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European Human Rights Moot Court Competition

Kallen v. Avrylia

Kallen

vs

Avrylia

Submission of the APPLICANT

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COUNCIL OF EUROPE
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I. LIST OF ABBREVIATIONS

Art - Article

CoE - Council of Europe

CPT - European Committee for the Prevention of Torture

ESD - Emergency State Decree

EU - European Union

HRC - Human Rights Committee

NGO - Non-governmental organization

SG - Secretary General of the Council of Europe

UN - United Nations

UN CAT - United Nations Committee Against Torture

II. LIST OF REFERENCES

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III. SUMMARY OF THE RESULTS

- The Applicant's right not to be subject to inhuman and degrading treatment under Art 3 was violated during the interrogation. Non-punishment of perpetrators of the ill-treatment is a violation of the procedural safeguards under Art 3. If enforced, extradition of the Applicant will infringe Arts 3, 5 and 6.
- The Applicant's right to liberty and security under Art 5 was violated as his detention was not based on reasonable suspicion and was not effected for the purposes of bringing him before competent legal authority.
- The Applicant's right to fair trial under Art 6 was violated due to (i) usage of self-incriminating statement obtained as a result of ill-treatment to secure conviction and (ii) lack of legal assistance during the interrogation.
- The Applicant's rights to privacy and to respect for correspondence under Art 8 were violated as the ESD does not contain adequate safeguards against covert surveillance.

- The Applicant's rights to respect for private life, home and correspondence under Art 8 were violated by the search of his house and seizure of two computers and several boxes of documents. In justifying covert surveillance and search and seizure, the Respondent cannot rely on derogation under Art 15. Measures adopted in the context of the derogation were not strictly required by the exigencies of the situation, rendering the derogation invalid. Also, the Respondent failed to duly notify the SC of the CoE of the derogation.
- The Applicant's right to an effective remedy under Art 13 was violated as the ESD does not imply right to appeal against covert surveillance measures. Accordingly, the Respondent cannot claim non-exhaustion of domestic remedies.

IV. MERITS OF THE CASE

a. Article 3

1. Violation of Article 3 regarding the Applicant's interrogation

1. Art 3 stipulates that "*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*". Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits derogation from Art 3, despite the pressure from States to dilute this protection in cases concerning threat of terrorism.[1]

2. First of all, the Applicant submits that treatment of Mr. Kallen by national security officers is both inhuman and degrading. In order to invoke violation of Art 3, inhuman or degrading treatment "*must attain a minimum level of severity*".[2] The threshold level for *de minimis* rule is relative and depends on all circumstances of the case, such as nature and context of treatment, its manner and methods used, its duration.[3]

3. As regards degrading treatment, the Court stressed that "*in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Art 3, whatever the impact on person in question*".[4] Thus, in *Bouyid v. Belgium* one slap caused to each of the applicants while they were under the police control was not strictly necessary by their conduct and was found to diminish their dignity.[5]

4. In the present case, two hits in a face were not strictly necessary in the view of Mr. Kallen's conduct, as there was no physical resistance from him during the questioning. In this

[1] *Saadi v. Italy*, § 137; Committee of Ministers Resolution 1840 (2011), § 5.1; PACE Resolution 2090, § 16.3
[2] *Kudla v. Poland*, § 91
[3] *Tyrer v. the United Kingdom*, § 31
[4] *Bouyid v. Belgium*, § 101
[5] Ibid, § 111

regard, unnecessary and illegitimate use of physical force by national security officers diminished human dignity of the Applicant and, thus, constitutes degrading treatment.

5. Furthermore, the Grand Chamber emphasized that when torture as a means of obtaining information is threatened but not imposed, this constitutes inhuman treatment,[6] provided that it is "*sufficiently real and immediate*".[7]

6. After hitting Mr. Kallen, the national security officers threatened to proceed with "*interrogations as seen in the movies when dealing with dirty pigs like you*" in order to obtain information from him. In the present case, the threat was not a spontaneous act, but was premeditated and applied in a deliberate and intentional manner. It followed after Mr. Kallen was cuffed to the chair with his hands and legs within 15 minutes and was hit twice in face by security officers. Moreover, the threats were made in the absence of the Applicant's lawyer, thus, intensifying the risk of being subjected to torture. In the light of abovementioned facts, a threat during interrogation must be regarded as having caused Mr. Kallen considerable fear, anguish and mental suffering and, thus, constitutes inhuman treatment.

7. Conclusively, the Applicant submits that the pain inflicted on Mr. Kallen with two hits in his face, unnecessary recourse to physical force and threat of torture attain a minimum level of severity, and, thus, constitute inhuman and degrading treatment contrary to Art 3. Finally, the burden is on the Respondent to provide a plausible explanation of how those injuries were caused,[8] as there is a strong presumption of responsibility of the State authorities.[9]

2. Violation of Article 3 regarding non-punishment for perpetrators of ill-treatment

8. According to the Court, when an individual makes a credible assertion that he has suffered treatment infringing Art 3, it is the duty of the national authorities to carry out "*an effective official investigation*" capable of punishing those responsible.[10] The Court further underlined that if this was not the case, general prohibition under Art 3 would be illusory and lead to the impunity of perpetrators.[11] Thus, the logical consequence of investigation for ill-treatment by state authorities is a punishment of perpetrators, while the mere fact of initiating thorough proceeding at national court does not suffice.[12]

9. In this regard, the Applicant does not contest the procedural safeguards applied by Avrylia with respect to protection of the Applicant's right to appeal; however, the Applicant

[6] *Gäfgen v. Germany*, § 67
[7] *Campbell and Cosans v. the United Kingdom*, § 26
[8] *Salman v. Turkey*, § 99
[9] Ibid, § 100
[10] *Assenov and Others v. Bulgaria*, § 102
[11] Ibid
[12] *Gäfgen v. Germany*, § 123

submits that non-punishment of A.M. and P.K is contrary to the Convention. In the present case, criminal proceedings against the Avrylian security officers who interrogated Mr. Kallen were officially initiated by the prosecutor's office. The Avrylian Criminal Code punishes acts of ill-treatment committed by officials with imprisonment between 2 and 5 years. However, the Avrylian's court of last resort found that within the applicable emergency legislation, interrogation techniques were appropriate and the use of force was not excessive, finding the officers not guilty. As Mr. Kallen made a credible assertion as to impugned treatment contrary to Art 3 [Memorial, Part a.1], Avrylia had a positive obligation to ensure that national security officers would be punished under its national law. However, as the Respondent failed to take this action, it violated Art 3 of the Convention.

3. Violation of Article 3, Article 5 and Article 6 regarding the Applicant's extradition

10. Extradition is accepted as a legitimate and desirable means of enforcing criminal justice between States;[13] however, it is subject to exceptions. The Court held that extradition contravenes Art 3 "*where there are substantial grounds for believing that the person would be subject to torture or inhuman or degrading treatment or punishment by authorities*".[14]

11. Similarly, extradition may be barred on the basis of Art 6, where individual would risk suffering from flagrant denial of justice in the requesting state.[15] The term "*flagrant denial of justice*" means trial which is manifestly contrary to the provisions of Art 6 or the principles embodied therein. The Court identified certain forms of unfairness that amount to flagrant denial of justice, including the use in criminal proceedings of statements obtained as a result of a suspect's treatment in violation of Art 3.[16]

12. Furthermore, the Court also considered that a Contracting State would violate Art 5 if it removed an applicant to a State where he was at real risk of deprivation of liberty, specifically having been convicted after a flagrantly unfair trial under Art 6.[17]

13. The Applicant underlines that in order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances.[18] The Court considered that the same standard and burden of proof applies to

[13] *Soering v. the United Kingdom*, § 89
[14] CoE Convention on the Prevention of Terrorism, Art 21 § 2
[15] *Mamatkulov and Askarov v. Turkey*, §§ 81-91
[16] *Sejdovic v. Italy*, § 84
[17] Ibid
[18] *Vilvarajah and Others v. the United Kingdom*, § 108

Art 5 and Art 6 in extradition cases.[19] In the scope of abovementioned factors, the Applicant stresses that in the present case (i) there is a risk of violation of Arts 3, 5 and 6 of the Convention in Walentia. Furthermore, (ii) the diplomatic assurances provided by Walentian authorities, in their practical application, are not a sufficient guarantee against this risk.

i. Risk assessment

14. Firstly, while assessing general situation in the receiving country, the Court heavily relies on the information contained in recent reports from independent international human rights protection associations and NGOs.[20] In this regard, UN CAT and HRC indicated in its 2014 Concluding Observations that ill-treatment remains widespread in Walentia when national security officers are involved. Similarly, this was affirmed in 2014 and 2015 Annual Reports of NGO *International Human Rights Centre*, which documented situations of excessive use of force, use of evidence obtained through torture in criminal proceedings and ill-treatment in prisons and during interrogations, especially as regards persons suspected of terrorist activities, with these practices becoming even more-widespread in 2016 as reported by Walentian NGO *Themis*. Secondly, as regards personal circumstances of Mr. Kallen, the reports of notable international and national human rights bodies indicate that persons suspected of terrorist activities form a specific group that is systematically exposed to practice of ill-treatment from 2014 till today.

15. Given that the arrest warrant was issued in respect of the Applicant in Walentia on charges of planning and preparing terrorist attacks in Walentia, there are substantial grounds for believing that after extradition of Mr. Kallen to the State of his nationality he would be subjected to ill-treatment, as well as that in pending criminal proceeding evidence would be extracted contrary to Art 6. Consequently, as there is a risk that Mr. Kallen may be found guilty of planning and preparing terrorist attacks in Walentia because of unfair trial, thus, a violation of Art 5 will occur if Walentian authorities put the Applicant in prison.

ii. Diplomatic assurances

16. In the case at hand, Walentian highest authorities provided diplomatic assurances that the extraditee would not be subjected to ill-treatment, arbitrary detention, and extraction of evidence under torture if returned to Walentia. In assessing whether diplomatic assurances provide sufficient protection against real risk, the Court stated that "*the preliminary question is whether the general human rights situation in the receiving State excludes accepting any*

[19] *Othman (Abu Qatada) v. the United Kingdom*, § 233, 261
[20] *Chahal v. the United Kingdom*, § 99; *Saadi v. Italy*, § 131

assurances whatsoever".[21] For instance, in *Sultanov v. Russia* the Court has found general situation in the country to be alarming and gave no weight to diplomatic assurances. In that case, given that practice of torture in Uzbekistan was described by UN institutions and international NGOs as systematic and enduring for several years, the Court rejected to consider any assurances since general situation in the receiving State was alarming.[22]

17. Likewise in *Sultanov*, Walentia is a state where the use of torture is systematically practiced and where evidence is obtained under torture from 2014 till nowadays, as reported by UN institutions and NGOs. Consequently, the Court should find that in the light of alarming situation in Walentia, diplomatic assurances do not provide a reliable safeguard against the risk of arbitrary detention, ill-treatment and extraction of evidence under torture.

18. Alternatively, if the Court accepts diplomatic assurances given by Walentian authorities, there must be an assessment of its quality and whether, in the light of the receiving State's practices, these assurances can be relied upon.[23] The Court has established a number of factors that have to be taken into account when assessing diplomatic assurances,[24] i.e. whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, and if it is willing to cooperate with international monitoring mechanisms and to investigate allegations of torture, to punish those responsible.[25]

19. As in *Kolesnik v. Russia*,[26] in the present case there are no objective means to check whether Walentia would fulfill diplomatic assurances. Since no independent international controlling mechanism is established in order to ensure procedural safeguards of Mr. Kallen before Walentian courts, Walentia will not be able to ensure effective protection of the Applicant. In addition, the Applicant stresses that the requesting State is not willing to cooperate with international monitoring mechanisms. Both UN CAT and HRC while praising Walentia for bringing its laws in line with the relevant human rights treaties, raised their deep concerns about ill-treatment in Walentia. However, the following reports of reputable NGOs indicate the enduring systematic and widespread practice of torture in Walentia accompanied by impunity of the officials involved. Accordingly, the Respondent is not willing to cooperate with international controlling mechanisms for the purposes of investigating allegations of ill-treatment and punishing perpetrators.

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[21] *Othman (Abu Qatada) v. the United Kingdom*, § 188
[22] *Sultanov v. Russia*, § 73
[23] *Othman (Abu Qatada) v. the United Kingdom*, § 189
[24] Ibid
[25] *Koktysh v. Ukraine*, § 63
[26] *Kolesnik v. Russia*, § 73

20. Furthermore, there is an international consensus that diplomatic assurances are ineffective and not legally binding safeguard against the risk of torture. UN CAT, the CPT and the CoE Commissioner for Human Rights indicated that the assurances have proven unreliable in many cases.[27] The practice demonstrates that those subject to their "guarantees" have been ill-treated, deprived of fair trial and arbitrarily detained.[28] Therefore, any reliance on diplomatic assurance hinders effective protection of human rights in case of extradition.

21. Consequently, the assurances issued by Walentian authorities, due to their quality do not provide a sufficient safeguard against the Applicant's prospective risk of being subjected to ill-treatment, flagrant denial of justice and arbitrary detention in Walentia. Therefore, the decision to extradite Mr. Kallen to Walentia would breach Arts 3, 5, 6 if enforced.

b. Article 5

1. Violation of the Applicant's right to liberty and security regarding his detention

22. The Applicant submits that his arrest violated Art 5 § 1 (c), which governs the arrest or detention of suspects in the administration of criminal justice. In particular, his detention (i) was not based on the reasonable suspicion and (ii) was not effected for the purpose of bringing him before competent legal authority.

i. Failure to have required level of suspicion as a basis for detention

23. The detention must be "*based on a reasonable suspicion*", which is an essential part of the safeguard against arbitrary arrest and detention.[29] Despite a fine line between the suspicion, which is sufficiently based on objective facts and that which is not, the notion of "*reasonable suspicion*" should not be stretched too much even in the emergency circumstances.[30]

24. Reasonable suspicion implies the existence of facts or information that would "*satisfy an objective observer that the person concerned may have committed the offence*".[31] There is a difference between honest and reasonable suspicion. The honest one has lower threshold,[32] but the fact that the suspicion is merely held in a good faith is insufficient for the arrest.[33]

25. Additionally, in some situations, police may be called upon to arrest a suspected terrorist on the basis of reliable, but undisclosable to the suspect or the court information as its

[27] *Agiza v. Sweden*; 5th General Report on the CPT's activities; Report by Mr. Alvaro Gil-Robles
[28] Report of the UN High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism
[29] *Gusinskiy v. Russia*, § 53
[30] *O'Hara v. the United Kingdom*, § 41
[31] Ibid; *Labita v. Italy*, § 155; *Erdagöz v. Turkey*, § 51; *Fox, Campbell and Hartley v. the United Kingdom*, § 32
[32] *Fox, Campbell and Hartley v. the United Kingdom*, § 34
[33] *Gusinskiy v. Russia*, § 53

disclosure may jeopardize the source. However, in this case the safeguard secured by Art 5 § 1 (c) can be impaired by overly broad interpretation of the notion of reasonableness, that cannot be justified even when dealing with terrorism.[34] In order to prove the reasonability, the Respondent must provide some information to satisfy the Court that the arrested person was reasonably suspected of having committed the alleged offence.[35]

26. In *Fox, Campbell and Hartley v. the United Kingdom*, the Court accepted that the applicants had been arrested and detained on an honest suspicion that they were terrorists, grounded on their previous connections with terrorists and the fact that they were questioned during their detention about specific terrorist acts of which they were suspected. It only confirmed officers' honest suspicion that they had been involved in those acts, but the Respondent did not provide enough evidence to "*satisfy an objective observer that the applicants may have committed these acts*", thus, there was a breach of Art 5 § 1.[36]

27. In the present case, the arrest was based on the intelligence from the Walentian counterparts relating to Mr. Kallen´s suspected involvement with a terrorist organization and participation in planning and conducting terrorist activities in Avrylia, as well as a suspicion that he had coordinated and planned bomb attacks. His specific role in the activities was doubted, as the information available to the Security Service did not specify whether he planned the attack or only knew where the bombs were located. Also, the authorities had classified information shared unofficially, and at the moment of the arrest one could not be sure if it was reliable.

28. Consequently, the intelligence that became the basis for the arrest consisted mostly of suspicions and possible, but not proven information. It could trigger officers' honest suspicion, but there are no facts that could assure an objective observer that Mr. Kallen had indeed committed the offence. Therefore, the Applicant submits that the arrest was not based on reasonable suspicion, and it constitutes a breach of Art 5.

ii. Failure to comply with the required purpose of the arrest

29. Under the Court's well-established case-law, every category of person's detention referred to in Art 5 §1 (c) must be "*effected for the purpose of bringing him before the competent legal authority*".[37] Accordingly, deprivation of liberty is permitted only in

[34] *O'Hara v. the United Kingdom*, § 35
[35] Ibid; *Fox, Campbell and Hartley v. the United Kingdom*, § 34
[36] *Fox, Campbell and Hartley v. the United Kingdom*, §§ 35 and 36
[37] *Ostendorf v. Germany*, § 67; *Lawless v. Ireland* § 14; *Jecius v. Lithuania*, §§ 50-51

connection with criminal proceedings,[38] as Art 5 § 1 (c) governs pre-trial detention.[39] Moreover, a person's detention on remand must be done to secure his presence before the competent legal authority and be strictly necessary for it.[40] Thus, Art 5 § 1 (c) does not permit the detention of an individual for questioning merely as a part of intelligence-gathering. There must be an intention to bring charges, otherwise the person must be released.[41]

30. In the case at hand, the main reason for the Applicant's apprehension was a suspicion that he had coordinated and planned several bomb attacks. Thus, he was not apprehended to be brought before the competent legal authority. In fact, he was only questioned, which indicates that the detention was more of a part of intelligence-gathering than of pre-trial stage of criminal proceedings. Therefore, the arrest was not effected for bringing Mr. Kallen before the competent legal authority.

31. To conclude, the Applicant submits that his detention was not based on the reasonable suspicion and was not effected for bringing him before the competent legal authority, which amounts to violation of Art 5 § 1 (c).

c. Article 6

1. Violation of the Applicant's right to fair trial regarding the impugned evidence

i. Unfairness of the proceedings due to use of the impugned evidence

32. As Art 6 does not contain any rules on the admissibility of evidence,[42] the Court decides whether the proceedings were fair as a whole.[43] In *Salduz v. Turkey* it was emphasized that criminal proceedings form an organic and interconnected whole from the moment of arrest until handing down of the sentence.[44] Investigation stage is particularly important: evidence obtained at this stage determine the framework in which the offence will be considered.[45] So when at this stage a suspect's absolute right not to be subjected to ill-treatment is violated, domestic courts must explicitly declare impugned statements inadmissible. Otherwise, they will be considered as part of evidence on which the conviction was based.[46] This approach applies irrespective of probative value of the statements and their decisiveness in securing the conviction.[47] Such approach will deprive State agents of any

[38] *Ostendorf v. Germany*, § 68; *Jecius v. Lithuania*, § 50
[39] *Ostendorf v. Germany*, § 68; *Ciulla v. Italy*, §§ 38-40
[40] *Ladent v. Poland*, § 55
[41] Harris, O'Boyle, Bates, Buckley (2014), p. 318
[42] *Schenk v. Switzerland*, §§ 45-46; *Teixeira de Castro v. Portugal*, § 34
[43] *Khan v. the United Kingdom*, § 34; *Allan v. the United Kingdom*, § 42
[44] *Salduz v. Turkey*, § 58
[45] Ibid, § 54
[46] *Harytyunyan v. Armenia*, §§ 58-59
[47] *Gafgen v. Germany*, §166, *Jalloh v. Germany*, § 99, 104

potential inducement for treating suspects in a manner inconsistent with Art 3. Furthermore, if the prosecution proves the case resorting to evidence obtained through coercion or oppression in defiance of the suspect's will, it constitutes breach of the right not to incriminate oneself.[48]

33. In the present case, the Applicant made a self-incriminating statement as a result of ill-treatment during his interrogation [Memorial, Part a.1]. Within the proceedings before the national courts Mr. Kallen complained that the impugned statement was inadmissible evidence, but the complaints were dismissed. While Avrylian first-instance and appellate courts found that the conviction was based on other evidence, the Supreme Court concluded, that "*Mr. Kallen's conviction had not been based solely on his statement while in police custody*". In other words, the Supreme Court confirmed that the statement was not eradicated from the case-file and was used as a part of the evidence on which the Applicant's conviction was based. Accordingly, none of the courts at any of the three levels explicitly declared the statement inadmissible.

34. Therefore, use of the self-incriminating statement obtained as a result of ill-treatment to secure the Applicant's conviction rendered the criminal proceedings unfair as a whole.

ii. Validity of the conventional guarantees despite public interest

35. The Respondent may argue that the public interest in the investigation and punishment of the terrorist activity outweighs the Applicant's interest in fair trial.[49] However, fair trial rights cannot be undermined for the sole reason that the individuals in question are suspected of terrorism.[50] While having regard to the interests at stake in the context of Art 6, the Court emphasized in *Gafgen v. Germany* that Art 3 of the Convention enshrines an absolute right.[51] Weighting it against other interests, such as public interest in effective criminal prosecution, would undermine its absolute nature.[52] Accordingly, securing of a criminal conviction may not be obtained at the cost of compromising protection of the absolute right not to be subjected to ill-treatment prohibited by Art 3 as this would undermine those values and impair fair administration of justice.[53]

36. Mr. Kallen was found guilty of participation in terrorist organizations and planning and organizing terrorist activities. The impugned confession statement was used as a part of the evidence on which the Applicant's conviction was based. However, the Respondent

[48] *Saunders v. the United Kingdom*, § 68; *Heaney and McGuinness v. Ireland*, § 40
[49] *Jalloh v. Germany*, § 97
[50] *Ibrahim and Others v. the United Kingdom*, § 252
[51] *Gafgen v. Germany*, § 176
[52] *Saadi v. Italy*, §§ 138-139
[53] *Alchagin v. Russia*, § 66

cannot hide the violation of an absolute right not to be subject to ill-treatment behind the public interest in the investigation and punishment of the alleged terrorist activity. Such conduct undermines absolute nature of the right and impairs fair administration of justice. Therefore, as far as the evidence was obtained in violation of an absolute right, public interest cannot overrule the conventional guarantees.

37. Given the above, the Applicant requests the Court to declare that the criminal proceedings were unfair as a whole, which amounts to violation of Art 6 § 1.

2. Violation of the Applicant's right to legal assistance during interrogation

38. The right of access to lawyer constitutes a fundamental safeguard against coercion and ill-treatment of suspects by the police.[54] In *Pishchalnikov v. Russia* the Court stated that a suspect "*who had expressed desire to participate in investigative steps only through counsel, should not be subject to further interrogation until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police or prosecution*".[55] Accordingly, once having invoked a right to legal assistant, a suspect cannot be subject to further interrogation unless the lawyer is physically present. The European Committee for the Prevention of Torture supported this approach, stating that "*the right of access to a lawyer should also include the right to have the lawyer present during any questioning conducted by the police*".[56] Finally, as Avrylia is a Member State of the EU, it is bound by the Directive 2013/48/EU, which affirms a suspect's right for their lawyer to be present and participate effectively in interrogation.[57]

39. In the present case, the Applicant hired a lawyer of his choice, which implies his intention to participate in pre-trial proceedings through legal assistant. Given Mr. Kallen's continuous refusal to speak, he was unlikely to initiate further communication, exchanges or conversations with the authorities. Accordingly, national security and police officers were not entitled to subject him to further interrogation in the absence of a lawyer. However, they used physical force and threat of torture in order to obtain information [Memorial, Part a.1]. At the same time, presence of the Mr. Kallen's lawyer would have altered the police behavior and protected the Applicant against coercion. Thus, lack of legal assistance during the interrogation renders the proceedings unfair and amounts to violation of Art 6 § 3 (c).

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[54] *Salduz v. Turkey*, §§ 53-54; *Pishchalnikov v. Russia*, §§ 68-69
[55] *Pishchalnikov v. Russia*, § 79
[56] CoE, CPT/Inf (2011) 28, 21st General Report (10 November 2011) § 24
[57] Directive 2013/48/EU of the European Parliament and of the Council (22 October 2013), Art 3 § 3 (b)

40. To summarize, the Applicant respectfully requests the Court to declare that there was a violation of Art 6 §§ 1 and 3 (c) regarding usage of the self-incriminating statement to secure the Applicant's conviction and lack of legal assistance during the interrogation.

d. Article 8

1. Invalidity of the derogation under Article 15

i. Disproportionality of the measures in the exigencies of the situation in Avrylia

41. The Applicant contends that even if the situation in Avrylia could justify derogation from obligations under the Convention, the enforcement of the ESD was still disproportionate to its strict requirements. The measures are "*strictly required*" by the situation if, *inter alia*, adequate safeguards against abuse are provided by the emergency legislation.[58] Generally, the Court finds that the State cannot rely on its derogation if no such safeguards exist. [59]

42. The Applicant will demonstrate that he was not afforded any effective safeguards from the abuse of powers during covert surveillance, search and seizure [Memorial, Parts d.2.i and d.2.ii]. Thus, the "*strictly required*" test is not satisfied and Avrylia cannot justify the interference by the derogation under Art 15.

ii. Failure to give required notification of the derogation

43. Alternatively, the Applicant submits that Avrylia cannot rely on its derogation, since it failed to comply with the procedural requirement of Art 15 § 3. In the *Greek* case, there was a four-month delay between the declaration of state of emergency and the notification of the SG. The Commission found the derogation to be invalid and stressed that the late notification would not justify any actions taken before the actual notification. [60]

44. In the case at hand, state of emergency was declared on 10 May 2015, while the SG of the CoE was officially notified thereof on 1 October 2015. The measures in derogation from the Convention, namely covert surveillance as well as search and seizure of the Mr. Kallen's property under the ESD, were undertaken on 9 August 2015 and 9 September 2015 respectively, that is before any notification was brought to the attention of the SG.

45. It follows that at the time when the Respondent intervened with Mr. Kallen's rights under Art 8, the SG was not put on notice neither of any measures derogating from the Convention nor of the reasons thereof. Thus, the procedural requirement under Art 15 § 3 was not met by the Government of Avrylia and it cannot rely on its late declaration to retroactively justify violation of the Convention.

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[58] *A. and Others v. the United Kingdom*, § 184; *Brannigan and McBride v. the United Kingdom*, §§ 48-66
[59] *Aksoy v. Turkey*, §§ 79-84
[60] *Denmark, Norway, Sweden and the Netherlands v. Greece*, § 45

2. Violation of Article 8 regarding covert surveillance and search and seizure

46. The Applicant submits that covert surveillance as well as the search and seizure of his property violated Art 8. The Court has confirmed that searches of property intervene with the right to respect for private life and home.[61] Seizure of computers and documents violates the right to respect for correspondence.[62] Covert surveillance measures interfere with the right to privacy[63] and right to respect for correspondence.[64] Interference with these rights is justified if it is "*prescribed by law*", "*pursues a legitimate aim*" and is "*necessary in a democratic society*".[65] However, if a restriction is not prescribed by law, namely does not have some basis in domestic law[66] or is not accessible, foreseeable and compatible with the rule of law,[67] the Court will usually refuse to examine further issues.[68] In the present case, the Applicant submits that the ESD is incompatible with the rule of law due to lack of any safeguards. Accordingly, as the ESD does not imply any safeguards against abuse, the impugned measures could not be conducted in a manner consistent with the Convention and, thus, necessary in a democratic society.

i. Incompatibility of the covert surveillance measures with the rule of law

47. In the context of covert surveillance, domestic law is compatible with the rule of law if (i) it indicates the scope of the authorities' discretion and the manner of its exercise with sufficient clarity[69] and (ii) provides for adequate and effective safeguards against abuse.[70] In view of the risk that a system of secret surveillance set up to protect national security may undermine or even destroy democracy on the ground of defending it, the Court must be satisfied that there are adequate and effective guarantees against the abuse.[71] The necessary safeguards may take the form of (ii.a) independent authority competent to authorize the surveillance and (ii.b) external control of secret surveillance measures.

48. Regarding the first requirement, the Ministry of the Interior has wide powers to order covert surveillance under the ESD. The ESD also implies that human rights restrictions ordered in accordance with emergency legislation shall be considered justified and

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[61] *Sher and Others v. the United Kingdom*, § 171; *Murray v. the United Kingdom*, § 86
[62] *Elçi and Others v. Turkey*, § 696
[63] *Szabo and Vissy v. Hungary*, § 31
[64] *Klass and Others v. Germany* § 41
[65] Ibid, § 39
[66] *Société Colas Est and Others v. France*, § 43
[67] *Harju v. Finland*, § 33; *Sorvisto v. Finland*, § 106
[68] *Prezhdarovi v. Bulgaria*, § 51
[69] *Roman Zakharov v. Russia*, § 247; *Liu v. Russia*, § 56
[70] *Roman Zakharov v. Russia*, § 236
[71] *Rotaru v. Romania*, § 59; *Klass and Others v. Germany*, § 49

permissible. Accordingly, the law does not indicate the scope of the authorities' discretion and, thus, grants them an unlimited power to restrict the Applicant's rights under Art 8.

49. Regarding the second point, the ESD does not provide for necessary safeguards. Firstly, authorization of covert surveillance measures by a non-judicial authority may be compatible with the Convention,[72] provided that the authority is sufficiently independent from the executive branch.[73] The supervision by a politically responsible member of the executive branch, such as the Minister of Justice, does not provide the necessary guarantees as the political nature of the authorisation and supervision increases the risk of abuse.[74] Thus, the executive authorities can neither authorize the surveillance nor supervise its authorization.

50. In the present case, the Ministry of Interior can order covert surveillance of persons and objects under the ESD. Since it belongs to executive branch of power, there is a risk of abuse, which is incompatible with the Convention.

51. Secondly, interference by the executive authorities with individual rights should be subject to an external, preferably judicial, control of secret surveillance activities, which is the best guarantee of independence, impartiality and a proper procedure.[75] The ESD, however, does not provide any external control, either in the form of court review or appeal. Accordingly, lack of any control mechanism, especially judicial one, creates a risk of arbitrary decision-making. Therefore, the law does not provide the Applicant with the guarantees of independence, impartiality and a proper procedure.

52. To summarize, given the wide discretion of the national authorities and absence of any safeguards against abuse, the ESD is incompatible with the rule of law.

ii. Incompatibility of the search and seizure with the rule of law

53. In the context of search and seizure, only the law that provides some protection to the individual against arbitrary interference with Art 8 rights is compatible with the rule of law.[76] The rules must be clear, detailed and precise, set safeguards against possible abuse or arbitrariness[77] and be subject to "*a legal framework and very strict limits*".[78]

a) <u>Absence of judicial control</u>

[72] *Klass and Others v. Germany*, § 51; *Kennedy v. the United Kingdom*, § 31
[73] *Roman Zakharov v. Russia*, § 258; *Dimitry Popescu v. Romania (no. 2)*, § 72
[74] *Szabo and Vissy v. Hungary*, § 77
[75] *Klass and Others v. Germany*, §§ 56, 70-71; *Kennedy v. the United Kingdom*, §§ 184-191
[76] *Harju v. Finland*, § 39; *Elçi and Others v. Turkey,* § 699; *Kruslin v. France*, §§ 32-36
[77] *Sorvisto v. Finland*, § 111
[78] *Harju v. Finland*, § 39

54. In a number of cases, the mere lack of judicial warrant led the Court to conclude that there was a violation of Art 8,[79] since this provided the police with "*exclusive competence to assess the expediency, number, length and scale of inspections*". The absence judicial authorization may be counterbalanced by the *ex post factum* judicial review of the search.[80]

55. In the present case, the order was issued by the Ministry of Interior without any judicial supervision. No *ex post factum* judicial review of the search and seizure was available to the Applicant.

b) Indiscriminate search

56. Any order shall specify what items and documents should be found in the premises and their relevance to the investigation.[81] The scope of the order must be limited to what is indispensable in the circumstances of the case.[82] As the Court concluded in *Imakayeva v. Russia*, the Government's reliance on the antiterrorist legislation "*cannot replace an individual authorization of a search, delimiting its object and scope, and drawn up in accordance with the relevant legal provisions either beforehand or afterwards*".[83]

57. In the case at hand, the police had an unlimited discretion while conducting the search. It did not in any way distinguish the personal information of the Applicant, which could have been stored on the seized computer, from the information of interest for the investigation.

c) Other safeguards

58. Finally, the Court examined some of the effective safeguards in the cases of *Camenzid v. Switzerland*[84] and *Wieser and Bicos Beteiligungen GmbH v. Austria*.[85] These include, *inter alia*, presence of the person concerned during the search, presence of the person responsible for ensuring that the search does not deviate from its purpose, drawing up a record of the search immediately after its end, sealing of the documents and data if required by the owner.

59. The ESD did not contain any such safeguards. Neither the Applicant, nor any independent observers were present during the search, no reports were drawn up at its end.

60. Ultimately, in matters affecting human rights, expressing the powers of the police in an unfettered manner is contrary to the rule of law[86] and deprives the Applicant of "*the minimum degree of protection to which he was entitled under the rule of law in a democratic*

[79] *Cremieux v. France*, § 40; *Funke v. France*, § 57; *Miailhe v. France*, § 38
[80] *Smirnov v. Russia*, § 45
[81] *Iliya Stefanov v. Bulgaria*, § 41
[82] *Buck v. Germany*, § 50
[83] *Imakayeva v. Russia*, § 188
[84] *Camenzind v. Switzerland*, § 46
[85] *Wieser and Bicos Beteiligungen GmbH v. Austria*, § 60
[86] *Szabó and Vissy v. Hungary*, § 65

society".[87] In the absence of any safeguard against abuse, the search and seizure of an unlimited scope, based on a tainted arrest and not subject to any judicial control the interference does not meet the "*in accordance with the law*" requirement.

61. To summarize, the Respondent requests the Court to find that the ESD is incompatible with the rule of law and, thus, there was a violation of the Applicant's rights under Art 8.

e. Article 13

1. Absence of the right to appeal against covert surveillance

62. The Respondent may argue that the Applicant did not exhaust domestic remedies with regard to covert surveillance. However, if the relevant law does not provide for effective remedies to a person who has been subjected to covert surveillance, it amounts to violation of Art 13 and the Respondent's objection should be rejected.[88] The remedy may arise in the form of appeal against the decision authorizing covert surveillance.[89]

63. In the present case, decisions of the Ministry of Interior concerning authorization of covert surveillance shall not be subject to appeal under the ESD. Accordingly, the Applicant was deprived of an opportunity to challenge the covert surveillance, which created a risk of arbitrariness and abuse of powers. Therefore, absence of a remedy results in violation of Art 13 and, thus, the Respondent cannot claim non-exhaustion of domestic remedies.

V. CONCLUSION

For the reasons stated above, the Applicant respectfully requests the Court:

1. To adjudge and declare that Avrylia violated the Applicant's rights:

- Under Art 3 regarding (i) inhuman and degrading treatment, (ii) non-punishment of national security officers and (iii) the extradition of the Applicant, if enforced;
- Under Art 5 § 1 (c) regarding the detention;
- Under Art 6 regarding the usage of the self-incriminating statement to secure the Applicant's conviction and the lack of legal assistance;
- Under Art 8 regarding the covert surveillance and the search and seizure measures;
- Under Art 13 regarding absence of the right to appeal against covert surveillance.

2. To award "just satisfaction" under Art 41 of the Convention in respect to the Applicant's non-pecuniary damage and order the reimbursement of the full costs and expenses incurred.

[87] Ibid, § 45
[88] Ibid, §§ 298-301
[89] *Avanesyan v. Russia*, § 30