the passing by Parliament of new legislation on the matter, had been forced to make contracts with civil aviation companies. Subsequently, after the amendment of the Regulation Act on 14 August 2003 (see paragraphs 77-80 below), the chairperson of the CAA, the applicant, had become entitled to issue orders setting the amount of fees payable by the companies.

41. When questioned by the trial court, the representatives of various other private companies working in civil aviation, who were contractors of the CAA, stated that prior to 1 April 2003, they had paid the regulation fee in accordance with the law. Following the judgment of the Constitutional Court of 10 January 2003, they had stopped doing so and had only resumed payments on 1 October 2003, as a result of Order no. 1, issued by the applicant.

42. When questioned by the trial court, the accountancy expert from the Ministry of the Interior who had authored the audit report on the CAA's activities confirmed the conclusions in the report relating to the legality of the CAA's transactions between 1 April 2003 and 13 March 2004.

43. In his submissions before the court, the applicant first reiterated the arguments he had made during the investigation, notably in his complaint of 15 September 2004 (see paragraph 28 above). The applicant then argued that of the amounts which he had been unjustifiably accused of charging

unlawfully, he had paid GEL 490,473 (some EUR 225,000) to the State, while the remainder had been used to fund the CAA's operations (see the aforementioned expert report cited at paragraphs 22-26 above). Consequently, neither he nor anyone else had derived any personal profit from the amounts in question. The applicant argued that the accountancy expert's report confirmed the legality of his actions. He explained that the reason the Constitutional Court had delayed the entry into force of its judgment of 10 January 2003 had been to grant Parliament sufficient time to legislate and fill the gap arising from its judgment. In order not to leave the CAA without funds, which would have meant flight safety might have been compromised, the Constitutional Court had clearly indicated in its judgment that the CAA could enter into contractual relationships with the aviation companies concerned, which would thus be able to negotiate conditions freely.

44. It was for the very same reasons as those espoused by the Constitutional Court in its judgment that the Georgian President had issued Decree no. 364 on 25 July 2003 (see paragraph 82 below). That decree, as well as section 13(d) of the Public-Law Entities Act, gave a direct right to the applicant, as chairperson of the CAA, to collect duties by entering into contractual relations with companies working in civil aviation. Furthermore, the new law, required as a result of the judgment of the Constitutional Court of 10 January 2003, had been passed on 14 August 2003 and had entered into force on 15 September 2003. The applicant had issued Order no. 1 in compliance with that law and had subsequently submitted it to the Ministry of Justice for registration. The Ministry of Justice had registered it on 27 November 2003, approving its retrospective application as of 1 October 2003 under sections 33(4) and 54 of the Law on Normative Legal Acts, on the grounds that all the companies covered by the Order had the necessary legal identification numbers and codes. The applicant pointed out that if it had been unlawful to apply the order at issue retrospectively, the Ministry of Justice would have informed the CAA and instructed it to make the necessary amendments, in accordance with the law. The applicant concluded that the actions he had taken in the exercise of his official duties had not been contrary to the judgment of the Constitutional Court in question, or to any other legal provisions applicable at the material time, and thus could not qualify as abuse of power.

### *3. The applicant's conviction for abuse of power*

45. On 8 August 2005 the Tbilisi City Court found the applicant guilty of two of the three episodes of abuse of power which the GPO had accused him of (see paragraph 27 above), but acquitted him of one. The one he was acquitted of was with respect to the CAA collecting "an annual registration fee for transport activities" from eight private companies working in civil aviation, including Sakaeronavigatsia and Tbilisi International Airport,

between 1 April and 1 October 2003. The court established that the relevant amounts corresponded to debts owed to the CAA by those companies for the period prior to 1 April 2003.

46. As for the other two episodes, the Tbilisi City Court considered that the applicant had unlawfully entered into the contracts of 28 March and 13 August 2003 with Sakaeronavigatsia, Tbilisi International Airport and Air-BP-Georgia, in breach of the Constitutional Court's judgment of 10 January 2003. Thus, between 1 April and 1 October 2003, the CAA had unlawfully received the sums of GEL 425,000 (some EUR 208,000), 180,000 (around EUR 83,000) and 25,000 (some EUR 11,000) respectively, from which the applicant had unlawfully paid his own salary and the salaries of his employees, and had financed the CAA's business trip and management expenses. Furthermore, the applicant was found guilty of unlawfully issuing Order no. 1, to which the applicant had moreover given retrospective effect, which served as the basis for collecting levies between 1 October 2003 and 13 March 2004 from twenty-two companies, amounting to GEL 281,344.23 (some EUR 133,000) which had been spent in the same, unlawful way.

47. The Tbilisi City Court stated that it disagreed with the applicant's argument that the Constitutional Court judgment of 10 January 2003 had given him the right to enter into contracts with the companies concerned and that the CAA would have been unable to continue to operate if those contracts not been entered into. However, the court did not give any reasons to explain its position.

48. As to the audit report prepared by the accountancy expert on the CAA's activities, the Tbilisi City Court restricted itself to noting that the expert in question was from the Ministry of the Interior and that he had confirmed his conclusions when he had been questioned during the trial. The court gave no explanation for why it did not take the expert's statements into consideration.

49. The judgment of 8 August 2005 found the applicant guilty of the crime provided for in Article 332 §§ 1 and 3 (a) of the Criminal Code and sentenced him to five years' imprisonment. He was also banned from holding public office for two years.

50. The applicant appealed, stating that the Tbilisi City Court had not established which of the impugned actions had breached the notion of public service requirements, within the meaning of Article 332 § 1 of the Criminal Code, what exactly the criminal offence had consisted of, what had been the reasons for it, and what its objectives and consequences had been. Furthermore, the Tbilisi City Court had not explained how his actions had damaged the interests of twenty-two companies, when none of those companies had expressed any interest in joining the criminal proceedings as civil parties or had ever initiated any separate civil proceedings against the CAA.

51. When questioned by the Tbilisi Court of Appeal, representatives of fourteen of the companies concerned stated that they had incurred no financial damage as a result of having paid the fees for the services provided by the CAA, either on the basis of the relevant contracts or Order no. 1. Moreover, the cost of the amounts paid had not been borne by the companies, since it had been included in the price of airplane tickets sold to the end consumer, who was airline passengers (see also the accountancy expert's report cited at paragraphs 22-26 above). By a judgment of 30 December 2005 the Tbilisi Court of Appeal acquitted the applicant in respect of the charge relating to the aforementioned fourteen companies. It upheld the judgment of the lower court as to the remaining charges, notably the collection by the CAA of fees for services from the remaining eight companies on the basis of either contracts or Order no. 1. The applicant's prison sentence was amended and set at four years.

52. The applicant appealed on points of law, arguing that his case had been examined superficially and that, amongst other things, the accountancy expert's report of 20 July 2004 (see paragraphs 22-26 above) had not been taken into consideration. The applicant complained that in examining the question of the existence of a loss to the aforementioned eight companies, the Court of Appeal had failed to consider the case from the same point of view concerning the other companies, especially Sakaeronavigatsia, which had allegedly incurred the biggest loss. In fact, according to the applicant, the Court of Appeal had completely failed to consider that part of the case or the accountancy expert's view that Sakaeronavigatsia could not have incurred a loss. The applicant concluded that the reasoning given by the lower court to prove his guilt had been manifestly insufficient and arbitrary.

53. On 14 September 2006 the Supreme Court of Georgia dismissed the appeal on points of law by the applicant, stating that by continuing to charge the fees to the various private companies after 1 April 2003 the applicant had misapplied the judgment of the Constitutional Court of 10 January 2003 and had thus committed an abuse of power, infringing the rights of various legal entities and the general legal interests of the State.

54. After serving his sentence in full, the applicant was released on 14 March 2008.

### **C. Content of video recording produced by the applicant**

55. In December 2003, well before the applicant had been placed under investigation and arrested, and shortly after the Rose Revolution that led to the resignation of President Shevardnadze (see *Georgian Labour Party v. Georgia*, no. 9103/04, §§ 11-13, ECHR 2008), Mr M. Saakashvili, who did not hold any State office at the time but was campaigning as a candidate to be elected president, addressed representatives of Georgian companies in Tbilisi's sports stadium. He stated that the objectives of the abolition of the

old, corrupt and unfair regime had not involved simply replacing one political clan with another. In particular, he promised that nepotism, irrespective of where it came from, whether from representatives of the old or the new regime, would no longer be the rule. Amongst other things, he stated in that regard:

“I heard more news on the television yesterday: it would appear that Zurab Ts ..., the chairman of a committee of the former parliament, took his son and had him appointed deputy chairman of the Civil Aviation Authority! It is now 3.35. I will give [the applicant]: either he gets rid of Ts ..., or [the applicant] himself goes to jail! ... It is said that we are instructing the prosecution authorities to arrest officials of the old regime but that this seems like a breach of their human rights! Yes, I confirm, all those who should be arrested will be jailed. They only began to remember human rights when their own interests were threatened ... Where does the money come from [for a former governor] to hire lawyers to defend himself and ... live in a five-star hotel in Moscow, when one night there costs the same as your pensions several times over...? Is not your money, Georgia’s money, being taken from your pockets? ... “

56. According to the applicant, the events which came after the speech of Mr Saakashvili, who was elected President of Georgia in January 2004, were as follows: the son of Zurab Ts. immediately resigned as deputy chairman of the CAA, the applicant was placed under investigation in March 2004 on the aforementioned charges and the same Zurab Ts. was re-elected to parliament from Mr Saakashvili’s presidential party list during the parliamentary elections of March 2004.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Code of Criminal Procedure, as it stood at the material time

57. The relevant provisions of the Code of Criminal Procedure concerning the preventive measure of pre-trial detention read as follows:

#### Article 159 §§ 1 and 2 “Detention”

- “1. No one may be arrested without a court order or other judicial decision.
2. Courts, prosecutors and investigators are obliged to immediately release any person who is detained unlawfully.”

#### Article 417 §§ 1 and 3 “Committal for trial”

- “1. Where there is a sufficient basis for hearing the case, the judge (court), without prejudging the merits of the case, shall commit the accused for trial...
3. During the admissibility hearing, in addition to deciding whether to commit the accused for trial..., the judge (court) shall decide whether to impose a measure of restraint on the accused.”

**Article 419 “Time-limits for committal decisions”**

“The judge (court) shall decide whether to commit the accused for trial within 14 days or, in complicated cases, within a month of the date of delivery of a final judgment on the last criminal case registered with the same judge (court).”

**B. Criminal Code**

58. At the time the applicant held the post of chairperson of the CAA, Article 332 of the Criminal Code, proscribing the offence of abuse of official authority, read as follows:

**Article 332 § 1 and 3 – “Abuse of official authority”**

“1. Abuse of official authority by an officer or a person of equivalent status, to the detriment of public service requirements and in order to gain any personal profit or privilege or any profit or privilege for another person, and which has substantially affected the rights of a legal or natural person, or the legal interests of society or the State, shall be punishable by a fine or a term of up to three years’ imprisonment, a bar on holding public office or a bar on engaging in professional activities for a period of up to three years.

3. The action referred to in paragraph 1 ... above:

(a) committed on more than one occasion;

... shall be punishable by a term of imprisonment of between three and eight years, accompanied by a bar on holding public office or a bar on engaging in professional activities for a period of up to three years.”

**C. The Law of 29 October 1996 on Normative Legal Acts, as in force at the material time**

59. At the time the applicant held the post of chairperson of the CAA, the relevant parts of sections 33 and 54 of the Law read as follows:

**Section 33(4)**

“The draft of a normative act to be issued by a minister or by a head of a public authority shall be submitted to the Ministry of Justice, which, within a period of two weeks, shall issue an opinion as to the compatibility of the draft with legislative acts and presidential decrees.”

**Section 54**

“1. Any public authority ... that has issued a normative act must forward that act to the Ministry of Justice for registration within a period of ten days of the date of signature thereof by the authorised person.

2. All such normative acts ... must be accompanied ... by the opinion of the Ministry of Justice referred to in sub-section 4 hereof.

3. The Ministry of Justice shall enter the normative act into the State register and allocate it a number within a period of three days of [it] having been forwarded ...



4. Before being entered into the State register as normative acts, the Ministry of Justice must issue an opinion as to whether draft normative acts are compatible with normative acts of a higher legal force. If the opinion is negative, the Ministry of Justice may not enter the act in the State register.

5. Registration of a normative act may be refused where: ...

b) following amendments to the relevant legislation, the legal relationships on which the normative act is based are governed by new rules...”

#### **D. The Act of 28 May 1999 on Public-Law Entities, as it stood at the material time**

60. At the time the applicant was chairperson of the CAA, Section 13(d) of this Law read as follows:

##### **Section 13(d)**

“Public-law entities may be funded by ...

d) income received for work performed on a contractual basis ...”

#### **E. Various legal acts on civil aviation**

61. Domestic law concerning State regulatory activities in the field of civil aviation changed significantly over time. For the purposes of the present case, an overview of the relevant legal provisions can be divided into two periods – *i.* how the relevant legal framework developed between 12 March 2002 and 13 March 2004, when the applicant held the post of chairperson of the civil aviation authority; and *ii.* the changes that occurred in the legal framework after the applicant resigned on 13 March 2004 and up to the present date.

##### *1. As the domestic law on State regulatory activities in the civil aviation stood prior to 13 March 2004*

###### **(a) Order no. 110 of the Minister for Transport of 28 December 2001**

62. By this order, the Minister for Transport approved the Articles of Association of the CAA.

63. Article 1 §§ 1 and 3 of the Articles of Association defined the CAA as a public-law entity, entrusted by the State with the task of regulating, supervising and controlling civil aviation. In performance of that task, the CAA reported to the Minister for Transport.

64. Under Article 2 § 1, the regulation of civil aviation was intended to ensure the safety of flights and to regulate the legal, technical, technological and financial aspects of their operation.

65. Under Article 7, the chairperson of the CAA, who was appointed by the Minister for Transport, ensured that those objectives were achieved by

the CAA, issued orders within the scope of his remit, and so on. Under sub-paragraph (k) of Article 7, the chairperson also performed “other activities for which he is responsible under Georgian law”.

66. Pursuant to Article 8 § 1, the primary source of income of the CAA was “the annual regulation fee for transport activities”, as defined by the State Regulation Act, as well as the sources of funding provided for by section 13 of the Public-Law Entities Act.

67. On 14 July 2003, prompted by the legal effects of the Constitutional Court’s judgment of 10 January 2003, the term “annual registration fee for transport activities” was deleted from Article 8 § 1 (see also paragraphs ... below).

**(b) Order no. 109 of the Minister for Transport of 28 December 2001, valid until 14 July 2003**

68. By this order, the Minister for Transport approved the rules for determining the amount and payment of the “annual regulation fee for transport activities” in the field of civil aviation.

69. Under Article 2, the regulation fee was payable annually and constituted the CAA’s primary sources of revenue. It was directly linked to performance by the CAA of its regulatory functions as defined by the law, and did not represent income from commercial activities.

70. Pursuant to Article 4 § 2, the full annual regulation fee was to be paid by the company concerned for the account of the CAA, which would make use of it in accordance with the law.

71. On 14 July 2003, prompted by the legal effects of the Constitutional Court’s judgment of 10 January 2003, the Minister repealed Order no. 109.

**(c) The Act of 20 June 2001 on the Rules of State Management and the Regulation of Transport and Communication (“the Regulation Act”)**

72. A direct consequence of the Constitutional Court’s judgment of 10 January 2003 was a major revision to the Regulation Act, which took the form of an amendment of 14 August 2003.

73. The following is a summary of how that Amendment affected the CAA.

74. Prior to the Constitutional Court’s judgment of 10 January 2003, Section 1(u) and 9(5) of the Act had provided that “the annual regulation fee for transport activities”, which had constituted one of the CAA’s primary sources of revenue, was to be determined by a normative act of the Minister for Transport and Communications. The fee was linked to performance by the CAA of the regulatory functions entrusted to it by law, it had to be a reasonable amount and non-discriminatory, and did not represent income from commercial activities.

75. The Constitutional Court's judgment of 10 January 2003 declared the above-mentioned sections unconstitutional, with effect from 1 April 2003 (see also paragraphs 9-13 above).

76. Prior to 1 April 2003, section 14 of the Regulation Act read as follows:

**[Former] Section 14(2), (3) and (5)**

“2. The budget sources of a transport authority are:

- a) the annual regulation fee for transport activities;
- b) other income provided for by the Public-Law Entities Act.

3. The annual regulation fee for transport activities shall be paid in full into the account of the relevant authority in accordance with the rules laid down by law. The relevant authority will use such sums in accordance with the law.

5. The budget of the authority concerned, together with the corresponding explanatory report, shall be approved by the Minister for Finance upon the report of the Minister for Transport and Communications.

77. After 1 April 2003, paragraphs 2(a) and 3 of the former section 14 lost their legal effect because they were unconstitutional, whilst the amendment of 14 August 2003 also repealed paragraph 5. Thus, by virtue of the amendment, the revised section 14 read as follows:

**[New] Section 14**

“The budget sources of the authority concerned shall be income received in accordance with the National Independent Regulatory Bodies Act, the Public-Law Entities Act and other relevant normative acts.”

78. Prior to 1 April 2003, section 22(1)(b) read as follows:

**Section 22(1)(b)**

“With regard to transport, the fees for services shall include any charge which is necessary in order to provide the service and which is economically justified, including the annual regulation fee for transport activities ... “

79. The amendment of 14 August 2003 replaced the term “the annual regulation fee for transport activities” in section 22(1)(b), which had been declared unconstitutional on 10 January 2003, by “and any other necessary charge provided for by law”.

80. The Amendment Act of 14 August 2003 also introduced transitional provisions, including the following in section 24(5):

**Section 24(5)**

“Pending adoption of a new legislative act on the matter by Parliament, the rates of the various regulation fees (რეგულირების საფასური) shall be set as determined directly by the transport authority concerned.”

81. Article 1 of Order no. 1, the legal act issued by the chairperson of the CAA on 25 November 2003, indicated that it was based on section 24(5) of the Regulation Act (see also paragraph 16 above). Thus, the Order set the amount and modalities of payment of the regulation fee for transport activities in the field of civil aviation.

**(d) Presidential Decree no. 364 of 25 July 2003**

82. According to its preamble, the decree (ბრძანებულება) was issued by the President of Georgia in accordance with the judgment of the Constitutional Court of 10 January 2003 and section 13 of the Public-Law Entities Act, and within the consequent framework of necessary institutional reforms. Article 1 of the decree read as follows:

**Article 1**

“The public-law entities created pursuant to the [Regulation] Act, such as ..., the CAA, are hereby authorised to fund their respective budgets by charging amounts corresponding to the value of the service provided on the basis of contracts.”

*2. Development of domestic law on civil aviation from 13 March 2004 to present day*

83. On 30 June 2004 a new Chapter VI, relating to the regulation fee, which repealed the above-mentioned transitional section, 24(5) (see paragraph 80 above), was introduced to the Regulation Act. The relevant provisions of that Chapter read as follows:

**Section 23(1)(1) and (1)(2)**

“1. The regulation fee [for civil aviation] constitutes a means of covering the expenses necessarily incurred in the performance of the regulatory functions allocated by law to the CAA. The regulation fee may not exceed 2% of the price of the service provided by the payer or the amount, excluding VAT, received by the payer in respect of its civil aviation activities. The CAA may, by a normative act, set the regulation fee below the maximum amount defined above.

2. The rules for payment of the regulation fee shall be laid down by a normative act of the CAA so as to ensure:

- a) that the CAA is able to perform its tasks ...;
- b) that the expenses incurred by the CAA in providing companies with regulatory services are covered;
- c) that the rights of the parties concerned are safeguarded through the safe and effective performance of transport activities ...”

84. It was on the basis of the new Chapter VI in the Regulation Act that the applicant’s successor, appointed after the applicant resigned, issued Order no. 3 on 16 August 2004. Similarly to the applicant’s impugned Order no. 1, the new order set rates for the regulatory fees chargeable by the CAA on various private commercial activities in the field of civil aviation.

Order no. 3 was duly approved by the Minister of Justice and was enforced without any impediments.

85. On 30 March 2007 the Georgian Parliament adopted a new Act on State Regulatory Activities in Transport (“the new Act on State Regulation in Transport”), which is currently in force. The adoption of the new law automatically resulted in the repealing of the previous Act of 20 June 2001 on State Regulation, and the accompanying Order no. 3 issued by the chairperson of the CAA (see the preceding paragraph).

86. Pursuant to sections 1(j) and 9 of the new Act on State Regulation in Transport, the CAA was entitled to receive “onto its own account” regulatory fees from private companies operating in the same field so it could perform its regulatory activities in the field of civil aviation on behalf of the State. The law emphasised that the payment of those fees was “mandatory” as it constituted compensation for the public services provided by the regulatory authority. In addition to the payment of those fees, section 9 provided for a number of other additional sources of revenue for the CAA, such as the possibility for the authority to conclude various civil contracts and gain subsidies from the State budget.

87. On 14 April 2011 the Minister of the Economy and Sustainable Development issued Order no. 1-1/583, endorsing the Articles of Association of the CAA, in accordance with the new Act on State Regulation in Transport. Article 7 (c) and (d) of the Order, which are still in force, confirmed that the primary sources of revenue for the CAA were either regulatory fees mandatorily collected from companies operating in the civil aviation sector in exchange for the regulatory services it provided, or income received from separately established contractual relations.

88. Furthermore, on the basis of the new Act on State Regulation in Transport, the Minister of the Economy and Sustainable Development issued, on 18 April 2011 and 20 April 2012, two more Orders, nos. 1-1/611 and 1-1/1025, which set detailed rates for regulatory fees on various, specific commercial activities which were mandatory and were to be paid directly to the CAA’s account in exchange for the regulatory activities it provided. Those rates are still applicable.

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

89. The applicant complained under Article 5 § 1 of the Convention that his detention between 16 September 2004, the date of the expiration of his five-month detention period, and 16 March 2005, the date of his committal

for trial, had been unlawful. That provision of the Convention reads, in so far as relevant, as follows:

#### **Article 5**

“1. ... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence ...;”

90. The Government submitted that there had been no need for a court to authorise the applicant’s pre-trial detention after the five-month detention period had expired on 16 September 2005 because by that time the investigation of the case had already been terminated and a few days later, on 20 September 2005, the case had been transmitted to the first-instance court for trial. The Government stated that in accordance with the relevant provisions of the Code of Criminal Procedure (“the CCP”) the fact that the case had been transmitted to the trial court had sufficed for the detention to fall under “judicial scrutiny” and thus to be compatible with Article 5 § 1 of the Convention.

91. The applicant replied that his detention from 16 September and 16 March 2005 had been unlawful because it had not been covered by a valid court decision.

#### **A. Admissibility**

92. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

#### **B. Merits**

93. The Court notes that it has already found a violation of Article 5 § 1 of the Convention in a number of cases, including those directed against Georgia, concerning the practice of holding defendants in custody solely on the basis of the fact that a bill of indictment had been filed with a trial court. Detaining defendants without a specific legal basis or clear rules governing their situation – with the result that they may be deprived of their liberty for an unlimited period of time without judicial authorisation – is incompatible with the principles of legal certainty and protection from arbitrariness, which are common threads throughout the Convention and the rule of law (see, amongst many other authorities, *Khudoyorov v. Russia*, no. 6847/02, § 146-147, ECHR 2005-X (extracts); *Baranowski v. Poland*, no. 28358/95,

§§ 53-58, ECHR 2000-III; *Ječius v. Lithuania*, no. 34578/97, §§ 60-64, ECHR 2000-IX; *Ramishvili and Kokhreidze v. Georgia*, no. 1704/06, § 106-111, 27 January 2009; and *Gigolashvili v. Georgia*, no. 18145/05, §§ 32-36, 8 July 2008).

94. The Court notes that the present application is no different from the *Ramishvili and Kokhreidze* or *Gigolashvili* cases cited above, owing to the identical deficiencies in the Georgian criminal procedural law and practice at the material time.

95. Notably, under Article 417 §§ 1 and 3 of the CCP, once the prosecution had terminated the investigation and transmitted the criminal case file to the court with jurisdiction, the latter could hold an admissibility hearing and decide whether to commit the accused for trial and whether it was necessary to impose a restraint measure on that individual. However, a problem arose with the timing of such a hearing. Pursuant to Article 419 of the CCP, an admissibility hearing was required to be held within fourteen days or, for “complicated cases”, within a month of the delivery of a final judgment on the last, unrelated criminal case brought before the same judge, but the latter had no time constraints in deciding that “last” case. The CCP neither required that a judicial order authorising the defendant’s detention should be issued in the meantime, nor did it specify any statutory limits for this phase of detention. Such statutory lacunae resulted in the practice of detaining defendants without any judicial decision for months (see also *Absandze v. Georgia* (dec.), no. 57861/00, 20 July 2004; and *Ramishvili and Kokhreidze*, cited above, §§ 108-109).

96. It follows that for six months, between 16 September 2004 and 16 March 2005, there was no judicial decision authorising the applicant’s detention. The fact that the criminal case file and the bill of indictment had been sent to the trial court did not render the remaining period of detention “lawful” within the meaning of Article 5 § 1 of the Convention (see *Gigolashvili*, cited above, § 36, and *Nakhmanovich v. Russia*, no. 55669/00, § 68, 2 March 2006).

97. There has thus been a violation of Article 5 § 1 of the Convention in respect of that period of detention.

## II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

98. The applicant complained under Article 6 § 1 of the Convention that the domestic courts had not given sufficient reasons for their decisions to convict him of a criminal offence. The relevant part of Article 6 reads as follows:

### Article 6

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

99. The Government submitted that the courts had fully examined the case in the light of all the most important evidence submitted by the applicant, including the audit report of 20 July 2004. The examination of the case had been conducted in truly adversarial proceedings, during which the principle of the equality of arms had been duly respected. Both parties' legal and factual submissions had been carefully addressed by the courts in their decisions.

100. The applicant maintained that there had been a manifest lack of duly reasoned domestic decisions confirming his guilt. Notably, the domestic courts had failed to address the fact that by concluding contracts with the various companies working within civil aviation, the applicant had simply followed the instructions given by the Constitutional Court in its judgment of 10 January 2003. Nor had the courts taken into consideration the fact that he had issued the impugned Order no. 1 on the basis of Presidential Decree no. 364 of 25 July 2003. It was equally problematic that the domestic courts had not explained in their decision why he had been acquitted with respect to his dealings with fourteen aviation companies but convicted in relation to the remaining companies, whereas the factual circumstances underlying both the acquittal and conviction had been identical.

#### **A. Admissibility**

101. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

#### **B. Merits**

102. Although it is not the Court's function to deal with errors of fact or law allegedly committed by national courts (see *Tejedor García v. Spain*, 16 December 1997, § 31, *Reports of Judgments and Decisions* 1997-VIII; and *Buzescuv. Romania*, no. 61302/00, § 63, 24 May 2005), it still reiterates that according to its established case-law, reflecting a principle linked to the proper administration of justice under Article 6 § 1 of the Convention, the judgments of courts and tribunals should adequately state the reasons on which they are based, and which should be void of manifest arbitrariness, in order to show that the parties were duly heard and ensure public scrutiny of the administration of justice (see *Taxquet v. Belgium* [GC], no. 926/05, § 91, ECHR 2010; *Salov v. Ukraine*, no. 65518/01, §§ 89-92, ECHR 2005-VIII (extracts), *Jgarkava v. Georgia*, no. 7932/03, § 71, 24 February 2009; and *Hirvisaari v. Finland*, no. 49684/99, § 30, 27 September 2001).



103. Admittedly, Article 6 § 1 cannot be understood as requiring a detailed answer to every argument raised by the parties, and the question whether a court has failed to fulfil its obligation to state reasons can only be determined in the light of the circumstances of a particular case (see *Ruiz Torija v. Spain*, 9 December 1994, § 29, Series A no. 303-A, *Suominen v. Finland*, no. 37801/97, § 36, 1 July 2003; and *Boldea v. Romania*, no. 19997/02, § 30, 15 February 2007). However, even though a domestic court has a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties' submissions, the injured party can expect a specific and express reply from the court to those submissions which are decisive for the outcome of the proceedings in question (see *Hiro Balani v. Spain*, 9 December 1994, §§ 27-28, Series A no. 303-B; *Grădinar v. Moldova*, no. 7170/02, §§ 107-108, 8 April 2008; and *Gheorghe v. Romania*, no. 19215/04, § 43, 15 March 2007).

104. The Court observes that the applicant was convicted of abuse of official authority on account of two specific actions that he took in his capacity as chairperson of the CAA: (i) the fact that he had concluded service agreements with the three civil aviation companies on 28 March and 13 August 2003 for the purpose of collecting fees for services, which in actual fact represented the regulation fee in disguise, from them between 1 April and 1 October 2003, and (ii) the fact that the same regulation fees had continued to be collected from some eight other civil aviation companies on the basis of Order no. 1, which had been issued unlawfully by the applicant on 25 November 2003.

105. With respect to the first episode – the collection of the fee for services from the companies by the CAA on the basis of service agreements dated 28 March and 13 August 2003 – the domestic authorities prosecuted the applicant for his failure to abide by the Constitutional Court's judgment of 10 January 2003, which had allegedly banned the authority from charging any fees to civil aviation companies. However, having regard to the reasons given in the constitutional judgment in question, it cannot be resolutely concluded that the Constitutional Court outright forbade the CAA from entering into service agreements with the civil aviation companies. Admittedly, the constitutional judgment invalidated the statutory obligation to pay the "annual regulation fee for transport activities" under the law. However, in the reasoning of the same judgment, the Constitutional Court also entertained the idea, as an answer to the CAA's argument of its alleged inability either to function without being funded with fees for services and to sign services contracts with civil aviation companies, that it was, on the contrary, preferable from the constitutional point of view for the CAA and civil aviation companies to enter into freely-formed contractual relations, whereby the latter companies would undertake a contractual obligation to pay a fee in exchange for the regulatory services provided by the CAA, in

accordance with section 13(d) of the Public-Law Entities Act (see paragraphs 11-12 and 60 above). That being so, the Court finds it difficult to understand why the Tbilisi City Court, when convicting the applicant for having entered into services agreements with the civil aviation companies, did not give any meaningful answer to the applicant's major defence argument that he had merely followed the Constitutional Court's indication to enter into such contractual relationships (compare paragraphs 43 and 47 above). Of further significance is the audit report of 20 July 2004, an investigative measure that had been commissioned by the authorities themselves, which suggested that the initiation and conclusion of the impugned contracts by the applicant in his capacity as chairperson of the CAA was apparently in accordance with the Constitutional Court's ruling of 10 January 2003 (see paragraph 22-26 above). The Court further observes that at least one of those contracts, the second one, dated 13 August 2003, had been based on an additional legal ground, which was Presidential Decree no. 354 of 25 July 2003. That decree stated outright that the CAA was empowered to charge fees to civil aviation companies in exchange for regulatory services, on the basis of privately concluded contracts. Noteworthy in this regard was that the decree itself emphasised in its preamble that for the CAA to follow such a mode of operation "was in accordance with the judgment of the Constitutional Court of 10 January 2003" (see paragraph 82 above).

106. As regards the second episode on which the applicant's conviction was grounded – the charging of the regulation fee between 1 October 2003 and 16 March 2004 on the basis of Order no. 1 of 25 November 2003 – the domestic courts concluded that it had been unlawful for the applicant to set regulation fees unilaterally after the Constitutional Court's judgment of 10 January 2003 had heavily amended the Regulation Act by removing all references to the "the annual regulation fee for transport activities". However, the Court considers that the domestic courts failed to address the self-evident fact that Order no. 1 had been based on section 24(5) of the State Regulation Act, a transitional provision which was introduced by the Amendment of 14 August 2003. Notably, that transitional provision read that the CAA, as a transport regulation authority, was entitled to set regulation fees on its own, pending the adoption of a new piece of legislation on the matter by Parliament. Given that a new law set rates for regulation fees as late as 30 June 2004 (see paragraph 83 above), it is difficult to understand why it was wrongful for the applicant to regulate the matter by issuing Order no. 1 on 25 November 2003 as head of the CAA, in accordance with the above-mentioned section 24(5). Furthermore, if it was manifestly unlawful for the applicant to issue Order no. 1, which took effect from 1 October 2003, then the Ministry of Justice, the authority in charge of overseeing the lawfulness of various sub-legislative legal acts, should ordinarily have flagged up all the underlying legal defects of the order.

Furthermore, the audit report of 20 July 2004, the only forensic item of evidence available in the case file (see paragraphs 22, 24 and 42 above), again suggested that the applicant had apparently acted in conformity with the then existing legislation, when issuing Order no. 1 (see also paragraphs 80 and 81 above).

107. The Court observes that a clarification of all the above-mentioned factual and legal aspects was indispensable for the purposes of establishing the applicant's guilt in relation to both episodes. However, despite the fact that the applicant duly voiced all the relevant arguments before the domestic authorities (see paragraphs 28, 30, 43-44, 50 and 52 above), the domestic courts manifestly omitted to give them any meaningful consideration in their decisions. Indeed, it is irregular that none of the three judicial instances attempted in their decisions to have a discussion about the correlation between the applicant's actions, what exactly was said in the Constitutional Court's judgment of 10 January 2003 and what the relevant statutory law was in the immediate aftermath of that constitutional judgment.

108. The foregoing considerations are sufficient for the Court to conclude that the domestic courts gave no reasoned consideration to the above-mentioned, significant aspects of the criminal case directed against him. Those aspects could have had decisive implications for the determination of the applicant's guilt (compare *Salov*, cited above, § 92, *Grădinar*, cited above, §§ 114 and 115; and *Gheorghe*, cited above, § 50). The resultant incongruity renders the applicant's conviction for abuse of official authority far from being convincingly determined from the standpoint of an objective legal observer, such as the Court. What is at stake in the present case is not the applicant's individual criminal responsibility or the establishment of the elements of the offence, matters which are exclusively within the domestic courts' domain. Rather, the situation, prompted by the absence of sufficient reasons in the decisions of the domestic courts, is that of incomprehension for the Court as to why the applicant's acts – the collection of the fee on the basis of service agreements and the sub-legislative legal act – were described as criminal at all. In other words, the applicant cannot be said to have had the benefit of fair proceedings in so far as the criminal law – notably, the scope of the offence of abuse of official authority prosecuted under Article 332 of the Criminal Code – was inexplicably and thus arbitrarily construed to his detriment by the domestic courts.

109. There has accordingly been a violation of Article 6 § 1 of the Convention.

### III. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 5

110. Citing Article 18 of the Convention in conjunction with Article 5, the applicant complained that the criminal proceedings against him and his subsequent pre-trial detention had had ulterior, abusive motives. That provision provides as follows:

#### Article 18

“The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

111. The Government submitted that pre-trial detention had been imposed on the applicant strictly for the purposes of the criminal proceedings initiated against him for abuse of power, falling squarely within the exception envisaged by Article 5 § 1 of the Convention. Apart from purely law-enforcement considerations, there had been no other “hidden agenda” behind the relevant domestic authorities’ actions when conducting the criminal proceedings in question.

112. The applicant replied by elaborating that the initiation of the criminal proceedings against him and the associated imposition of pre-trial detention had been a direct outcome of Mr Saakashvili’s clear and specific public threat that had been directed against him in December 2003, during the latter’s presidential election campaign (see paragraph 55 above). Indeed, as soon as Mr Saakashvili had been elected President of Georgia in January 2004, the threat of “jailing the applicant” had started to materialise.

#### A. Admissibility

113. The Court emphasises that Article 18 of the Convention does not have an autonomous role. It can only be applied in conjunction with other Articles (see *Gusinskiy v. Russia*, no. 70276/01, § 75, ECHR 2004-IV). As it has previously held in its case-law, the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith. Indeed, any public policy or individual measure may have a “hidden agenda”, and the presumption of good faith is rebuttable in theory. However, it is difficult to overcome this assumption in practice. Indeed, an applicant alleging that his rights and freedoms were limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed or which could be reasonably inferred from the context. A mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention is not sufficient to prove that Article 18 was breached (see *Khodorkovskiy v. Russia*, no. 5829/04, § 255, 31 May 2011). When an

allegation under Article 18 of the Convention is made, the Court applies a very exacting standard of proof. As a consequence, the Court has only been satisfied in a few cases that such a standard was met, such as *Gusinskiy v. Russia* (cited above, §§ 73–78); *Cebotari v. Moldova* (no. 35615/06, §§ 46 et seq., 13 November 2007); or *Lutsenko v. Ukraine*, (no. 6492/11, § 108, 3 July 2012). For a contrasting example, see *Sisojeva and Others v. Latvia* (striking out) ([GC], no. 60654/00, § 129, ECHR 2007-I).

114. The Court notes that when it comes to allegations of political or other ulterior motives in the context of a criminal prosecution, it is difficult to dissociate the pre-trial detention from the criminal proceedings within which such detention was ordered (see *Lutsenko*, cited above, § 108). In the instant case, the applicant's only argument backing up his allegation of an abusive initiation of criminal proceedings against him was a reference to the public statements of presidential candidate Mr Saakashvili. The Court acknowledges the inappropriateness of the public statements in question, which can indeed be easily read as a threat to the applicant (see paragraph 55 above). However, it is still unable, in the absence of any other additional evidence or arguments and applying an exacting standard of proof beyond a reasonable doubt, to establish that the initiation of the criminal case against the applicant was necessarily linked to the threat uttered by Mr Saakashvili, or that the latter in any other manner unduly influenced the unfolding of the criminal case after he became President. Indeed, the mere suspicion of a hidden abusive agenda, no matter how arguable that suspicion may be, cannot be sufficient for the Court to conclude that the whole legal machinery of the respondent State in the present case lacked independence and was *ab initio* misused under alleged pressure from the President, or that from beginning to end the prosecution and judicial authorities acted in bad faith and in blatant disregard of the Convention (compare *Khodorkovskiy*, cited above, § 260). There was nothing in the present case to suggest that the prosecution or judicial authorities themselves showed, either through official or unofficial channels, the existence of any ulterior motives incompatible with the restrictions on the applicant's liberty which are permitted under Article 5 of the Convention (contrast with *Lutsenko*, cited above, §§ 108-109; *Gusinskiy*, cited above, §§ 73–78; and *Tymoshenko v. Ukraine*, no. 49872/11, § 299, 30 April 2013).

115. In the light of the foregoing, the Court concludes that by limiting the evidence to substantiate his joined complaint under Articles 5 and 18 of the Convention to the reference to the threat against him by the then candidate for the Presidency of the country, the applicant failed to discharge the requisite burden of proof. It cannot therefore be said that a *prima facie* case has been established that there were improper motives behind the applicant's criminal prosecution and detention (see *Khodorkovskiy*, cited above, § 256).

116. Accordingly, this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

#### IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

##### **A. As regards the complaints directed against the domestic court decisions of 19 and 25 March and 14 June 2004**

117. Citing Article 5 §§ 1 and 3 and Article 13 of the Convention, the applicant complained about the court decisions of 19 and 25 March and 14 June 2004 which imposed and extended his pre-trial detention. Notably, he stated that those decisions had been either unlawful and/or unreasonable as there had been no reasonable suspicion that he had committed a criminal offence, and that the impugned decisions had lacked sufficient and relevant reasons.

118. The Government contended that the applicants' complaint of a lack of a reasonable suspicion that he had committed an offence of abuse of official authority was manifestly ill-founded in so far as the items of evidence that had been collected at the early stage of the investigation had been more than enough for the domestic courts to confirm the need to keep the applicant in pre-trial detention. They also stated that the court decisions in question had been properly reasoned.

119. The Court observes that the applicant's above-mentioned complaints under various provisions of Article 5 of the Convention aimed to challenge the lawfulness and reasonableness of the Krtsanisi-Mtatsminda District Court's decision of 19 March 2004 and the Tbilisi Regional Court's decisions of 25 March and 14 June 2004.

120. Out of those three court decisions, the first two – the decisions of 19 and 25 March 2004 – constituted two instances of the same *habeas corpus* procedure bearing on the initial period of the applicant's pre-trial detention, with the latter decision, which was delivered by the appellate instance, being the final one (compare *Saghinadze and Others v. Georgia*, no. 18768/05, § 136, 27 May 2010). However, the present application was lodged on 12 March 2005, that is, more than six months after the final domestic decision of 25 March 2004 in the impugned *habeas corpus* procedure (see, for a similar conclusion in identical situations, *Davtian v. Georgia* (dec.), no. 73241/01, ECHR 6 September 2005; *Ghvaladze v. Georgia* (dec.), no. 42047/06, 11 September 2007; and *Panjikidze and Others v. Georgia* (dec.), 73241/01, 20 June 2006).

121. As regards the Tbilisi Regional Court's decision of 14 June 2004, which extended the applicant's initial pre-trial detention, no further appeal lay against that particular decision at the time, according to the Code of Criminal Procedure then in force. That decision was consequently final for

the purposes of Article 35 § 1 of the Convention (compare with the identical situation in *Aliev v. Georgia*, no. 522/04, §§ 111 and 112, 13 January 2009). Consequently, the applicant's challenge to that particular decision, lodged with the Court on 12 March 2005, is equally belated (see also *Panjikidze and Others*, cited above).

122. It follows that this part of the application has been lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

**B. As regards the complaint about the inability to challenge the unlawfulness of the applicant's detention between 16 September 2004 and 16 March 2005**

123. Additionally citing Article 5 § 4 of the Convention, the applicant complained that his complaint of 1 February 2005 of the unlawfulness of his continued detention, starting from 16 September 2004, was left without any consideration by the Tbilisi City Court on 16 March 2005, when the latter instance committed him for trial.

124. The parties' submitted the same arguments as those made with respect to the complaint under Article 5 § 1 of the Convention of the unlawfulness of the applicant's detention between 16 September 2004 and 16 March 2005 (see paragraphs 90 and 91 above).

125. The Court notes that it has already carried out a comprehensive examination of the issue of the unlawfulness of the applicant's detention between 16 September 2004 and 16 March 2005. It reiterates its previous conclusions that a violation of Article 5 § 1 of the Convention was caused by lacunae in the well-established domestic law and practice at the material time, which was a structural problem that had no possible remedy. That being so, the complaint under Article 5 § 4 of the Convention, which is closely linked to the one already examined under Article 5 § 1, must be also declared admissible. However, in the light of its previous comprehensive findings on the merits of the matter, the Court considers that there is no need for an additional, separate examination of that same structural problem from the viewpoint of Article 5 § 4 (compare with *Gigolashvili*, cited above, §§ 14, 15 and 30-37).

**IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION**

126. Article 41 of the Convention provides:

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

### **A. Damage**

127. The applicant claimed GEL 142,600 (some EUR 120,000) in respect of pecuniary damage. He explained that that amount would provide compensation for his monthly salary, which was GEL 2,300 (some EUR 1,100) at the material time and which he would have received if he had not been forced to resign as chairperson of the CAA after the institution of unfair criminal proceedings against him.

128. The applicant also claimed EUR 500,000 in respect of non-pecuniary damage. He submitted that he had suffered severe stress, which had had a negative impact on his health, on account of the violations of his rights under Article 5 § 1 and Article 6 § 1 of the Convention.

129. The Government submitted that the claim for pecuniary damage was unfounded as there was no causal link between it and the alleged violations. The Government stated that the claim for non-pecuniary damage was excessive.

130. The Court does not discern any causal link between the violation it has found and the alleged pecuniary damage. Indeed, it cannot speculate on whether and for how long the applicant would have retained his job if there had been no criminal proceedings against him (compare also *Georgian Labour Party v. Georgia*, no. 9103/04, § 148-151, ECHR 2008).

131. On the other hand, the Court has no doubt that the applicant suffered distress and frustration on account of the violations of his rights under Article 5 § 1 and Article 6 § 1 of the Convention. The resulting non-pecuniary damage would not be adequately compensated for by the mere finding of those breaches. Having regard to the particular circumstances of the case, the Court, making its assessment on an equitable basis, finds it appropriate to award the applicant EUR 20,000 under this head.

### **B. Costs and expenses**

132. The applicant claimed reimbursement of 28,200 and 11,760 United States dollars (USD) (some EUR 25,415 and EUR 10,600) in respect of his legal representation in the proceedings before both the domestic courts and the Court respectively. In support of that claim, he submitted two billing requests dated 19 March 2008 and 7 May 2009 from his two representatives. Those documents broke down the legal services that had allegedly been provided into the number of hours worked and the lawyers' hourly rates. The first representative claimed that he had worked 188 hours at a rate of USD 150 (EUR 135) per hour, while the second claimed to have worked 98 hours at a rate of USD 120 (EUR 108) per hour. It was not clear from the documents that were submitted whether the amounts claimed by the two lawyers have actually been paid by the applicant.



133. The Government submitted that the costs claimed for legal representation, which the applicant had indisputably received from the two lawyers, were exaggerated.

134. The Court reiterates that to be entitled to an award for costs and expenses under Article 41 of the Convention, an applicant must have actually and necessarily incurred them. In this connection, it further reiterates that in the absence of any additional financial documents confirming that the relevant financial transaction has actually, truly occurred, mere billing requests from lawyers can hardly be taken as a proof that the legal costs and expenses claimed have “actually and necessarily” been incurred by the applicants themselves (see *Georgian Labour Party*, cited above, § 161 and 164; *Dadiani and Machabeli v. Georgia*, no. 8252/08, § 65, 12 June 2012; *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 77, Series A no. 316-B; and *Malama v. Greece* (just satisfaction), no. 43622/98, § 17, 18 April 2002). Furthermore, the Court is not bound by domestic legal fee scales and practices and is thus free not to endorse domestic lawyers’ hourly rates which appear to be excessive (see *Assanidze v. Georgia* [GC], no. 71503/01, § 206, ECHR 2004-II).

135. In the present case, regard being had to the lack of financial documents in its possession and the above criteria, the Court cannot accept the applicant’s claim in full. Rather, it finds it reasonable to award him a global sum of EUR 15,000 for the costs of his legal representation in the proceedings before the domestic courts and the Court.

### C. Default interest

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

### FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 5 §§ 1 and 4 and Article 6 § 1 of the Convention concerning, respectively, the applicant’s pre-trial detention between 16 September 2004 and 16 March 2005, the judicial review of 16 March 2005 and the fairness of the criminal proceedings against him admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the unlawfulness of the applicant's pre-trial detention between 16 September 2004 and 16 March 2005;
3. *Holds* that there is no need to examine the complaint under Article 5 § 4 of the Convention concerning the judicial review of 16 March 2005;
4. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
5. *Holds*
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
    - (i) EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
    - (ii) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 June 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli  
Registrar

András Sajó  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) joint concurring opinion of Judges Sajó, Tsotsoria and Pinto de Albuquerque;
- (b) concurring opinion of Judge Kūris.

A.S.  
M.T.

## JOINT CONCURRING OPINION OF JUDGES SAJÓ, TSOTSORIA AND PINTO DE ALBUQUERQUE

1. For technical reasons and as a matter of judicial respect for the case-law we voted to find the applicant's Article 18 complaints inadmissible. However, like many colleagues in other cases, we are of the view that it is time to revisit the prohibitive standards of our Article 18 case-law.

2. In our analysis of the alleged Article 18 violations we should first consider some technical aspects to the case that were not apparent in the examination of the other violations.

### **I. The temporal scope of the application (Article 5)**

3. The complaints concerning the period of detention from the applicant's initial arrest until 16 September 2004 were declared inadmissible because the applicant filed the claim more than six months after this period of detention. As such the Court did not need to consider whether there had been a violation of Article 5 § 1 (c) on account of the lack of "reasonable suspicion" as grounds for arresting and detaining the applicant in the first instance. However, there were incomprehensible elements of the proceedings during this period that raised questions about the legitimacy of the applicant's prolonged detention and the domestic court judgments. We should consider the first period of detention in order to assess the Article 18 claim because it is in respect of that period that we can examine whether the motive was legitimate. Article 18 can be applied together with another Article even if there has been no violation of the main Article (see *Gusinskiy v. Russia*, no. 70276/01, § 73, ECHR 2004-IV). The claim's inadmissibility for the purposes of an Article 5 violation does not mean that the Court should ignore the facts from this period when considering an alleged Article 18 violation based on the entirety of the circumstances of the case.

### **II. The material scope of the application (complaints under Article 6 taken in conjunction with Article 18)**

4. Although the applicant complained of a violation of Article 6 taken in conjunction with Article 18, that complaint was not communicated, in line with the case-law that was deemed to be applicable at the time of communication. This unfortunate shortcoming precluded the Court from considering this matter.

5. We should not ignore the possibility of such a violation. The Court, in *Navalnyy* and *Frumkin*, did not proceed to determine the merits of the

Article 18 claim having found a violation of Article 6<sup>1</sup>. This should not mean that the Court cannot apply Article 18 in conjunction with Article 6<sup>2</sup>. The judgments of the domestic courts have been found to violate Article 6 § 1 and this should in certain circumstances raise issues of abuse. After all, since the trial of Socrates, “political justice” has been a most notable form of abuse of justice by the powers-that-be.

6. In the present case there is no plausible explanation that suggests a bona fide error. We do not know why the domestic courts refused to respond to the arguments posited by the applicant. This silence demands an explanation. The shortcomings that constituted an Article 6 violation also raise questions about why such shortcomings existed. Article 18 allows for claims arising from these questions. As such the Article 6 claim bears consideration under Article 18.

### III. Standard of proof for Article 18

7. Besides the technical difficulties which made a genuine analysis of the issue practically impossible, we were confronted with a more fundamental problem. At present the standard of proof for Article 18 violations is prohibitively high. The State is presumed to be operating in good faith<sup>3</sup>. This presumption demands a standard of proof even higher than “beyond reasonable doubt”, with no burden shifting even after the applicant makes a prima facie showing<sup>4</sup>. The Court requires that the applicant must “convincingly show that the real aim of the authorities was not the same as that proclaimed”; a “mere suspicion” is not enough<sup>5</sup>. We must insist on a review of the current standard. While we have little reason to doubt the presumption of good faith of a State Party to the Convention, that presumption, as it is understood currently, imposes such a high standard of proof that the task of proving a violation is practically impossible and contrary to the spirit of the safeguards provided by Article 18<sup>6</sup>. Where there

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1 *Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, § 117, 23 February 2016, and *Frumkin v. Russia*, no. 74568/12, § 173, ECHR 2016.

2 There is no obvious reason why there should be a limitation on which Articles can be applied together with Article 18. Articles 5 and 6 are interrelated and have important similarities for the purposes of Article 18. See the dissenting opinion in *Navalnyy and Ofitserov v. Russia*, § 6: “Article 6 of the Convention, like Article 5, does not enshrine an absolute right, and though neither provision textually provides for restrictions in a separate second paragraph analogous to those contained in Articles 8-11 of the Convention, limitations are nonetheless possible. There is therefore no *a priori* reason why Article 18 should apply only in conjunction with Article 5 and not with Article 6.”

3 *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 905, 25 July 2013.

4 See Helen Keller & Corina Heri, “Selective Criminal Proceedings and Article 18 ECHR: The European Court of Human Rights’ Untapped Potential to Protect Democracy”, Part II.

5 *Khodorkovskiy v. Russia*, no. 5829/04, § 255, 31 May 2011.

6 See Keller & Heri, *supra* note 4, Part I (B).

are incomprehensible elements in the detention or conviction in question the current standard makes it practically impossible for the applicant to prove his or her case. If the Court itself cannot ascertain the domestic courts' reasons for a certain act it would be impossibly difficult to demand that the applicant do so in order to satisfy the standard of proof. There will seldom be written agreements outlining the true purpose of the detention<sup>7</sup> or explicit statements to the effect that the applicant was detained for another reason<sup>8</sup>. This standard results in a practically impossible burden of proof for Article 18 violations.

8. It would be more consistent with the spirit of Article 18 to allow a *prima facie* showing and burden shifting. If the applicant can make a *prima facie* showing that there are elements of the detention or judgment that are incomprehensible, flagrantly in breach of the Convention or arbitrary and apparently related to political aims or impermissible private ambitions (for example extortion for private gain), then the burden should shift to the Government to prove that their reasons were legitimate. The position of international impartial observers might be of great relevance here.

9. In the present case we should have considered the facts and assessed the merits of the case under Article 18. However, we were prevented from doing so as we were bound by the prohibitive standards of the case-law.

10. We call upon our fellow judges to reconsider this matter at the earliest possible opportunity.

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<sup>7</sup> *Gusinskiy v. Russia*, no. 70276/01, ECHR 2004-IV.

<sup>8</sup> *Lutsenko v. Ukraine*, no. 6492/11, 3 July 2012.

## CONCURRING OPINION OF JUDGE KŪRIS

1. I voted with my colleagues in favour of finding inadmissible the applicant's complaint of a violation of Article 18 of the Convention. Nevertheless, like my colleagues Judges Sajó, Tsotsoria and Pinto de Albuquerque, I have, to put it mildly, very serious doubts that the standard dictating that the application should be rejected, as established in the Court's case-law, is (still?) a good one.

### I

2. More than forty years ago, in *Kamma v. the Netherlands* (no. 4771/71, Commission's report of 14 July 1974), the European Commission of Human Rights held that Article 18 "does not have an autonomous role" and that it "can only be applied in conjunction with other Articles". Accordingly, "there may ... be a violation of Article 18 in connection with another Article, although there is no violation of that Article taken alone" (p. 9). For the sake of convenience, I will refer to such "other" Article(s) as to the "main Article(s)", although this (merely technical) denotation is perhaps not very fortunate, as it implicitly suggests that Article 18 may be somewhat "less important" than, say, Articles 3 or 5, or 6, or 8, or 10, or 11, or 13. I would like to distance myself from such an approach.

3. The Court has accepted the Commission's logic without reservation, word for word (see *Oates v. Poland* (dec.), no. 35036/97, 11 May 2000). It is therefore consistent with this principled stance on the part of the Court that in applications which *prima facie* satisfy admissibility criteria and therefore are examined by a judicial formation other than a single judge, alleged breaches of Article 18 are depicted not as "autonomous", but as intrinsically linked to the violation of some other Article(s) of the Convention or its Protocols, that is, the "main Article(s)". Also consistent with this stance is the practice whereby, if the Court does not find a violation of the "main" Article, the complaint of a violation of Article 18 either also gives rise to a finding of no violation, or is not even examined on the merits, being dismissed as unsubstantiated.

4. Cases in which the Court has found a violation of Article 18 can be counted on the fingers of two hands, and still there would be some fingers left. Given the pace at which the fingers have been bent to date, one may predict that the others will remain free for some time yet. Such modest numbers do not mirror the reality of "political justice" in its diverse manifestations – politically inspired arrests, prosecutions, detentions, trials, convictions, confiscations of property, and restrictions of civic action. However, as the Court has stated in *Khodorkovskiy v. Russia* (no. 5829/04, § 255, 31 May 2011),

“the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith.”

5. The presumption of good faith (on the part of the authorities) implies that in complaints under Article 18 (unlike in complaints under virtually all other Articles) the *onus probandi* is on the applicant:

“Indeed, any public policy or an individual measure may have a ‘hidden agenda’, and the presumption of good faith is rebuttable. However, an applicant alleging that his rights and freedoms were limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context). A mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention is not sufficient to prove that Article 18 was breached.” (ibid.)

6. Presumptions can be weak and strong. The presumption of good faith in Article 18 cases appears to be *extremely strong*. Not only has the burden of proof not been imposed on the respondent Government (as in cases under other Articles) but on the applicant, but in order to convince the Court that there has indeed been a violation of Article 18, the applicant has to present the Court with *at least some* cast-iron, even diamond proof, as direct as proof can be. The “rebuttable” presumption, thus, can be rebutted only by “irrebuttable” evidence, and this evidence has to be furnished by the applicant. In the Court’s case-law this test is referred to as a “*very exacting* standard of proof” (emphasis added). In *Khodorkovskiy* (ibid., § 256), the Court, referring to its earlier case-law, stated:

“When an allegation under Article 18 is made the Court applies a very exacting standard of proof; as a consequence, there are only few cases where the breach of that Convention provision has been found. Thus, in *Gusinskiy v. Russia* (no. 70276/01, §§ 73–78, ECHR 2004-... (extracts)), the Court accepted that the applicant’s liberty was restricted, *inter alia*, for a purpose other than those mentioned in Article 5. The Court in that case based its findings on an agreement signed between the detainee and a federal minister of the press. It was clear from that agreement that the applicant’s detention was applied in order to make him sell his media company to the State. In *Cebotari v Moldova* (no. 35615/06, §§ 46 et seq., 13 November 2007) the Court found a violation of Article 18 of the Convention in a context where the applicant’s arrest was visibly linked to an application pending before the Court. However, such cases remain rare (see, as an opposite example, *Sisojeva and Others v. Latvia* [GC], no. 60654/00, § 129, ECHR 2007-II). Particularly, the Court notes that there is nothing in the Court’s case-law to support the applicant’s suggestion that, where a *prima facie* case of improper motive is established, the burden of proof shifts to the respondent Government. The Court considers that the burden of proof in such a context should rest with the applicant.”

So, the standard of proof imposed on the applicant in Article 18 cases is mountain high. Perhaps some would say that the presumption of good faith has turned almost into an almost uncritical *belief* in the authorities’ good faith, which was not shaken even after *Khodorkovskiy* (cited above) was followed by *OAO Neftyanaya Kompaniya Yukos v. Russia* (no. 14902/04, 20 September 2011) and *Khodorkovskiy and Lebedev*

*v. Russia* (nos. 11082/06 and 13772/05, § 899, 25 July 2013). Or was there such a belief from the outset?

But this is hardly a belief. Rather it is a *precaution*.

7. True, there may be good reasons not to abandon (at least altogether) the aforementioned presumption. In *Khodorkovskiy and Lebedev* (cited above, § 903), the Court stated:

“even where the appearances speak in favour of the applicant’s claim of improper motives, the burden of proof must remain with him or her. [The Court] confirms its position in *Khodorkovskiy* (no. 1) that the applicant alleging bad faith of the authorities must “convincingly show” that their actions were driven by improper motives. Thus, the standard of proof in such cases is high. Otherwise the Court would have to find violations in every high-profile case where the applicant’s status, wealth, reputation, etc. gives rise to a suspicion that the driving force behind his or her prosecution was improper. Such prosecutions as those, for example, at the heart of the case of *Streletz, Kessler and Krenz* [*v. Germany*, nos. 34044/96, 35532/97, 44801/98, ECHR 2001-II] would then become impossible. ... The Court reiterates its dictum in *Khodorkovskiy* (no. 1) that ‘high political status does not grant immunity’.”

8. The rationalisation cited above is phrased in a more or less absolutist manner. In theory, it leaves *some* scope for arguing that the authorities, by restricting the applicant’s rights, pursued some “other purpose than those defined in the Convention” (see *Khodorkovskiy*, cited above, § 255), but he or she has to “convincingly show” that the authorities acted in bad faith. Thus, in fact, the applicant’s case depends on the Court’s ability to be “convinced” by the evidence provided.

Both “faith” and “conviction” are concepts that are not devoid of an element of subjectivity. Consequently, if an applicant has only what the Court, not being “convinced” by him or her, may consider to be mere “contextual evidence” (that is, if there are only “appearances”, no matter how many) that he or she fell victim to “political justice” (no matter how convincing that evidence may be to the general public), there is not much that can be done for the *judicial* acknowledgment that this was indeed so.

This explains why there have been so few cases in which the Court has found that Article 18 has been breached (see paragraph 11 below). And *vice versa*: the low number of such cases is strong evidence of the absolutist character of the principle whereby the “rebuttable” (in theory) presumption of good faith is rebuttable with such great difficulty in practice.

9. The assertion that the Court, in the event that the onus in an Article 18 case is imposed on the Government,

“would have to find violations in *every* high-profile case where the applicant’s status, wealth, reputation, etc. gives rise to a suspicion that the driving force behind his or her prosecution was improper” (emphasis added)

is not impeccable. It raises more questions than it provides answers. First of all, *really* every? Why *every*? The statement that



“[s]uch prosecutions as those, for example, at the heart of the case of *Streletz, Kessler and Krenz* ... would then become impossible”

is a sheer exaggeration. It amounts to nothing less than an admission by the Court of its impotence in the face of charges that may be fabricated, accusations that may be concocted, speculations that may be groundless. I do not believe that the Court is so helpless or paralysed. Are there really no other means for dismissing from the very outset a bogus conspiracy theory that the applicant’s rights or freedoms were restricted for a purpose other than one prescribed by the Convention if the applicant cannot provide the Court with a written or recorded confession by the authorities that they are “after him” for this other purpose (whatever it may be), or at least something like an “agreement” signed by the applicant in the authorities’ favour while the latter was kept in detention (as, for example, in *Gusinskiy v. Russia* (no. 72076/01, ECHR 2004-IV))? All in all, a suspicion is only a suspicion; if it is not authoritatively dismissed from the outset as a sham, it can be rejected after a closer reasoned examination. A blank refusal to probe a suspicion that a politically motivated abuse of power has taken place will never dissipate that suspicion. But it can surely increase the suspicion.

And what about “ESK” (this abbreviation of “every schoolboy knows” is borrowed from Richard Dawkins)? What if the “contextual evidence” that an applicant was politically persecuted by the authorities is measured in library stacks? In other words, what if (as phrased in *Khodorkovskiy and Lebedev* (cited above; see paragraph 7 above)) the “appearances [which] speak in favour of the applicant’s claim of improper motives” are *so abundant* that anyone who wants to see things as they really are would no longer be able to subscribe to the presumption of good faith with respect to that particular Government? Can such “contextual evidence” nevertheless be outweighed by a prudent formalistic judicial reservation? Can and, more importantly, must the Court formally reject such “contextual evidence” on the sole basis that those involved in persecution of a political opponent were not reckless enough to sign an affidavit and hand it to the applicant to be delivered to the Court?

10. All these questions are not about any of the cases *already* decided by the Court, in which the latter has not found a violation of Article 18. They are about *the principle*. They are about the standard of proof and the method of reasoning based on precaution. By extension, they are about the relationship between law and manifest reality. If a principle, however reasonable in legal terms, has originated in precaution, it does not necessarily help to narrow the gap between law and real life. It can go in either direction. But there is a great risk that it will go in the direction of widening that gap.

11. Be that as it may, from 2004 (only) until today the Court has found a violation of Article 18, in conjunction with one or more provisions of

Article 5, in six cases. All these cases were decided by a Chamber, and none by the Grand Chamber. These cases were (in chronological order): *Gusinskiy* (cited above); *Cebotari v. Moldova* (no. 35615/06, 13 November 2007); *Tymoshenko v. Ukraine* (no. 49872/11, 30 April 2013); *Lutsenko v. Ukraine* (no. 6492/11, 3 July 2012); *Ilgar Mammadov v. Azerbaijan* (no. 15172/13, 22 May 2014); and *Rasul Jafarov v. Azerbaijan* (no. 69981/14, 17 March 2016).

In all these cases the Court based its finding of a violation of Article 18, in conjunction with one or more provisions of Article 5, on evidence which was clearly not “contextual”. Some of these items of evidence are mentioned *passim* in quotations from the Court’s case-law, as cited in this opinion, and I shall not deal with these matters in greater detail. My concern is not the violations of Article 18 that have been found by the Court, but the violations that *have not been found*, and the alleged violations that *have not been examined*.

12. It goes without saying that in the Court’s history there have been many more applications in which the issue of Article 18 was raised. Nevertheless, the dominant pattern of dealing with such cases so far has been to *find the claims under Article 18 inadmissible*. As already asserted (see paragraph 8 above), the presumption of good faith is so strong and the requirements for the acceptance of proof are so rigid that applicants have only very seldom and under very exceptional conditions succeeded in passing this test.

13. However, the Court’s case-law in cases where the applicants’ complaints under Article 18 have not been upheld has up until now diverged into four competing patterns. Unquestionably, there can be very different criteria for classification of that case-law and, thus, different typologies. The one provided below makes no claim to be crowned as the queen bee. It is meant to serve only the purpose of this opinion, and nothing more.

## II

14. The *first pattern* of not upholding the applicants’ complaints under Article 18 is the following. The Court finds *no violation of the “main” Article* under which the applicant complains. As a rule, applicants complain under not one but several Articles of the Convention and/or its Protocols, and therefore in practice this pattern is present when the Court finds no violation of *any* of the Articles under which the applicant complained (with the proviso that claims under some Articles may be not examined at all). On the ground that a violation of the “main” Article(s) has not been established, the Court also, after very brief reasoning, finds no violation of Article 18 and explicitly states this in the operative part of the judgment. The respondent Government wins such cases *in full*.

15. Thus, in *Handyside v. the United Kingdom* (7 December 1976, Series A no. 24) the Court found no violation of Articles 10 and 14 of the Convention and of Article 1 of Protocol No. 1. It limited its examination on the merits of the alleged violation of Article 18 to a finding that the “restrictions” imposed on the applicant

“concerned aims that were legitimate under ... [Article 10 of the Convention and Article 1 of Protocol No. 1]” (§ 64).

16. More than twenty years later, in *Gündem v. Turkey* (25 May 1998, *Reports of Judgments and Decisions* 1998-III), the Court found no violation of Article 3, Article 5 § 1 and Article 8 of the Convention, or of Article 1 of Protocol No. 1. As to the alleged violation of Article 18, the Court based its reasoning on the fact that the Commission (which had examined the case first)

“did not have a sufficient factual basis on which to reach a conclusion that there had been a violation of Articles 3, 5, or 8 of the Convention or of Article 1 of Protocol No. 1”

and that

“[n]or could there be a question under Article 18 of the Convention of restrictions having been applied for improper purposes in regard [the] events [complained about by the applicant]”.

Consequently, the Court concluded that

“there has been no violation of Articles 3, 5 § 1, 8 and 18 of the Convention or of Article 1 of Protocol No. 1” (§§ 67 and 69).

17. In this context one could also mention *Sisojeva and Others* [GC] (cited above). In that case the issue of Article 18 was not raised by the applicants in their written submissions, in which they complained under Article 8. It was only at the hearing that the applicants’ representatives, alongside the representatives of the Russian Government (who intervened on the basis of Article 36 § 1), requested the Court to raise *of its own motion* the issue of the application of Article 18 and to hold that there had been a violation of that Article (§ 128). In that case the Court held that the matter giving rise to the applicants’ complaint under Article 8 had been resolved and struck the application out of its list of cases. As to whether the request to invoke Article 18 was allowed at all, the Court left this question aside (and made no mention of it in the operative part of the judgment) because, in the Court’s own words,

“[it] sees no evidence that the Latvian authorities abused their powers by applying a restriction authorised by the Convention for a purpose other than that for which it was intended ... [and] sees no reason to raise [this issue] of its own motion” (§ 129).

### III

18. Different from this first pattern is the *second one*, whereby the Court finds a violation of one or more “main” Articles, but no breach of Article 18 itself, even if it is alleged by the applicant that the violation which has actually been found by the Court and the alleged violation of Article 18 are intrinsically linked. In such cases, the operative part of the judgment always includes a point in which it is explicitly stated that there has been no violation of Article 18.

19. This pattern was developed two decades ago and has been employed in several cases decided by the Grand Chamber. Thus, in *Akdivar and Others v. Turkey* (16 September 1996, *Reports* 1996-IV), the Court found no violation of Article 18, although it found violations of Article 5 and (former) Article 25 § 1 (as the latter was worded at that time), as well as a violation of Article 1 of Protocol No. 1. Then, in *Menteş and Others v. Turkey* (28 November 1997, *Reports* 1997-VIII) the Court found a violation of Articles 8 and 13, but, again, no violation of Article 18. In *Çakıcı v. Turkey* [GC] (no. 23657/94, ECHR 1999-IV) a violation of Articles 2, 3, 5 and 13 was found, but no violation of Article 18. Finally, in *Tahsin Acar v. Turkey* [GC] (no. 26307/95, ECHR 2004-III) the Court found a procedural violation of Article 2, as well as a “failure to comply with Article 38 of the Convention” on the part of the respondent State, but no violation of Article 18 was found.

20. This pattern has been even more common in cases decided by a Chamber. Here are the judgments (in chronological order) in which this pattern has been employed: *Selçuk and Asker v. Turkey* (24 April 1998, *Reports* 1998-II) – violations of Articles 3, 8 and 13 of the Convention and of Article 1 of Protocol No. 1; *Kurt v. Turkey* (25 May 1998, *Reports* 1998-III) – violations of Articles 3, 5 and 13, as well as a finding “that the respondent State has failed to comply with its obligations under [former] Article 25 § 1” (as it was worded at that time); *Tekin v. Turkey* (9 June 1998, *Reports* 1998-IV) – violations of Articles 3 and 13; *Ergi v. Turkey* (28 July 1998, *Reports* 1998-IV) – violations of Articles 2 and 13 and (former) Article 25 § 1 (as it was worded at that time); *Şener v. Turkey* (no. 26680/95, 18 July 2000) – violations of Article 6 § 1 and Article 10; *Tanlı v. Turkey* (no. 26129/95, ECHR 2001-III) – violations of Articles 2 (both substantive and procedural) and 13; *Tepe v. Turkey* (no. 27244/95, 9 May 2003) – violations of Articles 2 (procedural) and 13; *Yöyler v. Turkey* (no. 26973/95, 24 July 2003) – violation of Articles 3, 8 and 13 of the Convention and of Article 1 of Protocol No. 1; *Tekdağ v. Turkey* (no. 27699/95, 15 January 2004) – violations of Article 2 (procedural) and 13, as well as a finding that the respondent Government had “failed to fulfil their obligation under Article 38 § 1 (a) of the Convention”; *İpek v. Turkey* (no. 25760/94, ECHR 2004-II) – violations of

Articles 2 (both substantive and procedural), 3, 5 and 13 (the latter in conjunction with Articles 2, 3 and 5) of the Convention and of Article 1 of Protocol No. 1, as well as a finding that the respondent Government had “failed to fulfil their obligation under Article 38 § 1 (a) of the Convention”; *Altun v. Turkey* (no. 24561/94, 1 June 2004) – violations of Articles 3, 8 and 13 of the Convention and of Article 1 of Protocol No. 1; *Şirin Yılmaz v. Turkey* (no. 35875/97, 29 July 2004) – violations of Article 2 (procedural) and 13; *Abdülismet Yaman v. Turkey* (no. 32446/96, 2 November 2004) – violations of Article 3, Article 5 §§ 3, 4 and 5 and Article 13; *Dicle v. Turkey* (no. 34685/97, 10 November 2004) – violations of Article 10 and Article 6 § 1; *Menteşe and Others v. Turkey* (no. 36217/97, 18 January 2005) – violations of Articles 2 (procedural) and 13; *Ağtaş and Others v. Turkey* (no. 33240/96, 2 February 2006) – a violation of Article 13; *Artun and Others v. Turkey* (no. 33239/96, 2 February 2006) – a violation of Article 13; *Keser and Others v. Turkey* (nos. 33238/96 and 32965/96, 2 February 2006) – a violation of Article 13; *Kumru Yılmaz and Others v. Turkey* (no. 36211/97, 2 February 2006) – a violation of Article 13; *Nesibe Haran v. Turkey* (no. 28299/95, 2 February 2006) – a violation of Article 2 (procedural); *Öztoprak and Others v. Turkey* (no. 33247/96, 2 February 2006) – a violation of Article 13; *Şaylı v. Turkey* (no. 33243/96, 2 February 2006) – a violation of Article 13; *Aksakal v. Turkey* (no. 37850/97, §§ 43-44, 15 February 2007) – a violation of Article 13; *Khodorkovskiy* (cited above) – violations of Article 3 and Article 5 §§ 1, 3 and 4; *OAO Neftyanaya Kompaniya Yukos* (cited above) – violations of Articles 6 §§ 1 and 3 (b) and of Article 1 of Protocol No. 1; and *Khodorkovskiy and Lebedev* (cited above) – violations of Article 3, Article 5 §§ 3 and 4, Article 6 § 1 (in conjunction with Article 6 § 3 (c) and (d)) and Article 8 and of Article 1 of Protocol No. 1, as well as a finding that the authorities had failed “to respect their obligation under Article 34 of the Convention”.

In all these cases the Court, even if briefly, dealt with the merits of the allegations under Article 18 in relation to one or more “main” Articles and found that, even if the latter had been breached, Article 18 had not, and explicitly stated this in the operative parts of the judgments.

21. Within the second pattern, the Court has used different forms of wording for substantiating the finding of no violation of Article 18 (while finding, in the same judgment, a violation of one or more of the “main” Articles).

For example, in some (mostly earlier) cases the Court was satisfied that a violation of Article 18 had not been established by the Commission, and considered it appropriate not to depart from that conclusion (see, for example, *Selçuk and Asker*, cited above, § 102; *Menteş and Others*, cited above, § 98; and *Çakıcı*, cited above, § 117).

In other cases the Court used laconic wording (with some variations) in finding that

“no violation of [the] provision [of Article 18] can be established on the basis of the evidence before [the Court]” (see, for example, *İpek*, cited above, § 216, and *Abdulsamet Yaman*, cited above, § 91).

Through the years, however, something of a “template” formula has been worked out and has been employed more often than any other:

“The Court ... has already examined this allegation in the light of the evidence submitted to it, and found that it was unsubstantiated. Accordingly, no violation of [the] provision [of Article 18] has been established” (see, for example, *Tepe*, cited above, § 204; *Ağtaş and Others*, cited above, § 75; *Kumru Yılmaz and Others*, cited above, § 88; and *Aksakal*, cited above, § 59).

In all such cases the explicit reasoning of the Court as to the alleged violation of Article 18 has indeed been limited to only a few sentences (occasionally to one).

22. However, in the more recent judgments adopted in *Khodorkovskiy, OAO Neftyanaya Kompaniya Yukos and Khodorkovskiy and Lebedev* (all cited above), such reasoning has been much more extensive (§§ 254-261, §§ 663-666 and §§ 897-909 respectively). Moreover, in two of these judgments, namely *Khodorkovskiy* and *Khodorkovskiy and Lebedev*, a rather cautious concluding formula has been used: the Court has stated that

“[it] cannot find that Article 18 was breached” (§ 261 and § 909 respectively).

This can be translated as meaning that maybe the breach was there, but the Court “cannot” hold it to be proven. This caution is perfectly understandable, given that it has become increasingly difficult to find an informed “man on the street”, let alone a serious political analyst, who would be quick to believe, especially with the hindsight of well-known *ex post* developments, that these formal(istic) judicial findings adequately reflect “contextual evidence”, as provided by the applicants, but also by the media and analysts worldwide.

#### IV

23. The *third pattern* of not upholding applicants’ complaints under Article 18 is where the alleged violation is *not examined on the merits at all*, because the Court, for one reason or another, has decided that there is *no need for such examination*.

24. This is precisely what happened in *Navalnyy and Yashin v. Russia* (no. 76204/11, 4 December 2014). In that case, the Court found a violation of Article 3, Article 5 § 1, Article 6 § 1 and Articles 11 and 13, but at the same time it found that it was “not necessary” to examine the complaint under Article 18. This middle-of-the-road solution leaves the parties (and other readers of the judgment) guessing as to whether a violation of

Article 18 could have been found had the Court not decided that it was “not necessary to examine” this issue. In other words, while the first-pattern cases are won by the respondent Government *in full*, their victory in the third-pattern cases is *partial* and eventually – if the emergence, in the future, of evidence that is more than “contextual” will allow for a “follow-up” case (but so far this has been only a theoretical possibility) – may even be *not final*. However, this “economic” approach is not limited to claims under Article 18 but has been used in relation to claims under many other Articles too. Such “economy of examination” is not faulty in itself. However, as I have already stated on a different occasion,

“overly laconic reasons for the rejection of ‘remainders of complaints’ have become a long-standing practice of the Court, not only in cases where the need for such rejection is self-evident but also in cases where it would merit more explicit consideration. I believe that the present case clearly belongs to the latter category” (see paragraph 2 of my partly dissenting opinion in *M.C. and A.C. v. Romania*, no. 12060/12, 12 April 2016 (not yet final)).

25. The reasoning as to *why* this examination was, in the Court’s opinion, “not necessary” in *Navalnyy and Yashin* (cited above) was the following:

“116. The Court has found above that the applicants were arrested, detained and convicted of an administrative offence arbitrarily and that this had the effect of preventing and discouraging them and others from participating in protest rallies and engaging actively in opposition politics (see paragraphs 73–74 above).

117. In view of those findings, the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 18 of the Convention.”

This reasoning was repeated, word by word, in the very recent case of *Frumkin v. Russia* (no. 74568/12, §§ 172–173, 5 January 2016).

26. I am perplexed at such a conclusion. Stunned.

To wit, a finding that an *arbitrary* (that is, not merely incidental, but discretionary, wilful, even capricious!) arrest, detention and conviction (that is, not an isolated act, but the whole “chain” of the criminal proceedings!)

“had the effect of *preventing* and *discouraging* [the applicants] *and others* from participating in protest rallies and engaging actively in opposition politics” (emphasis added)

commands nothing less than the most thorough judicial scrutiny of whether such prevention and discouragement of the applicants *and others* from political activity was not only the *effect*, but also the *purpose* of that arbitrary arrest, detention and conviction.

Arrests, detention and conviction are acts by public authorities. When authorities *act arbitrarily* and, moreover, when they do so not incidentally but are *consequential in their arbitrariness*, they – unless there is such a coincidence of circumstances as to penetrate deep into the territory of improbability – do so with a *purpose*.

And *purpose* is precisely what Article 18 speaks about!

## V

27. The *fourth* and, up until now, *last pattern* of not upholding applicants' complaints under Article 18 is where the alleged violation is *not examined on the merits*, because the complaint appears to be incompatible *ratione materiae* with the provisions of the Convention.

28. In the recent case of *Navalnyy and Ofitserov v. Russia* (nos. 46632/13 and 28671/14, 23 February 2016) the Court found a violation of Article 6 § 1. At the time of writing this opinion, that judgment is not yet in force, pending the examination of a request for referral to the Grand Chamber.

In *Navalnyy and Ofitserov* (cited above) the related complaint under Article 18 was declared inadmissible *ratione materiae*, because

“the provisions of ... Articles [6 and 7], in so far as relevant to the present case, do not contain any express or implied restrictions that may form the subject of the Court's examination under Article 18 of the Convention.”

29. Without going into the merits of that case, and limiting myself to the issue of the admissibility of the Article 18 complaint, I refer to the joint partly dissenting opinion of Judges Nicolaou, Keller and Dedov, in which they disagree with the “majority” as to this declaration of inadmissibility. In their own words,

“The present case is the first in which the Court has been called upon to apply the accessory protection of Article 18 solely in conjunction with Article 6 or 7 of the Convention.” (See paragraph 5.)

According to the authors of the joint partly dissenting opinion,

“In its past case-law, the Court has explicitly permitted the invocation of Article 18 together with Article 5 of the Convention, Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention. However, the Court also seems to have allowed Article 18 to be invoked together with one of these three provisions and other Convention rights, for example Article 6 of the Convention. Furthermore, the drafting history of Article 18 would indicate that its application was not intended to be limited to those provisions of the Convention containing an explicit restriction clause. Instead, as per its *ratio conventionis*, it applies to limitations on all Convention rights, with the exception of those absolute rights that do not permit limitation and to which it therefore cannot logically apply, for example those under Article 3.” (See paragraph 4; footnotes omitted.)

Consequently, the dissenters conclude:

“Rejecting the complaint as incompatible *ratione materiae*, as the majority do, flies in the face of the *ratio conventionis* and the previous case-law concerning Article 18. For this reason, though we do not consider it our place to make a determination about the merits of the applicants' complaint in this context, we



consider that the Court should have declared the complaint under Article 18 of the Convention admissible.” (See paragraph 7.)

30. There is one element of this opinion that I do not agree with.

I concur, in principle, with the authors of the opinion that the scope of Article 18 should not be limited by, *inter alia*, a declaration that a complaint is incompatible *ratione materiae* with the provisions of certain Articles of the Convention and/or its Protocols. I would only add that this applies even more in relation to the Articles which in the case under examination were found to have been violated (in *Navalnyy and Ofitserov*, Article 6 § 1).

However, I disagree with the authors of the opinion where they equate this declaration of incompatibility *ratione materiae* to a finding – by a majority in the case of *Navalnyy and Ofitserov* – that it is “not necessary” to examine the complaint under Article 18. They write:

“Our colleagues considered that, given the findings made under Article 6 § 1 of the Convention, it was not necessary to examine the applicants’ other complaints under Articles 6 and 7 of the Convention.” (See paragraph 1.)

31. I have shown (see paragraphs 23-26 above) that a finding that there is “no need” to examine a complaint under Article 18 is a recently invented technique (the third pattern) for not upholding applicants’ complaints under that Article, and is distinct from the other two patterns employed in earlier cases. It is also distinct from a declaration that a complaint is incompatible *ratione materiae* with the provisions of a particular Article of the Convention or its Protocols. Declaring that a complaint is incompatible *ratione materiae* with the provisions of a particular Article is both formally and essentially different from concluding that it is “not necessary” to examine it. In the “not necessary to examine” pattern, as employed in *Navalnyy and Yashin* (cited above), a separate explicit point is devoted to this conclusion in the operative part of the judgment. In the “incompatibility *ratione personae*” pattern, however, the declaration of incompatibility is subsumed by the relevant point of the operative part, in which the respective part of the complaint (usually labelled the “remainder” of the application(s)) is declared inadmissible, but Article 18 is not even mentioned. Thus, point 2 in the operative part of the judgment in *Navalnyy and Ofitserov* (cited above) states that the Court

“[d]eclares, unanimously, the complaints under Articles 6 and 7 of the Convention admissible and, by a majority, the remainder of the applications inadmissible”.

Moreover, the incompatibility of a complaint with the provisions of the Convention *ratione materiae* (or *ratione temporis*, *ratione loci*, and so on) by definition precludes the Court from finding the examination of the complaint “not necessary”. It is not just “not necessary” – it is “not allowed”. It is *legally not possible*.

32. Notwithstanding this oversight (or slip of the pen, if it is still permissible to speak of a “pen” with respect to a text written in the

computer era), I wholeheartedly agree with the dissenters in *Navalnyy and Yashin* (cited above). The invention of the fourth pattern of not upholding applicants' complaints under Article 18 – incompatibility of a complaint *ratione materiae* with the “main” Article – is most regrettable.

33. But there is one more important difference between the two new patterns which deserves to be mentioned.

I think that I have shown how faulty and unacceptable the third (“not necessary to examine”) pattern is – or at least was in the context of the case of *Navalnyy and Yashin* (cited above), where it was invented.

However, I cannot say the same about the fourth (“incompatibility”) pattern. Viewed from a broader perspective, it is not, as such, limited to the complaint's incompatibility *ratione materiae* with certain Article(s) of the Convention or its Protocols. It is beyond any doubt that applications, not excluding those lodged under Article 18, *may be incompatible* with the provisions of the Convention or its Protocols, say, *ratione temporis*, or *ratione loci*, or *ratione personae*. What is wrong in this fourth pattern is not the “incompatibility” element but that of “*ratione materiae*”.

All the same, this broader version of the incompatibility of complaints under Article 18 *ratione temporis* etc. with the “main” Article is, so far, but a theoretical exercise. It does not yet seem to have been furnished with illustrations from the Court's case-law.

## VI

34. I referred (see paragraph 27 above) to the fourth pattern of not upholding applicants' complaints under Article 18 as “up until now, the last” one (see also paragraph 13 above). Now I have to clarify what I meant by this “up until now”.

35. *In the present case, we, the Chamber, have coined a fifth pattern* – namely, we have declared the applicant's complaint under Article 18 to be *manifestly ill-founded* (see paragraph 116 of the judgment) and therefore inadmissible (see point 1 of the operative part). This is a very new technique for dealing with these issues in the Court's case-law.

36. As a matter of principle, the technique of declaring a complaint under Article 18 manifestly ill-founded is not fallacious *in itself*. Applicants often do lodge manifestly ill-founded complaints under various Articles, which *must* be declared inadmissible under Article 35 § 3 (a). Why should Article 18 be an exception? Therefore, this fifth pattern of rejection of a complaint under Article 18 is legally not impossible and, if one may say so, is “valid”, at least in theory; simply, it has not been employed by the Court until the present case.

37. Nevertheless, up until now, in cases in which a violation of some other (“main”) Article was found (in the present case these “other” Articles are 5 § 1 and 6 § 1), the Court has dealt with such complaints

according to the second pattern described above (see paragraphs 18-22 above). Concise as it is, the “template” formula (referred to in paragraph 19 above) includes a finding that the complaint under Article 18 is “unsubstantiated”. And when the Court has not used this “template” formula, it has still applied *the same logic* by explicitly stating that no violation of Article 18 could be established on the basis of the evidence before it (*ibid.*).

38. Only in very few cases has the Court rejected the applicants’ arguments as to the alleged violation of Article 18 after conducting a more detailed examination of the evidence before it. These cases (to recapitulate) were *Khodorkovskiy*, *OAO Neftyanaya Kompaniya Yukos* and *Khodorkovskiy and Lebedev* (all cited above). One may agree or disagree with the finding of no violation of Article 18 in these cases, but it is indisputable that the Court *dealt* with the issue under Article 18 and, having applied its “very exacting standard of proof”, decided that there was not enough evidence to support the applicants’ allegations that Article 18 had been breached. Consequently, the Court was able to find that there had been no violation of Article 18, or (in two cases out of three) at least stated that it could not find that that Article had been breached (see paragraph 22 above).

39. In the present case, the Court also *dealt* with such evidence quite extensively, even if it was “contextual” (see paragraphs 113–115 of the judgment). But despite the similarity (and the scope) of the reasoning, the “end product” was completely different: instead of finding that Article 18 had not been violated, the Court decided that this part of the application was “manifestly ill-founded” (see paragraph 116 of the judgment).

40. Such a finding may have a boomerang effect. Can the conclusion that the application under Article 18 is “manifestly ill-founded” itself be seen as well-founded?

Firstly, the “potential of convincingness” (and, by extension, legitimacy, as opposed to formal legality) of the rejection of the complaint in question depends, at least to some extent, on the parties’ and the broader public’s opinion as to whether the notion of a “manifestly ill-founded” application also includes applications supported by available factual information which, according to the Court’s standard of proof, amounts only to “appearances”. Thus, this conclusion may be received with suspicion by those to whom the *factual* situation dealt with in this case is “ESK” (if I may use Dawkins’ abbreviation again, and not for the last time), that is, by those who have enough “contextual evidence” to believe that this evidence deserved to be looked into with closer attention. The existence of such information in *this particular* case is, of course, only a hypothesis; I do not assert that such “contextual evidence” exists at all. But *if it is* in place, then what has been declared “manifestly ill-founded” in the formal legal sense distances itself tremendously from what is “manifestly ill-founded” in terms of common sense. If not, then it does not.

Secondly, the conclusion in the present case may be criticised from the point of view of the Court’s case-law, in which, (again) up until now, there have been two options: (i) a (relatively) extensive examination of evidence pertaining to the alleged violation of Article 18, leading to a finding of no violation of that Article; and (ii) a laconic examination, leading to the conclusion that the application was “unsubstantiated” or that no violation of Article 18 could be established “on the basis of the evidence before the Court”. Thus, the conclusion in question, at least from the point of view of legal drafting, may be seen as a hybrid in its own right.

41. This second criticism, however, would be superficial. The devil does not hide in this structural technicality. It hides in the fact that *at this stage of development of the Court’s case-law* the Court has to follow the *ever tougher* standard for the admissibility of complaints under Article 18. *Khodorkovskiy, OAO Neftyanaya Kompaniya Yukos and Khodorkovskiy and Lebedev* (all cited above) have made the change. There is an irony in that out of these three cases, which have had the strongest bearing on the outcome of the Article 18 complaint, only *Khodorkovskiy* (cited above) has been cited in the relevant paragraphs (113–115) of the judgment in the present case. On the other hand, it was in *that* case that the change finally crept in – although even that case had deep roots in cases decided much earlier, notwithstanding the fact that some of them produced a different result and violations of Article 18 were found. As a result, applications which a decade or less ago could have been considered *prima facie* admissible, but unsubstantiated by evidence other than “contextual” evidence, *sooner or later* had to be treated as “manifestly ill-founded” (as in the present case, which happened to be the first one given such treatment – but, if the approach does not change, by no means the last), because the Court, equipped with its ever tougher standards of admissibility, knows *a priori* that a complaint has no prospect of success if it is supported only by “contextual evidence” (“appearances”) – hence the complaint may not even be communicated to the Government. It seems appropriate to admit that this is precisely what happened with *the present* applicant’s complaint under Article 18 in conjunction with Article 6 § 1, which, unlike the complaint under Article 18 in conjunction with Article 5, was *not communicated* to the Government.

Did it *have* to be *this* case where this new pattern of rejecting applications under Article 18 had to come to life? I do not know. But once it had become established case-law that “appearances”, or “contextual evidence”, were of no value in supporting an allegation that there had *indeed* been a violation of Article 18, such a change had to take place. In this regard, the current (fifth) pattern, unlike the third and fourth patterns described above, is a logical development of the Court’s case-law. This, however, does not justify the direction in which this case-law has developed.

42. One aspect still should puzzle an attentive student of the Court's case-law. The application in this case was lodged with the Court as far back as 2005. The ones in *Khodorkovskiy, OAO Neftyanaya Kompaniya Yukos* and *Khodorkovskiy and Lebedev* (all cited above) were lodged in 2004, 2004 and 2006 and 2005 respectively, at about the same time. It is merely due to the wheel of fortune (or, better, misfortune) that those three cases were examined earlier than the present one. What would have been the outcome of the complaint in the present case had it been examined before these three cases? I am just wondering.

## VII

43. One could also ask whether the complaint in question, if (as established by the Court) it is ill-founded, is really *manifestly* ill-founded. What is the added value of this “manifestly”? And what is so *manifest* about the ill-foundedness of the complaint if the Court had to devote a page and a half of the judgment to establishing such ill-foundedness, whereas (it will be recalled) in the cases belonging to the second pattern the Court needed only a couple of sentences to declare that the complaint was unsubstantiated and to find no violation of Article 18 (see paragraph 21 above)?

These questions address a broader problem. It lies, at least in part, in the determination of the Court to model the wording it uses on the language of the Convention as closely as possible. And the language used in the Convention (Article 35 § 3 (a)) is “manifestly ill-founded”, not simply “ill-founded”. The Court *never* declares applications “ill-founded” – only “manifestly ill-founded”. It may seem somewhat (?) striking, at least for an “outsider” to the Court, when the Court declares a complaint “manifestly ill-founded” *not unanimously*, but “by a majority”. Those who (still) believe that words have meanings may infer that the ill-foundedness of an application has been not so “manifest”, because some judges have not voted for its rejection as inadmissible. In fact, such usage is a matter of tradition, which has developed through the decades. It will not change, for better or maybe for worse.

44. Now back to the first of the two hypothetical criticisms mentioned in paragraph 40 above, namely the broader than legal virtue (or maybe imperfection) of the conclusion of “manifestly ill-founded”. Is it *really* convincing – not in the formal sense characteristic of judicial formulas, but in the sense that an average educated person (someone who does not have even “contextual evidence” available) would attribute to the words “manifestly ill-founded”?

45. For instance, I doubt that many will be convinced by the following argument (see paragraph 114 of the judgment):

“There was nothing in the present case to suggest that the prosecution or judicial authorities themselves showed, either through official or unofficial channels, the

existence of any ulterior motives incompatible with the restrictions on the applicant's liberty which are permitted under Article 5 of the Convention."

I wish this argument had been omitted. Bluntly, it instructs: "when committing a crime, don't leave fingerprints."

46. Judges Jungwiert, Nußberger and Potocki stated in their joint concurring opinion in *Tymoshenko* (cited above):

"[A] mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention cannot be sufficient to prove that Article 18 was breached. ... [T]he Court rightly applies a very exacting standard of proof ... *This requirement must not, however, be such as to render it impossible for the applicant to prove a violation of Article 18.* ...

... [T]he wording of Article 18 contains the word 'purpose', which necessarily refers to a subjective intention which can be revealed only by the person or persons holding it, unless it is – *accidentally* – documented in some way ... Generally, knowledge about what the Court calls a 'hidden agenda' is within the sphere of the authorities and is thus *not accessible to an applicant*. It is therefore necessary to accept evidence of the authorities' improper motives which relies on inferences drawn from the concrete circumstances and the context of the case. Otherwise the protection granted by Article 18 would be ineffective in practice.

... [W]hen relying on the circumstances and the context of a case the Court must nevertheless not apply double standards and accept more easily a violation of Article 18 in conjunction with Article 5 or 6 in the case of applicants holding specific prominent positions in society. ..." (emphasis added)

And further:

"[T]he Court has held that the burden of proof should rest with the applicant even where a prima facie case of improper motive is established ... Nevertheless, that cannot mean that in cases where the authorities cannot advance any 'proper motive' it would not be possible to consider an 'improper motive' to be proven."

I fully agree.

47. Regrettably, what has been cited above is a concurring opinion. And a concurring opinion (like any separate opinion of a judge) is, by definition, an alternative to the majority's reasoning in a case. More than that: the considerations cited above are not in line not only with the majority's position in that case, but also with the much bigger volume of the Court's established case-law on Article 18, including *Khodorkovskiy, OAO Neftyanaya Kompaniya Yukos* and *Khodorkovskiy and Lebedev* (all cited above), just as my concurring opinion in the present case is calling into question not so much the Chamber's reasoning as the Court's established case-law, which inevitably has led the Chamber to declare the applicant's complaint under Article 18 "manifestly-ill founded".

48. The Court's extremely rigid admissibility test in Article 18 cases calls for reconsideration. The "very exacting standard of proof" does not recognise mere "appearances". It does not distinguish between "appearances" that are only speculation and "appearances" that are "ESK".

But please compare another test – the so-called Duck test, which says: “If it walks like a duck and swims like a duck and quacks like a duck, we call that bird a duck.”

The Duck test is all about “appearances”! Obviously, that bird does not have to sign a document saying “I am a duck.”

A rhetorical question: *would such a duck pass our admissibility test in Article 18 cases?*

I guess not.

This is a non-legalistic hint as to the direction in which the admissibility test in Article 18 cases should be reconsidered, with a view to bringing the law of the Convention closer to the reality of political life.

49. It is important to stress (I have to repeat this time and again) that I do not have in mind *this particular case*. I have in mind the *principle*. The *method*. In *this* case it is far from obvious that the restriction of the applicant’s rights pursued another purpose than those defined in the Convention.

50. But *there will be other cases* where something that is “ESK” will not pass our extremely rigid admissibility test.

51. After all, *Tahsin Acar* (cited above), the last *Grand Chamber* (!) case dealing specifically with an Article 18 issue, was decided twelve years ago – in a manner too concise to satisfy today’s challenges of “political justice”.

It really is time for reconsideration.