2015-2016

Team Number: 037

THE EUROPEAN HUMAN RIGHTS

MOOT COURT COMPETITION

2015-2016

"Case of Association Leniter-Alegria, Green Exploitations Initiative and 135 Others v. Kandelia"

Association Leniter-Alegria,

Green Exploitations Initiative and

135 Others

(Applicants)

vs.

Kandelia

(Respondent)

Submission for the Respondent

II. LIST OF ABBREVIATIONS

Art	Article
ALA	Association Leniter - Alegria
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GEI	Green Exploitation Initiative
KMI	Kamba Mining International
KSC	Kandelian Supreme Court

III. LIST OF REFERENCES

III.1. Coventions and Treaties

Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe (4 Nov 1950)

III.2. Cases of the European Court of Human Rights

1. *A, B and C v. Ireland* [GC], no. 25579/05 (16 December 2010)
2. *Airey v. Irland*, no. 6289/73 (9 October 1979)
3. *Antoniades v. the UnitedKingdom*, no. 15434/89 (15 February 1990)
4. *Armonienė v. Lithuania*, no. 36919/02 (25 November 2008)
5. *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95 (6 April 2000)
6. *Balmer-Schafroth and Others v. Switzerland* [GC], no. 27644/95 (6 April 2000)
7. *Boddaert v. Belgium*, no. 12919/87 (12 October 1992)
8. *Brudnicka and Others v. Poland*, no. 54723/00 (3 March 2005)
9. *Buckley v. the United Kingdom*, no. 20348/92 (25 September 1996)
10. *Budayeva and Others v. Russia*, no. 15339/02,21166/02, 20058/02, 11673/02 and 15343/02 (20 March 2008)
11. *Burden v. the United Kingdom* [GC], no. 13378/05 (29 April 2008)
12. *Buscarini and Others v. San Marino*, no 24645/94 (18 February 1999)
13. *C. v. the United Kingdom*, no. 10358/83 (15 December 1983)
14. *Casado Coca v. Spain*, no. 15450/89 (24 February 1994)
15. *Case "relating to certain aspects of the law on the use of languages in education in Belgium" v. Belgium*, nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64 (23 July 1968)

16. *Case of Centre for legal resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08 (17 July 2014)
17. *Cha'are Shalom Ve Tsedek v. France*, no. 27417/95 (27 June 2000)
18. *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95 (26 April 1999)
19. *Chelu v. Romania*, no. 40274/04 (12 January 2010)
20. *Collectif national d'information et d'opposition à l'usine Melox – Collectif stop Melox et Mox v. France*, no. 75218/01 (12 June 2007)
21. *CP and Others v. France*, no. 36009/97 (1 August 2000)
22. *Demades v. Turkey*, no 16219/90 (31 July 2003)
23. *Dubetska and Others v. Ukraine*, no. 30499/03 (10 February 2011)
24. *Eweida and Others v. the United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10 (15 January 2013)
25. *Fadeyeva v. Russia*, no. 55723/00 (09 June 2005)
26. *Fägerskiöld v. Sweden*, no. 37664/04 (26 February 2006)
27. *Georgiadis v. Greece*, no. 21522/93 (29 May 1997)
28. *Giacomelli v. Italy*, no. 59909/00 (2 November 2006)
29. *Gillow v. the United Kingdom*, no. 9063/80 (24 November 1986)
30. *Golder v. the United Kingdom*, no. 4451/70 (21 February 1975)
31. *Grâdinar v. Moldova*, no. 7170/02 (8 April 2008)
32. *Grimkovskaya v. Ukraine*, no. 38182/03 (21 July 2011)
33. *Guerra and Others v. Italy* [GC], no. 14967/89 (19 February 1998)
34. *Handyside v. the United Kingdom*, no. 5493/72 (7 December 1976)
35. *Hardy and Maile v. the United Kingdom*, no. 31965/07 (14 February 2012)
36. *Hartung v. France*, no. 10231/07 (3 November 2009)
37. *Hatton and Others v. the United Kingdom* [GC], no. 36022/97 (8 July 2003)
38. *Herbst v. Germany*, no. 20027/02 (11 January 2007)
39. *Horvat v. Croatia*, no. 51585/99 (26 July 2001)
40. *Ilhan v. Turkey* [GC], no. 22277/93, (27 June 2000)
41. *Jedamski and Jedamska v. Poland*, no. 73547/01 (26 July 2005)
42. *Katte Klitsche de la Grange v Italy*, no. 12539/86 (27 October 1994)
43. *Kreuz v. Poland*, no. 28249/95 (19 June 2001)
44. *Kudla v. Poland* [GC], no. 30210/96 (26 October 2000)
45. *Kyrtatos v. Greece*, no. 41666/98 (22 May 2003)

46. *Ledyayeva and Others v. Russia*, nos. 53157/99, 53247/99, 53695/00 and 56850/00 (26 October 2006)
47. *Lemke v. Turkey*, no. 17381/02 (5 June 2007)
48. *Leyla Sahin v. Turkey* [GC], no. 44774/98 (10 November 2005)
49. *López Ostra v. Spain*, no. 16798/90 (9 December 1994)
50. *Manousakkis and Others v. Greece*, no. 18748/91 (26 September 1996)
51. *McMichael v. the United Kingdom*, no. 16424/90 (24 February 1995)
52. *McVicar v. the United Kingdom*, no. 46311/99 (7 May 2002)
53. *Niemietz v. Germany*, no. 13710/88 (16 December 1992)
54. *Nölkenbockhoff v. Germany*, no.10300/83 (25 August 1987)
55. *Öneryildiz v. Turkey* [GC], no. 48939/99 (30 November 2004)
56. *Podbielski and PPU Polpure v. Poland*, no. 39199/98 (26 July 2005)
57. *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06 (21 September 2010)
58. *Powell and Rayner v. the United Kingdom*, no. 9310/81 (21 February 1990)
59. *Prokopovich v. Russia*, no. 58255/00 (18 November 2004)
60. *Rees v. the United Kingdom*, no. 9532/81 (17 October 1986)
61. *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98 (13 February 2003)
62. *Reuther v. Germany*, no. 74789/01 (5 June 2003)
63. *Rylski v. Poland*, no. 24706/02 (4 July 2006)
64. *S.A.S v. France* [GC], no. 43835/11 (1 July 2014)
65. *Selmouni v. France* [GC], no. 25803/94 (28 July 1999)
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69. *Taşkın and Others v. Turkey*, no. 46117/99 (10 November 2004)
70. *Tătar v. Romania*, no. 67021/01 (27 January 2009)
71. *The United Communist Party of Turkey and Others v. Turkey*, no. 19392/92 (30 January 1998)
72. *Tomé Mota v. Portugal*, no. 32082/96 (2 December 1999)
73. *V.M. v. Bulgaria*, no. 45723/99 (8 June 2006)
74. *Vernillo v. France*, no. 11889/85 (20 February 1991)
75. *Weissman and Others v. Romania*, no. 63945/00 (24 May 2006)
76. *Wingrove v. the United Kingdom*, no. 17419/90 (25 November 1996)

77. *Young, James and Webster v. the United Kingdom*, no. 7806/77 (18 October 1982)
78. *Zander v. Sweden*, no. 14282/88 (25 November 1993)

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IV. SUMMARY

- For a long time Kandol-Alto - a region in Kandelia - was considered a disadvantaged area due to its poor economic situation. Without a strong employer the region was not self-sustainable and depended strongly on financial support from the state. At the same time unemployment levels were exceptionally high.
- To combat this economic dilemma the government developed a strategy, which included the reopening of a former gold and silver mine near the Kand river. It held a referendum on the matter, which resulted in favour of the reopening and the mining site was inaugurated at the end of 2012.
- In September 2014 Kandelia was struck by a natural hazard. Heavy rains damaged the waste stock area of the exploitation site, which gave rise to a leakage of sodium cyanide into the river Kand. Moreover the high tide burst the banks, caused damage to the area and overturned the Leniter Rock.
- Following these events individuals of the Leniterist confession got themselves poisoned because they continued to use the water from the river. This happened despite the adequate implementation of countermeasures by Kandelian authorities. As a result ALA, GEI and 135 applicants filed a civil liability lawsuit against the mining company KMI and the regional authorities. They claimed damages based on alleged wrongful acts of the company and an alleged lack of control over the exploitation site on behalf of the authorities.
- The first instance court rejected the aforementioned claims and held that the unfortunate events were more likely to be linked to the heavy rainfall than to any misconduct of KMI and that by any means, there was no proof that the disaster was triggered by such misconduct. The applicants were ordered to bear the legal costs of the opposing party.

- After the applicants had filed an appeal, the second instance court ruled in their favour stating that the exploitation site represented a danger to the environment and that it affected the Leniterist community. The applicants were awarded damages for the effects on their health and the authorities were ordered to suspend the exploitation license.
- The authorities and KMI filed for an appeal before the Kandelian Supreme Court (KSC), which confirmed the first-instance judgement and held that there was a lack of proof for causal link between the damage and the conduct of KMI and the authorities.
- 35% of the Kandelian population profess to the Leniterist confession. Kandol-Alto, where the small mountain river Kand and the Leniter Rock are located, constitutes their pilgrimage area.

V. ADMISSIBILITY

V.1. Art 34 Victim status

Regarding the civil proceedings the government submits that the NGOs ALA and GEI lack victim status according to Art. 34. According to the well-established case law of the Court, one has to show that he or she was 'directly affected' by the measure complaining about, in order to be able to lodge an application in accordance with Art 34 of the Convention[1]. There are generally 'non-transferable' rights, such as the Articles 2, 3, 5, 8, 9 and 14[2]. However concerning Art 6 and Art 8, the Court grants exceptions to this rule only in very specific circumstances and allows a transfer to close relatives, having a '*moral interest in having the late victim exonerated of any finding of guilt*'[3], wanting to protect their own reputation and that of their family[4], or showing '*material interest on the basis of the direct effect on their pecuniary rights*'[5]. None of the mentioned criteria apply to the NGOs in the given case. In the view of the above, it has to be pointed out that the NGOs cannot claim to be 'victims' within the meaning of Art 34 and their application has to be found inadmissible.

V.2. Art 35 § 1 Exhaustion of local remedies

Art 35 § 1 bears the principle of subsidiarity, according to which the states and its intuitions are primarily responsible for guaranteeing the protection of human rights and compliance with

[1] *Case of Centre for legal resources on behalf of Valentin Câmpeanu v. Romania*, § 96; see also *Burden v. United Kingdom*, § 33; *Ilhan v. Turkey*, § 52.
[2] *Case of Centre for legal resources on behalf of Valentin Câmpeanu v. Romania*, § 100.
[3] *Nölkenbockhoff v. Germany*, § 33; see also *Grâdinar v. Moldova*, §§ 95 and 97-98.
[4] *Brudnicka and Others v. Poland*, §§ 27-31; see also *Armonienė v. Lithuania*, § 29; *Polanco Torres and Movilla Polanco v. Spain*, §§ 31-33.
[5] *Ressegatti v. Switzerland*, §§ 23-25; see also §§ 29-30; *Nölkenbockhoff v. Germany*, § 33; *Grâdinar v. Moldova*, § 97.

the Convention[6]. In order to be able to submit to the Court the appellant is obliged to exhaust all national remedies. Therefore every appellant must be granted the legal and factual opportunity to lodge an appeal or file a remedy before a national body, so a violation or its continuation can be prevented and/or to be awarded compensation for the claimed violation[7].

In the given case the respondent created sufficient and available remedies[8]. However the applicants did not make adequate use of them. Merely a civil liability lawsuit against KMI and the regional authorities was filed while the Kandelian Code of Obligations as well as the Administrative Procedure Act provides additional remedies, which were not employed by the applicant. With regard to the former anyone who suffers damage as a result of an illegal or tortious act may bring an action for damages for pecuniary loss and non–pecuniary loss before the Kandelian courts. With regard to the latter anyone who sustains damage as a result of an act by the authorities may claim compensation from them. It would have been reasonable for the applicant to lodge these remedies, as they would have had a real chance of success, given that a wrongful act could have been proven. On these grounds the applicant was obligated to introduce aforementioned actions before filing an application with the Court[9]. The government submits that the applicants failed to comply with the provisions under Art 35 § 1 of the Convention. Owing to this omission the respondent's opportunity to resolve matters through its own national legal system[10] was withdrawn. Moreover, as expressed by the first instance court, the applicant should have made its complaint against the central authorities, which were in charge of the reopening of the mining site. It was the government, which adopted the revival plan and signed the concession agreement with KMI rather than the regional authorities, which therefore lack *locus standi*. Hence the government submits that the applicants failed to meet the requirements under domestic law. The Court rejects cases for non-exhaustion if applicants do not observe the requirements of the national law.[11]

Concerning the administrative proceedings the government would like to draw the Courts attention to the fact that the 135 individuals were not parties to the proceedings before the Kandol-Alto Administrative Court. Therefore the 135 individuals did not make use of all the available remedies not only with regard to the compensatory claims but also with regard to the proceedings concerning the concession license.

[6] *Selmouni v. France*, § 74.
[7] *A, B and C v. Ireland*, § 104.
[8] *Vernillo v. France*, § 27.
[9] *Tomé Mota v. Portugal*, § 2.
[10] *Horvat v. Croatia*, § 37.
[11] Harris, O'Boyle, Bates, Buckley (2014), p. 50.

The government therefore kindly asks the Court to declare the application inadmissible in its entirety. Provided that the Court does not accept these preliminary objections and considers the application admissible or partly admissible, the government submits the following observations regarding the merits of the application.

VI. MERITS OF THE CASE

VI.1. ALLEGED VIOLATION OF ARTICLE 8

VI.1.1. *Civil proceedings*

VI.1.1.1. Applicability and environmental rights

First of all, it has to be noted that neither Art 8 nor any other provision of the Convention guarantees the right to a clean and safe environment[12] or provides general protection of the environment as such[13]. According to the case law of the Court, issues can only arise under Art 8 if the breach asserted by the applicant directly affected their home in such a way as to infringe their family or private life[14]. 'Home' has been defined as the place where a person lives or has settled down on a permanent basis or with which the person has sufficient and continuous links[15] and where private life and family life develops. The term encompasses regular living spaces, such as houses and flats, temporarily inhabited spaces[16] or caravans[17] but also business premises[18] since professional activities can overlap with 'home' and 'private life'. Yet a communal laundry room[19] or an artist's dressing room in a concert hall[20], for instance, do not qualify as a 'home' for the purpose of Art 8. Consequently, the respondent draws the conclusion that public places or natural territory - such as a river- clearly do not fall within the broad interpretation of 'home'. Thus, the respondent submits that Art 8 is not applicable in the present case. Provided that the Court considers Art 8 applicable despite these elaborated reflections, the respondent submits that pollution must reach a certain minimum level in order to fall within the scope of Art 8[21], which was not the case in Kandelia as we will show to your satisfaction. The respondent further notes that the Court itself affirmed that, Art 8 "*is not violated every time that environmental deterioration occurs*"[22].

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[12]*Hatton and Others v. the United Kingdom*, § 96; see also *Fägerskiöld v. Sweden*, § 1.
[13]*Kyrtatos v. Greece*, § 52, see also *Dubetska and Others v. Ukraine*, § 105.
[14]*Hardy and Maile v. the United Kingdom*, § 187; see also *Kyrtatos v. Greece*, § 52.
[15]*Prokopovich v. Russia*, § 36; see also *Gillow v. the United Kingdom*, § 46; *Buckley v. the United Kingdom*, § 53-54.
[16]*Demades v. Turkey*, § 32; see also *Fägerskiöld v. Sweden*, § 1.
[17]*Buckley v. the United Kingdom*, § 53-54.
[18]*Niemietz v. Germany*, § 30-31.
[19]*Chelu v. Romania*, § 45.
[20]*Hartung v. France*, § 1.
[21]*LópezOstra v. Spain*, § 51; see also *Hardy and Maile v. the United Kingdom*, § 187; *Fadeyeva v. Russia*, § 68.
[22]*Fadeyeva v. Russia*, § 68.

VI.1.1.2. Role of the Government

The government would like to draw the Court's attention to the fact that the company, responsible for the adverse effects on the environment, is not and never was state-owned, controlled or in any way related to state facilities or state order. Quite the contrary, the present case involves a private business entity. Hence, it must be highlighted that Art 8 does not apply due to any negative obligation of the state, because the facts disclose no direct interference by a public authority and they cannot be held responsible for any wrongful conduct of KMI. At this point the respondent respectfully remarks that "*the essential object and purpose of Article 8 is to protect the individual against arbitrary interference by the public authorities*"[23] and not to regulate rights and obligations between citizens or third parties.

VI.1.1.3. Regarding the reopening of the mining site

The respondent rejects the assertion that the reopening of the mining site interfered with the applicants' rights guaranteed under Art 8. Whether a state failed to comply with a positive duty possibly arising from Art 8 is directly dependent on whether "*a fair balance between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention*"[24] has been struck. During the process of reopening of the mining site the respondent acted in accordance with the national regulations, namely Section 15 of the National Environment Act. An environmental certificate was issued based on an environmental impact assessment carried out by independent experts. The government observed the mentioned environmental norm even though the mining site, due to its minor size, does not fall within its ambit. This clearly shows how seriously the respondent takes its duty to preserve the regional environment for its citizens. This obligation is also laid down in Art 35 of the Kandelian Constitution.

According to the Court, the contracting states are first and foremost responsible for securing the rights and freedoms enshrined in the Convention and "*the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights*"[25]. The government notes that each member state enjoys a certain margin of appreciation in balancing interests and taking adequate measures[26]. The democratic and legitimate state authorities are in the best position to assess the local needs or the economic

[23]*Fägerskiöld v. Sweden*, § 1; see also *Niemietz v. Germany*, § 31.
[24]*Rees v. United Kingdom*, § 37.
[25]*Handyside v. the United Kingdom*, § 48; see also *Case "relating to certain aspects of the law on the use of languages in education in Belgium" v. Belgium* § 10.
[26]*Powell and Rayner v. the United Kingdom*, § 41.

and social conditions in a state or one of its regions[27]. This is particularly true for environmental cases as the Court itself stated in *Powell and Rayner v. United Kingdom* "*It is certainly not for [...] the Court to substitute for the national authorities any other assessment of what might be the best policy in this difficult technical and social sphere*"[28]. Furthermore, the Court does not see itself in the position to "*adopt a special approach in this respect by reference to a special status of environmental human rights*"[29]. The past has shown that the Court restrains from overruling domestic environmental policies, as this specific subjects fall into the sphere each of the member state[30]. So as to the Court's case law one can conclude that the contracting parties enjoy a wide margin of appreciation concerning environmental issues[31] and that the Court sees itself in a subsidiary role with regard to environmental protection, due to the complexity and individuality of each case[32].

The region of Kandol-Alto was a disadvantaged area which depended strongly on financial support from the national government and suffered from very high unemployment. These devastating conditions in the respective area induced the respondent to reopen the mine, in pursuit of a recovery of the economy of the region as well as of the state as a whole. Resuming mining activity promised great economic benefits for the region together with an upsurge in employment and public revenue by virtue of concession fees and taxes, as underscored by several. This demonstrate how the government of Kandelia only aimed at improving the economic wellbeing of its state and its citizens, which is recognised by the Court in its established case law[33] as a legitimate aim when interfering with a right under the Convention. The Court further has acknowledged economic interests to be taken into consideration in shaping a country's policy[34], which is exactly what Kandelia did. In pursuing this objective, the respondent struck a fair balance of the involved interests.

With regard to the mining site, the respondent would like to highlight that the extraction method to be used was introduced to the public by means of publication of a report. The use of sodium cyanide is typical in the extraction of gold and silver and widespread within the mining industry.

[27]*Handyside v. the United Kingdom*, § 48.
[28]*Powell and Rayner v. the United Kingdom*, § 44.
[29]*Hatton and Others v. the United Kingdom*, § 122.
[30]*Fadeyeva v. Russia*, § 104.
[31]*Powell and Rayner v. the United Kingdom*, § 44; see also *Taşkın and Others v. Turkey*, § 116; *Hatton and Others v. the United Kingdom*, § 100; *Giacomelli v. Italy*, § 80.
[32]*Fadeyeva v. Russia*, § 105.
[33]*Fadeyeva v. Russia*, § 101; see also *Ledyayeva and Others v. Russia*, § 101; *Hatton and Others v. the United Kingdom*, § 121.
[34]Ibid.

The respondent notes that Art 8 does not explicitly encompass any procedural rights. Yet it is generally acknowledged that the decision-making process regarding measures, which touch on the interests of an individual under Art 8 must be a fair one[35].

The Court held that substantive and procedural aspects must be observed when national decisions are made on issues of environmental and economic policy. At the beginning of the decision making process investigations must be carried out and the public must be granted access to the result[36]. This obligation "*does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided*"[37]. After a fair balance has been struck on well-founded grounds between the conflicting interests at stake the individual must be able to challenge the authorities' decision or act by either an appeal or a remedy under national law[38]. Section 15 of the Kandelian Environmental Impact Act provides for all these instruments as stated above and was observed regarding the issues of the given application. In accordance with the Court's established case law[39], the government of Kandelia held a national referendum on the revival plan and the reopening of the mining site. With regard to this referendum, reports involving details on the mining technique and on possible impacts were filed. In addition, an information campaign on the measures to be implemented was launched and interested individuals had access to the reports. In view of all this, it can be said that the citizens of Kandelia were involved in a fair and democratic decision-making process and their individual interests and rights under Art 8 were safeguarded in the procedure.[40] As a result, the referendum confirmed the government's political plans. A part from that the revival plan was presented within the context of the previous election campaign and the Kandelian population voted for the current government because of this revival plan.

At this point, the respondent notes that the only reason for the closing of the mine in 1985 was of political nature and the decision was influenced by the large number of Lenterist representatives in the governing bodies. The mine was not closed due to any negative impacts on the environment. To conclude, the respondent submits that the reopening of the mine was

[35] *McMichael v. the United Kingdom*, § 87.
[36] *Taşkın and Others v. Turkey*, § 118-119 see also *Buckley v. the United Kingdom*, § 76; *Hatton and Others v. the United Kingdom*, § 128; *Lemke v. Turkey*, § 43-44; *Giacomelli v. Italy*, § 82-83; *Grimkovskaya v. Ukraine*, § 69; *Tătar v. Romania*, § 88.
[37] *Taşkın and Others v. Turkey*, §118.
[38] *Taşkın and Others v. Turkey*, § 118-119 see also *Buckley v. the United Kingdom*, § 76; *Hatton and Others v. the United Kingdom*, § 128; *Lemke v. Turkey*, § 43-44; *Giacomelli v. Italy*, § 82-83; *Grimkovskaya v. Ukraine*, § 69; *Tătar v. Romania*, § 88.
[39] *Ibid.*
[40] *Buckley v. the United Kingdom*, § 76.

necessary in a democratic society and that the exceptional circumstances, in which the Court would revise a material conclusion of domestic authorities, are not given in the case at hand[41].

VI.1.1.4. Regarding the pollution of the river Kand and the sealing of the area

The respondent submits that the events discussed in the application derived from a natural hazard and unforeseeable accidents.

As stated above, the extraction method involving sodium cyanide was not extraordinary, but is commonly used in the entire mining industry. Investigations were carried out in order to examine the economic and environmental impacts of a possible resumption of the exploitation at the site. Both reports unmistakably illustrated multiple economic benefits for the area. The environmental impact assessment assured that there is no risk for human health and as already mentioned under VI.1.1.3, that the respondent complied with the national environmental regulations. Furthermore, a special waste management plan was adopted to ensure long-term stability of the storage and disposal facilities as well as the minimization of air, water or soil contamination. The waste stock area was compliant with the standards in demand for this type of mines.

For compliancy with its obligation to inform its population on environmental pollution, which the Court established with regard to Art 8[42], the government initiated an investigation to clarify the actual extent of pollution of the river and the repercussions of the natural hazard.

Additionally, Kandelian authorities took all possible measures to protect the local population from the leakage of sodium cyanide. These measures were performed as soon as possible, when it had transpired that there was a real risk of pollution. Written warnings were put up around the area and the entrance to the Leniterist site was sealed so that believers would not use or drink the river water. The fact that people came into contact with the polluted water despite the security measures taken, was not due to any misconduct of the authorities, but due to the religious leaders, who deliberately encouraged adherents to continue to drink the water. In the view of this and considering that adequate and necessary safety measures were immediately taken the state authorities are not to blame for the damage to the Leniterists' health. Moreover, it must be taken into account "*to what extent the applicant contributed to creating this situation for himself and was in a position to remedy it without a prohibitive*

[41] *Taşkın and Others v. Turkey*, § 117.
[42] *Guerra v. Italy*, § 39.

outlay"[43]. In the present case the respondent claims that by drinking and using the contaminated water in spite of the authorities' warning, it was within the responsibility and conduct of the applicants not to expose themselves to the toxins. Furthermore, the investigation concluded that the heavy rains triggering the ecological disaster were a natural phenomenon, which could not have been avoided or foreseen. In this context, one has to remark that the Court does not hold authorities responsible for violations, which are the result of "*a sudden and unexpected turn of events*"[44]. The state can only be found guilty of a violation of Art 8 if the infringement is "*long-standing and well known to the State authorities and if the State was or should have been aware that the hazard or the nuisance was affecting the applicant's private life*"[45]. This can clearly be negated in the present case as explained above the contamination of the river was caused on the occasion of unpredictable heavy rains. Finally one has to come to the conclusion that no positive obligations were missed to comply with and that Art 8, namely the right to respect for home, family and private life was at no time violated.

VI.2. ALLEGED VIOLATION OF ARTICLE 9

VI.2.1. *Civil proceedings*

VI.2.1.1. Applicability

Freedom of religion under Art 9 entails the right to "*practise or not practise religion*"[46] in manifesting it in worship, practise and observance. The "*act in question must be intimately linked to the religion or belief*"[47]. Thus, the government acknowledges Art 9 as basically applicable, but as explained below, it distances itself from any accusation of violating it.

VI.2.1.2. Kandelia as a secular state

The respondent deeply respects the belief and rituals and celebrations of the Leniterist community and would like to highlight that the government adheres to the case law of the Court, acknowledging that "*Pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'*"[48]. Thus, the government stresses that it has not violated Art 9 of the Convention in any way. Kandelia, as a secular state, would like to emphasise that both the common weal as well as the religious beliefs and activities of the Leniterists are of utmost

[43] *Dubetska and Others v. Ukaine*, § 108.
[44] *Dubetska and Others v. Ukaine*, § 108.
[45] Ibid.
[46] *Buscarini and Others v. San Marino*, § 34.
[47] *Eweida and Others v. the United Kingdom*, § 82.
[48] *Leyla Sahin v. Turkey*, § 108.

interest to the state. In *Leyla Sahin v. Turkey* the Court highlighted "*the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs*" and stated that "*this role is conducive to public order, religious harmony and tolerance in a democratic society*"[49]. The government of Kandelia therefore considers it as its duty to not only act to improve the living standards in the region renowned as a disadvantaged area, but also to achieve a fair balance ensuring that the Leniterists are treated fairly and that their interests are properly taken into account regarding decisions taken onto the national levels[50]. Pluralism also means striking compromises "*which are justified, in order to maintain and promote the ideals and values of a democratic society*"[51]. With regard to questions, that concern the relationship between religions and the state, the national decision-making body's role is of special importance[52]. The respondent politely asks the Court to pay regard to what is at stake when delimiting the margin of appreciation in the present case, namely the need to protect both the lives of its people as well as the religious self-definition of the Leniterists[53].

VI.2.1.3. Regarding the reopening of the mine

The government insists that the reopening of the mine did not disturb the Leniterists in freely practising their religion. Neither was any celebration disturbed by machinery, workers or anything associated with the company, nor was there a pollution of the river or the air or a disturbance by noise. The distance between the mine and the religious area represents one kilometre, which was chosen very attentively in order to not impair the Leniterists during their religious activities.

Since the respondent cherishes the religious site as one of the country's historical, cultural and of course religious monuments, it was of highest importance to the government to realise the project responsibly and in consultation with only the most respected experts for environmental and safety issues.

Therefore, the respondent would like to reiterate that an impact assessment, which contained all the relevant information for the public, was conducted and issued. Independent experts concluded, that there was no risk for human health since the norms were complied with, as mentioned under VI.1.1.3. The assessment was in accordance with the Environmental Act,

[49]*Leyla Sahin v. Turkey*, § 107.
[50]*Young, James and Webster v. the United Kingdom*, § 63; see also *Chassagnou and Others v. France*, § 112; *Leyla Sahin v. Turkey*, § 108.
[51]*The United Communist Party of Turkey and Others v. Turkey*, § 45; see also *Leyla Sahin v. Turkey*, § 108; *Refah Partisi (the Welfare Party) and Others v. Turkey*, § 99.
[52]*Wingrove v. the United Kingdom*, § 58; see also *Cha'are Shalom Ve Tsedek v. France*, § 84; *Leyla Sahin v. Turkey*, § 109.
[53]*Manousakkis and Others v. Greece*, § 44; see also *Casado Coca v. Spain*, § 55.

particularly Section 15, which demands an environmental impact report for "*establishments and concerns, which propose to carry out activities which might cause environmental problems*". Section 15 demands that the ensuing report is made public, accordingly the government would like to deny any claim suggesting that information was kept undisclosed for the population. Anyone interested in the details of the entire project had the possibility to inform him- or herself. Finally, the waste management plan was elaborated and adjudged to be compliant with the standards imposed for this type of mine. Hence, the government distances itself from the allegations of not taking adequate safety measures.

The Kandelian government struck a fair balance of the involved interests, namely of those who were desperately in need for a job and therefore strongly supported the revival plan, as well as those of the Leniterists. In consequence, the government decided to hold a referendum. As mentioned above, the said referendum had a turnout of only 45%, of whom 59% voted in favour of the reopening. The government sees it as its duty in a democratic society, to respect and accept the majority's vote.

Until the hazard had occurred, the religious community had the possibility to exercise their religious rituals without impediment. It was unpredictable and exceptionally, heavy rainfall in September 2014, which led to the damages in the waste stock area of the exploitation site, and induced the government to close the area for safety reasons. The intensity of the rains was hitherto unprecedented, at this point paying special attention to the usual frequency and force of rain for temperate continental climate, and could not have been foreseen or avoided. According to experts' opinions, the rainfall qualified as a natural disaster.

Provided that the Court does not accept these arguments, we would like to highlight that, as mentioned above, the company has never been and still is not owned, controlled or operated by the Kandelian government and that therefore there is no reason to assume that an alleged interference would be within the public authorities' sphere of responsibility. Thus, Section 20 of the Administrative Procedure Act does not apply, as no damage can be linked to the respondent's conduct.

Given the miserable conditions the region was in, it was the respondent's duty to take practicable steps in reopening the mine and, in consideration of several environmental reports, *ipso facto* achieve a great economic benefit for the country.

VI.2.1.4. Regarding the sealing of the area

The government underlines that the restrictions with regard to the religious sites of the Kandriver and the Leniter rock, which were put in place after the disastrous natural hazard,

were justified according to Art 9 § 2. These measures were indisputably necessary to protect public health and safety, especially concerning the Leniterist community itself. In order to protect those people of the Kandelian population, which believes in the healing power of the water from the river Kand, the responsible authorities sealed the area around the river immediately after concern arose, that there was a real risk of pollution and that the Leniterist population would continue to use the water. More severe damage could only be avoided, due to the quick and adequate actions of the government. Had the site not been sealed, the setting would have taken on a dramatic scale.

Any limitation of the freedom of religion must pursue an aim listed in the respective provision of the Convention, in order to be compatible with it. It has to be reiterated, that in the case at hand, the government acted in pursuit of public health and safety. It weighed the interests of its entire population and decided, quite rightly, that it had to temporarily restrict fragments of the religious freedom of a few in order to retain the health of a large group of people. The government took all the interests at stake into consideration and as a consequence its decision qualifies as proportionate. Therefore the government cannot be accused of a violation of Art 9, as the interference was clearly justified under Art 9 § 2.

VI.3. ALLEGED VIOLATION OF ARTICLE 6

VI.3.1. *Civil proceedings*

VI.3.1.1. Applicability of Art 6 § 1

The government acknowledges the applicability of Art 6 § 1 with regard to the civil liability claims. Proceedings between private individuals[54] and proceedings for compensatory damages must be classified as belonging to the core of private law, irrelevant whether these claims are directed at private individuals or the national authorities[55] or if the underlying prerequisite to the damage claims is of a public law nature[56]. Hence, the civil proceedings against KMI and the regional authorities quite rightly fall within the scope of Art 6 § 1. However, when it comes to the accusations of a violation, the respondents wishes to refer to the considerations below.

VI.3.1.2. Regarding the legal fees

[54] *Airey v. Ireland*, § 21.
[55] *Georgiadis v. Greece*, § 28.
[56] *Herbst v. Germany*, § 55.

The respondent does not see a violation Art 6, neither with regard to the access to a court nor with regard to the principle of equality of arms.

With regard to the principle of equality of arms one has to note that civil proceedings imply the risk of losing the lawsuit and as a consequence carrying the costs of the adversary. The respondent submits, that according to the Court's case law it is reasonable that an unsuccessful litigant bears the costs of his successful opponent[57]. In the present case, the government did not deviate from this basic rule, as the applicants were defeated in the first instance, in which the payment of KMI's legal fees was ordered. Only the opposite case, namely if the successful litigant would have to carry the costs, would lead to an advantage of one party in proceedings and therefore to an inequality of arms[58]. This is however not the case in the given application as determined above. The government notes that the applicants did not have to pay for the legal fees of the regional authorities.

Furthermore, the respondent respectfully highlights the fact that, as the court of last instance, the KSC availed itself of its judicial right to mitigation. In its rule on the fees to be paid by the applicants it reduced the amount of 450.000 kandis to 300.000 kandis, which represents the same amount the first instance court awarded. By doing so, the respondent complied with the case law of the Court, which states that domestic courts must take the personal situation of the applicant into consideration and decide on reasonable grounds, whether and if so, what amount of fees the applicant is able to pay[59].

With regard to the access to court the respondent submits that legal fees in general do not bar the access to a court, given that the Court's latest case law on the access to court only encompasses *inter alia* court fees[60] and legal aid[61]. The Court itself never has ascertained legal fees to represent an obstacle to the access to court and the ECtHR only considers court fees as a barrier. Hence the government concludes that legal fees do not represent an obstacle to the access to court and that this right under Art 6 is not breached.

The number of involved parties before domestic courts as well as before the ECtHR amounts to 137. 135 are individual applicants and two applicants are non-governmental organisations, namely ALA and GEI. The sum of legal fees to be paid by all the applicants amounts to 300.000 kandis. If this amount is shared out between the applicants each one will have to pay

[57] *Antoniades v. the United Kingdom*, § 2.
[58] *Stankiewicz v. Poland,* §§ 68-69
[59] *V.M. v. Bulgaria*, § 49; see also *Jedamski and Jedamska v. Poland*, § 60; *Rylski v. Poland*, § 83.
[60] *Kreuz v. Poland*, §§ 60-67; see also *Podbielski and PPU Polpure v. Poland*, §§ 65-66; *Weissman and Others v. Romania*, § 42; conversely, *Reuther v. Germany*, § 2.
[61] *Airey v. Ireland*, § 26; see also *Steel and Morris v. the United Kingdom*, § 61; *McVicar v. the United Kingdom*, § 62.

approximately 2.200 kandis providing that the NGOs bear the same amount as the individuals. Compared with the individuals' monthly income of approximately 1.700 kandis, the costs are put into perspective. In the context of a lawsuit of this complexity, size and the high level of damages involved, the respondent submits, that 2.200 kandis per applicant are reasonable. Furthermore, one has to remark that two of the applicants are NGOs as stated above. It is not unusual for such institutions to pay a higher proportion of the fees and thus in the present case the amount bore by one individual could even be less. The Court itself did not find it unfair that an environmental NGO was ordered to pay the costs of a third party due to the circumstances that the NGO had a legitimate aim to defend and the amount of costs was modest[62].

The respondent notes that he also has to guarantee the rights of the defendant. KMI as the defendant in the lawsuit before the national courts has the right to legal representation and to choose it freely. In view of the special circumstances of the case, and having regard to the large group of individual applicants, the high level of damage, and the ensuing substantial amount of money involved in the case, it cannot be said to be unwarranted that the defendant decided to have professional legal representation[63]. Additionally the respondent respectfully notes that "*the right of access to the courts is not absolute but may be subject to limitations permitted by implication*"[64] and that Convention leaves "*contracting states with a free choice of the means of ensuring effective civil access to court*"[65]. To conclude, the amount of the legal fees was reasonable and did not infringe the rights guaranteed under Art 6 § 1.

VI.3.2. *Administrative proceedings*

VI.3.2.1. Applicability of Art 6 § 1

The government admits that in the case at hand there is both an arguable claim, as well as a dispute, concerning administrative proceedings on concession agreement. Nonetheless Art 6 is not applicable, as there are no civil rights involved, as the respondent will elaborate further below. As the Court mentioned in *Athanassoglou and Others v. Switzerland*, it is not possible to lodge an *actio popularis*, when there is no imminent danger, to a human being[66]. The Court acknowledges that administrative proceedings can fall within the ambit of Art 6 § 1 provided that 'civil rights' are involved. But there are no property rights, or rights concerning financial

[62] *Collectif national d'information et d'opposition à l'usine Melox – Collectif stop Melox et Mox v. France*, § 15.
[63] *Stankiewicz v. Poland*, § 74.
[64] *Golder v. the United Kingdom*, § 38; see also *Stanev v. Bulgaria*, § 230.
[65] *Airey v. Ireland*, § 26
[66] *Athanassoglou and Others v. Switzerland*, § 43; see also *Balmer-Schafroth and Others v. Switzerland*, § 32.

or economic assets involved in the given application. For that very reason there are no 'civil rights' concerned[67]. Consequently Art 6 § 1 is not applicable.

VI.3.2.2. Regarding the length of proceedings

In the case at hand, the government would like to mention that the Kandol-Alto Administrative Court had acted with due diligence. "*Art. 6 commands that judicial proceedings be expeditious, but it also lays down the more general principle of the proper administration of justice.*"[68] Thus, in the case at hand, one has to admit, that due to the complexity of the allegations, it is not exceptional for the Kandol-Alto Administrative Court, to take the time needed in order to justly decide the verdict.

As the Court's well-established case law itself determined, the length of the proceedings must not be considered in a general way, but rather be examined with regard to the specifics of the individual case. Various different reasons can extend a trial, sometimes over years and nonetheless the proceedings are in conformity with the law. In *CP and Others v. France* the length of almost eight years did not disclose a violation[69]. One has to acknowledge not only the complexity of the case, but also the levels of importance the judgment would have. As mentioned above, the decision to reopen the mine was necessary in order to foster the economic wellbeing of the region. Therefore, the decision was of highest importance, and had to be rendered carefully. In *Katte Klitsche de la Grange v. Italy* the Court decided that, eight years disclosed no violation of the Convention "*in particular since the decision, which concerned such a sensitive area as town planning and the protection of the environment*[70]", comparable to the case at hand. Analogous to the present case, "*the principal reasons for the length of the proceedings lay in the complexity of the case as regards both the facts and the legal issues*"[71]. In summary the respondent sees no violation of Art 6 with regard to the length of proceedings.

VII. CONCLUSION

On the basis of the aforementioned, it is submitted that the application, in its entirety, is inadmissible in the meaning of Art 34 and 35 § 1 of the Convention.

Provided that the Court considers the application admissible, the government refers to Art 41 of the Convention, according to which, the main condition for affording just satisfaction by

[67] *Reversely Zander v. Sweden*, § 27.
[68] *Boddaert v. Belgium*, § 39.
[69] *CP and Others v. France*, §§ 32-35
[70] *Katte Klitsche de la Grange v. Italy*, § 62.
[71] *Katte Klitsche de la Grange v. Italy*, § 52.

the Court is the finding of a violation of the Convention or the Protocols thereto. However, as the respondent demonstrated above the application is manifestly ill-founded since there is no violation of Articles 6, 8 or 9 in the present case. Additionally the respondent contends that the amounts claimed by the applicants are excessive.