



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

FIRST SECTION

**CASE OF ČAPSKÝ AND JESCHKEOVÁ v. THE CZECH
REPUBLIC**

(Applications nos. 25784/09 and 36002/09)

JUDGMENT
(Just satisfaction)

STRASBOURG

9 February 2017

FINAL

03/07/2017

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

In the case of Čapský and Jeschkeová v. the Czech Republic,

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

Mirjana Lazarova Trajkovska, *President*,

Ledi Bianku,

Linos-Alexandre Sicilianos,

Robert Spano,

Pauliine Koskelo,

Tim Eicke, *judges*,

Zdeněk Kühn, *ad hoc judge*,

and Abel Campos, *Section Registrar*,

Having deliberated in private on 22 November 2016 and 10 January 2017,

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

PROCEDURE

1. The case originated in five applications (nos. 37926/05, 25784/09, 36002/09, 44410/09 and 65546/09) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”).

2. In a judgment delivered on 3 July 2014 (“the principal judgment”), the Court held that there was a violation of Article 1 of Protocol No. 1 (see *R & L, s.r.o. and Others v. the Czech Republic*, nos. 37926/05, 25784/09, 36002/09, 44410/09 and 65546/09).

3. Since the question of the application of Article 41 of the Convention was not ready for decision, the Court reserved it and invited the Government and the applicants to submit, within three months, their written observations on that issue and, in particular, to notify the Court if any agreement had been reached (*ibid.*, paragraph 142, and point 4 (b) of the operative part).

4. The applicants in applications nos. 37926/05 and 44410/09 reached a friendly settlement. Thus in two separate judgments adopted on 11 June 2015 the Court decided to strike these applications out of its list as regards the Article 41 procedure.

5. Under Article 41 of the Convention the present applicants, whose particulars are specified in Annex, sought just satisfaction (further details are set out in paragraph 140 of the principal judgment).

6. The applicants and the Government each filed observations.

THE FACTS

RELEVANT DOMESTIC PRACTICE

7. The relevant domestic practice is described in detail in Annex II of the principal judgment. For the purposes of the present judgment the Court only reiterates some of the relevant case-law of the Constitutional Court, as depicted in the principal judgment.

8. In the judgment no. IV. ÚS 113/05 of 7 September 2005, the Constitutional Court quashed the judgment of the appellate court upholding a first-instance judgment in which an applicant's action against tenants for the surrender of unjust enrichment had been rejected. The unjust enrichment consisted in the fact that the tenants had used a flat in the applicant's building without legal entitlement and they had paid her, for the use of the flat, the amount of the "controlled rent" for a second-category flat. The Constitutional Court stated, *inter alia*, that the amount of the unjust enrichment should correspond to the amount of usual rent in the given place and time. The interpretation by the ordinary courts, which did not respect the limits stipulated in Article 4 § 4 of the Charter, represented a disproportionate restriction of the ownership rights of the flat owner and was therefore contrary to Article 11 § 1 of the Charter.

9. As no statute providing for controlled rents had been enacted after the Constitutional Court judgment no. 84/2003 and the ordinary courts had failed to provide landlords with any remedy in respect of controlled rents, the Constitutional Court in its judgment no. IV. ÚS 611/05 of 8 February 2006, with reference to the case-law of the Court and to the principle of non-interference with property rights other than on a statutory basis, reiterated its intention to apply the principles enshrined in its previous judgments in individual cases until the existing *vacuum legis* was filled. It held that "it is incumbent upon the courts to fill the *vacuum legis* by their case-law... while taking into consideration the Constitutional Court's case-law...". It further found that the ordinary courts were obliged to protect individuals' fundamental rights in a way that will protect the very substance and objective of ownership within the meaning of Article 4 § 4 of the Charter.

10. In the judgment no. II. ÚS 93/05 of 8 June 2006, the Constitutional Court quashed the lower courts' decisions having rejected a landlord's action for surrender of unjust enrichment in the amount of the difference between the controlled rent and the rent corresponding to the local conditions. The Constitutional Court esteemed that this action was "the only imaginable for the landlord"; by rejecting it the lower courts deprived him of the right to a fair trial and his right to peaceful enjoyment of property.

11. In the judgment no. I. ÚS 47/05 of 13 July 2006, the Constitutional Court reiterated the principles articulated in its previous judgments and

quashed the lower courts' decisions by which they rejected a landlord's action requesting the payment of additional rent, corresponding to the difference between the regulated and market rent, for a past period of time.

THE LAW

12. 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. The Government's preliminary objection

13. The Government maintained that the applicants had violated the rule of confidentiality of friendly-settlement negotiations as in their letters to the Court dated 18 December 2014 and 20 February 2015 respectively, they included both arguments concerning their claims on just satisfaction with their negative comments on the negotiation procedure. Moreover, copies of letters written by the Government Agent, which concerned the friendly settlement negotiations, had been enclosed with the letter of 20 February 2015. According to the Government, the applicants had informed the Court of the details of the negotiations including the sum offered by the Government.

14. The applicants disputed the Government's objection.

15. The Court reiterates that under Article 39 § 2 of the Convention and Rule 62 § 2 of the Rules of Court, negotiations with a view to securing a friendly settlement are confidential. These provisions read as follows:

Article 39 of the Convention

"1. At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.

2. Proceedings conducted under paragraph 1 shall be confidential.

..."

Rule 62 § 2 of the Rules of Court (Friendly settlement)

"In accordance with Article 39 § 2 of the Convention, the friendly-settlement negotiations shall be confidential and without prejudice to the parties' arguments in the contentious proceedings. No written or oral communication and no offer or

concession made in the framework of the attempt to secure a friendly settlement may be referred to or relied on in the contentious proceedings.”

16. The Court has therefore to examine, in cases such as this one, whether “the circumstances lead it to conclude” that “for any other reason ... it is no longer justified to continue the examination of the application”, pursuant to Article 37 § 1 (c). The Court recalls that it enjoys a wide discretion in identifying grounds capable of being relied upon in a strike out application on this basis; however, it also recalls that such grounds must reside in the particular circumstances of each case (see *M.H. and A.S. v. the United Kingdom* (dec.), nos. 38267/07 and 14293/07, 16 December 2008 and *Association SOS Attentats and de Boery v. France* [GC], (dec.), no. 76642/01, § 37, ECHR 2006–XIV).

17. The Court reiterates that the rule of confidentiality is absolute and does not allow for individual assessment of how much detail has been disclosed (see *Abbasov and Others v. Azerbaijan* (dec.), no 36609/08, § 28, 28 May 2013; *Balenović v. Croatia* (dec.), no. 28369/07, 30 September 2010; and *Lesnina Veletrgovina d.o.o. v. the former Yugoslav Republic of Macedonia* (dec.), no. 37619/04, 2 March 2010). An intentional breach of the rule of confidentiality, may, in certain circumstances, constitute an abuse of the right of application, resulting in declaring the application inadmissible pursuant to Article 35 § 3 of the Convention (compare *Miroļubovs and Others v. Latvia*, no. 798/05, § 66, 15 September 2009; *Mandil v. France* (dec.), no. 67037/09, 13 December 2011; *Ausad Valimised Mtü v. Estonia* (dec.), no 40631/14, § 18, 27 September 2016).

18. The Court recalls that the rule of confidentiality serves to protect both the parties and the Court from any attempt to exert political or any other kind of pressure (see *Abbasov and Others*, cited above, § 29; *Mandil*, cited above; *Miroļubovs and Others*, cited above, § 66; and, *mutatis mutandis*, Eur. Com. HR, no. 26135/95, Dec. 5. 3. 1996, D.R. n° 84-B, p. 156). Thus, it aims to facilitate a friendly-settlement, by safeguarding that the information provided in the course of negotiations are not revealed and made public. At the same time, Rule 62 § 2 in fine also protects the Court and its own impartiality, by ensuring that should the friendly-settlement negotiations fail, their content will not prejudice the outcome of the contentious proceedings.

19. Having in mind this general purpose, the Court has already stressed that it is always left to its discretion to assess whether disclosing of particular details from the friendly-settlement negotiations to the Court or any other third person would entail, in the particular circumstances of a case, declaring the application inadmissible as an abuse of the right of petition (see *Stoilkovska v. the former Yugoslav Republic of Macedonia*, no. 29784/07, § 31, 18 July 2013; *Lesnina Veletrgovina d.o.o.*, cited above; and *Miroļubovs and Others*, cited above, § 68).

20. The Court has repeatedly observed that Article 39 § 2 of the Convention and Rule 62 § 2 of the Rules of Court prohibit the parties from making public information concerning the friendly-settlement negotiations, either through the media, or by a letter likely to be read by a significant number of people, or by any other means (see e.g. *Ausad Valimised MTÜ*, cited above, § 19). The Court has rejected applications as abusive in numerous cases where the applicants or their representatives had intentionally disclosed to the media details from the friendly-settlement negotiations (see *Gorgadze v. Georgia* (dec.), no. 57990/10, § 21, 2 September 2014; *Ausad Valimised MTÜ*, cited above, § 10; *Tsonev v. Bulgaria* (dec.), no. 44885/10, § 27, 8 December 2015) or where the applicants referred to the Registry's proposal prepared within the framework of the friendly-settlement negotiations in their application for compensation with the domestic authority (see *Hadrabová and Hadrabová v. the Czech Republic* (dec.), no. 42165/02, 25 September 2007).

21. On the other hand, in *Stoilkovska* (cited above) the Court did not find a breach of confidentiality when the applicant had disclosed some details from the friendly-settlement negotiations to the Court. The Court emphasised that the applicant had not made that information public and that she had communicated it in a separate document, without having made any reference to that information in the documents submitted by her in the contentious proceedings.

22. In this context, the Court cannot overlook the general role of the Registrar, or of the Court as such, within the friendly-settlement negotiations, as stipulated in Rule 62 § 1 of the Rules of Court. Pursuant to this provision, the Registrar, acting on the instructions of the Chamber or its President, shall enter into contact with the parties with a view to securing a friendly settlement of the matter in accordance with Article 39 § 1 of the Convention; while the Chamber shall take any steps that appear appropriate to facilitate such a settlement. It follows that the Court does not remain uninvolved in relation to the friendly-settlement negotiations. The rule of confidentiality, set in Article 39 § 2 of the Convention and Rule 62 § 2 of the Rules of Court, should be interpreted having these facts in mind.

23. Turning to the present case, the letters to which the Government referred (see paragraph 13 above) were neither read by a large number of persons, nor was the information on the friendly-settlement negotiations disclosed to the media or otherwise made public. Moreover, these letters were submitted by the applicants with an intention to inform the Court about the development in their negotiations and with a view to securing a friendly settlement of their cases in the proceedings following the principal judgment (see paragraph 2 above). The Court notes in this regard that the principal judgment in point 4 (b) of the operative part had also invited the parties "to notify the Court of any agreement that they may reach". In such circumstances, the Court considers that the applicants' behaviour does not

amount to an abuse of the right of application. The Government's inadmissibility plea on account of a violation of the rules of confidentiality of the friendly settlement negotiations must therefore be dismissed.

B. Pecuniary damage

1. The parties' submissions

(a) The applicants

24. The applicant Mr Čapský claimed that he had suffered pecuniary damage amounting to CZK 1,358,964 Czech korunas (CZK, approximately 50,252 euros (EUR)), which equalled the difference between the rent collected and the "usual rent" for his properties in the period from 1 January 2002 to 31 December 2004. He also claimed the payment of interest equal to the marginal lending rate of the European Central Bank plus three percentage points for the period from 4 January 2005. On 20 August 2012, this interest allegedly amounted to CZK 622,002 (EUR 23,000).

He also claimed CZK 750,000 (EUR 27,734) in respect of non-pecuniary damage suffered, CZK 182,140 (EUR 6,735) in respect of costs and expenses incurred in the domestic proceedings, CZK 500,000 (EUR 18,489) in respect of costs and expenses incurred before the Court, and CZK 70,000 (EUR 2,588) in respect of administrative costs and the cost of document translation.

25. The applicant Ms Jeschkeová claimed that she had suffered pecuniary damage of CZK 740,498 (EUR 27,382), equivalent to the difference between the rent collected and the "minimum economic rent" between 1 July 2002 and 31 August 2005. She further claims the payment of interest equal to the marginal lending rate of the European Central Bank plus three percentage points for the period from 14 October 2005. On 20 September 2012, this interest allegedly amounted to CZK 308,122 (EUR 11,394).

She also claimed CZK 750,000 (EUR 27,734) in respect of the non-pecuniary damage sustained, CZK 169,995 (EUR 6,286) in respect of costs and expenses incurred in the domestic proceedings, CZK 450,000 (EUR 16,640) in respect of costs and expenses incurred before the Court and CZK 50,000 (EUR 1,849) in respect of administrative costs and the cost of document translation.

26. The applicants argued that a guideline for the calculation of compensation may be found in the legal definition of the right to a property, in which the proceeds from that property are integral to the property itself; that is to say, the right to an adequate yield on the property. Thus, the applicants deemed it just to receive compensation amounting to the difference between the controlled rent and the "usual rent" in a given locality, possibly decreased by an index (for example 10%) that would take

into account a possible period when the property could be vacant and the length of the interference with the applicants' right to protection of property. Any compensation which would be less than the costs of depreciation was unacceptable to the applicants.

27. The applicants admitted that the national courts in similar cases use the method also chosen by the Government for the calculation of compensation. However, they challenged it as unsuitable since Law no. 107/2006 allowed landlords, as of 1 January 2007, to increase controlled rent only by 15-20% which, according to them, was still unconstitutional.

28. As to the interest, the applicants insisted on it being applied as of the date when their actions before the first-instance court had been brought until the sum had been settled, at the rate applicable under European regulation.

29. In respect of non-pecuniary damage, the applicants asked for their claims to be granted as they had experienced very negative feelings of utter helplessness as the State had not ensured protection of their rights safeguarded by the Convention. They relied on the case of *Hutten-Czapska v. Poland* (no. 35014/97 [GC], 19 June 2006, ECHR 2006-VIII).

(b) The Government

30. The Government pointed out that the instant case differed from other rent-control cases in the Court's case-law. In earlier rent-control cases, the Court had found a violation of the Convention owing to the fact that the level of rent collected had been inadequate as it had failed to cover the costs of the depreciation of the properties, let alone to enable attainment of a reasonable profit. In the case at hand, the Court held that the Convention had been violated as a result of the unlawfulness of the interference (lasting between 1 January 2002 and 31 December 2006 (see paragraph 50 of the principal judgment) rather than of its disproportionality. Thus, for the present case there are no guidelines for the calculation of compensation.

31. The Government further challenged the method used and the conclusions reached in the expert reports submitted by the applicants in order to determine the alleged pecuniary damage as being inappropriate and excessive. The Government was of the opinion that the applicants had relied improperly on the difference between controlled rent and "market rent" (the rent the applicants would have collected at the relevant time and place if the properties had not been regulated) or "minimum economic rent".

32. The Government noted in this respect that owing to rent control, the property market had been distorted and, consequently, the market rents had been overvalued. As regards the minimum economic rent, the relevant time period had been too short and had therefore been of no informational value (as to the timeframe for potential investment in property or further improvements and related return on investment). In addition, the Government pointed to the general context of rent control and argued that

for many tenants, a surge in rents to a free-market level would be untenable and they would have been unable to pay such rents.

33. The Government suggested applying the method established by the domestic courts which had strictly distinguished between full compensation, which was not applicable to the case at hand, and compensation for restriction of ownership, which did not have to be the exact difference between market rent and controlled rent. The Government deemed it suitable to regard the rent that the applicants could collect for the flats in question under Law no. 107/2006 as of 1 January 2007 as the reference criterion for calculating compensation (as did the Supreme Court) with the effects of the law had it been in force as of 1 January 2002 would be simulated. The Government also underlined the finding of the Constitutional Court which had held that the progressively rising levels of rent set forth in Law no. 107/2006 had been constitutional. This method therefore satisfied the requirement of proportionality under Article 1 of Protocol No. 1.

34. The Government also considered that the severity of the forcible restriction of ownership rights and the house maintenance and repair costs should also be taken into account, as well as the surface areas of the flats, the categories of the flats and the controlled rent that had been collected by the applicants at the material time.

35. Moreover, the Government did not see any reason to grant the applicants' claims in respect of interest, as this type of claim was granted by the Court only under exceptional circumstances, which was not the case here.

36. The applicants' claims for non-pecuniary damage were regarded by the Government as excessive since no exceptional circumstances justifying the award of such an amount had been found. Furthermore, a conclusion that the Convention had been violated in the instant case would constitute *per se* sufficient redress.

37. Lastly, the Government maintained that the applicants' claims for costs and expenses were excessive and unsupported by any evidence that they had actually been paid. In addition, both applicants were represented before the Court by the same counsel.

2. The Court's assessment

38. The Court reiterates that a judgment in which it finds a breach of the Convention or its Protocols imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. If national law does not allow reparation or allows only partial reparation, Article 41 of the Convention empowers the Court to afford the injured party such satisfaction as appears to it to be

appropriate (see *Bittó and Others v. Slovakia* (just satisfaction), no. 30255/09, § 20, 7 July 2015).

39. The Court notes that the applicants have suffered pecuniary damage and hence are entitled to compensation in respect of the loss of their right to use their property in the conditions guaranteed by Article 1 of Protocol No. 1 (see paragraph 104 of the principal judgment) because they were unable to charge an adequate rent for their flats for part of the period when there was a legal vacuum, as selected by them, that is between 1 January 2002 and 31 December 2004 in the case of Mr Čapský (see paragraph 12 of the principal judgment), and in the case of Ms Jeschkeová between 1 July 2002 and 31 August 2005 (see paragraph 18 of the principal judgment).

40. In general, the Court has also already held that when enacting housing legislation the States parties to the Convention are entitled to reduce the rent to a level below the market value, as the legislature can reasonably decide as a matter of policy that charging the market rent is unacceptable from the point of view of social justice (see *Mellacher and Others v. Austria*, 19 December 1989, § 56, Series A no. 169). Therefore, such measures designed to achieve greater social justice may call for less than reimbursement of the full market value (see, for example, *Edwards v. Malta* (just satisfaction), no. 17647/04, § 20, 17 July 2008).

41. In the present case, the parties disagree as to the method that should be applied in calculating the damages suffered by the applicants due to the lack of a legal basis for the rent control system between 1 January 2002 and 30 March 2006. The applicants consider it just to receive compensation amounting to the difference between the controlled rent and the “usual” rent in a given locality, possibly decreased by an index, for example, 10% (see paragraph 26 above). The Government, on the other hand, invites the Court to have regard to the rent that the applicants could have collected for the flats in question under Law no. 107/2006 as of 1 January 2007, thus, in effect, using the reference criterion in the law for calculating compensation assuming it would have been in force as of 1 January 2002 (see paragraph 33 above).

42. At the outset, the Court recalls that, as observed in the principal judgment (see paragraph 117 of the principal judgment), the Constitutional Court had found the Czech rent-control scheme unconstitutional as violating the right of property of owners protected by Article 1 of Protocol No. 1. The situation existed between at least 1 January 2002 and 30 March 2006 was described as a “legal vacuum” by the Constitutional Court (see paragraph 123 of the principal judgment), and the Court further considered that no legal basis existed for rent-control measures also in the period between 31 March and 31 December 2006 (see paragraph 126 of the principal judgment).

43. The Court notes that following the findings of the Constitutional Court, many landlords in the Czech Republic sought to increase the rents of

their flats and requested payments of additional rents, corresponding to the differences between the controlled rent and rent in a given locality or market rent, before the ordinary courts as well as the Supreme Court and the Constitutional Court (see Chapters III-V in Annex II to the principal judgment which provide a compilation of case-law). The Constitutional Court in its numerous judgments (compare paragraphs 8-11 above and in more detail paragraphs 114-166 of Annex II to the principal judgment) quashed the ordinary courts' decisions dismissing landlords' claims for increases in the rent on the grounds of the unconstitutionality of the rent-control scheme and urged the ordinary courts to fulfil their essential role, to protect individuals' fundamental rights, and to fill the existing *vacuum legis* by their case-law.

44. In the light of the above, the Court considers that in its assessment of the satisfaction to be awarded to the applicants in the present case under Article 41 of the Convention, and taking account of the principal judgment, regard must be had to the way in which the Constitutional Court, in its case-law, formulated the obligations incumbent on the domestic courts to decide on rent increases in the period of the existing legal vacuum under the domestic law. This element also has a bearing on the legitimate expectations that the applicants had as to their ability to increase their rents during that period.

45. Noting the nature of the violation found in the principal judgment (see paragraphs 117-126 of the principal judgment) and bearing in mind the Government's overly general argument about public interest of rent control (see paragraph 32 above), the Court observes that the determination of the compensation should be based, among other things, on the difference between the rent under free-market conditions and the rent to which the applicants were entitled under the domestic legislation which the Court has found to be unlawful (see *mutatis mutandis Statileo v. Croatia*, no. 12027/10, § 157, 10 July 2014). Thus, the Court finds it appropriate to deduct the amount of the protected rent the applicants were entitled to receive in the period for which the compensation is to be awarded (see paragraph 39 above).

46. The applicants submitted their estimates of what a free-market rent would be, supported by a rental contract for an identical flat in the same building one floor below. Moreover, those estimates, which in the Court's view do not raise any doubts, were not contested by the Government. The Court shares the view of the Government that it is more appropriate to use as the basis for calculation the highest rate of controlled rent, or the actual rent collected if the latter sum is higher.

47. In the light of the foregoing, and in order to determine the adequate rent in the present case, the Court has made an estimate, taking into account in particular the information submitted by the parties on the market rent for comparable flats in the relevant period and the protected rent the applicants

were entitled to receive in the same period for renting out his flat (see *Statileo*, cited above, § 158) and the nature of a violation found in the principal judgment.

48. Regarding the applicant Mr Čapský, the documents supplied by him show that he collected rent in the amount of CZK 398,196 (EUR 14,726) from his seven flats during the relevant time. However, the Court takes into account the Government's objection that under the rent-control legislation he could have collected CZK 414,216 (EUR 15,319). The market-value rent which could have been collected in that period, as supported by the expert opinion, corresponds to CZK 1,757,160 (EUR 64,984). The difference between the last two sums is CZK 1,342,944 (EUR 49,655). The Court considers that this sum has to be awarded to the applicant in respect of pecuniary damage.

49. Regarding the applicant Ms Jeschkeová, the Court observes that from the documents submitted by the parties it appears that she collected CZK 251,484 (EUR 9,300) from her three flats during the relevant period; the maximum she could have collected as controlled rent was CZK 255,322 (EUR 9,422). The Court notes that the applicant did not claim an award of the difference up to the full market-value rent but, only up to minimum-economic-value rent. Thus, the difference between this sum and the minimum-economic-value rent amounts to CZK 902,737.12 (EUR 33,385), as supported by the uncontested expert opinion. The Court further notes that from 1 July 2002 to 31 August 2005 Ms Jeschkeová was only the co-owner of the flats in question, thus her losses proportional to her share of the ownership amount to CZK 736,660 (EUR 27,243). The Court is of the opinion that this is the sum that has to be awarded to this applicant in respect of the pecuniary damage sustained.

C. Non-pecuniary damage

50. Both applicants claimed CZK 750,000 (EUR 27,372) in respect of non-pecuniary damage.

51. The Court considers, unlike the Government, that the applicants must have sustained non-pecuniary damage, in the form of continuous feelings of disappointment, frustration and even of concerns regarding the risk of deterioration of their properties (see paragraph 104 of the principal judgment), having regard to the nature of the breach and to the "legal vacuum" which lasted for five years (see paragraph 42 above) which cannot be compensated for solely by the finding of a violation of the Convention. Making its assessment on an equitable basis, the Court awards each applicant EUR 3,000 under this head, plus any tax that may be chargeable thereon.

D. Costs and expenses

52. The applicants formulated their claims in respect of costs and expenses (see paragraph 140 of the principal judgment) and submitted further observations.

53. The applicant Ms Jeschkeová claimed a total sum of CZK 669,995 (EUR 27,769) which covers the following items:

(i) CZK 154,135 (EUR 5,698) in respect of the legal assistance provided at domestic level,

(ii) CZK 450,000 (EUR 16,636) for her legal representation in the proceedings before the Court;

(iii) CZK 15,860 (EUR 586) for the costs of the proceedings before the Czech courts;

(iv) CZK 50,000 (EUR 1,848) for the costs of translation of her submissions to the Court.

54. The applicant Mr Čapský claimed a total sum of CZK 830,020 (EUR 30,691) which included the following items:

(i) CZK 182,140 (EUR 6,733) in respect of the legal assistance provided at domestic level,

(ii) CZK 500,000 (EUR 18,484) for his legal representation in the proceedings before the Court;

(iii) CZK 78,060 (EUR 2,886) for the costs of the proceedings before the national courts;

(iv) CZK 70,000 (EUR 2,588) for the costs of translation of his submissions to the Court.

55. The Government disputed these amounts (see paragraph 37 above).

56. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI, and *Tarakhel v. Switzerland* [GC], no. 29217/12, § 142, 4 November 2014).

57. The Court further reiterates that Rule 60 § 2 of the Rules of Court and consequently the Court's case-law (see *Efstathiou and Michailidis & Co. Motel Amerika v. Greece*, no. 55794/00, § 40, *Reports* 2003-IX) requires applicants to submit itemised particulars of all their just satisfaction claims, together with any relevant supporting documents, failing which the Court may reject the claims in whole or in part (Rule 60 § 3).

58. The Court notes that the applicants did not sufficiently document their costs and expenses. The applicant Mr Čapský submitted documents showing the amount of CZK 14,896 (EUR 551) as the cost of the translation of his submissions to the Court, and the amount of CZK 78,060 (EUR 2,887) for the costs and expenses incurred in the domestic proceedings.

The applicant Ms Jeschkeová submitted documents substantiating the amount of CZK 22,231 (EUR 822) as the cost of the translation of her submissions to the Court, CZK 15,860 (EUR 587) for the costs and expenses incurred in the domestic proceedings and the sum of CZK 22,000 (EUR 814) as the cost of the expert report.

59. In the light of these submissions, the Court awards the applicant Mr Čapský CZK 92,956 (EUR 3,438) and the applicant Ms Jeschkeová CZK 60,091 (EUR 2,223) in respect of their respective costs and expenses. It rejects the remainder of the applicants' just-satisfaction claims.

E. Default interest

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

FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to disjoin the applications from the application to which they had been joined (application no. 65546/09);
2. *Rejects*, unanimously, the Government's preliminary objection to discontinue examination of the applications;
3. *Holds*, by five votes to two,
 - (a) that the respondent State is to pay the applicants, 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 Czech korunas at the rate applicable at the date of settlement:
 - (i) EUR 49,655 (forty-nine thousand six hundred and fifty-five euros) to the applicant Mr Čapský in respect of pecuniary damage;
 - (ii) EUR 27,243 (twenty-seven thousand two hundred and forty-three euros) to the applicant Ms Jeschkeová in respect of pecuniary damage;
 - (iii) EUR 3,000 (three thousand euros) to each of the applicants, plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (iv) EUR 3,438 (three thousand four hundred and thirty-eight euros) to the applicant Mr Čapský, plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(v) EUR 2,223 (two thousand two hundred and twenty-three euros) to the applicant Ms Jeschkeová, 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;

4. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 9 February 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Mirjana Lazarova Trajkovska
President

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

- (a) Concurring opinion of Judge Spano;
- (b) Partly concurring and partly dissenting opinion of Judge Koskelo;
- (c) Partly concurring and partly dissenting opinion of Judge Eicke.

M.L.T
A.C.

CONCURRING OPINION OF JUDGE SPANO

1. In paragraph 16 of the judgment, the Court states that in cases where it is alleged that a breach of the confidentiality of friendly settlement proceedings has occurred it must examine whether it is no longer justified to continue the examination of the application pursuant to Article 37 § 1 (c) of the Convention, in other words whether to *strike out* the application. However, the reasoning then correctly proceeds in paragraph 17 by recalling the Court's case-law that an "intentional breach of the rule of confidentiality may, in certain circumstances, constitute an abuse of the right of application resulting in declaring the application inadmissible pursuant to Article 35 § 3 of the Convention". The Court then concludes on the facts, again correctly in my view, that the applicants' behaviour does not amount to an *abuse of the right of application* (see paragraph 23 of the judgment).

2. I write separately to highlight that in my view the reference in paragraph 16 of the judgment to the Court's need to examine an allegation of a breach of confidentiality of friendly settlement proceedings, through the lens of the strike-out provision of Article 37 § 1 (c) of the Convention, is misplaced. The use of this reference in the reasoning also brings a lack of clarity to the Court's subsequent examination of the Government's preliminary objection, which is correctly based on the abuse of process provision of Article 35 § 3 (a) of the Convention. The reasoning thus in fact begs the question: which provision is the correct legal basis for the Court's decision to dismiss the Government's objection?

3. It seems to me that, notwithstanding the reference to Article 37 § 1 (c) in paragraph 16 of the judgment, the majority at the end of the day dismiss the Government's claim on the basis of Article 35 § 3 (a) of the Convention. Let me explain further why I consider that to be the correct approach and thus also why I respectfully disagree with the view of my colleagues Judges Koskelo and Eicke, as expressed in their separate opinions, that Article 37 § 1 (c) is the appropriate vehicle in these kinds of cases.

4. The rule of confidentiality of friendly settlement proceedings enshrined in Article 39 § 2 of the Convention and Rule 62 § 2 of the Rules of Court is formulated in absolute terms. The consequences of a breach of confidentiality are however left open in the terms of these provisions. The question then arises as to the applicable legal standard under the Convention and the Rules of Court when such a breach has occurred.

5. It goes without saying that the rule of confidentiality of friendly settlement proceedings must have some teeth, as it is an important safeguard in preserving the interests elaborated by the Court in paragraph 18 of the judgment; namely, those of protecting both parties and the Court from any attempt to exert political or any other kind of pressure, of facilitating a friendly settlement, and, not least, of protecting the Court and its own impartiality by ensuring that should the friendly-settlement negotiations fail,

their content will not prejudice the outcome of the contentious proceedings. In other words, the prohibition on the disclosure of friendly settlement details is a rule of a procedural nature, designed to ensure the proper administration of justice in the context of proceedings before the Court.

6. However, dismissing an application due to a breach of confidentiality of friendly settlement proceedings has drastic consequences for the applicant. His application is rejected and he loses the opportunity to have his claim of a human rights violation decided on the merits or, as here, his Article 41 claim for just satisfaction, if it is reserved following a principal judgment finding a violation of the Convention. The balance between these two competing interests requires in my view a legal standard which is both transparent and rigorous in its application, focusing in particular on whether the alleged breach of confidentiality is intentional or excusable, applying *mutatis mutandis* the approach taken by the Grand Chamber in the case of *Gross v. Switzerland* ([GC], no. 67810/10, ECHR 2014). It is exactly that standard which the abuse of process provision of Article 35 § 3 (a) of the Convention provides and which has until now been the basis on which the Court has examined claims of the kind dealt with in the present case (see the references to case-law in paragraph 17 of the judgment). The vagueness and malleability of the strike-out provision of Article 37 § 1 (c) militate against applying that provision to situations where the Court is confronted with a request by a respondent Government to dismiss an application due to a breach of a procedural rule.

7. Finally, I consider it necessary to make a few remarks on some of the views expressed by my colleagues Judges Koskelo and Eicke in their partly concurring, partly dissenting opinions.

8. First, I would note that I agree with the views expressed by Judge Koskelo in her opinion (see paragraphs 9-10) where she makes a distinction between the two distinct aspects of the general principle of confidentiality that is set out in Article 39 § 2 of the Convention and Rule 62 § 2 of the Rules of Court, namely, an “external” aspect that entails a prohibition of disclosure to third parties, including the media, and an “internal” aspect concerned with preserving the objectivity of the Court. However, I disagree that these two distinct elements of the rule on confidentiality would be better examined under the strike-out provision of Article 37 § 1 (c). Whether the breach relates to the external or internal aspects of the rule will rather have a bearing on the contextual application of the abuse of process rule under Article 35 § 3 (a) where intentionality may be more readily ascertainable in one situation than in the other.

9. Second, Judge Eicke takes the view that the Article 37 § 1 (c) strike-out route is the appropriate one to take when the alleged breach of procedural rules is made *following the delivery* of a judgment on the merits, as the use of the abuse of process rule is inapposite in such situations (see paragraphs 1-8 of his opinion). I would, however, respectfully argue that

Article 35 § 3 (a) remains the appropriate Convention basis for reviewing allegations of a breach of absolute procedural rules, of the kind set out in Article 39 § 2 of the Convention and Rule 62 § 2 of the Rules of Court, even where a principal judgment on the merits has been delivered and the Court has reserved the Article 41 claim for just satisfaction. The use of Article 35 § 3 (a) of the Convention is not precluded by a decision to declare a complaint admissible, as elements disclosing an abuse of process may be discovered at a later stage in the proceedings. As the decision on admissibility is now invariably taken at the same time as the decision on the merits (see Article 29 § 1 of the Convention), the issue usually does not arise, but can certainly be relevant if the Article 41 claim is reserved, as indeed it was in the present case. If the relevant abuse of process conditions are met, I can see no reason why it should be considered legally problematic to apply Article 35 § 3 (a) to a preliminary objection issue akin to that in the present case. It goes without saying that the principal judgment remains untouched, as it is only the resolution of the Article 41 claim that was reserved by the Court.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE KOSKELO

1. As regards the Government's preliminary objection, I have voted, like my colleagues, in favour of rejecting that objection. However, I am not satisfied with the reasoning of the majority concerning this issue. As regards the amount awarded for pecuniary damage, I am to my regret not able to agree with the majority.

Concurring opinion as regards the Government's preliminary objection

2. In the present case, there has been an evident breach by the applicants of clear provisions in the Rules of Court, in that the applicants have failed to comply with Rule 62 § 2 according to which "no written or oral communication and no offer or concession made in the framework of the attempt to secure a friendly settlement may be referred to or relied on in the contentious proceedings". The issue is which legal basis and what kind of reasons should determine the Court's reaction to a breach of this particular kind. This specific provision in the Rules of Court is founded on Article 39 § 2 of the Convention, which contains a more general provision under which proceedings with a view to securing a friendly settlement must be confidential.

3. In its principal judgment (see paragraphs 2-3 of the present judgment), the Court had reserved the question of the application of Article 41 and invited the parties to submit their observations on the issue of just satisfaction and to notify the Court if any agreement were to be reached concerning the compensation to be paid by the State on account of the violation of the applicants' rights that had been found in the principal judgment. In their submissions to the Court concerning the application of Article 41, the applicants did disclose and refer to offers made by the Government in the course of the failed negotiations that had taken place in the wake of the Court's principal judgment.

4. As regards the first question of the *legal basis*, in the Court's case-law breaches of Rule 62 § 2 have usually been approached by having recourse to Article 35 § 3 (a) of the Convention, i.e. by considering whether such a breach constitutes an abuse of the right of individual application, with the consequence that the application is to be declared inadmissible. In my view, while there are various situations where an applicant's conduct may naturally and appropriately fall to be considered from such an angle, it is problematic to have recourse to this legal basis in a context such as the present one. The question of an abuse of the right of application has been raised in a number of situations where, for instance, an applicant has submitted false information, or failed to submit relevant information, or where other forms of unacceptable behaviour *vis-à-vis* the Court have been

at issue. It is natural that cases of this nature, relating to various types of conduct that have not been specifically addressed in the Convention nor in the Rules of Court, will have to be dealt with on the basis of the “general clause” contained in Article 35 § 3 (a).

5. By contrast, where specific provisions have been included in the Rules of Court, and there is a breach of such expressly provided norms of conduct, the situation is, in my opinion, different. Rule 62 § 2 has been adopted for good and important reasons, namely in order to safeguard the proper conduct of the contentious proceedings before the Court, in a situation where attempts have been made to reach a friendly settlement but those endeavours have failed. In the case of a breach of such specific rules of conduct that are addressed to the applicants and expressly reiterated, with clear instructions, in standard letters sent by the Court in the course of the proceedings, having recourse to Article 35 § 3 (a) does not appear to be an optimal legal basis for considering the consequences of such conduct. If breaches of clear and specific Rules that have been put in place for good reasons cannot be sanctioned without first having to consider whether or not they can be characterised as an abuse of the right of application, such an approach risks diluting and weakening those Rules in a manner that seems problematic. Breaches of these express rules both require and deserve a more stringent approach than one that follows a route via a standard of abuse which is intended appropriately to encompass other, more diffuse types of misconduct.

6. For these reasons, it would be more appropriate to have recourse to Article 37 § 1 (c) as the legal basis for addressing situations where there has been a breach of Rule 62 § 2 of the Rules of Court. Under that provision, the Court may strike out an application where, for any other reason than those listed in the previous sub-paragraphs, the Court finds that it is no longer justified to continue the examination of the application. As is apparent from the wording of Article 37, having recourse to this provision in the present kind of situation does not mean that the Court is left with no discretion in considering whether or not the breach in the concrete circumstances is such as to justify the application being struck out.

7. In the present case, the majority in paragraph 16 of the judgment do first refer to Article 37 § 1 (c), suggesting that this is the legal basis for considering the Government’s preliminary objection in the light of the applicants’ conduct. Subsequently, however, the reasoning turns toward addressing the situation from the point of view of whether or not the applicants’ conduct amounts to an abuse of the right of application. In the concluding paragraph (paragraph 23), the majority make the determination that this was not the case. In my view, the approach taken appears unclear and rather confusing in regard to the question, which is not unimportant, as to what legal basis should guide the Court when faced with a breach of Rule 62 § 2.

8. As for the detailed *reasoning*, I also have some misgivings about the line taken by the majority. In my view, it is important to note that Rule 62 § 2 contains two distinct elements. Firstly, in line with Article 39 § 2 of the Convention, there is the general requirement that negotiations aiming at a friendly settlement be kept confidential. Secondly, there is the requirement that these negotiations remain without prejudice to any arguments in the subsequent contentious proceedings. Specifically in regard to the latter aspect, the parties are prohibited from referring to or relying on any written or oral communication or on any offer or concession that has been made in the context of attempts to secure a friendly settlement in the contentious proceedings that may follow.

9. Rule 62 § 2 thus contemplates two distinct aspects of the general principle of confidentiality that is set out in Article 39 § 2 of the Convention, one being “external” to the proceedings before the Court, the other being “internal” to those proceedings. The “external” aspect entails that the parties are not allowed to disclose information concerning the friendly settlement negotiations to any third parties, including the media. The rationale behind this restriction is to preclude the parties from seeking direct or indirect external support or pressure for their position in order to gain, through publicity or otherwise, extra leverage in the negotiations. The “internal” aspect is concerned with maintaining and protecting the objectivity of the Court when it is called upon to adjudicate the issues that have been the subject matter of the prior negotiations with a view to a friendly settlement.

10. These two aspects may in practice become intertwined but they are distinct and serve in part different purposes, which is why the factual elements to be taken into consideration in an assessment of the consequences of a breach are not necessarily identical. While, for instance, the question of the extent of impermissible communication of information, such as whether the information has been disclosed to a limited number of third persons or published in the media, may be relevant in the context of the external aspect and the consequences of external disclosure, such considerations should not carry similar weight in regard to the internal aspect. Attempts to exert undue influence on the Court by references to, or reliance on, communications, offers or concessions made at the negotiation stages are, by express provision, not permitted, and the illegitimate nature of such conduct does not, as a matter of principle, depend on the number of persons who may come to have cognizance of the information involved in such breaches of the Rules. In particular, it cannot be decisive in the context of this internal aspect whether or not the information has also been disclosed to third parties or made public in the media. What is at stake here is the integrity of the Court in the contentious proceedings, and an assessment of a breach of the specific Rules of conduct *vis-à-vis* the Court cannot depend on whether or not the public, or third parties, have been made aware of the

matter or whether or not the information has also been communicated to persons outside the Court.

11. In regard to the above-mentioned aspects, which should be distinguished, I find the reasoning adopted by the majority too muddled. I also find it difficult to excuse the applicants' conduct by reference to the invitation addressed to the parties to "notify the Court of any agreement that they may reach", or by reference to their alleged intention of informing the Court about the development of the negotiations. It is clear that the Court's invitation only concerned information about any agreement actually reached between the parties. In this case, no such agreement was reached, and the express intent and purpose of Rule 62 § 2 is to state that the Court shall not be informed about developments in the course of negotiations where these have failed and where therefore the Court is required to engage in further adjudication in contentious proceedings in order to settle the issues of just satisfaction under Article 41.

12. In their submissions to the Court regarding their claims for just satisfaction, the applicants communicated to the Court information concerning their negotiations with the respondent Government, including information about offers made and concessions suggested in the course of those negotiations. There has thus been a clear breach of Rule 62 § 2 of the Rules of Court. It remains to be determined whether or not, taking into account all the circumstances, the breach is so serious that it should result in the striking out of the applications in its remaining part, i.e. the applicants' claim for just satisfaction. In this respect, while under Article 37 § 1 (c) the issue is not whether the applicants' conduct amounts to an abuse of the right of application, there is nevertheless certain room for discretion, the test being whether or not it remains justified to continue the examination of the claims and, in particular, whether respect for human rights so requires.

13. In the applicants' submissions in response to the Government's preliminary objection, I find no convincing justification for the breach of Rule 62 § 2 that has occurred. Nevertheless, I have joined the majority in concluding that the preliminary objection must be rejected. The main reason is that in this particular case, I find that it would be excessively harsh on the applicants if their compensation claims were to be struck out on account of a breach that is likely to have resulted from a failure on the part of their lawyer to abide by the relevant Rules rather than from any instruction stemming from the applicants themselves to disregard those Rules. Although it is an important and established principle that any mistakes or omissions made by the lawyer engaged by the applicants are imputable to the applicants themselves, who must bear the negative consequences of what their lawyer does or fails to do in handling the case, in the present situation it would be a disproportionate consequence if the applicants were precluded from having their compensation claims examined, taking into account that the Court has already found a violation of their Convention

rights and that efforts to reach a friendly settlement have failed. In the belief that the applicants have acted in good faith and cannot be faulted for the breach that has occurred, I am prepared to accept that it is, in the circumstances of the present case, justified to continue examining their remaining claims.

Dissenting opinion as regards the award of compensation for pecuniary loss

14. To my regret, I am unable to agree with the majority as regards the determination of the amount of compensation for pecuniary damage to be awarded to the applicants. The majority have taken the view that the proper measure of compensation for pecuniary loss in the present case is the difference between the level of rent under free-market conditions and the actual regulated rents in the relevant period. In my opinion, the position according to which the level of market rent is to be taken as the point of reference for the calculation of pecuniary loss is, in the circumstances of the present case, incorrect and results in over-compensation.

15. According to well-settled case-law, a judgment in which the Court has found a violation of the Convention imposes on the respondent State a legal obligation to put an end to the violation and make reparation for its consequences in such a way as to restore as far as possible the situation that would have existed had the violation not occurred. Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate. In this context, the purpose of an award of damages for pecuniary loss is compensatory, not punitive. As regards the applicants' claims for pecuniary loss, the Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicants and the violation of the Convention (see, among many authorities, *Kurić and Others v. Slovenia* (just satisfaction) [GC], no. 26828/06 § 81, 12 March 2014).

16. The background to the present case is that on 21 June 2000 the Constitutional Court of the Czech Republic had found the domestic rent control legislation unconstitutional and set a deadline (31 December 2001) by which legislative measures had to be taken in order to correct the situation. The State's legislative organs, however, failed to replace the unconstitutional legislation in a timely manner, while the flawed regulation remained in place. In a judgment of 28 February 2006, the Constitutional Court held that the continuing failure by Parliament to enact a law on unilateral rent increases was unconstitutional. New legislation did not enter into force until 1 January 2007.

17. The principal judgment of this Court established a violation of Article 1 of Protocol No. 1 because of the fact that in the period between the beginning of the year 2002 and the end of 2006 there was no legal basis at

domestic level for the interference with the applicants' property rights (arising from the rent control) that would have been in compliance with the requirement of lawfulness under Article 1 of Protocol No. 1. The substantive features of the rent control were not the subject of the Court's assessment in the principal judgment, and not the basis for the finding of a violation. In this context it may be recalled that Article 1 of Protocol No. 1 has not been considered to preclude Contracting States from taking measures in their housing regulation in order to reduce rents to a level below market value in the interest of social policy and social justice. Although the proportionality of such measures may come under the Court's review, the principal judgment in the present case does not contain and is not based on such a review (paragraph 127 of the principal judgment). In this regard, the present case clearly differs, for instance, from the case of *Statileo v. Croatia*, no. 12027/10, 10 July 2014 (referred to in paragraph 45 of the present judgment), where the Court did examine the proportionality of the Croatian rent-control system in its impact on the applicant and came to the conclusion that, notwithstanding their wide margin of appreciation, the Croatian authorities had failed to strike the requisite fair balance between the general interests of the community and the protection of the applicant's property rights.

18. With this background in mind, I find it important to stress the following elements.

19. Firstly, the Court's principal judgment does not entail a finding that the rent control as such violated the applicants' rights under Article 1 of Protocol No. 1. The flaw as established by the Court was not the presence of rent control, or its substantive features, but the absence of a proper legal basis for the interference with the owners' property rights from the point of view of the requirement of lawfulness.

20. Secondly, given the declaratory nature of the Court's judgments, the finding of a violation on the grounds of a lack of lawfulness in the domestic regulation has not had any impact on the domestic regulations that were in place. The Court's judgment has not rendered those regulations invalid, or otherwise ineffective.

21. Therefore, although the Court found that there was no Convention-compliant legal basis for the rent control regime that was applied at the time, it does not follow, as a matter of law or fact, that the appropriate alternative hypothesis for the purposes of an assessment of pecuniary losses suffered should have been a complete absence of rent control in the relevant period. Thus, neither in view of its substance nor in terms of its legal effects was the Court's principal judgment as such capable of justifying a conclusion according to which the applicants either should or would have been in a position to charge market-level rents for the flats in question during the relevant period.

22. Furthermore, as a matter of domestic law, the Government have shown that an abrupt abolition of rent control was not required by the national constitution, and might not even have been in conformity with the constitution. In any event, the Constitutional Court has accepted the 2006 legislation, under which rent control was not abolished at once but which provided for a gradual, progressive adjustment of the rent levels. It is also clear from the Government's submissions that social consequences were behind the policy decision whereby rent control was not abolished at once but adjusted gradually in order to raise permissible rents towards market levels over a longer period.

23. For the above-mentioned reasons, neither the Convention nor domestic law, including domestic constitutional law, justify the conclusion, in the circumstances of the present case, that the correct point of reference from the point of view of an award of damages in keeping with the principle of *restitutio in integrum* would be the level of market rents. Taking into account the above-mentioned elements, I am unable to discern any reasonable basis for considering that the hypothetical scenario that would have prevailed without the violation found in the principal judgment was a situation without any rent control measures whatsoever. In my view, notwithstanding the violation found in the principal judgment, the applicants could not have entertained any legitimate expectation of being totally free from any kind of rent control in the relevant time period. Accordingly, awarding pecuniary damages on that basis would, in my view, result in over-compensation.

24. The Government have argued for a method which – instead of applying market level rents as the benchmark – is based on the idea that the maximum rent allowed under the 2006 legislation for the year 2007, i.e. the first year of the new legislation, should be the cap by reference to which the compensation should be calculated. This approach does not appear justified, either, for the following reasons.

25. The underlying problem in the present case is that, even admitting that as a matter of principle the respondent State would not have been required to abolish rent regulation once and for all, the necessary legislative response came five years too late. A progressive adjustment of the rent levels over a period encompassing several years was not begun until 2007, whereas in the light of the Constitutional Court's findings it ought to have begun in 2002. Under such circumstances, it is difficult to see a justification for using the first, initial year of the actual adjustment scheme as a cap for calculating the pecuniary loss for a period which, for the applicant Čapský, encompassed the years 2002-2004, and for the applicant Jeschkeová a period from mid-2002 to mid-2005. The method proposed by the Government would in turn result in under-compensation.

26. The difference between the amount awarded by the majority, based on free-market rents, and the amount suggested by the Government, is wide,

the majority award being roughly 10 times the latter amount for the applicant Čapský. For the applicant Jeschkeová, whose claim is based not on full market rents but on minimum-economic-value rents, the difference is somewhat narrower.

27. It goes without saying that in a situation such as the present one, it is easier to conclude which hypotheticals are incorrect than to substitute a better solution in their place. This difficulty, however, is not a justification for either of the above-mentioned options, one being overly generous and the other inadequate. As the Court has acknowledged on other occasions, a precise calculation of the sums necessary to make complete reparation (*restitutio in integrum*) in respect of the pecuniary losses suffered by the applicants may be prevented by the inherently uncertain character of the damage flowing from the violation (see, for instance, *Kurić and Others*, cited above, § 82). Under such circumstances, an award must be determined by the Court at its discretion, having regard to what is equitable.

28. From the judicial perspective of this Court, and with the limited information available, it is impossible to speculate with any accuracy what might have been the situation for the applicants if a constitutionally acceptable and Convention-compliant legislative regime for rent regulation had been in place for their flats in the relevant period of time. In the absence of elements that would enable an approximation of the actual losses but with the aim of avoiding both over-compensation and under-compensation, I would award the applicant Čapský the amount of EUR 30,000 and the applicant Jeschkeová the amount of EUR 17,000 in compensation for their pecuniary loss.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE EICKE

Preliminary issue – abuse of process

1. I agree that the Government's inadmissibility plea on account of an alleged violation by the applicants of the rules of confidentiality of the friendly settlement negotiations must be dismissed on the basis of Article 37 § 1 (c) (paragraph 16 in *Čapský and Jeschkeová* and paragraph 23 in *Heldenburg*). However, as is clear from the forceful case advanced in the concurring opinion of Judge Spano, the question of the correct legal basis for considering the Government's inadmissibility plea is clearly important and controversial and it may, therefore, be helpful to set out in more detail why I consider that the judgments are right to base their conclusion on Article 37 § 1 (c) and not Article 35 § 3 (a).

2. This is even more so as, as far as I am aware, this Court has not yet had to consider this issue in the context of cases such as the present where the alleged "abuse"/breach of the Rules of Court is said to have taken place *after* this Court has handed down its merits judgment (which, in these cases, had become final) in the context of proceedings under Article 41 of the Convention. This absence of guidance is underlined by the fact that:

(a) the Government, in its pleadings, invited the Court to "declare inadmissible for an abuse of the applicants' right of petition within the meaning of Article 35 § 3 (a) *in fine* of the Convention" (see e.g. Additional Observations in *Čapský and Jeschkeová* of 25 May 2015, § 9); and

(b) the judgment, in support of its conclusion, cites extensively (and exclusively) from this Court's case-law on the concept of "abuse of the right of application" under Article 35 § 3 (a).

3. It seems to me, however, that the particular circumstances of this case are all important to the choice of appropriate legal base.

4. In so far as relevant, Articles 35 § 3 (a) provides:

"The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is ... an abuse of the right of individual application. ..." (my emphasis)

5. "Individual applications submitted under Article 34" are, of course:

"... applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto."

6. Taking these provisions as one's starting point, it is, in my view, clear that, in a situation such as the present where the Court is only concerned with the (deferred) application of Article 41 of the Convention, Article 35

§ 3 (a) can no longer be the applicable/relevant Convention basis for dealing with allegations of an “abuse” of process/breach of the Rules of Court. This is, in my view, not affected by the fact that Article 35 § 4 mandates the Court to “reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings” (my emphasis). After all:

(a) the Article 34 “application” has, in fact, invariably already been declared admissible (in fact, in the merits judgment relevant to these cases (*R & L, s.r.o. and Others v. the Czech Republic*, nos. 37926/05, 25784/09, 36002/09, 44410/09 and 65546/09) the Court spent some 35 paragraphs on the issue of admissibility (paragraphs 60 - 95), including the issue of an alleged abuse of the right of application by Mr and Mrs Heldenburg): see *mutatis mutandis Pisano v. Italy (striking out) [GC]*, no. 36732/97, § 35, 24 October 2002;

(b) the “claim[...]to be the victim of a violation” has already been judged to have been well founded; hence the final merits judgment triggering the obligations under Articles 41 (to provide just satisfaction/reparation for the violation found) and Article 46; and

(c) it is clear from the opening words of Article 41 (“[i]f the Court finds that there has been a violation of the Convention”) and the overall structure of the Convention that the claim for just satisfaction, by definition, cannot be characterised as a separate “application under Article 34”.

7. That said (and not having had submissions on the issue), it also seems to me to be clear that:

(a) nevertheless, this Court must retain the ability (and the necessary sanctions) to deal with clear cases of an abuse of process/breach of the Rules of Court even at this separate stage of the proceedings; and

(b) the apparent mechanism provided by the Convention is to be found in Article 37 § 1 (c):

“The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

...

(c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.”

8. In applying this provision, in absence of any specific guidance from this Court, I would accept that the existing case law in relation to the “abuse of the right of application” under Article 35 § 3 (a), as summarised in *Čapský and Jeschkeová and Heldenburg*, must be capable of being applied *mutatis mutandis* and with equal force to the question whether an alleged “abuse”/breach of the Rules of the Court is such as to warrant the proceedings being struck out under Article 37 § 1 (c). Once a clear “abuse”/breach of the Rules of Court has been established, Article 37

provides the Court with a discretion whether or not to exercise its power to strike out the application. The exercise of this discretion is, of course, delimited by the overarching proviso in Article 37 § 1, last sentence, that:

“However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.”

9. In the present case, essentially for the reasons set out in the separate opinion of Judge Koskelo in paragraph 13 of her separate opinion in *Čapský and Jeschkeová* but not without some hesitation, I accept that, while there has been a clear breach of Rule 62 § 2 second sentence of the Rules of Court, in the circumstances of these cases the Court is justified in exercising its discretion under Article 37 § 1 (c) so as to continue examination of the applicants’ claims for just satisfaction and to dismiss the respondent Government’s preliminary objection.

Rule 62 § 2 last sentence

10. I endorse what Judge Koskelo says in paragraphs 8-11 of her separate opinion in *Čapský and Jeschkeová* about the importance of (a) the distinction between the “two distinct elements of the general principle of confidentiality” and (b) the need to protect the “integrity of the Court in the contentious proceedings”.

11. In that context, I would add two comments:

(a) In the context of post-merits judgment consideration of the just satisfaction claim under Article 41 it is worth bearing in mind that, frequently if not invariably, at the very least the parties’ initial submissions in relation to any claim for just satisfaction (which are most likely to form the starting point for any friendly settlement negotiations) will have been before the Court (in contentious proceedings) and, having been considered in detail and found “not ready for decision”, will be summarised in the merits judgment (see e.g. §§ 140-141 of *R & L, s.r.o.*). As a consequence, they will be known to the Court (and, in the context of Rule 62 § 2, first sentence, will be capable of being known to the general public; especially if, as I understand is the case in the Czech Republic, as part of the execution of an adverse judgments of this Court under Article 46, such judgments are translated by the respondent Government and published on a Government website); and

(b) The obligations under Rule 62 § 2 are, of course, addressed to “the parties” and, therefore, apply both to the applicant and to the respondent Government. Not having heard submissions on this, it would appear to me, therefore, that it might be relevant to the exercise of any discretion under Article 37 § 1 (c) on the basis of an alleged breach by an applicant of Rule 62 § 2 second sentence to consider whether and in how far the respondent Government has itself acted in breach of that Rule

and/or aggravated any breach committed by the applicant by, for example, quoting *in extenso* from the applicant's correspondence or pleadings which are said to have been, by virtue of that very content, in breach of Rule 62 § 2, second sentence.

Rule 62 §2 first sentence

12. In paragraphs 29-31 of the judgment in *Heldenburg*, the applicants' disclosure of the details of the friendly-settlement negotiations to the Ministry of Justice and/or the Constitutional Court is considered under Rule 62 § 2, first sentence, and, ultimately, found to be distinguishable from the decision in *Hadrabová and Others v. the Czech Republic* (dec.), nos. 42165/02 and 466/03, 25 September 2007. I do not find the distinction drawn between these two cases particularly convincing but, in any event, consider (again, without having had submissions on it) that on this particular point of principle the decision in *Hadrabová* is wrongly decided.

13. In the admissibility decision in *Hadrabová* the application was found inadmissible under Article 35 § 3 (a) on the basis of a finding that it was:

“... clear that in their application for compensation [to the Ministry of Justice], the applicants explicitly referred to the Registry's proposal prepared within the framework of friendly-settlement negotiations. It considers that this behaviour constitutes a breach of the above mentioned rule of confidentiality which must also be considered as an abuse of the right of application.”

14. The obligation under the Convention to end the violation found and to provide just satisfaction (Article 41) to an applicant whose Convention rights have been violated is, of course, imposed on the “High Contracting Party” rather than any particular Government department or other state organ. It seems to me that, viewed from the position of this Court as an international court, the term “parties” in Article 39 § 1 of the Convention and Rule 39 § 2 of the Rules of Court (to whom the content of any friendly settlement negotiations is “confidential”) cannot be read, in relation to the respondent Government, so as to be limited to the Agent to the exclusion of other relevant public authorities of the High Contracting Party. While there may be a division of responsibility as a matter of national law, this cannot, as a matter of public international law, be relied upon before this Court as against the applicant. As a consequence, disclosure (in confidence) of the content of friendly settlement negotiations to any relevant ministry, authority or domestic court, in the context of domestic attempts to secure the ending of the violation found and/or the payment of just satisfaction, cannot, in my view, constitute a breach of the otherwise strict confidentiality rules provided for under the Convention and the Rules of Court.

Just satisfaction

15. Like Judge Koskelo, and essentially for the reasons she gives in her separate opinions, I also cannot agree with the majority as regards the determination of the amount of compensation for pecuniary damage to be awarded to these applicants.

16. I also agree with the quantum of damages she would have awarded. The difficulties in assessing the quantum of damages even in a case such as the present set out in her separate opinion just serve to underline the difficult position this Court is left in by the absence of sufficiently focussed, detailed and realistic pleadings and evidence presented on behalf of the parties.

ANNEX

No	Application No	Lodged on	Applicant Date of birth Place of residence Nationality	Represented by
1.	25784/09	29/04/2009	Josef ČAPSKÝ 10/12/1939 Prague Czech	Dita KŘÁPKOVÁ
2.	36002/09	23/06/2009	Miroslava JESCHKEOVÁ 07/11/1947 Brno Czech	Dita KŘÁPKOVÁ