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**2020-2021**

Team: 40

# **EUROPEAN HUMAN RIGHTS MOOT COURT COMPETITION**

## **Specter v. Alethea**

*Darius Specter*

**VS**

*State of Alethea*

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## **Submission of the Applicant**

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## List of Abbreviations

— a. O.	and Others
— ACC	Alethean Criminal Code
— ACCP	Alethean Code of Criminal Procedure
— ADPL	Alethean Data Protection Law
— AI	Artificial Intelligence
— ALFA	Alethean Law on Freedom of Assembly
— Art.	Article
— Arts.	Articles
— CESCR	Committee on Economic, Social and Cultural Rights
— CM	Committee of Ministers
— CoA	Court of Appeal (Charon County Court)
— CoE	Council of Europe
— DPA	Data Protection Agency
— EUR	Euro
— FIC	First Instance Court (Charon City Court)
— FZ	FriendZone
— GC	Grand Chamber
— GPMB	Global Preparedness Monitoring Board
— HRC	Human Rights Committee
— NGO	Non-governmental Organisation
— OHCHR	United Nations Human Rights Office of the High Commissioner
— PACE	Parliamentary Assembly
— Prot.	Protocol
— Protocol	Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data
— SG	Secretary General
— The Convention	European Convention on Human Rights
— The Court	European Court of Human Rights
— UK	the United Kingdom
— UN	United Nations

- UNAIDS United Nations Joint Programme on HIV/AIDS
- Venice Commission European Commission for democracy through law
- WHO World Health Organization

## Summary of Submissions

- The applicant, Mr. Specter, submits that all the admissibility criteria under Arts. 34 and 35 have been fulfilled and thus, the application is admissible.
- Firstly, the applicant argues that the respondent State, by capturing his alleged image in CCTV footage, extracting photos from his FZ profile and processing them via PanOptis, interfered with his right to private life under Art. 8. This interference was not in accordance with the law and cannot be considered as necessary in a democratic society, as there was a lack of adequate safeguards and the measures were disproportionate to the legitimate aim pursued.
- Secondly, the applicant maintains that there was an interference with his right under Art. 11. The absolute prohibition of any gatherings of more than 100 persons cannot be justified. In addition, the imposition of a disproportionate fine of EUR 2,500 on the applicant constitutes a further violation of his right to freedom of assembly.
- Subsequently, the applicant argues that the respondent State cannot rely on the derogation of 15 June 2019 under Art. 15 in order to justify the aforementioned interferences with his rights under Art. 8 and 11. The State's unreasonable delay in notifying the SG renders the derogation invalid. In addition, the measures in question were not strictly required by the exigencies of the situation.
- The applicant further submits that his right to a fair trial under Art. 6 has also been breached. His conviction was based exclusively on unlawful and unreliable evidence, namely the results of PanOptis and the statements of the two prosecution witnesses. Furthermore, the domestic courts unduly refused to examine Mr. Specter's sole and decisive witness.
- Finally, the applicant claims that the respondent State failed to provide an effective remedy in practice within the meaning of Art. 13. The domestic courts never dealt with the substance of his complaints regarding a violation of his privacy rights nor did they grant him appropriate redress. The complaint to the DPA, on the other hand, does not constitute an effective remedy, as it lacks the independence and impartiality of a judicial body.

## Submissions

### A. ADMISSIBILITY OF THE APPLICATION

Mr. Darius Specter submits that the requirements set forth in Arts. 34 and 35 regarding the admissibility of his application are satisfied. Firstly, the applicant claims that he qualifies as a direct victim. Secondly, that all the available domestic remedies have been exhausted and that the application has been lodged within six months after the final decision. Thirdly, that the impugned acts fall within Alethea's jurisdiction and, therefore, the Court's jurisdiction. Finally, that he has suffered a significant disadvantage.

#### A.1 *Victim status*

The applicant submits that he is a direct victim of a violation of his rights under Arts. 6, 8, 11 and 13 of the Convention. Specifically, in the present case, the applicant was directly affected by the measures taken by the Alethean authorities, namely the police's exploitation of his biometric data and photographs through the PanOptis facial recognition software as well as the decisions of the national courts.<sup>1</sup> He was unlawfully monitored and identified, prohibited from demonstrating, wrongfully accused and convicted.<sup>2</sup> In addition, the CoA found him guilty under Art. 306 of the ACC and imposed a EUR 2,500 fine. Thus, the applicant has *locus standi* to lodge an application before this Court.

#### A.2 *Exhaustion of domestic remedies and compliance with six-month time limit*

The applicant acknowledges the importance of the principle of subsidiarity.<sup>3</sup> To this end, he exhausted all available domestic remedies before raising an application before the Court.<sup>4</sup> The applicant submits that he did everything that could reasonably be expected of him in order to exhaust domestic remedies.<sup>5</sup>

After the issuance of a final judgment on the criminal proceedings against Mr. Specter, the latter raised a constitutional complaint before Alethea's Constitutional Court pursuant to the State's Constitution. As the Court has recognised, in legal systems which provide for constitutional protection for fundamental human rights and freedoms, such as the Alethean one, it was incumbent upon the applicant to test the extent of this protection.<sup>6</sup> In Alethea, any person may submit such a complaint to the Constitutional Court, alleging that his or her constitutional

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<sup>1</sup> *Vallianatos a. O. v. Greece* [GC], §47; *Tourkiki Enosi Xanthis a. O. v. Greece*, §38.

<sup>2</sup> *Gaughran v. the UK*, §66; *Catt v. the UK*, §93.

<sup>3</sup> *A, B and C v. Ireland* [GC] §142; *Demopoulos a. O. v. Turkey* (dec.) [GC], §§69, 97; Prot. No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (2013), Art. 1.

<sup>4</sup> *Vincic a. O. v. Serbia*, §48; *Pikic v. Croatia*, §28; *Dalia v. France*, §38.

<sup>5</sup> *Gherghina v. Romania* (dec.) [GC], §93; *Ilhan v. Turkey* [GC], §59; *Akdivar a. O. v. Turkey* [GC], §69.

<sup>6</sup> *Dragan Petrović v. Serbia*, §44; *A, B and C v. Ireland* [GC], §142; *Vincic a. O. v. Serbia*, §51.

and/or Convention rights had been violated.<sup>7</sup> The exercise of the constitutional complaint does not depend on State officials' discretionary powers.<sup>8</sup> Therefore, the complaint before the Constitutional Court was not an extraordinary remedy but rather it was to be exhausted within the domestic legal order and its inadmissibility decision should be considered the final domestic decision.<sup>9</sup> Most importantly, this remedy has already been declared effective by the Court.<sup>10</sup>

The applicant expressly invoked Arts. 6, 8 and 11 of the Convention before the Constitutional Court of Alethea. The fact that he did not explicitly mention Art. 13 does not render his claim under the latter article inadmissible, as Mr. Specter raised this complaint in substance.<sup>11</sup> He raised arguments in respect to the violation of his privacy rights in every level of jurisdiction of Alethea, although the domestic courts never addressed the substance of his arguments. As the exhaustion of domestic remedies with regard to Art. 13 is closely linked to the substance of Mr. Specter's complaint, he argues that it must be joined to the merits of the application.<sup>12</sup> In addition, the exhaustion of the domestic remedies is not rescinded by the Constitutional Court's decision that the complaint was manifestly ill-founded.<sup>13</sup>

Furthermore, the applicant lodged his application before the Court within the six-month time-limit. The six-month period runs from the final decision issued in the process of exhaustion of domestic remedies which are effective, sufficient and not extraordinary.<sup>14</sup> Therefore, the final decision was that of the Constitutional Court, which was published on 15 June 2020. The application was lodged after only 54 days, on 8 August 2020.

### A.3 Jurisdiction

The violations of the applicant's rights under the Convention have been committed by the police and the courts of the Alethean State, which is a Contracting Party to the Convention. The Alethean State is responsible for the acts and omissions of its authorities.<sup>15</sup> The violations occurred within the state's territory, namely in the capital, Charon, and thus the state had jurisdictional competence *ratione loci*. The Court has jurisdiction *ratione temporis*, as the violations occurred after the State of Alethea had ratified the Convention and its Protocols. Last but not least, the applicant complains about violations of his Convention rights and therefore,

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<sup>7</sup> Case, §25.

<sup>8</sup> *Martynets v. Russia* (dec.).

<sup>9</sup> *Xheraj v. Albania*, §43; *Beshiri a. O. v. Albania*, §32; *Hatjianastasiou v. Greece* (dec.).

<sup>10</sup> Case, §25.

<sup>11</sup> *Fressoz and Roire v. France* [GC], §37; *Castells v. Spain*, §32.

<sup>12</sup> *Mateus Pereira da Silva v. Portugal*, §27; *Abuhmaid v. Ukraine*, §111; *De Souza Ribeiro v. France* [GC], §76.

<sup>13</sup> *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], §61; *Gäfgen v. Germany* [GC], §144.

<sup>14</sup> *Lekić v. Slovenia* [GC], §65; *Moreira Barbosa v. Portugal* (dec.).

<sup>15</sup> *Al-Skeini a. O. v. the UK* [GC], §130; *Ilaşcu a. O. v. Moldova and Russia* [GC], §311



jurisdiction *ratione materiae* has also been established.

#### *A.4 Significant disadvantage*

The applicant submits that he has suffered a significant disadvantage from Alethea's violation of his rights. The severity of the violation should be assessed taking into account both what is objectively at stake in the present case and the applicant's subjective perceptions.<sup>16</sup> Mr. Specter was forced to pay a fine of EUR 2,500 as a result of his wrongful conviction. The significance of the applicant's pecuniary loss must be examined in the light of Mr. Specter's specific economic conditions and the economic situation in Alethea. The applicant is a 20-year-old privacy rights activist receiving the average monthly salary of EUR 1,000.<sup>17</sup> Thus, the imposed fine is significant considering the particular circumstances.<sup>18</sup>

Lastly, the applicant suffered a non-financial disadvantage, as well. Specifically, personal photographs of him, found in his social media platform FZ, were arbitrarily used as evidence. As a vocal privacy rights activist this case concerns an important question of principle for him.<sup>19</sup> The applicant has a general interest in pursuing the case which was manifested by his effort to obtain redress for the injustice he suffered before the Constitutional Court.<sup>20</sup> In addition, the applicant's reputation and the way in which he is perceived by the public is at stake due to his guilty verdict.<sup>21</sup> Therefore, the applicant's subjective perception of the gravity of the violations of his Convention rights, the heavy fine he had to pay, combined with the damage to his reputation, fulfil the significant disadvantage requirement.

## **B. VIOLATION OF ART. 8**

### *B.1 The applicant's claims fall within the ambit of Art. 8 §1*

The applicant submits that the respondent State, by capturing his alleged image in CCTV footage, by scraping his FZ photos and by processing them via PanOptis, interfered with two aspects of his right to respect for his private life. Firstly, the authorities retained Mr. Specter's image, namely an essential attribute of his personality which reveals his unique characteristics and restricted his right to control the use of his image or object to potential recording.<sup>22</sup> Secondly, the State interfered with Mr. Specter's right to informational self-

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<sup>16</sup> *Biržietis v. Lithuania*, §36; *Gagliano Giorgi v. Italy*, §55; *Giuran v. Romania*, §18.

<sup>17</sup> *Korolev v. Russia* (dec.); *Clarification Question 23 for additional factual information*.

<sup>18</sup> *Shefer v. Russia* (dec.), §26.

<sup>19</sup> *Mehdiyev v. Azerbaijan* (2019), §28; *Diacenco v. Romania*, §46; *Ionescu v. Romania* (dec.).

<sup>20</sup> *Shefer v. Russia* (dec.), §25.

<sup>21</sup> *Farzaliyev v. Azerbaijan*, §3; *G.I.E.M. S.R.L. a. O. v. Italy* [GC], §314.

<sup>22</sup> *P.N. v. Germany*, §56; *Küchl v. Austria*, §58; *Von Hannover v. Germany* (no. 2) [GC], §96; *Reklos and Davourlis v. Greece*, §40; *Sciacca v. Italy*, §§28-29.

determination regarding the collection and processing of his personal data.<sup>23</sup>

#### *B.1.1 Concerning the depiction of the applicant's alleged image in CCTV footage*

The applicant considers that the collection and further storage of his alleged image by public authorities via CCTV footage, which reveals his purported whereabouts and movements in the public sphere, constitutes an interference with his right to respect for private life.<sup>24</sup> Even if Mr. Specter was involved in public activities, such as walking along the street, he should have been entitled to a reasonable expectation of privacy, which holds significant weight in establishing an interference with his private life.<sup>25</sup> In the case at hand, the applicant had no expectation that footage could have been recorded for the purposes of a facial identification procedure and, especially, as evidence prejudicial to his defence at trial.<sup>26</sup> Therefore, regardless of his alleged presence and his awareness of CCTV cameras operating in Charon's main square, the actions of the Alethean authorities went beyond the foreseeable use of these cameras and, thus, interfered with his reasonably expected right to privacy.<sup>27</sup> Furthermore, the Respondent did not comply with the requirements set forth in *Friedl v. Austria* for the collection of photographs by the police during public demonstrations.<sup>28</sup> Namely, the applicant's anonymity was not maintained and his alleged photographs were entered into the data processing system of PanOptis in order to identify him.<sup>29</sup>

#### *B.1.2 Concerning the retrieval of the applicant's images from the social network FZ*

The Court has established that private life is a broad term including the right to lead a "social private life" by developing relationships with other persons and the outside world.<sup>30</sup> Therefore, Art. 8 encompasses a zone of social interaction between the applicant and others, even in a public context.<sup>31</sup> In light of the rapid social and technological development, the applicant invites the Court to find that social media platforms, such as FZ, fall within the notion of social private life, and thus his FZ profile, including his private and public photographs, fall within the protective scope of Art. 8 §1.

The applicant submits that the Alethean authorities extracted photographs that were uploaded in his private FZ profile and were not openly accessible on the Internet. Mr. Specter,

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<sup>23</sup> *Breyer v. Germany*, §75; *Benedik v. Slovenia* §103; *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], §§136-137.

<sup>24</sup> *Shimovolos v. Russia*, §65.

<sup>25</sup> *Uzun v. Germany*, §44; *P.G. and J.H. v. the UK* [GC], §57.

<sup>26</sup> *Perry v. the UK*, §41; *Case*, §§13, 18, 20.

<sup>27</sup> *Vukota-Bojić v. Switzerland*, §§54-56; *Perry v. the UK*, §§38, 40, 43.

<sup>28</sup> *P.G. and J.H. v. the UK*, §58; *Friedl v. Austria*, Commission report, §50; *Case*, §13-14.

<sup>29</sup> *P.G. and J.H. v. the UK*, §58; *Friedl v. Austria*, Commission report, §50; *Case*, §13-14.

<sup>30</sup> *Bărbulescu v. Romania* [GC], §70; *Özpınar v. Turkey*, §45; *S. and Marper v. the UK* [GC], §66.

<sup>31</sup> *Shimovolos v. Russia*, §64; *Gillan and Quinton v. the UK*, §61; *Mólka v. Poland* (dec.).

based on his full and privy knowledge of his photographs on FZ, is the only person that can attest to the fact that his private photographs were clear enough to provide a distinct view of his facial features.<sup>32</sup> As a privacy rights activist, he has ensured that his public photos are not clear enough for third parties to identify him. In direct contradiction to the decision of *Lupker a. O. v. the Netherlands*, the Alethean authorities invaded the applicant's privacy by using his private photographs, and not photographs voluntarily provided by the applicant or obtained through previous criminal proceedings, in order to identify him in the pre-trial investigation under Art. 306 of the ACC.<sup>33</sup>

However, even assuming that the images, used to allegedly identify Mr. Specter, were extracted from the applicant's publicly available photographs, the law-enforcement authorities retrieved them in circumstances where the applicant could not have reasonably anticipated that they would be stored and used for identification purposes.<sup>34</sup> Under these circumstances, acquisition of public photographs on social media by the authorities amounts to an intrusion to his private life and, thus, an interference with his rights under Art. 8.

### *B.1.3 Concerning the processing of the images and biometric data by the facial recognition software PanOptis*

The applicant submits that the automatic AI-based processing of his personal data and biometric markers through PanOptis by the authorities is an interference with his rights under Art. 8 §1.<sup>35</sup> Regardless of the method of acquisition of the images, the analysis and cross-reference of the applicant's photographs by PanOptis constitutes a self-standing interference with his right to respect for his private life.<sup>36</sup> The applicant further claims that his right to informational self-determination is violated by the fact that PanOptis processed his personal data in a manner which was not normally predictable.<sup>37</sup> If the applicant had expected that his personal data would be subjected to such processing, he would not have consented, as he vocally opposes the use of AI and meticulously protects his privacy by using a Faraday bag.<sup>38</sup> Moreover, by the use of PanOptis, a third-party gains control of Mr. Specter's image and sensitive biometric parameters as well as of their subsequent use, resulting in an interference with the applicant's private life.<sup>39</sup>

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<sup>32</sup> *Case*, §18.

<sup>33</sup> *Lupker a. O. v. the Netherlands*, Commission decision.

<sup>34</sup> *Perry v. the UK*, §42.

<sup>35</sup> *S. and Marper v. the UK* [GC], §103; *Case*, §36.

<sup>36</sup> *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], §134; *P.G. and J.H. v. the UK*, §57.

<sup>37</sup> *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], §§136-137.

<sup>38</sup> *Case*, §§16, 36.

<sup>39</sup> *López Ribalda a. O. v. Spain* [GC], §89; *De La Flor Cabrera v. Spain*, §31; *Reklos and Davourlis v. Greece*,

In addition, the applicant claims that the storage of his images by the PanOptis servers in a permanent and systematic manner and for an indefinite period of time amounts to an interference under Art. 8.<sup>40</sup> The applicant submits that the present case is analogous to that of *P.G. and J.H. v. the UK*. In that case, the Court found an interference due to the fact that a permanent record of the applicants' personal data came into existence from the public domain and was subsequently subjected to a process of further analysis directly relevant to detecting the applicants.<sup>41</sup>

## *B.2 The interference cannot be justified under Art. 8 §2*

### *B.2.1 The interference of Mr. Specter's rights under Art. 8 was not in accordance with the law*

Mr. Specter submits that the interference with his right to private life was not in accordance with the law within the context of Art. 8 §2. The impugned measures were not consistent with the requirements laid down in Art. 202 of the ADPL which regulates the use of personal data.<sup>42</sup> Firstly, the collection and processing of such data must take place transparently. Contrary to this provision and despite the applicant's persistent inquiries, the Alethean authorities repeatedly refused to explain to Mr. Specter how PanOptis processed his photographs.<sup>43</sup> Additionally, under Alethean law, usage of personal data must address specified and explicit purposes and should be limited to the extent that is necessary. In the present case, contrary to Art. 270 of ADPL, monitoring Charon's main square via CCTV did not serve a specific public interest objective but instead open-endedly captured whoever was present at any given time and stored information indefinitely. Moreover, there is no indication that the police met their obligation to access the CCTV footage on the basis of a warrant.<sup>44</sup>

In addition, the applicant argues that the domestic legislation is not foreseeable in its application and does not set out adequate safeguards against interferences with his Art. 8 rights by the Alethean authorities.<sup>45</sup> The phrase "in accordance with the law" under Art. 8 does not simply require that the impugned measure have some basis in domestic law; it further necessitates that the law in question is of a certain quality.<sup>46</sup> As available technological means have become more and more sophisticated thus allowing for multiple methods of interference

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§40.

<sup>40</sup> *Gaughran v. the UK*, §70; *Peck v. the UK*, §59, *Amann v. Switzerland* [GC], §65, *Case*, §36.

<sup>41</sup> *P.G. and J.H. v. the UK*, §§57, 59.

<sup>42</sup> *Libert v. France*, §43; *Peev v. Bulgaria*, §43; *Perry v. the UK*, §45; *Case*, §31.

<sup>43</sup> *Case*, §§14, 16.

<sup>44</sup> *Case*, §34.

<sup>45</sup> *Perry v. the UK*, §45; *P.G. and J.H. v. the UK*, §§44, 46; *Kopp v. Switzerland*, §§55, 64.

<sup>46</sup> *Szabó and Vissy v. Hungary*, §59; *Kruslin v. France*, §27; *Malone v. the UK*, §67.

with privacy rights, the rules on storage and usage of personal data must be clear and precise.<sup>47</sup> In the case at hand, the ADPL does not regulate the access, retention and eventual destruction of personal data by third parties and, thus, fails to address the risks of abuse and arbitrariness inherent in the function of PanOptis.<sup>48</sup> Furthermore, there is no indication that the domestic legislation specifies the scope of application of the measures and the citizens were not warned about the potential processing of their social media photos via PanOptis.<sup>49</sup> As the quality of law is undermined due to insufficient safeguards against arbitrariness, the ADPL cannot satisfy the criterion of “accordance with the law” under Art. 8 §2.<sup>50</sup>

### *B.2.2 The interference was not necessary in a democratic society*

The applicant submits that the Respondent failed to limit its interference to the extent that was “necessary in a democratic society”.<sup>51</sup> Mr. Specter submits that the Malit-5 epidemic does not give rise to such a strict necessity, as less than 2% of the Alethean population has died with Malit-5 amongst possible causes and, in contrast, almost 80% of those infected were asymptomatic or showed minor symptoms.<sup>52</sup> Furthermore, it should be noted that the above-mentioned mortality rate has not been established with absolute certainty.

The applicant argues that the use of PanOptis, in light of its disputed accuracy, is not suitable to fulfil the legitimate aim of the protection of public health for which it is employed and, as such, cannot be considered necessary in a democratic society.<sup>53</sup> According to a study conducted by the NGO Themis that is particularly well-versed in the field of privacy rights, the error rate of PanOptis is as high as 50%.<sup>54</sup> Even the official estimation by the Alethean police reveals a worrying error rate of 15% admitting that the software is bound to fail once in every seven searches.<sup>55</sup>

The applicant further submits that the State of Alethea did not meet its obligation to minimally impair his rights under Art. 8. As illustrated in the case of Mx. A and Mx. B, who were identified via direct visual contact by police officers physically present at the protest, it was possible to achieve their prosecution and conviction under article 306 of ACC without the

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<sup>47</sup> *Köpke v. Germany* (dec.); *Von Hannover v. Germany*, §70.

<sup>48</sup> *S. and Marper v. the UK* [GC], §99; *Liberty a. O. v. the UK*, §§62-63; *Rotaru v. Romania* [GC], §59; *Case*, §36.

<sup>49</sup> *Roman Zakharov v. Russia* [GC], §229; *Weber and Saravia v. Germany* (dec.), §93; *Clarification Question 13 on CCTV/PanOptis*.

<sup>50</sup> *S. and Marper v. the UK* [GC], §95; *Rotaru v. Romania* [GC], §52; *Halford v. the UK*, §§49-50.

<sup>51</sup> *P.N. v. Germany*, §69; *S. and Marper v. the UK* [GC], §101; *M.K. v. France*, §33.

<sup>52</sup> *Case*, §§4, 5.

<sup>53</sup> *Breyer v. Germany*, §88; *Fernández Martínez v. Spain* [GC], §124; *Uzun v. Germany*, §80.

<sup>54</sup> *Case*, §37.

<sup>55</sup> *Case*, §38.

use of PanOptis or CCTV footage.<sup>56</sup> The Respondent did not exhaust less restrictive alternative measures which would still contribute effectively to the objectives pursued.<sup>57</sup> For example, if law-enforcement officials were to watch the CCTV footage in real time, they would still be able to monitor compliance with the health regulations, but there would be no systematic storage of the material nor any subsequent automatic analysis in breach of the depicted individuals' privacy rights. Likewise, PanOptis could use as a reference sample photographs submitted voluntarily to the authorities, for instance those in passports or driving licences, or taken by the police on the occasion of a previous arrest, instead of invading the reasonably expected privacy of social media users.<sup>58</sup>

To that end, Mr. Specter further claims that the measures due to their indiscriminate nature were disproportionate and, thus, not compatible with Art. 8 §2. This blanket surveillance system places individuals with no connection to any criminal activity under screening by law enforcement and may result in a constant unprompted feeling of being monitored or treated as a suspect.<sup>59</sup> The software system PanOptis also does not process images of a specific individual suspected of a certain crime. It rather operates like a search engine and analyzes the faces of several social media users who have no reason to be implicated in any criminal investigation.<sup>60</sup> This scheme can easily go beyond what is strictly necessary in order to pursue the legitimate aim of protecting public health. The Court has previously emphasised, in the case of *S. and Marper v. the UK*, that an open-ended data retention system requires careful scrutiny.<sup>61</sup> The Court also found that such an indiscriminate system combined with the absence of sufficient safeguards could not be considered necessary in a democratic society.<sup>62</sup> Mr. Specter invites the Court to follow this approach in his case.

Additionally, an interference with personal data, the protection of which is extremely important to a person's enjoyment of his right to respect for private life, could be tolerated only if they were adequate and effective safeguards against potential abuse and arbitrariness.<sup>63</sup> The State of Alethea, having ratified all major CoE human rights treaties, is bound by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.<sup>64</sup> According to Art. 6 of the aforementioned Convention, as amended by the Protocol,

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<sup>56</sup> *Clarification Question 27 for additional factual information; Case*, §13.

<sup>57</sup> *López Ribalda a. O. v. Spain* [GC], §116; *Liblik a. O. v. Estonia*, §136; *Dragojević v. Croatia*, §95.

<sup>58</sup> *Perry v. the UK*, §42; *Lupker a. O. v. the Netherlands*, Commission decision.

<sup>59</sup> Rezende (2020), pp. 375, 385.

<sup>60</sup> *Case*, §36.

<sup>61</sup> *S. and Marper v. the UK* [GC], §120.

<sup>62</sup> *S. and Marper v. the UK* [GC], §§119, 125.

<sup>63</sup> *Kennedy v. the UK*, §153; *Klass a. O. v. Germany*, §50.

<sup>64</sup> Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981);

the applicant's biometric data, due to their inherent link to his personality and their use as an identification method, are a special category of data which require additional safeguards.<sup>65</sup>

Mr. Specter claims that the State, as the operator of PanOptis, is not absolved of its obligation to abstain from unjustifiably interfering with the applicant's rights under Art. 8. His image was stored indefinitely in the servers of PanOptis.<sup>66</sup> Despite the fact that the software was originally developed by a private company, Alethea should have adjusted the software's function accordingly. The Respondent, by using Panoptis, has managed to evade its responsibility to discard personal data within a specific time.<sup>67</sup> The initial intentions of PanOptis's developers do not bind the State, as the latter is obliged to prioritise the protection of Mr. Specter's Convention rights while the former are understandably motivated by an economic interest and enjoy freedom of expression.

On these grounds, the applicant claims that the Respondent went beyond its margin of appreciation and failed to strike a fair balance between serving a public interest objective and affording protection to Mr. Specter's rights under Art. 8 of the Convention.<sup>68</sup> Besides, in the case of privacy rights, the Court has determined that the State's margin of appreciation is narrow, as interferences can only be justified if they are "strictly necessary" in response to the aim of public health protection.<sup>69</sup>

## **C. VIOLATION OF ART. 11**

### *C.1 The applicant's complaints fall within the ambit of Art. 11*

The applicant claims that the State of Alethea negated the essential object of Art. 11, as the authorities interfered with his right to freedom of peaceful assembly by enforcing a blanket ban on gatherings.<sup>70</sup> According to the Court, demonstrations, such as the one conducted in Charon on 1 July 2019, fall within the notion of "peaceful assembly" under this provision.<sup>71</sup>

Even if the demonstration in question was unlawful under ALFA or the emergency decrees, the protection of the applicant's right of freedom of assembly enshrined in Art. 11 remains.<sup>72</sup> Moreover, as the threshold of interference with Art. 11 lies below the point of an

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Case, §23.

<sup>65</sup> Protocol (2018), Art. 8; Jasserand (2016), p. 309.

<sup>66</sup> *Clarification Questions 3, 6 and 10 on CCTV/PanOptis*.

<sup>67</sup> *P.N. v. Germany*, §§59-60; *R.E. v. the UK*, §§140-143; *Kennedy v. the UK*, §164; *Case*, §36.

<sup>68</sup> *Bremner v. Turkey*, §84; *Slivenko v. Latvia* [GC], §128; *Hatton a. O. v. the UK* [GC], §122.

<sup>69</sup> *L.L. v. France*, §45; *Segerstedt-Wiberg a. O. v. Sweden*, §88; *Klass a. O. v. Germany*, §42.

<sup>70</sup> *Chernega a. O. v. Ukraine*, §222; *Kudrevičius a. O. v. Lithuania* [GC], §158; *Djavit An v. Turkey*, §57, *Case*, §8.

<sup>71</sup> *Laguna Guzman v. Spain*, §§4, 36; *Gün a. O. v. Turkey*, §§6, 52; *Case*, §12.

<sup>72</sup> *Kudrevičius a. O. v. Lithuania* [GC], §150; *Oya Ataman v. Turkey*, §39; UN, HRC, General comment No. 37, §16; *Case*, §§7-8, 39.

outright ban, the applicant argues that the absolute interdiction of any gatherings by virtue of the emergency decree of 14 June 2019 constitutes an interference with the right enshrined in Art. 11.<sup>73</sup> Even though the demonstration eventually took place, the ban gave rise to further grievances under Art. 11 due to the chilling effect it had on Mr. Specter, who abstained from the protest solely to avoid criminal prosecution.<sup>74</sup> The applicant argues that the punitive measures, namely his conviction and the fine of EUR 2,500 imposed on him due to his alleged participation in the demonstration, constitute a further interference of Art. 11.<sup>75</sup>

In addition, the applicant submits that this case is analogous to the one of *Zülküf Murat Kahraman v. Turkey*, where the Court found that the applicant's prosecution and conviction established a clear link with the gathering in question and amounted to an interference with the exercise of his right to freedom of assembly, even though he had not attended the demonstration.<sup>76</sup> If Mr. Specter were required to admit to having violated the emergency decrees and Art. 306 of the ACC, he would have to relinquish his right not to incriminate himself in order to enjoy the protection of Art. 11.<sup>77</sup> Furthermore, the mere prohibition of leaving his home for reasons other than those exhaustively listed in the decree, interfered with his freedom of assembly, as it precluded the possibility of moving to a certain venue to attend a demonstration.<sup>78</sup>

## *C.2 The interference cannot be justified under Art. 11 §2*

### *C.2.1 The interference was not "prescribed by law"*

The applicant submits that the interferences with his right to freedom of assembly cannot be considered "prescribed by law" within the meaning of Art. 11 §2. The ALFA grants to the authorities the discretion to employ "any means" in restricting the freedom of assembly and, therefore, it lacks the precision needed to make it adequately foreseeable.<sup>79</sup> Furthermore, the provision does not include any safeguards against arbitrary exercise of the unrestricted power afforded to the authorities.<sup>80</sup> While there is a domestic legal basis for restrictions to be placed upon the freedom of assembly in exceptional circumstances, the State went beyond the scope of this provision. The complete ban on gatherings exceeds the meaning of a mere

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<sup>73</sup> *Huseynli a. O. v. Azerbaijan*, §84; *Ibrahimov a. O. v. Azerbaijan*, §70; *Rassemblement Jurassien and Unité Jurassienne v. Switzerland*, Commission decision, p. 119; *Case*, §§8-9.

<sup>74</sup> *Lashmankin a. O. v. Russia*, §404; *Ibrahimov a. O. v. Azerbaijan*, §70; *Bączkowski a. O. v. Poland*, §§66-68; *Case*, §19.

<sup>75</sup> *Tóth v. Hungary*, §20; *Kudrevičius a. O. v. Lithuania [GC]*, §100; *Ezelin v. France*, §39; *Case*, §18.

<sup>76</sup> *Zülküf Murat Kahraman v. Turkey*, §45; *Navalnyy and Yashin v. Russia*, §52.

<sup>77</sup> *Yagublu and Ahadov v. Azerbaijan*, §79; *Müdüür Duman v. Turkey*, §30; *Yılmaz and Kılıç v. Turkey*, §40.

<sup>78</sup> *Kasparov v. Russia*, §66; *Singartiyski a. O. v. Bulgaria*, §43; *Djavit An v. Turkey*, §§61-62.

<sup>79</sup> *Piroğlu and Karakaya v. Turkey*, §65; *Gorzelik a. O. v. Poland [GC]*, §64; *N.F. v. Italy*, §29.

<sup>80</sup> *Navalnyy v. Russia [GC]*, §115; *Lashmankin a. O. v. Russia*, §430; *Zülküf Murat Kahraman v. Turkey*, §46.



restriction and amounts to the total nullification of the right.<sup>81</sup>

### *C.2.2 The interference was not “necessary in a democratic society”*

The applicant argues that the interference with his right under Art. 11 cannot be deemed as “necessary in a democratic society”. The epidemiological situation does not reach the threshold of a pressing social need, which is inherent to the notion of necessity according to the Court’s jurisprudence.<sup>82</sup> More specifically, the vast majority of those infected with the virus had minor symptoms or were asymptomatic. Simultaneously only less than 2% of the Alethean population died since May 2019 with Malit-5 being merely one of the possible causes of their death.<sup>83</sup> Moreover, the mortality rate has not been estimated with absolute certainty and therefore, it could be even lower.

Furthermore, the applicant claims that the prohibition of more than 100 persons was disproportionate to the legitimate aim pursued.<sup>84</sup> Exceptions to the right to freedom of assembly, due to its fundamental value for a democratic society, must be narrowly interpreted and the necessity for any restriction must be convincingly established.<sup>85</sup> This is even more important in the case of human rights defenders, such as Mr. Specter, who need additional protection.<sup>86</sup> Thus, the intensity of the interference with Art. 11 in the present case, which is on the verge of an absolute prohibition, cannot be justified. The respondent State could have allowed bigger gatherings combined with other measures, such as keeping appropriate physical distance and wearing face masks, as well as generally promoting hand hygiene and cough etiquette.<sup>87</sup>

In addition, the fine imposed on Mr. Specter for allegedly attending the demonstration was disproportionate in relation to the aim pursued.<sup>88</sup> Imposing a fine of EUR 2,500, an amount more than two times higher than the applicant’s salary set at approximately EUR 1,000 and five times higher than the lowest possible fine of EUR 500 cannot be regarded as a proportionate penalty, even in order to protect public health.<sup>89</sup> The present case is similar to that of *Hyde Park a. O. v. Moldova* (nos. 5. and 6) where the Court found the penalty to be disproportionate, despite the fact that one of the demonstrations that the applicants attended

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<sup>81</sup> *Case*, §39.

<sup>82</sup> *Öllinger v. Austria*, §33; *Yazar a. O. v. Turkey*, §51.

<sup>83</sup> *Case*, §§4, 5.

<sup>84</sup> *Navalnyy and Yashin v. Russia*, §53; *Berladir a. O. v. Russia*, §46; *Barraco v. France*, §42.

<sup>85</sup> *Kudreivičius a. O. v. Lithuania* [GC], §142; *Nosov a. O. v. Russia*, §55; *Schwabe and M.G v. Germany*, §110; UN, HRC, General Comment No. 37, §1.

<sup>86</sup> CoE, CM, Declaration CM(2008)5-add., p. 1; UNGA, Resolution 53/144 (1999), Article 5.

<sup>87</sup> WHO, Key planning recommendations for mass gatherings in the context of COVID-19 (2020), p. 3.

<sup>88</sup> *Gülcü v. Turkey*, §111; *Gün a. O. v. Turkey*, §82.

<sup>89</sup> *Hyde Park a. O. v. Moldova* (nos. 5 and 6), §47; *Clarification Question 23 for additional factual information*.

was not authorised, as the fine was not at the lower end of the scale.<sup>90</sup>

Lastly, according to the Court's jurisprudence, when the sanctions are criminal in nature, such as in the present case, they require particular justification.<sup>91</sup> A peaceful demonstration, as the one of 1 July 2019, should not be subject to the threat of a penal sanction.<sup>92</sup> On the contrary, the public authorities did not show a certain degree of tolerance, as many attendees were arrested and prosecuted.<sup>93</sup> Thus, the applicant argues that the respondent State failed to strike a fair balance between the aim of protecting public health and his right to freedom of assembly.<sup>94</sup>

#### **D. INVALID DEROGATION UNDER ART. 15**

The applicant claims that the State of Alethea has invalidly derogated from its obligations under Arts. 8, 9, 10, 11, 2 of Prot.1 and 2 of Prot. 4, as the requirements set forth in Art. 15 were not fulfilled. He submits that Alethea did not inform the SG on time regarding the derogation. In addition, the applicant claims that there wasn't a public emergency threatening the life of the nation and that, in any case, the measures were disproportionate to the exigencies of the situation.

##### *D.1 Non-compliance with Art. 15 §3*

First of all, Mr. Specter argues that Alethea did not comply with the requirements under Art. 15 §3. The time period of one month which elapsed between the declaration of the state of emergency and adoption of the first emergency decree on 14 May 2019 and the derogation pursuant to Art. 15 on 15 June 2019 was not justifiable.<sup>95</sup> In the case *Lawless v. Ireland* (no. 3), the State had to deal with an extremely difficult and violent crisis marked by terrorist attacks and civil disorder.<sup>96</sup> The Commission considered that notifying the SG 12 days after the implementation of the measures was a reasonable time, taking into consideration the particular difficulties that the State faced.<sup>97</sup> In the present case, Alethea notified the SG 32 days after the imposition of the emergency measures. However, the respondent State did not have to deal with an extreme crisis. Alethea could have anticipated the increase in Malit-5 cases and be prepared to timely invoke Art. 15 as the authorities knew of the gradual spreading of the disease

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<sup>90</sup> *Hyde Park a. O. v. Moldova* (nos. 5 and 6), §47.

<sup>91</sup> *Obote v. Russia*, §44; *Chernega a. O. v. Ukraine*, §221; *Rai and Evans v. the UK* (dec.).

<sup>92</sup> *Kudrevičius a. O. v. Lithuania* [GC], §146; *Yilmaz Yildiz a. O. v. Turkey*, §46; *Gün a. O. v. Turkey*, §83.

<sup>93</sup> *Navalnyy v. Russia* [GC], §143; *Akgöl and Gol v. Turkey*, §43; *Nurettin Aldemir a. O. v. Turkey*, §46.

<sup>94</sup> *Kudrevičius a. O. v. Lithuania* [GC], §144; *Taranenko v. Russia*, §65.

<sup>95</sup> *Greece v. The UK* (Vol. 1), Commission report, §158.

<sup>96</sup> *Lawless v. Ireland* (no. 3), §28.

<sup>97</sup> *Denmark, Norway, Sweden, and the Netherlands v. Greece* ("Greek case"), Commission report, §§79, 80; *Lawless v. Ireland* (no. 3), §§45, 47.

since December 2018.<sup>98</sup> Therefore, the applicant claims that such a delay in notifying the SG cannot be fairly attributed to purportedly inevitable causes and particular difficulties induced by Malit-5.<sup>99</sup>

#### *D.2 Absence of a public emergency threatening the life of the nation*

Secondly, Mr. Specter submits that the epidemic of Malit-5 did not amount to a public emergency threatening the life of the nation within the meaning of Art. 15 §1. Both the Commission and the Court have described this term as an exceptional situation of crisis or emergency.<sup>100</sup> The applicant does not contest that the Malit-5 epidemic may have serious implications. However, he strongly believes that it did not lead to an exceptional crisis or danger. In particular, almost 80% of the people infected by the virus were asymptomatic or have had minor symptoms, meaning that the majority of the population was not under serious threat. Moreover, only 1,33% of the Alethean population has died with Malit-5 among possible causes of their death since May 2019, whereas the exact number of casualties resulting from Malit- 5 has yet to be clearly established.<sup>101</sup>

#### *D.3 Measures not strictly required by the exigencies of the situation*

Even if the Court finds that there was a public emergency threatening the life of the nation, Mr. Specter submits that the measures were not strictly proportionate to the exigencies of the epidemic.<sup>102</sup> There can be no doubt that Alethea retains its discretion in determining whether there is a public emergency threatening the life of the nation and deciding on the appropriate measures. However, Alethea does not enjoy an unlimited power as the Court has clarified that it is competent to rule on whether the Respondent has gone beyond the extent strictly required by the exigencies of the situation.<sup>103</sup> In the present case, the applicant maintains that the measures adopted by the State of Alethea were more severe and intrusive than necessary.<sup>104</sup> They encroached upon fundamental Convention rights, despite the fact that the situation caused by the Malit-5 epidemic did not justify this interference.<sup>105</sup>

More specifically, due to the low death rates, imposing a curfew only on the susceptible societal groups would have been an equally adequate and less restrictive measure than

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<sup>98</sup> WHO, GPMB, Report, A world in disorder; CoE, Venice Commission, Respect for democracy, human rights and the rule of law during states of emergency-reflections, p. 6; *Case*, §3.

<sup>99</sup> *Greece v. the UK* (Vol. 1), Commission report, §158.

<sup>100</sup> *A. a. O. v. the UK* [GC], §176; *Greek case*, Commission report, §152; *Lawless v. Ireland* (no. 3), §28.

<sup>101</sup> *Case*, §§4, 5.

<sup>102</sup> *Şahin Alpay v. Turkey*, §74; *Aksoy v. Turkey*, §§81, 86.

<sup>103</sup> *Aksoy v. Turkey*, §68; *Brammigan and McBride v. the UK*, §43; *Ireland v. the UK*, §207; *Greece v. The UK* (Vol. 1), Commission report, §143.

<sup>104</sup> *Mokhtar* (2004), p. 70.

<sup>105</sup> *Alparslan Altan v. Turkey*, §116; *A. a. O. v. The UK* [GC], §184.

prohibiting all people from going outside.<sup>106</sup> It should also be noted that the protection of personal data is of fundamental importance to one's private and family life as guaranteed by Art. 8 of the Convention.<sup>107</sup> On the other hand, Art. 11 is a fundamental right which is crucial for safeguarding the founding values of democracy.<sup>108</sup> Given the fact that only 11% of those infected by the virus showed serious symptoms of Malit-5 and 7% needed hospitalisation, the State cannot justify such an extreme interference with Mr. Specter's private life in the name of ensuring the implementation of the emergency decrees. Moreover, the applicant argues that the prohibition of gatherings of more than 100 persons was unreasonable due to the low intensity of the epidemic. Alethea, at this stage of Malit-5, could have allowed gatherings of more than 100 people in conjunction with other preventive measures such as using face masks in public spaces and keeping the requisite safety distance from one another.

Furthermore, Alethea's measure to allow police monitoring and initiation of criminal proceedings for breach of the restrictions imposed was overly restrictive. Excessive use of criminal law is not an appropriate answer to an epidemic, as it can undermine public health and human rights.<sup>109</sup> Accordingly, the overuse of criminal means does not comply with the proportionality requirement under the Convention.<sup>110</sup> The national authorities should have focused on educating the public about the potential risks of Malit-5 and the importance of compliance to the measures, before resorting to criminal sanctions.<sup>111</sup> It has been proven that people feel more compelled to obey the rules and public health advice when they are well-informed and supported to do so.<sup>112</sup> Therefore, the applicant submits that the State failed to strike a fair balance between the measures in question and the prevention of the epidemic.

The Court has previously determined that during the assessment of derogating measures weight must also be attached to the judgment of the Parliament.<sup>113</sup> In this case, the Parliament of Alethea believed that the measures were disproportionate to the extent required by the situation of the epidemic and thus, it did not approve the extension of the state of emergency, despite the increase in Malit-5 cases.<sup>114</sup> This evaluation could be an indication that the

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<sup>106</sup> Neufeld, Khataee and Czironk (2020), pp. 360-361.

<sup>107</sup> *M.L and W.W. v. Germany*, §87; *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], §137; CoE, Commissioner for Human Rights, Comment on safeguarding human rights in the era of AI (2018).

<sup>108</sup> *Kudrevičius a. O. v. Lithuania* [GC], §91; *Djavit An v. Turkey*, §56; CoE, Information document SG/Inf(2020)11, p. 6.

<sup>109</sup> UNAIDS, *Rights in a Pandemic* (2020), p. 9; UNAIDS, *Rights in the time of Covid-19* (2020), p. 9.

<sup>110</sup> CoE, Information document SG/Inf(2020)11, p. 6.

<sup>111</sup> UN, CESCR, General Comment No. 14, §§16, 44.

<sup>112</sup> UNAIDS, *Rights in a Pandemic* (2020), p. 19.

<sup>113</sup> *A. a. O. v. the UK* [GC], §180.

<sup>114</sup> *Case*, §6.

Parliament would not have agreed with the President's initial decision to declare a state of emergency and to invoke Art. 15 of the Convention.<sup>115</sup> Therefore, the applicant invites the Court to take into account the view of the Parliament when evaluating whether the measures were strictly required by the exigencies of the situation.<sup>116</sup>

The Court also takes into account the existence of sufficient safeguards against arbitrariness and abuse in order to assess the proportionality of the measures in question.<sup>117</sup> In the present case, competent for declaring and extending a state of emergency during the first 3 months is solely the President of Alethea. During that time period, the Government and line Ministries can adopt various emergency decrees in response to the emergency.<sup>118</sup> The applicant concedes that an emergency usually calls for immediate adoption of measures by the executive. That does not mean, however, that an absence of checks and balances is justified.<sup>119</sup> Any legislation introduced under a state of emergency should be subject to adequate legislative scrutiny.<sup>120</sup> Therefore, the executive's decision is not sufficient and it should have been supervised either by the Parliament or the Alethean courts.<sup>121</sup> During an emergency, it is essential that the public is involved in the decision-making in order to protect democracy.<sup>122</sup> The fact that the Alethean Parliament, the representative legislative body of the State, can examine the proportionality and the necessity of the measures adopted by the executive only 3 months after the declaration of the state of emergency cannot be considered a sufficient safeguard.

In conclusion, the applicant submits that the Respondent failed to inform on time the SG regarding the derogation, that there wasn't a public emergency threatening the life of the nation and that, in any case, the measures were not strictly proportionate to the exigencies of the situation. Hence, the applicant invites the Court to find that the respondent State did not comply with the procedural and substantive requirements of Art. 15.

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<sup>115</sup> *Brannigan and McBride v. the UK*, §51; CoE, Commissioner for Human Rights, Opinion 1/2002 §§9, 11.

<sup>116</sup> CoE, PACE/Res. (2018) 2209, §12.

<sup>117</sup> *A. a. O. v. the UK* [GC], §184.

<sup>118</sup> *Case*, §26.

<sup>119</sup> CoE, PACE/Res. (2018) 2209, §19; Schreuer (1982), p. 127.

<sup>120</sup> Greene (2020), p. 1.

<sup>121</sup> *Malone v. the UK*, §79; UN, OHCHR, Emergency measures and Covid-19: guidance (2020), p. 2.

<sup>122</sup> UNAIDS, Rights in the time of Covid-19 (2020), p. 6; CoE, Commissioner for human rights, Opinion 1/2002, §8.

## E. VIOLATION OF ART. 6

### E.1. Applicability of Art. 6.

Mr. Specter was convicted by Alethea's CoA and therefore, was ordered to pay a fine of EUR 2,500, on the alleged grounds that he failed to comply with health regulations adopted by the emergency decrees.<sup>123</sup> This transgression is classified as a criminal offence under Art. 306 of ACC.<sup>124</sup> Under this provision, which is also of a generally binding character, he could have been sentenced to up to 3 months' imprisonment.<sup>125</sup>

### E.2. Art.6 §1: Evidence obtained in violation of Article 8 led to an unfair trial

In the present case, the quality of evidence and the circumstances in which it was obtained cast doubt on their reliability and accuracy. Therefore, the applicant submits that his right to a fair trial was violated.<sup>126</sup> Mr. Specter, after being made aware of the photograph used by PanOptis for his identification,<sup>127</sup> maintains that he was identified through a private photograph on his FZ profile in contravention to his rights under Art. 8. Therefore, in accordance with Art. 11 of the ACCP, such evidence should not have been used in the criminal proceedings against him as it is considered unlawful based not only on the domestic law but also under the provisions of the Convention.<sup>128</sup> The Court has found that when the reliability of evidence is in dispute, the existence of fair procedures to examine the admissibility of the evidence takes on an even greater importance.<sup>129</sup> The FIC found that PanOptis' use breached requirements for processing faceprints, which could be qualified as unique and sensitive data under the ADPL. It also relied on reports concerning error rates of the software system and agreed with the applicant that PanOptis results could only be used as lead to be supported by actual evidence.<sup>130</sup> Despite the fact that the FIC seriously questioned the legality of PanOptis, the higher courts found the applicant guilty without examining in detail whether its use was indeed lawful in the present case. The unreliability of PanOptis' results was further contested by a 2019 study published by the NGO Themis proving that the system had a 50% error rate.<sup>131</sup> Nevertheless, the applicant was found guilty based on the above findings. Under these circumstances, the applicant

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<sup>123</sup> *Kasparov a. O. v. Russia*, §43; *Öztürk v. Germany*, §53.

<sup>124</sup> *Engel a. O. v. the Netherlands*, §§82-83; *Case*, §13, 18, 28.

<sup>125</sup> *Benham v. the UK*, §56; *Bendenoun v. France*, §47; *Demicoli v. Malta*, §34; *Öztürk v. Germany*, §50.

<sup>126</sup> *Bykov v. Russia* [GC], §89; *Allan v. the UK*, §43.

<sup>127</sup> *Clarification Question 31 on supporting details for legal submissions*.

<sup>128</sup> *Heglas v. the Czech Republic*, §§89-92; *P.G. and J.H. v. the UK*, §76; *Case*, §§25, 30.

<sup>129</sup> *Bykov v. Russia* [GC], §95; *Allan v. the UK*, §47.

<sup>130</sup> *Case*, §17.

<sup>131</sup> *Case*, §37.

invites the Court to acknowledge the absence of integrity and reliability of the main piece of evidence which led the domestic courts to a guilty verdict.<sup>132</sup>

The applicant also argues that as his conviction had not been based on any indisputable evidence, there was a strong need for supporting evidence.<sup>133</sup> Regarding the two witnesses' Mx. A and Mx. B who testified to have seen Mr. Specter during the demonstration, the applicant claims that as stated in the FIC's conclusion the witnesses were more than 15 meters from his alleged position and therefore could not have identified him at such a long distance.<sup>134</sup> Even if that was not the case, due to the kinetic character of every demonstration the 2 activists' view would also be blocked by the movement of other protesters.<sup>135</sup> Furthermore, since they were not presented with the CCTV footage in which the applicant was allegedly identified, further possibilities of misidentification exist.<sup>136</sup>

*E.3. Art.6 §3 (d): Non examination of the applicant's witness Mr.Z.*

According to the Court's jurisprudence, in circumstances where the applicant's conviction has been based primarily on the assumption of his whereabouts in a particular place at a particular time, the right to a fair trial imply that the applicant should be afforded a reasonable opportunity to challenge that assumption effectively.<sup>137</sup> In this context, Mr. Specter stresses the fact that the domestic courts refused to examine his main witness, his close friend Mr. Z whose testimony was not examined neither during the investigation nor during his trial.<sup>138</sup> The applicant's request was firstly denied by the FIC as irrelevant and this was further endorsed by the CoA as it also found that there was no need for Mr. Z to be heard.<sup>139</sup> The Court has clarified that when a defence witness can provide a testimony capable of reasonably establishing an alibi for the accused, such a witness is considered *prima facie* relevant.<sup>140</sup> During the domestic proceedings the applicant sufficiently explained in concrete terms how the testimony of Mr. Z could reasonably be expected to strengthen his defence.<sup>141</sup> Mr. Z and the applicant spoke on a daily basis as the former helped the latter deal with the stress of being confined in his home.<sup>142</sup> Therefore, Mr. Z was

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<sup>132</sup> *Nițulescu v. Romania*, §46; *Bykov v. Russia* [GC], §90.

<sup>133</sup> *Bykov v. Russia* [GC], §90; *Allan v. the UK*, §43; *Khan v. the UK*, §§35, 37.

<sup>134</sup> *Case*, §§13, 17.

<sup>135</sup> *Case*, §16.

<sup>136</sup> *Clarification Question 28 for additional factual information.*

<sup>137</sup> *Frumkin v. Russia*, §160; *Polyakov v. Russia*, §§34-37; *Popov v. Russia*, §183.

<sup>138</sup> *Delta v. France*, §36.

<sup>139</sup> *Clarification Question 4 on supporting details for legal submissions.*

<sup>140</sup> *Murtazaliyeva v. Russia* [GC], §143; *Polyakov v. Russia*, §34.

<sup>141</sup> *Mehdiyev v. Azerbaijan* (2019), §36; *Case*, §16.

<sup>142</sup> *Case*, §16.

the only person able to confirm that the applicant was home at the time the demonstration was held.<sup>143</sup> Taking into account that Mr. Z's testimony could have strengthened the applicant's position and the fact that his conviction was founded upon conflicting evidence against him, it is of extreme importance that the domestic courts refused to hear him without providing convincing reasons.<sup>144</sup> In direct contrast, Mx. A and Mx. B were not only examined in the pre-trial stage but were also heard by the FIC and considered by the CoA, despite their questionable reliability.<sup>145</sup> Considering that defence and prosecution witnesses are of equal relevance in establishing the truth, the domestic courts failed to conduct a proper examination of the evidence adduced by both of the parties affected the overall fairness of the proceedings.<sup>146</sup> Therefore, the applicant claims that his defence rights suffered an undue restriction as Mr. Z's testimony was necessary to preserve the fairness of the trial.<sup>147</sup>

## **F. VIOLATION OF ARTICLE 13 IN THE LIGHT OF ARTICLE 8**

### *F.1. Applicability*

The applicant submits that he lacked an effective remedy in respect of his privacy rights under Art. 8. The Court has held that a complaint about the unlawful use and processing of personal data constitutes an arguable claim.<sup>148</sup> Thus, Mr. Specter was entitled to an effective domestic remedy in order to enforce his rights regarding his private data and secure compliance with the relevant laws.<sup>149</sup> Even if the Court finds that there is no violation of Art. 8, such a finding does not alter the ability of Mr. Specter's grievances to be classified as an arguable claim under Art. 13.<sup>150</sup>

### *F.2. Lack of an effective remedy in practice by Alethea's domestic courts*

In the present case, the applicant claims that the domestic remedies were ineffective, in practice, as the Alethean courts did not examine his claims as carefully and rigorously as national authorities are obliged to under Art. 13.<sup>151</sup> First of all, the FIC only limited itself to highlighting the questionable legality of PanOptis and its use as lead to be supported by actual evidence without specifically dealing with the issue of the applicant's privacy violation which

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<sup>143</sup> *Seton v. the UK*, §58; *Al-Khawaja and Tahery v. the UK* [GC], §128; *Unterpertinger v. Austria*, §33.

<sup>144</sup> *Popov v. Russia*, §188; *Vidal v. Belgium*, §§34-35.

<sup>145</sup> *Case*, §13, 16, 18.

<sup>146</sup> *Mehdiyev v. Azerbaijan* (2019), §§41-42; *Murtazaliyeva v. Russia* [GC], §147.

<sup>147</sup> *Mehdiyev v. Azerbaijan* (2019), §40; *Topić v. Croatia*, §42; *Sergey Afanasyev v. Ukraine*, §70.

<sup>148</sup> *Segerstedt-Wiberg a. O. v. Sweden*, §116; *Kudla v. Poland* [GC], §157; *Leander v. Sweden*, §§77, 79.

<sup>149</sup> *Leander v. Sweden*, §79; *S. v. the UK*, Commission decision; *B. v. the UK*, Commission decision.

<sup>150</sup> *Ratushna v. Ukraine*, §85; *Nuri Kurt v. Turkey*, §117; *Hatton a. O. v. the UK* [GC], §137.

<sup>151</sup> *Stelian Roşca v. Romania*, §100; *Rotaru v. Romania* [GC], §67.



was explicitly raised.<sup>152</sup> Subsequently, although the CoA found Mr. Specter guilty, it did not establish through evidentiary material whether his public photographs were actually clear enough or whether PanOptis unlawfully extracted private photographs from the FZ profile of the applicant.<sup>153</sup> In addition, although under Art. 271 of ADPL the DPA conducts reviews in order to examine whether PanOptis accessed private photos, there is no indication that the CoA took into consideration the DPA's reports regarding the functionalities of PanOptis.<sup>154</sup> Lastly, the applicant stresses that the Constitutional Court has a special role to ensure that the legislative, executive and judicial authorities comply with the Constitution and can afford additional legal protection to citizens in respect of their fundamental rights.<sup>155</sup> However, in the present case, it did not seem to examine in detail whether the process of the applicant's personal data by the public authorities was in compliance with the 5 specific criteria set in the ADPL.<sup>156</sup>

### *F.3. The applicant did not have access to an effective compensatory remedy*

A remedy, in order to be effective, must also be capable of providing redress for the impugned situation.<sup>157</sup> Therefore, in certain cases, compensation for the pecuniary and non-pecuniary damage flowing from the breach should be available.<sup>158</sup> In the present case, the FIC found that PanOptis breached requirements for processing unique and sensitive data. Despite the fact that the FIC fully acquitted Mr. Specter, such a finding did not result in any award to the applicant of compensation for damages suffered as the result of the unlawful interference with his private life.<sup>159</sup> This fact in conjunction with the Constitutional Court's failure to examine in detail the data processing which has been conducted in the present case, reveals that there was no remedy providing redress in practice. None of Alethea's domestic courts examined in practice whether Mr. Specter's privacy rights were violated and therefore, the possibilities for him to be compensated were nugatory.

### *F.4. Lack of judicial oversight regarding PanOptis' use*

Lastly, the applicant argues that a complaint to the DPA about a violation of his privacy rights cannot be considered an effective remedy.<sup>160</sup> In the field of AI, which carries significant privacy risks, it is desirable for the supervisory control to be entrusted to domestic judges, for

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<sup>152</sup> Case, §17.

<sup>153</sup> Case, §18; *Clarification Question 36 on supporting details for legal submissions*.

<sup>154</sup> *İrfan Güzel v. Turkey*, §107; *P.G. and J.H. v. the UK*, §86; Case, §35.

<sup>155</sup> *Wendenburg a. O. v. Germany* (dec.), §3.

<sup>156</sup> Case, §31.

<sup>157</sup> *Konstantin Moskalev v. Russia*, §28; *Dobrev v. Bulgaria*, §§146, 169; *Kudła v. Poland* [GC], §158.

<sup>158</sup> *Brincat a. O v. Malta*, §60; *T.P. and K.M. v. the UK* [GC], §107.

<sup>159</sup> *Panteleyenko v. Ukraine*, §83.

<sup>160</sup> Case, §32.

reasons of independence, impartiality and a proper procedure.<sup>161</sup> This is further proven by the Court's strict scrutiny in verifying the independence of non-judicial bodies, as well as the procedural guarantees they offer to the applicant.<sup>162</sup>

## **G. CONCLUSION**

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

- a. to declare the application admissible,
- b. to adjudge and declare that the State violated the applicant's rights under Arts. 6, 8, 11 and 13 and did not comply with the requirements of Art. 15 of the Convention,
- c. to award just satisfaction under Art. 41 of the Convention in respect to the applicant's pecuniary and non-pecuniary damages, and order the reimbursement of the full costs and expenses incurred.

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<sup>161</sup> *Karabeyoğlu v. Turkey*, §71; *Roman Zakharov v. Russia* [GC], §233; *Klass a. O. v. Germany*, §§55-56.

<sup>162</sup> *İrfan Güzel v. Turkey*, §93; *Chahal v. the UK* [GC], §§152-154; *Leander v. Sweden*, §§77, 81-83.