2016

Team: 031

EUROPEAN HUMAN RIGHTS MOOT COURT COMPETITION

CASE OF KALLEN V. AVRYLIA

Mr. Jeffrey Kallen
(Applicant)

vs

The State of Avrylia
(Respondent)

SUBMISSION OF THE RESPONDENT

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SUMMARY

- The Government refutes the allegations of a violation of Article 3. Regarding the alleged ill-treatment, first, the alleged violation did not meet the threshold of severity. Second, Avrylia had a positive obligation under Article 2 to protect the life of the citizens and the Government maintains the view that the used force was strictly necessary. Regarding the procedural obligation to investigate the claim of the Applicant, the Government contends that it was fulfilled and that the investigation was effective and in accordance with all the standards, settled in the Court's case law. Regarding the complaint that the extradition to Walentia would infringe the Applicant's rights under Article 3, the Government has enough grounds to believe that Mr. Kallen would not be subjected to ill-treatment and that he does not face a real risk of infringement of his rights under Article 3.
- The Government further submits that the two complaints under Article 8 should be declared inadmissible. The complaints regarding the search and seizure and the covert surveillance do not comply with the six-month period established in Article 35. Additionally, there was a valid derogation under Article 15 in force and Article 8 is not applicable to the instant case, as Avrylia adopted special emergency legislation before the alleged violations. Furthermore, the emergency legislation and the actions of the Avrylian authorities were in compliance with the requirements of Article 8.
- The Government maintains that the complaints of the Applicant under Article 6 are ill-founded. First, all minimum rights under Article 6 were duly provided to the Applicant. Second, his statements while in police custody were not taken by violating Article 3, and even if the Court accepts they were, some of them were given before the violations and they were not decisive evidence in the proceedings against him. Third, the witness statements were only corroborating evidence and the Applicant did not dispute them before the national court. Fourth, the results from the covert surveillance were subject to review and duly admitted by the trial courts which did not overstep their margin of appreciation and fully observed the applicant's defence rights. Fifth, the evidence obtained through search and seizure was also gathered lawfully and neither its admissibility, nor its authenticity was disputed before the national court. The Government contends that the trial as a whole was fair.

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LIST OF ABBREVIATIONS

- NSS National Security Service

LEGAL PLEADINGS

I. ALLEGED VIOLATIONS OF ARTICLE 3

A) Admissibility

1. The Government does not raise any objections as to the admissibility of this complaint**.**

B) Merits

1. No derogation of Article 3 pursuant to Article 15

2. The Government confirms that the absolute nature of Article 3 does not permit for derogation in time of public emergency. The measures taken as a result of the declared state of emergency in Avrylia did not affect any of the rights guaranteed by Article 3, which is visible from the content of the Emergency State Degree and the Notification to the Secretary General[1].

2. The alleged ill-treatment of the Applicant while in police custody

3. The Applicant's complaints that during his detention he was subjected to ill-treatment that amounted to a violation of Article 3 are ill-founded.

4. Article 3 of the Convention embodies one of the fundamental values of democratic societies[2] and it does not give room for exceptions. Nonetheless, it requires that a certain level of severity must be attained[3]. In the absence of actual bodily injury or intense physical

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[1] Case §§19-20

[2] Universal Declaration of Human Rights, Article 5; International Covenant on Civil and Political Rights, Article 7; UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;

[3] *Ireland v. the United Kingdom*, (1978), § 162, *A and Others v. the United Kingdom* [GC] (2009), §127, *El-Masri v. "the former Yugoslav Republic of Macedonia"* (2012) §196

or mental suffering, applied for hours at a stretch[4], treatment that falls within the prohibition set forth in Article 3 may be treatment that humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance[5].

5. The Government contends that the defining characteristics of the applicant and of the situation should be taken into consideration when deciding if the necessary threshold of severity is met. The assessment of the minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim[6]. Regard must be had to the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotion[7]. The purpose for which the treatment was inflicted together with the intention or motivation behind it are also relevant[8].

6. First, the two NSS officers acted in an atmosphere of exceptional tension and emotion, as the lives of hundreds of innocent people, including children in an amusement park, were in danger. The threat was confirmed by the intelligence received from the Walentian NSS, by the fact that three bombs had already been discovered throughout the city in populated public locations and by the applicant's freely given confession in the presence of a lawyer that he knew where the other bombs were[9]. The situation was extremely time-sensitive, as the Walentian NSS provided information that the bombs were set to explode in the next few hours, which was proven right by 8:30 on 9th September[10]. What is more, Avrylia had been in a state of emergency because of incessant terrorist attacks in the past three years, which claimed the lives of many people. All these circumstances show that the danger was real, imminent and of horrendous proportions. The officers acted in an exceptionally tense situation. The behaviour of the two NSS officers was not an empty act of violence, which had the purpose to humiliate the applicant, to break his moral and physical resistance, to diminish his dignity or to extract a confession which according to the Court would be a factor in establishing a violation of Article 3[11]. The only aim was to protect the lives of hundreds of

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[4] *Labita v. Italy* (2000), §120

[5] *Pretty v. the United Kingdom* (2003), §52,

[6] *Ireland v. the United Kingdom* (1978), §162; *Jalloh v. Germany* [GC] (2006), §67; *Kudla v. Poland* (2000) §91

[7] *Bouyid v. Belgium*, [GC] §86; *Gäfgen v. Germany* [GC] §88

[8] *Gafgen v. Germany* [GC] §88*; Labita v. Italy* (2000), §120

[9] Case, §6 and §8

[10] Ibid

[11] *Labita v. Italy* (2000), §120; *Ranninen v. Finland* (1997) §55

citizens, which the two officers achieved with actions far below the threshold of severity, required by Article 3.

7. Second, the Government contends that the duration (15 minutes)[12], the intensity and the physical or mental effects of the treatment and the characteristics of the Applicant, who is a military trained, robust young man, are all important factors for the severity of the violation. It was not shown that the above acts have somehow affected his well-being, whether physical or mental. Consequently, the Government considers that, if all of these circumstances are taken into consideration, the actions of the officers could not amount to ill-treatment under Article 3 and therefore this complaint is manifestly ill-founded.

8. In addition, the Government maintains that the measures against the applicant were necessitated by the need to save hundreds of human lives. National authorities have a positive obligation under Article 2 to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual[13]. The Court already acknowledged that it was often difficult to separate States' negative obligations under Article 2 from their positive ones[14]. In the instant case, a highly probable and imminent danger for hundreds of citizens[15] existed and the Avrylian authorities were obliged to prevent it. The case Gäfgen[16] also concerned the preservation of the right to life in a time-sensitive situation, but it did not have the scale of the current situation, in which not only hundreds of people were in danger, but the very foundations of the Avrylian nation and the national security were threatened. In any event, the States' positive obligations under Article 2 were not examined in Gäfgen.

9. In the current case, the positive obligation of Avrylia under Article 2 to protect its citizens is juxtaposed to the negative obligation not to subject any citizen to ill-treatment under Article 3. Article 3 makes no provision for exceptions, as does Article 2, under which the use of force is permitted, as far as it is "absolutely necessary". Nevertheless, recourse to physical force may be justified also under Article 3 if it is indispensable and not excessive[17]. Many complaints under both Articles exist. Such is the case of Finogenov[18], in which the Court examined the necessity of the used force in respect to the right of life of the applicants.

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[12] Case, §9

[13] *Osman v. United Kingdom*, (1998), §115

[14] *Finogenov v. Russia* (2011), §17; *Kavaklioğlu v. Turkey* (2015), §172

[15] Case, §6

[16] *Gäfgen v. German* [GC], §20

[17] *Anzhelo Georgiev and Others v. Bulgaria* (2014) and the other judgments cited therein, §66

[18] *Finogenov v. Russia* (2011), §164

However, the Court decided not to examine the explicit complaint under Article 3, and instead proceeded with examining the facts in the light of Article 2 only[19]. As some researchers noted, in certain situations the juxtaposition of the non-absolute right to life and the absolute right not to be subjected to ill-treatment leads to serious discrepancies[20]. Consequently, the Government considers that the current case reveals such an exceptional situation where the authorities' control is minimal and the pressure is tremendous, and believes that it provides the Court with an opportunity to clarify to what extent the use of force in a case engaging the State's positive obligations under Article 2 could be seen as necessary and not violating its negative obligations under Article 3. The Government invites the Court to accept that there was no violation of Article 3 because the use of force was strictly necessary.

3. Procedural aspect of Article 3 regarding the thorough and effective investigation of the applicant's complaints

10. The Applicant's complaint that the alleged ill-treatment against him was not investigated effectively is ill-founded.

11. The Court stated that where an individual raises an arguable claim that he has been subjected to ill-treatment by agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1, requires that there should be an effective official investigation[21]. Such an investigation should be capable of leading to the identification and punishment of those responsible.[22] Although the Government contends that there was no violation of Article 3, it reiterates that the national authorities did everything in their powers to investigate the Applicant's claim.

12. For this reason, the prosecution of Avrylia initiated criminal proceedings against the Avrylian police officers and NSS officers who interrogated Mr. Kallen, thus identifying and prosecuting the responsible[23]. The Government contends that the investigation was sufficiently thorough and effective to meet the requirements of Article 3 and no evidence of the contrary is present. The investigating organs were independent than the targeted by the investigation[24], as required by the Court[25]. The methods used during the interrogation were

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[19] Ibid. §165

[20] Greer, Steven, Should Police Threats to Torture Suspects Always be Severely Punished? Reflections on the Gafgen Case, Human Rights Law Review 11:1, 2011

[21] *Assenov and Others v. Bulgaria* (1998), §102; *Andreşan v. Romania* (2012), §35; *Poltoratskiy v. Ukraine* (2003), §125

[22] Ibid.

[23] Case, §13

[24] *Bouyid v. Belgium*, [GC], §118

examined by the national courts on three levels and the national judges found that the officers were not guilty of ill-treatment, excessive use of force and abuse of power. They based this conclusion on a careful and impartial analysis of all relevant facts. The investigation procedure was also prompt and expeditious, as the decision of the third instance was delivered six months after the events.[26] What is more, the Applicant was part of the proceedings and even could defend his interests personally.[27] Consequently, the requirements for thorough investigation and effective implementation of the domestic laws were fulfilled.[28]

13. It is not the Court's role to assess itself the facts which have led a national court to adopt one decision rather than another and if it were otherwise, the Court would be acting as a court of fourth instance.[29] In that regard, the Government contends that the national courts had all the facts before them and took a decision in compliance with the Avrylian legislation and the Convention. Therefore, there was no violation of the procedural obligations under Article 3.

4. The extradition of the Applicant regarding Article 3 of the Convention

14. The Government contends that Mr. Kallen's extradition to his home country Walentia would not amount to ill-treatment contrary to Article 3.

15. The Court assesses whether there are 'substantial grounds' for believing that the person concerned faces a real risk of being subjected to treatment contrary to Article 3[30].

16. First, The Walentian government, in the face of the Minister of Foreign Affairs and the Walentian Prosecutor General, gave assurances that Mr. Kallen would be treated in accordance with international human rights standards. The Walentian authorities specified that Mr. Kallen would not be subjected to ill-treatment[31]. The Court accepts assurances as adequate guarantees of safety when they are given by a Contracting Party to the Convention. It stated that such State would be careful to uphold its promise on the ground that 'a possible failure to respect such assurances would seriously undermine that State's credibility'[32]. This is an important factor in the assessment of the reliability of assurances. Moreover, the State was praised for bringing its laws in line with the relevant human rights treaties[33] and it maintains close diplomatic relations with Avrylia, which include regular granting of extradition requests

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[25] *Mocanu and others v. Romania*, [GC] (2014), §320
[26] Case, §13
[27] Ibid.
[28] *Bouyid v. Belgium*, [GC], §§118 - 123
[29] *Kemmache v. France* (1993), §44
[30] *Soering v. The United Kingdom* (1989), §88; *Cruz Varas v. Sweden*, (1991), §69
[31] Case, §12
[32] *Chentiev And Ibragimov v. Slovakia*, (2012), §2 b)
[33] Case, §23

and implies active and sincere cooperation[34]. Based on all mentioned facts, the Avrylian government did not find grounds to doubt the credibility of the guarantees provided by the Walentian government and the Walentian Prosecutor General, as Walentia is a member of the Council of Europe[35].

17. Second, the Applicant must face a real risk of being subjected to ill-treatment in order for Article 3 to be applicable. The Court stated that "a mere possibility of ill-treatment (...) is not (...) sufficient to give rise to a breach of Article 3"[36]. The Court specified[37] that the returning state should make a proper assessment before the extradition in order to establish if the deported person is facing a risk of ill-treatment. One way to fulfil this obligation for "proper assessment", according to the Court, is to receive diplomatic assurances from the requesting state[38]. In the current case, as already mentioned, Walentia provided Avrylia with such assurances. As opposed to other cases[39], in the instant case there is no danger that the Applicant will be subjected to a punishment, contrary to the Convention[40]. The Government contends also that when the evidence concerning the background of the applicants does not establish that they are in particularly worse position than any other member of the same group, there are not sufficient grounds to give rise to a breach of Article 3[41].

18. The Government submits that it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to ill-treatment[42].

19. The Walentian authorities undertook measures to bring its laws in line with the relevant human rights treaties. As stated in Einhorn[43], when the assurances guarantee the protection of the applicant from treatment that is in the receiving State illegal, they will be deemed as sufficient guarantees of safety. Where the law itself protects the applicant from subjection to the proscribed treatment, the assurances constitute an additional safeguard against such treatment. Therefore, the approach of the Government in accepting the assurances as

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[34] Case, §22
[35] Case, §21
[36] *Vilvarajah and Others v. United Kingdom* (1991), §111
[37] *Garabayev v. Russia* (2007), §79
[38] Ibid.
[39] *Vinter v. the United Kingdom* [GC] (2013), §130
[40] Case §21
[41] *Vilvarajah and Others v. the United Kingdom*, §111; opposite *N. v. Finland* (2005), §162
[42] *Abdulkhakov v. Russia* (2013), §134
[43] *Einhorn v. France*, (dec), (2001), §26

adequate guarantees of safety in this context is reasonable and justified, given that a State that gives assurances not to do something which is also prohibited by law must uphold its promise[44].

II. ALLEGED BREACH OF ARTICLE 8

20. The Applicant contends that the search and seizure of his property has not been lawful because it was based on intelligence from the NSS and not subjected to any judicial approval which violated his rights under Article 8. Mr. Kallen also complains that he was subjected to unlawful covert surveillance.

A) Admissibility

21. The Government contends that the complaint is inadmissible under Article 35(1) for failure to meet the 6-month time limit.

1. Regarding the search and seizure carried out on 9th September

22. The Government claims that the procedure under Article 65 of the Code of Criminal Procedure was not a remedy which can reasonably be considered as effective[45]. The special legislation specifically highlights that searches and confiscation of property can be carried out on the basis of an order issued by the Ministry of the Interior which need not be reasoned.

23. When no effective remedy is available, the period for submitting an application runs from the date of the acts or measures complained of or from the date of knowledge of that act or its effect on or prejudice to the applicant[46]. In the current case, these dates are 9 September[47] or 20 November 2015[48] the latest, as this is the date of the beginning of the trial, where all evidence were presented, therefore the Applicant was with certainty aware of the search and seizure. Therefore, the decision from 28 March 2016 could not be regarded as a final decision of a remedy which had to be exhausted. Therefore the Government contends that the Applicant's complaint under Article 65 of the Code of Criminal Procedure was lodged with the sole purpose of catching the six months period under Article 35 and thus this complaint under Article 8 is inadmissible.

2. Regarding the complaint that Mr. Kallen was illegally subjected to covert surveillance

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[44] Volou, Aristi, Are diplomatic assurances adequate guarantees of safety against torture and ill-treatment? The pragmatic approach of the Strasbourg court, UCL Journal of Law and Jurisprudence, 2015

[45] *Horvat v. Croatia (2001),* §47; *Hartman v. the Czech Republic* (2003), §66;

[46] *Dennis and Others v. the United Kingdom* (dec,) (2002), section B, the Law; *Varnava and Others v. Turkey* [GC] (2009), §157

[47] Case §7

[48] Case §11

24. The Government contends that the six-month time limit for this complaint expired on 9th of September when the Applicant was apprehended. The complaints of the Applicant in the criminal proceedings regarding the covert surveillance could not be considered a use of an effective remedy, as already stated by the Court[49].

B) Merits

1. Derogation of the Convention under Article 15

The Government contends that, as the derogation of Avrylia under Article 15 was valid and applicable to the current case, both measures fall in the period of the derogation[50] (10 May 2015 – 10 November 2015) and Article 8 is inapplicable.

a) Regarding the existence of public emergency

25. The Avrylian Parliament's decision to declare a state of emergency was the consequence of consistent threat to the life of the nation. Avrylia has experienced ten terrorist attacks in the past three years, which claimed the lives of dozens of citizens. The state's cultural and historical heritage and the Avrylians' way of life suffered severely from the attacks. As the Court stated[51], it falls to each Contracting State to determine whether the life of the nation is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. The Court also noted that in this matter a wide margin of appreciation should be left to the national authorities[52]. Avrylia had the right to derogate from the Convention in order to protect the life of the nation.

b) Regarding the procedural requirements of Article 15

26. The obligation under Article 15(3) does not contain any rule as to the period in which the state's decision to derogate from the Convention should be notified to the Secretary General. The case law of the Court[53] imposed the obligation of giving information "without any unavoidable delay". However, there are no criteria about what could constitute as "an unavoidable delay". In Greece v. The United Kingdom, the Court gave as an example the gradual development of the emergency and the administrative delays this development caused. Therefore, the Government takes the view that the assessment of the inevitability of the delay would be made ad hoc, based on all the circumstances of the case. In the current situation, Avrylia was suffering from several terrorist attacks for years and was receiving

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[49] *Goranova-Karaeneva v. Bulgaria* (2011), §59

[50] Case, §§ 3, 7

[51] *Aksoy v. Turkey* (1996) §68; *Ireland v. United Kingdom* §207*; Demir And Others v. Turkey* [GC] (2008), §43; *Brannigan and Mcbride v. The United Kingdom* (1993), §43

[52] Ibid.

[53] Greece v. The United Kingdom, (1957), §§169-170

information from foreign surveillance about grave threats to the national security and to the life of its citizens. Consequently, the Government contends that the delay can fairly be attributed to inevitable causes connected with the gradual development of the emergency and that it was justifiable under Article 15(3).

c) Whether the measures taken by the Avrylian government were strictly necessary

27. The Court stated that it was not its role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism and respecting individual rights[54]. The special legislation at issue was adopted in narrow relation with the terrorism in the country, which claimed hundreds of lives, and was specifically aimed at effective and quick identification of the risks and prevention of future attacks. Those aims could not be achieved with lesser restrictions, seeing that in such types of crimes time was of the essence.

28. Furthermore, the Government contends that safeguards against abuse existed, as required by the Court[55]. First, the measures were very limited in time and in their scope: they only applied for a very short period (six months) and did not restrict any of the most essential human rights – the right to life, the rights to liberty, the right to not be subjected to ill-treatment and the right to a fair trial. Only certain rights under Articles 8 and 10 were affected. Second, any measures under the special legislation could only be undertaken under the control of the Ministry of the Interior, which was a safeguard that their scope would be limited to what is necessary. Furthermore, any use in subsequent judicial proceedings of the information thus obtained would mean that the measures would be reviewed by the court.

In conclusion, the Government upholds that the derogation was valid at the moment of the alleged violations and Article 8 is inapplicable.

2. The test under Article 8 regarding the lawfulness of the interference

29. In the alternative, assuming that the complaints are admissible and Article 8 applies, the Government contends that the requirements of that provision were complied with nonetheless. The conditions upon which a State may interfere with the enjoyment of a protected right in Article 8 are set out in Article 8(2). The elements which must be considered separately are ‘the law’, ‘the objective’ and ‘the necessity’.

a) Was the interference in accordance with the law

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[54] *Brannigan and Mcbride v. The United Kingdom* (1993), §59; *Marshall v. UK* (dec.);

[55] *A. and Others v. The United Kingdom* (2009), §184; *Brannigan and McBride*, §§48-66; *Aksoy.v. Turkey* (1996) §§71-84

30. Domestic legality is a necessary condition but it is not sufficient. The law must further be compatible with the rule of law and accessible to the person concerned, and the person affected must be able to foresee the consequences of the domestic law for him[56].

31. Regarding the quality of the law, the Government contends that the law was precise, it was in force for a short period of time and contained safeguards against abuse. The Emergency State Decree[57] was adopted in reference to the terroristic threat to the country, it had narrow application and all measures included in it were aimed at overcoming the situation. In addition, there is indirect post-factum judicial control in the criminal proceedings, as in the current case, where the legality of the search and seizure and the covert surveillance could be assessed[58].

32. Regarding the consequences of the law, the Government contends that they were foreseeable and publicly notorious, as required by the Court[59]. The applicant must be familiar with the special legislation as it has been declared by decision of Parliament and approved by the President. Mr. Kallen must have been aware that an eventual search warrant could be based on intelligence from the NSS and not subjected to court review.

b) Whether the interference pursued a legitimate aim

33. The special legislation was adopted in order to combat and prevent terrorism in the country, which had already suffered numerous attacks. Consequently, two of the legitimate aims of Avrylia were the protection of public order and national security. Also, the Government contends that another main purpose of the legislation was the prevention of a serious crime[60]. Most importantly, considering the dozens of victims of terrorism in the country, the aim was the protection of the life and health of the civilians.

c) Whether the interference was necessary in a democratic society

34. It is not enough that a state has a legitimate aim for interfering with someone's right under Article 8(2), it must show that the interference is necessary in a democratic society[61]. The requirement of proportionality is that "an interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued"[62]. The Government maintains that in the instant case there were sufficient elements which show that

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[56] *Kopp* (1998), §64, *P.G. and J.H. v. The United Kingdom* [GC] (2001), §46; *Kennedy v. the United Kingdom* (2010), §151; *Rotaru v. Romania* (2000), §52; *Heino v. Finland* (2011), §§39-40

[57] Case §19

[58] *Heino v. Finland* (2011), §45

[59] Ibid. §39

[60] Case, §17

[61] *Handyside v. UK* (1976), §48

[62] *Olsson v Sweden* (1988), §67; *W v. the United Kingdom* (1988), §60b*; Leander v. Sweden* (1987), §58

the interference was limited within reasonable bounds and not excessive to the legitimate aim.

35. According to the 'margin of appreciation' doctrine, developed by the Court, the state institutions make the initial assessment of whether the interference is justified[63]. Therefore, it was primarily for the Avrylian authorities to assess the need of the measures in the concrete circumstances of the case and their proportionality to the legitimate aims pursued.

36. Regarding the search and seizure, there were substantive grounds for believing that the Applicant had at least a connection to the planned bomb attacks and that his house may contain evidence for this connection, as well as information about the location of the bombs. The NSS had already had intelligence from its own sources and from their Walentian counterparts about the large scale of the attack and Mr. Kallen's involvement in it.[64] Under the special legislation adopted to fight crimes such as the one the Applicant was suspected of, search and seizure could be performed with an order of the Ministry of the Interior, which in the current case was duly provided[65]. The actions were fruitful and rendered legal, as the seized documents and computer were used in the criminal proceedings against the Applicant to prove him guilty of terrorism and other related activities. This allowed the national courts to exercise indirect control over the search and seizure operation and thus counterbalance the lack of prior judicial order, which in itself is not indispensable[66]. Moreover, in cases involving accusations of terrorism the Court noted that, because of the complexity of such cases, strict requirements about the search and seizure under Article 8 "could seriously jeopardise the effectiveness of an investigation where numerous lives might be at stake." [67] In conclusion, the interference with Mr. Kallen's rights was not disproportionate and was in accordance with the legitimate aim pursued.

37. Regarding the covert surveillance, it was also executed in accordance with the special legislation and by order of the Ministry of the Interior. The Court found the existence of legislation granting powers of secret surveillance under exceptional conditions necessary in a democratic society[68]. The Government contends that such conditions are present in the instant case and, as already mentioned, that the order of the Ministry of the Interior was sufficient guarantee for the protection of rights under Article 8. The covert surveillance was ordered,

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[63] *Keegan v. the United Kingdom* (2006), §31
[64] Case §§3-5
[65] Case §12
[66] *Heino v. Finland* (2011), §45
[67] *Sher and Others v. The United Kingdom* (2015), §174
[68] *Klass and others v Germany* (1978), §48

because Mr. Kallen had already been suspected of involvement in terrorist activities, thus justifying the actions of the authorities in concordance with the legitimate aims pursued and with the emergency legislation. The period of one month was short enough for the measure not to be excessive. What is more, ultimately the covert surveillance was fruitful[69], rendered legal, and also served as evidence in the criminal proceedings[70], thus proving the necessity of the measure to the legitimate aim to fight terrorism and to defend the interest of the public and allowing for an indirect judicial review[71].

III. ALLEGED BREACH OF ARTICLE 6

38. The Applicant complains that his right to a fair trial under Article 6(1) was violated in the proceedings before the national courts, because his conviction was based on his confession in violation of Article 3 and other evidence that he claims was inadmissible.

A) Admissibility

39. The Government does not raise any objections as to the admissibility of this complaint.

B) Merits

1. No derogation under Article 15

40. The Government confirms that the emergency legislation did not affect the applicability of Article 6.

2. Minimum rights of individuals charged with a criminal offence

41. The fairness of the proceedings is determined by examining them in their entirety[72]. In evaluating their overall fairness, it must be taken into account the minimum rights in Article 6, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases[73]. However, those minimum rights are not aims in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole[74].

42. The Applicant does not claim that the general safeguards under Article 6(1) and the minimum rights of persons charged with criminal offence under 6 (3) (a, b, c, e) had not been duly provided to him at any time during the criminal proceedings against him. The Government contends that those general and specific guarantees were fully respected and

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[69] Case §11

[70] *Dragojević v. Croatia* (2015), §72

[71] *Gäfgen v. Germany* [GC] §175

[72] *Ankerl v. Switzerland* (1996), §38; *Centro Europa 7 S.r.l, Di Stefano v. Italy* [GC] (2012), §197

[73] *Ibrahim and others v. The United Kingdom* [GC] (2016), § 251; *Sakhnovskiy v. Russia* (2010), §94; *Gafgen v. Germany* [GC], §169

[74] *Bykov v. Russia* [GC] (2009), §93*; Aleksandr Zaichenko v. Russia* (2010), §39

considers that this is an important factor in the overall assessment of the fairness of the proceedings.

3. Alleged violations regarding the evidence used in the criminal proceedings

a) The applicant's statement while in police custody

43. The Government contends that there was no breach of Article 3 and therefore the confession was not extracted while violating Convention rights.

44. Even in the Court accepts that there was ill-treatment, the Court did not declare that any evidence, obtained through ill-treatment not amounting to torture would be inadmissible in the trial, if the evidence did not have an impact on his or her conviction or sentence.[75]. The Government contends that the confession made by the Applicant after the use of force while in police custody was not decisive evidence. There is variety of evidence which is used against Mr. Kallen such as video recordings, wiretapped phone conversations, photographs, witness statements, information from his computer and documents [76], all of which not tainted in any way by the alleged violation of Article 3. The Government contends that Mr. Kallen would have been convicted, even if none of his statements while in police custody was taken into consideration.

45. The Applicant stated that 'all evidence obtained following his testimony was inadmissible'. However, the only evidence which seems to be found or gathered after that statement were the three remaining bombs which would have been found in any case. Hence, he may not argue that he incriminated himself because of the violation by saying the exact location, as he had admitted freely before the alleged ill-treatment that he knew where the bombs were. Moreover, the impugned real evidence, the bombs, was not used to prove him guilty or to determine his sentence. It can thus be said that there was a break in the causal chain leading from the prohibited methods of investigation to the applicant's conviction and sentence in respect of the impugned real evidence[77].

46. The Applicant's disclosure of the locations of the remaining bombs and the hour at which they were set to detonate was given freely[78] in the presence of his lawyer and the Supreme Court declared that there were no statements in absence of his lawyer that were taken into consideration. Consequently, the Government contends that there was no violation to the right of fair trial in regard to the Applicant's statements while in police custody.

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[75] *Gäfgen v. Germany* [GC] §17; *Jalloh v. Germany* [GC] (2006), §107

[76] Case §11

[77] *Gäfgen v. Germany* [GC] §§180-188.

[78] Case §8

b) Witness statements used in the criminal proceedings

47. Article 6(3)(d) guarantees a person charged with a criminal offence the right to examine or have examined witnesses against him. The Court confirmed[79] that exceptions to it are permitted and they must not infringe the rights of the defence of the accused.

48. First, there must be a good reason for non-attendance of a witness and second, the conviction must not be based solely or decisively on the witness statements. The Court stated[80] that even if there was no good reason for the absence of the witnesses, this could not by itself render the trial unfair, if there were sufficient counterbalancing factors such as procedural safeguards which can ensure any conviction is based on reliable evidence. In the instant case, the witness statements only concerned the attempts of Mr. Kallen to buy weapons, which is clearly insufficient to prove the crimes he was accused of. Therefore those statements could at best serve as indirect evidence corroborating other evidence against the applicant, and thus they were not decisive. Furthermore, those witness statements were disclosed to the defence and the Applicant could assess their importance and challenge them, if need be. The fact that he did not do so before the national courts shows that he did not consider them important.

c) Covert surveillance

49. In the present case some of the main evidence was audio and video tapes obtained through covert surveillance. According to this special legislation, covert surveillance could be ordered by the Ministry of the Interior and was not subject to court review or appeal. As the Court explained on numerous occasions[81], it is not its role to determine whether particular types of evidence may be admissible. The question which must be answered is whether the proceedings as a whole were fair. As already proven, the covert surveillance was gathered in conformity with the law, a fact also stated by the Supreme Court[82]. The Court stated that even illegal tapes could be used as evidence, as long as they were not the only evidence used in the trial and their authenticity and admissibility could be challenged in court[83]. In the current case the national court underlined specifically that the conviction was not based solely on the covert surveillance[84]. The Applicant disputed the admissibility of the tapes, therefore his right

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[79] *Al-Khawaja and Tahery v. the United Kingdom* (2011), §118

[80] *Simon Price v. the United Kingdom* (2016), §115

[81] *García Ruiz v. Spain* (1999), §28; *Schenk v. Switzerland* (1988), § 46; *Khan v. the United Kingdom* (2000), §34

[82] Case §11

[83] *Schenk v. Switzerland* (1988), §§ 47-48; *P.G. and J.H. v. The United Kingdom* [GC] (2001), §77

[84] Case §11

of defence was not breached in any way, regardless of the fact that his attempt was not successful[85].

50. Further, it does not appear that the applicant contested the authenticity of the evidence but only the fact that they were not ordered by the court. However, the trial court could verify their authenticity and exclude some of them if it had any doubt. It follows that there was a judicial control of the quality and relevance of that evidence which counterbalanced the lack of prior court order.

d) Evidence gathered through search and seizure

51. The Government contends that the evidence was gathered in accordance with the emergency legislation and therefore was legal and admissible in court. The Applicant did not dispute its admissibility during the criminal proceedings. Furthermore, on the basis of the available information, this evidence was not decisive and only corroborated other evidence.

4. Overall fairness of the criminal proceedings

52. Even if the Court accepts that one or more pieces of evidence against the Applicant were admitted in breach of any of the guarantees of a fair trial, when determining whether the proceedings as a whole have been fair, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and weighed against the individual interest that the evidence against him be gathered lawfully[86]. In the instant case, considering the nature of the crime, it is clear that such public interest exists.

53. In the light of all the stated facts, it could be concluded that there were numerous guarantees for the fairness of the proceedings. There was a wide variety of different evidence, proving the guilt of the Applicant and the court conducted a fair and proper assessment of their reliability and legality on three levels. All the pieces of evidence that could be tainted in any way were excluded from the proceedings or were explicitly rendered not decisive, while the verdict was based on other evidence, whose authenticity the Applicant did not dispute.

IV. CONCLUSION

For all these reasons the Government respectfully requests the Court to adjudge and declare that: 1. The applicant's complaints are inadmissible or ill-founded 2. Avrylia has not violated the applicants' rights under Articles 3, 6, and 8 of the Convention.

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[85] *Schenk v. Switzerland* (1988), §47

[86] *Ibrahim and Others v. The United Kingdom* [GC],(2016), §252; *Jalloh v. Germany* [GC], (2006), §97