

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 41380/06
by Ioannis ANASTASSAKOS and Others
against Greece

The European Court of Human Rights (First Section), sitting on 3 May 2011 as a Chamber composed of:

Nina Vajić, *President,*
Peer Lorenzen,
Khanlar Hajiyev,
George Nicolaou,
Mirjana Lazarova Trajkovska,
Julia Laffranque, *judges,*
Spyridon Flogaitis, ad hoc *judge,*
and Søren Nielsen, *Section Registrar,*

Mr C. L. Rozakis, the judge elected in respect of Greece, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr S. Flogaitis to sit as an ad hoc judge (Article 27 § 2 of the Convention and Rule 29 § 1).

Having regard to the above application lodged on 21 September 2006,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr Ioannis Anastassakos, Mr Spyridon Zavitsanos and Mr Stavros Leoussis are Greek nationals who were born in 1955, 1957 and

1944 respectively. They live in Athens. They are represented before the Court by Mr N. Alivizatos and Mr Y. Ktistakis, both lawyers practising in Athens. The Greek Government ("the Government") are represented by their Agent, Mr M. Apessos, Senior Adviser at the State Legal Council, Mrs U. Patsopoulou, Adviser at the State Legal Council and Mrs S. Trekli, Legal Assistant at the State Legal Council.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

1. The context of the case

The applicants have a direct or indirect involvement in the operation of AGB, a company under Greek law, which specialises in providing television audience measurement services. In particular, the first applicant was the first managing director of AGB, currently holds 5% of that company's shares and is the chairman of the board of directors. The second applicant has been the managing director of AGB since 2003. The third applicant was one of the co-founders of AGB and today holds 18% of the company's shares.

AGB was founded in 1987 and has remained the sole provider of TV audience data to the present day. The applicants state that it has been noticed worldwide that the relevant national markets prefer to share a common source of television audience data. This is due to the fact that commonly accepted television data in the context of national markets form a decisive parameter in the decision-making process, as regards advertising investment strategies. The applicants submit that Greece is a unique case in the field of terrestrial television broadcasting owing to the fact that, under the successive laws that have been enacted since 1989, when the State monopoly was abolished, there are today at least five private, fifty regional and sixty local television channels, none of which has a proper operating licence. It is submitted that in this context of institutional anarchy AGB's role has become more crucial than in other countries. The applicants claim that, for this reason, AGB has occasionally been the target of campaigns in which its professionalism and reputation have been attacked.

In 2002 a high-ranking executive of Alpha TV drafted and made public a report on AGB's activities suggesting that AGB and its executives had committed irregularities with regard to the choice of sample and the subsequent processing of television data. The Television Audience Measurement Committee, an independent committee created by virtue of section 11(4) of Law no. 2328/1995, conducted a special investigation and cleared AGB of all charges.

In autumn 2004 Alpha TV, which at the time was allegedly facing major financial difficulties and low ratings, again drew attention to the above-mentioned report. The latter gained widespread publicity, and on 14 December 2004 a preliminary examination was ordered in respect of AGB's managers by the Athens Public Prosecutor's Office. In February 2006 all three applicants were summoned to the prosecutor's office to answer rather general questions, without being bound by oath (*ανομωτί*). On 30 March 2006 the public prosecutor initiated criminal proceedings against the applicants for the concurrent offences of fraud, fraud committed against the State and filing of false statements before an administrative authority. On the same date, the case file was transmitted to the investigating judge.

2. The disclosure of the prosecutor's file to the media

The applicants submit that, on 30 March 2006, during the regular off-the-record meeting of the senior prosecuting authority with the media held on the premises of the Court of Cassation, journalists were briefed that criminal proceedings were to be initiated against the three applicants in relation to AGB's alleged irregularities. Long excerpts and explicit details about the allegations were read from the unofficial prosecutor's report (*πόρισμα*). This report is only an internal document and Greek law does not provide for such a report. It is only by way of a working practice that such reports are drafted by the prosecutor in charge as an informal description and assessment of the facts for the sole purpose of briefing the supervising prosecutor on the case. Moreover, the accused had not yet been notified of the report, and therefore the applicants had no official knowledge of its content.

On the same day, M.T., a journalist hosting a popular television show, *H Ζούγκλα* ("The Jungle"), appeared before a large panel of guests, holding a copy of the prosecutor's confidential report. While showing the report on camera with frequent close-ups, he went on to read out extensive parts of it. Quoting selected extracts from the report, he stated that AGB was an integral part of a "network of conspiracy" and the "real centre of power" in Greece, both at political and at economic level. Other guests participating in the panel stated that AGB not only built or destroyed TV careers but also distributed millions and constituted a "spider's web" and a "fraudulent trap".

The following day's newspapers contained extensive articles on the case. Three Athens dailies quoted parts of the prosecutor's confidential report, and one of them published photographs of the first two applicants and another three pages of the original report. The story caused such interest throughout Greece that, on the evening of 31 March 2006, the first and third applicants were forced to answer pressing questions by journalists live on two of the most popular evening television broadcasts.

3. Further developments of the case

The applicants submit that both their private and professional lives have dramatically changed. After the disclosure of the prosecutor's report and the ensuing publicity, they are allegedly looked upon with distrust and disapproval and are in a state of uncertainty as to their future careers. They state that the impact on their private lives has also been considerable. In particular, the first applicant started receiving anonymous hostile telephone calls and letters, which forced him to seek protection for his premises from private security guards. After the television reports, the first and second applicants' children started using their mothers' maiden name at school, so as to avoid further abuse. The second applicant, having already had health problems with his vocal cords, suffered a relapse, which required a second operation, after the above-mentioned events took place.

On 26 June 2009 the Indictment Division of the Athens Court of Appeal dismissed all the charges against the applicants (decision no. 1294/2009). It stated, *inter alia,* that there were no grounds to commit the applicants for trial.

B. Relevant domestic law and practice

1. The relevant provisions of the Constitution provide as follows:

Article 5A

"1. All persons are entitled to information, as specified by law. Restrictions to this right may be imposed by law only in so far as they are absolutely necessary and justified for reasons of national security, combating crime or protecting the rights and interests of third parties.

2. All persons are entitled to participate in the Information Society. Facilitation of access to electronically processed information, as well as of the production, exchange and diffusion thereof, constitutes an obligation of the State, always in observance of the guarantees of Articles 9, 9A and 19."

Article 99

"Actions against judicial officers for miscarriage of justice shall be tried, as specified by law, by a special court composed of the President of the Supreme Administrative Court, as President, and one councillor of the Supreme Administrative Court, one Supreme Civil and Criminal Court judge, one councillor of the Court of Auditors, two law professors of the law schools of the country's universities and two lawyers from among the members of the Supreme Disciplinary Council for lawyers, as members, all of whom shall be chosen by lot.

In each case, the member of the special court who belongs to the judicial body or branch the actions or omissions of an officer of which the court is called upon to judge shall be exempted. In the case of an action against a member of the Supreme Administrative Court or an officer of the ordinary administrative courts, the special court shall be presided over by the President of the Supreme Civil and Criminal Court.

No permission shall be required to institute an action for miscarriage of justice."

2. The following provisions of the Introductory Law (*Εισαγωγικός Νόμος*) to the Civil Code (Law no. 2783/41) are relevant:

Section 104

"The State shall be liable in accordance with the provisions of the Civil Code concerning legal persons, for acts or omissions of its organs regarding private-law relations or State assets."

Section 105

"The State shall be under a duty to make good any damage caused by the unlawful acts or omissions of its organs in the exercise of public authority, except where the unlawful act or omission is in breach of an existing provision but is intended to serve the public interest. The person responsible shall be jointly and severally liable, without prejudice to the special provisions on ministerial responsibility."

This section establishes the concept of a special prejudicial act in public law, creating State liability in tort. This liability results from unlawful acts or omissions. The acts concerned may be not only legal acts but also physical acts by the administrative authorities, including acts which are not in principle enforceable through the courts (Kyriakopoulos, Interpretation of the Civil Code, section 105 of the Introductory Law to the Civil Code, no. 23; Filios, Contract, Special Part, volume 6, Tort, 1977, para. 48 B 112; E. Spiliotopoulos, Administrative Law, 3rd edition, para. 217; Court of Cassation judgment no. 535/1971, Nomiko Vima, 19th year, p. 1414; Court of Cassation judgment no. 492/1967, Nomiko Vima, 16th year, p. 75). The admissibility of an action for damages is subject to one condition, namely, the unlawfulness of the act or omission.

3. The relevant provisions of the Civil Code read as follows:

Article 57

Personal rights

"Any person whose personal rights are unlawfully infringed shall be entitled to bring proceedings to enforce cessation of the infringement and restraint of any future infringement. Where the personal rights infringed are those of a deceased person, the right to bring proceedings shall be vested in his spouse, descendants, ascendants, brothers, sisters and testamentary beneficiaries. In addition, claims for damages in accordance with the provisions relating to unlawful acts shall not be excluded."

Article 59

Reparation for non-pecuniary damage

"In the cases provided for in the two preceding Articles, the court may, in the judgment it gives on the application of the person whose right has been infringed, and regard being had to the nature of the infringement, also order the infringer to make reparation for the plaintiff's non-pecuniary damage. Such reparation shall consist in the payment of a sum of money, publication of the court's decision and any other measure appropriate in the circumstances of the case."

Article 914

"Whoever unlawfully and culpably causes damage to another shall be bound to make reparation to the other for any damage thus caused..."

Article 932

"In the case of an unlawful act, the court may, irrespective of any award of compensation for pecuniary damages, award reasonable compensation ... for any non-pecuniary harm suffered..."

4. The relevant provisions of the Criminal Code read as follows:

Article 251

Breach of judicial secrecy

"1. Anyone who is under the legal obligation to perform judicial duties and discloses to a third person confidential information of the deliberations or the vote in which he took part shall be punished by up to two years' imprisonment.

(...)"

Article 252

Breach of service confidentiality

"A civil servant who, with the exception of cases described under Articles 248, 249, 250 and 251, deliberately and with the intention of unlawfully obtaining a pecuniary advantage for himself or another or who causes prejudice to the State or a third party, discloses to a third person (a) information which came to his knowledge because of his position or (b) a document either entrusted to him or accessible to him owing to his position, shall be punished by at least three months' imprisonment."

Article 259

Breach of an official duty

"A civil servant who deliberately breaches an official duty with the intention of unlawfully obtaining a pecuniary advantage for himself or another or who causes prejudice to the State or a third party shall be punished by up to two years' imprisonment, save where the offence is punishable pursuant to another provision of criminal law."

Article 361

Insult

"1. Except in cases which amount to defamation (Articles 362 and 363), anyone who by words or by deeds or by any other means injures another's reputation shall be punished by up to one year's imprisonment or by a pecuniary penalty. The pecuniary penalty may be imposed in addition to imprisonment.

2. If the injury to reputation is not severe, considering the circumstances and the person injured, the offender shall be punished by imprisonment or a fine.

3. The provision of paragraph 3 of Article 308 shall apply in this case."

Article 361A

Unprovoked insult through an act

"1. An insult committed through an act (Article 361, paragraph 1) shall be punishable by at least three months' imprisonment if it was unprovoked by the victim.

2. If two or more persons participated in the act referred to in the previous paragraph, it shall be punishable by at least six months' imprisonment."

Article 362

Defamation

"Anyone who by any means disseminates information to a third party concerning another which may damage the latter's character or reputation shall be punished by up to two years' imprisonment or a pecuniary penalty. The pecuniary penalty may be imposed in addition to imprisonment."

Article 363

Aggravated defamation

"If, in a case under Article 362, the information is false and the offender was aware of the falsity thereof, he shall be punished by up to three months' imprisonment, and, in addition, a pecuniary penalty may be imposed and deprivation of civil rights under Article 63 may be ordered."

Article 364

Defamation of a corporation

"1. Anyone who by any means asserts or disseminates information concerning a corporation with respect to its business, financial position, products or members of its board of directors which may lower the confidence of the public in the corporation and generally harm its business shall be punished by up to one year's imprisonment or a pecuniary penalty.

2. If the accused proves the truth of the information which he asserted or disseminated, he shall not be punished.

3. If the information which the accused asserted or disseminated is false, and he was aware of the falsity thereof, he shall be punished by imprisonment."

Article 241 of the Code of Criminal Procedure reads as follows:

"The judicial investigation takes place in writing and without any publicity (...)"

5. Article 99 of the Magistrates' Code provides in so far as relevant:

Disciplinary proceedings

« (...)

2. The competent judicial authorities are bound to initiate disciplinary proceedings when their attention is drawn by any means to acts committed by the judiciary which may constitute a disciplinary fault (...)"

6. Section 22(4) of Law no. 2472/1997 provides:

> "Anyone who unlawfully interferes in any way whatsoever with a personal data file, or takes notice of such data, or extracts, alters, adversely affects, destroys, processes, transfers, discloses, makes accessible to unauthorised persons, or permits such persons to take notice of, such data or anyone who exploits such data in any way whatsoever, shall be punished by imprisonment and a fine and, in the case of sensitive data, by imprisonment for a period of at least one (1) year and a fine amounting to between one million drachmas (GRD 1,000,000) and ten million drachmas (GRD 10,000,000), unless otherwise subject to more serious sanctions."

7. In its *Köbler* judgment of 30 September 2003 (Case C-224/01) the Court of Justice of the European Communities made clear that, since, in international law, a State which incurred liability for a breach of an international commitment was viewed as a single entity, irrespective of whether the breach which gave rise to the damage was attributable to the legislature, the judiciary or the executive, that principle must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, were bound, in performing their tasks, to comply with the rules laid down by Community law which directly governed the situation of individuals.

COMPLAINTS

The applicants complained under Articles 8 and 6 § 2 of the Convention that the disclosure of the confidential report to the media violated their right to respect for their private life and their right to be presumed innocent. They also complained under Article 13 of the Convention that the national legal order did not provide an effective remedy for those whose rights had been violated through the disclosure of confidential information in the context of pre-trial criminal proceedings.

THE LAW

A. Alleged violation of Article 8 of the Convention

The applicants complained about the failure of court officials or the court's registry to guarantee the confidentiality of the prosecutor's internal report at a time when they had only been suspected of committing the offences concerned. Moreover, they submitted that this failure was compounded by the omission to conduct a proper investigation regarding the criminal acts committed in the course of the disclosure of the

confidential evidence. They argued that there had been a breach of Article 8 of the Convention, which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions

(a) The Government

The Government pointed out primarily that the applicants could have brought an action for damages against the State, on the basis of section 105 of the Introductory Law to the Civil Code, in conjunction with Articles 914, 920, 932, 57 and 59 of the Civil Code. The applicants could have resorted to such a legal remedy as long as they believed that the prosecuting authorities had been responsible for the disclosure of the confidential report. The Government emphasised that the action for damages provided for in section 105 of the Introductory Law to the Civil Code did not presuppose that the claimant had established the existence of fault on the part of a State official. It required only that the act or omission committed in the exercise of the judicial authorities' functions should have been shown to be illegal.

In this respect, the Government affirmed that the case-law of the domestic tribunals had been reluctant at its early stages to recognise the State's liability to compensate damage stemming from the acts of judicial authorities. They also accepted that the case-law had actually recognised the State's liability only for acts committed by judicial authorities within the exercise of their administrative duties, such as those pertaining to promotions, transfers and payroll issues. The Government submitted judgment no. 2795/2001 of the Athens Administrative Court of Appeal which had recognised the State's civil liability for the assassination of two attorneys during a hearing before a military court. The domestic court had stressed that the police had not reinforced the security measures in the courtroom, despite the importance of the case. In this regard, it had admitted that the judge advocate had not drawn the police's attention to the probability of violent acts occurring at the hearing of the case so that the appropriate security measures could be taken. The Government also produced judgment no. 15006/2008 of the Athens Administrative Court of First Instance whereby it had been admitted that responsibility lay with the executive and legislative power to organise the judicial system in order to guarantee the adjudication of cases within a reasonable time, and that in this context the acts or omissions of the judiciary in each particular case were not necessarily relevant.

Moreover, the Government pointed out that according to the case-law of the European Court of Justice, the State's third-party liability was established with regard to damage caused to private individuals stemming from acts or omissions committed by judicial officers. In sum, the Government contended that an action for damages against the State was an accessible and effective legal remedy with regard to allegedly illegal acts committed by judicial officers.

Further, the Government observed that the applicants had also had at their disposal the remedy of lodging a criminal complaint and joining the criminal proceedings as a civil party. In particular they stressed that the applicants could have given the competent criminal authorities an opportunity to investigate the case by submitting a complaint against any person responsible for defamation, defamation of a company, violation of official confidentiality, breach of an official duty or the secrecy of the investigation, provided for in Articles 361 to 364, 251, 252 and 259 of the Criminal Code and section 22(4) of Law no. 2472/1977. In this connection, the Government produced decisions nos. 653/2003 and 440/2006 of the Indictment Division of the Court of Cassation, ruling on an issue of local jurisdiction among Indictment Divisions at the pre-trial stage of criminal proceedings against a deputy prosecutor. It also submitted judgment no. 360/1992 of the Court of Cassation concerning the condemnation of a judge for the disclosure of the topics of an examination held for the selection of judicial employees and judgment no. 344/1992 of the Court of Cassation regarding the rejection of an appeal on points of law on the grounds that the civil party's complaint had been submitted outside the set time-limit. Moreover, the Government submitted a prosecutor's order bringing criminal proceedings against the head of an educational institution for illegally hiring a housekeeper. Lastly, in the Government's submission, the applicants had had the possibility of initiating actions for miscarriage of justice under Article 99 of the Constitution and section 73 of the Introductory Law to the Code of Civil Procedure in so far as those provisions concerned the acts or omissions of civil servants.

As to the substance of the applicants' complaint, the Government argued that if there had been any reference to their criminal case, it had occurred not on the part of a specific public authority, but on the initiative of a private television channel and private newspapers. Further, the Government contended that in the *Craxi v. Italy (no. 2)* case (no. 25337/94, 17 July 2003), the private conversations of a former Prime Minister which had no connection with criminal charges had been disclosed to the public. On the contrary, in the present case, the press reports had provided information about the initiation of criminal proceedings against the applicants, had described the offences allegedly committed by them and had also described the progress of the case. In the Government's submission, the details presented by the media had pertained exclusively and solely to the alleged criminal acts and not to evidence. Moreover, the Government contended

that the offences allegedly committed by the applicants appeared to arouse public interest. Finally, with regard to the absence of a reaction on the part of the prosecuting authorities concerning the "leak" of the prosecutor's report, the Government submitted that a criminal complaint should have originally been filed by the applicants in relation to the presumed attack on their honour and personality.

(b) The applicants

The applicants contended that domestic case-law distinguished between the exercise of the judicial and administrative duties of members of the judiciary. Judicial duties were linked with the handling and adjudication of a pending case, whereas administrative duties concerned the institutional conditions under which justice is done. The applicants affirmed that it was the case-law dealing with the exercise of the judicial duties of members of the judiciary which would be relevant to the present case. In other words, it was case-law pertaining to the judicial treatment of acts or omissions performed in the context of a specific case brought before members of the judiciary in the light of which the applicants' complaint had to be examined. In particular, the acts the applicants' case pertained to had occurred in the exercise of the investigating authorities' judicial duties. The disclosure of the prosecutor's report to the media took place while the said report was still in the hands of the prosecuting authority which, at that moment, was responsible for the applicants' case since it had the discretion either to bring criminal proceedings or file the case.

The applicants submitted that to date it was only for judges' acts or omissions in the performance of purely administrative duties that the Greek State had been found liable by domestic courts under section 105 of the Introductory Law to the Greek Civil Code. The applicants produced copies of domestic court judgments which had accepted the State's liability for the signature of a court's staff payroll by judges and the lack of security measures in a courtroom during a hearing. On the contrary, the applicants pointed out that there were numerous judgments by domestic courts expressly denying the State's liability when it came to wrongdoing on the part of the judiciary within the exercise of its judicial duties. The applicants produced, among others, judgment no. 1458/2000 of the Thessaloniki First-Instance Administrative Court, which had found that the prosecutor of the Thessaloniki Court of Appeal did not qualify as an "organ of the State" within the meaning of section 105 of the Introductory Law to the Greek Civil Code but as an "independent judicial authority", whose actions could not render the Greek State liable for compensation.

Moreover, the applicants claimed that judgments nos. 2795/2001 and 15006/2008 submitted by the Government were simply irrelevant to their case, as none of them concerned the liability of judicial agents in the exercise of their duties. On the contrary, the first judgment had dealt with

the State's liability for the lack of appropriate security measures in a courtroom and pertained to exceptional facts: an administrative inadequacy had led to the assassination of two attorneys during a hearing before the Athens Permanent Military Court. As far as the second judgment was concerned the State was found liable as the domestic court's had not reached judgments within a reasonable time. The applicants stressed that these judgments created a misleading impression. They both concerned the conditions under which justice is done and not acts or omissions by judges or prosecutors in the context of their judicial duties as in the instant case. Furthermore, the applicants contended that even with regard to illegalities committed by judicial officials in the exercise of their administrative duties, the Greek courts were reluctant today to apply section 105 of the Introductory Law to the Civil Code. They produced several judgments whereby the State had been absolved from any liability, *inter alia*, for the illegal promotion of the head of a court's registry, for the omission by the competent judicial council to grant a salary increase to a judge, and for the omission by another judicial council to promote a judge to a higher grade. Finally, as to the Government's reference to the case-law of the European Court of Justice, the applicants submitted that the domestic courts had to date never ordered the State to pay compensation for the non-enforcement of European Union law by the judiciary.

In addition, with regard to the provisions of the Code of Criminal Procedure, the applicants contended that there was no criminal offence provided for in Greek law covering the disclosure of confidential documents by the prosecuting authorities. The only offence that came close to what the respondent State referred to as a "breach of the secrecy of the investigation" was a "breach of judicial confidentiality" as provided for in Article 251 of the Greek Criminal Code. The applicants emphasised that this offence, however, referred strictly to judges and not to prosecutors; moreover, only "deliberations" and "votes" fell within its ambit. In fact, in the applicants' submission, a breach of the confidentiality of pre-trial proceedings by members of the judiciary merely constituted a disciplinary offence, which could only be punished on the initiative of the Minister of Justice. Moreover, the applicants argued that the offences prescribed under Article 252 and Article 259 of the Greek Criminal Code required that the offender intended to achieve personal benefit or to harm a third party. They pointed out that, without any doubt, it would be extremely difficult to prove in the circumstances of the present case such an aim on the part of a judge or a prosecutor and that they had never claimed that such an intention existed in their case. They referred in this connection to the relevant case- law of the domestic courts. Lastly, as far as an action for miscarriage of justice was concerned, the applicants stressed that since 1911, the year that legal remedy had been introduced, no member of the Greek judiciary had ever been found liable for a miscarriage of justice.

As regards the core of their claim, the applicants affirmed at the outset that for cases that attract broad public interest, the disclosure of secret documents is a rather common practice in Greece. They submitted an article published in a law review by the former vice-president of the Court of Cassation, characterising the disclosure of confidential prosecution documents or evidence as a recurring problem in the criminal process. The article points out that in Greece there is in practice an objective inability to protect a person's right to their good name and presumption of innocence, especially at the stage before trial. It continues by saying that in the efforts of journalists to impress and to gain an exclusive piece of news, and the broadcasting stations' quest for high ratings, there are often serious violations of the rights of accused and victims alike. The applicants submitted that to date no disciplinary proceedings have ever been undertaken against any investigating official, either from the police or the judiciary.

In the applicants' view, the Court's findings in *Craxi (no. 2)* (cited above) fully applied to the present case. In this connection, the applicants argued that the public's right to be informed could have been fully satisfied by an official press release by the prosecuting authorities stating the names of those accused and the offences of which they had been accused.

2. The Court's assessment

(a) General principles developed by the Court

The Court reiterates that the rule of exhaustion of domestic remedies in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the European Court for their acts before they have had an opportunity to put matters right through their own legal system. The rule in Article 35 § 1 is based on the assumption, reflected in Article 13, with which it has a close affinity, that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time, namely, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *T. v. the United Kingdom* [GC], no. 24724/94, § 55, 16 December 1999). Equally, an applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case-law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 156, ECHR 2003-VI, and *Salah*

Sheekh v. the Netherlands, no. 1948/04, §§ 121 et seq., ECHR 2007-I (extracts)).

The application of the rule of exhaustion must make due allowance for the context. Accordingly, the Court has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. The rule is neither absolute nor capable of being applied automatically. In reviewing whether it has been observed it is essential to have regard to the particular circumstances of each case. Thus, Article 35 must be applied to reflect the practical realities of the applicant's position in order to ensure the effective protection of the rights and freedoms guaranteed by the Convention (see *Nnyanzi v. the United Kingdom*, no. 21878/06, § 42, 8 April 2008). This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (see *Akdivar and Others v. Turkey*, 16 September 1996, § 69, *Reports of Judgments and Decisions* 1996-IV).

(b) Application of those principles to the present case

The Court observes that the Government have highlighted, in particular, that an action for damages based on section 105 of the Introductory Law to the Civil Code was an available and effective remedy in the circumstances of the present case. In this respect the parties disagreed on the nature of the judicial authorities' duties in the exercise of which the disclosure of the prosecutor's report took place. The Government affirmed that the case concerned acts or omissions of the judicial authorities within the context of their administrative duties. On the contrary, the applicants contended, *inter alia*, that their case concerned the exercise of the prosecutor's office's judicial duties and, thus, according to the constant case-law of domestic courts, the civil liability of the State on the basis of section 105 of the Introductory Law to the Civil Code could not be established. The Court considers that it is not its task to determine whether the judicial authorities acted in the context of their judicial or administrative competences. It will only assess whether the Government, which is claiming non-exhaustion, has proved that civil liability of the State could have been established on the grounds of section 105 of the Introductory Law to the Civil Code.

In this connection, the Court observes that the applicants do not challenge the availability of this remedy. Further, as regards its effectiveness, the Court notes that the above remedy is of a compensatory nature and is subject to one condition, namely, the unlawfulness of the act or omission attributable to the State's organs. In other words, under section 105, the claimant is under the sole obligation to establish that the unlawfulness is objectively attributable to the State without necessarily going into the subjective liability of the State' organs involved. Thus, an

action for damages based on section 105 of the Introductory Law to the Civil Code would allow the applicants to seek compensation without necessarily having to establish the personal liability of the judicial authorities which were allegedly involved in the disclosure of the confidential report.

Secondly, the Court takes note of judgments nos. 2795/2001 of the Athens Administrative Court of Appeal and 15006/2008 of the Athens Administrative Court of First Instance submitted by the Government, which admitted State liability under section 105 for the lack of appropriate security measures in a courtroom and the delay in reaching a judgment. 'The Court agrees with the applicants that the judgments produced by the Government differ from the present case in so far as their factual context is concerned, and it is true that in both cases the civil liability of the State mainly resulted from omissions attributed primarily to the executive and legislative powers and partially to the judicial authorities.

Nonetheless, the Court has already accepted that the mere existence of doubts as to the effectiveness of a domestic remedy does not automatically absolve the applicant from the obligation to use it (see, *inter alia*, *Back v. Finland* (dec.), no. 23773/94, 9 April 1996, and *Tamm v. Estonia* (dec.), no. 15301/04, 2 September 2008). In the present case, the judgments submitted by the Government accepted, at least partially, the civil liability of the State under section 105 of the Introductory Law to the Civil Code for acts or omissions attributed to judicial authorities, and the applicants have not put forward a valid reason, or established the existence of any special circumstances, which would render the remedy referred to by the Government inadequate and ineffective (see, for example, *Akdivar and Others*, cited above, § 68, and *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V).

In the light of the foregoing, the Court finds that the applicants ought to have tried initiating a procedure under section 105 of the Introductory Law to the Civil Code capable of leading to an award of monetary redress for the alleged damage to their professional and personal life due to the disclosure of the confidential judicial report to the media. The applicants have therefore failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention as far as the complaint concerning Article 8 of the Convention is concerned. It follows that this complaint must be rejected for non-exhaustion of domestic remedies under Article 35 §§ 1 and 4 of the Convention.

B. Alleged violation of Article 6 § 2 of the Convention

The applicants complained that the disclosure of confidential information deriving from the prosecutor's report indicated that there had been an intention on the part of the judicial authorities to expose them as having

committed offences of which they had, to that date, never been accused. They argued that there had been a breach of Article 6 § 2 of the Convention, which provides:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Government submitted that the judicial authorities could not be held responsible for the disclosure of the prosecutor's report to the press. They further argued that the selected extracts quoted from the report contained only information on the initiation of criminal proceedings against the applicants without being accompanied by any value judgments on their guilt.

The Court observes that the presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of the fair criminal trial that is required by paragraph 1 (see *Allenet de Ribemont v. France*, 10 February 1995, § 35, Series A no. 308). It prohibits the premature expression by the tribunal itself of the opinion that the person "charged with a criminal offence" is guilty before he has been so proved according to law (see *Minelli v. Switzerland*, 25 March 1983, Series A no. 62). It also covers statements made by other public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority (see *Allenet de Ribemont*, cited above, § 41, and also *Daktaras v. Lithuania*, no. 42095/98, §§ 41-43, ECHR 2000-X).

The Court observes that on 26 June 2009 the Indictment Division of the Athens Court of Appeal dismissed all the charges against the applicants and stated that there were no grounds to commit them for trial. Thus the applicants' innocence was no longer open to doubt in the criminal proceedings since they did not end with any finding of guilt. Moreover, the Court refers to its findings above with regard to the complaint raised under Article 8 of the Convention. It observes that judgments nos. 2795/2001 of the Athens Administrative Court of Appeal and 15006/2008 of the Athens Administrative Court of First Instance submitted by the Government have accepted, at least partially, the civil liability of the State under section 105 of the Introductory Law to the Civil Code for actions or omissions attributed to judicial authorities. In the light of the foregoing the applicants should have initiated a procedure under section 105 of the Introductory Law to the Civil Code in conjunction with Articles 57 and 59 of the Civil Code insofar as the alleged breach of their presumption of innocence may have resulted in damage to their professional and personal life.

This part of the application is accordingly inadmissible and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

C. Alleged violation of Article 13 of the Convention

The applicants complained that the Greek legal system did not provide an effective remedy for those whose rights had been violated, as in the present case, through the disclosure of confidential information in the context of pre-trial criminal proceedings. They argued that there had been a breach of Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government replied that no issue arose under Article 13 of the Convention.

The applicants mainly referred to their observations on the Government's objection on non-exhaustion of domestic remedies as regards the complaint raised under Article 8.

The Court refers to its findings above that the applicants had effective domestic remedies in respect of the alleged damage to their professional and personal life due to the disclosure of the confidential judicial report to the media, which they failed to have recourse to. Accordingly, the applicants' complaint under Article 13 of the Convention is manifestly ill-founded.

It follows that this part of the application should be rejected pursuant to Article 35 §§ 3 a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Søren Nielsen	Nina Vajić
Registrar	President