

## SPECTER v. ALETHEA

### Facts

1. The applicant Mr. Darius Specter, born in 2000, is a national of Alethea, a Council of Europe member state. He is a privacy-rights activist living in Charon, the capital of Alethea.
2. Alethea has a population of 15 million, mostly living in urban areas. Charon, the country's largest city, has 4 million inhabitants.
3. In December 2018, an airborne contagious viral disease Malit-5 began spreading sporadically in Alethea. The Government recommended that the general public observe hygiene measures and keep physical distance. In May 2019, Malit-5 reached the level of an epidemic. The areas recently affected by major Malit-5 epidemics do not include any other Council of Europe Member State. Even though the end of the epidemic was officially declared in June 2020, the virus is still present among the population.
4. Malit-5 can manifest itself through a number of symptoms, affecting mainly cardiovascular and respiratory systems, ranging from minor cold and sweat, heart palpitations, high fevers, up to possible cardiac arrest. Many in the infected population are asymptomatic. While the available medication is able to treat patients with mild-to-moderate symptoms, it does not tend to be effective in patients with severe symptoms. There is currently no specific vaccine available against the virus causing Malit-5. The mortality rate has been difficult to estimate, as the vast majority of the population who die due to Malit-5, die from a heart attack. Even though Malit-5 is not a new disease, this was the first Malit-5 epidemic in Alethea and the population was highly susceptible.
5. To date it is estimated that 7 million people in Alethea have been infected by the virus. One million have had moderate to serious symptoms of the disease, and 500,000 of them needed hospitalisation. The rest had either minor symptoms or were asymptomatic. Since May 2019, 200,000 people have died with Malit-5 among possible causes of their death. The overall mortality rate in Alethea during the period from May 2019 to May 2020 increased by 5% in comparison with the same period in 2018. However, it has not been clearly established how many died as a result of Malit-5.
6. On 14 May 2019, the President of Alethea declared a state of emergency for 30 days. The decision was repeatedly extended on 13 June for 30 days, and on 16 July for 30 days (i.e. until 14 August 2019). No further extension was approved, as the proposal did not obtain a majority vote in the Parliament. The main reasons against the continued state of emergency were the harsh consequences of the emergency measures on the economy.
7. On 14 May 2019, the Ministry of Health, following the advice of the National Commission for the Prevention of Infectious Diseases, an advisory body comprised of medical experts, adopted an emergency decree with immediate effect. The initial measures aiming to prevent spreading of Malit-5 included, *inter alia*, prohibition of gatherings of more than 100 persons, compulsory wearing of face-masks both indoors (in all other places than one's home) and

outdoors, closure of all primary and secondary schools, as well as department stores of over 5,000 m<sup>2</sup>.

8. As the initial measures gave no tangible results, on 14 June 2019 the Minister of Health informed the population of a new emergency decree adopted that day and effective immediately. The Minister explained that, in addition to the earlier measures, people would not be allowed to go outside for the period of 30 days, except to buy food or medicaments or engage in individual sport activities for not more than an hour per day. All shops, restaurants and bars were to be closed for 30 days, except for essential services. The decree's validity was repeatedly extended with the respective extension of the state of emergency, that is until 14 August 2019.
9. The same emergency decree, in conjunction with the Criminal Code allowed the police to monitor compliance and initiate criminal proceedings for breach of the restrictions imposed. Offenders would be prosecuted for "Failure to comply with health regulations during an epidemic" under Article 306 of the Criminal Code.
10. On 15 June 2019, Alethea submitted a declaration to the Secretary General of the Council of Europe, informing him of its decision to invoke Article 15 of the European Convention of Human Rights ("the Convention") and derogate from its obligations under Articles 8, 9, 10, 11, Article 2 of Protocol No. 1, and Article 2 of Protocol No. 4 for the duration of the state of emergency. The declaration also included an overview of the measures adopted, copies of the decrees, and reasons for them, highlighting the need to protect public health. The Secretary General was also duly informed of the end of the state of emergency and full application of the Convention after 14 August 2019.

*Criminal proceedings against Mr. Specter*

11. On 16 June 2019, Mr. Specter was stopped by the police because he was jogging with a group of friends, contrary to the emergency decrees. They were only given a warning as the decrees had only recently entered into force. They were notified that if anyone violated the rules again, all prescribed measures would be taken against them. The oral warning was noted in the police records.
12. On 1 July 2019, a demonstration was held against "fake Malit-5 propaganda" and the use of artificial intelligence in monitoring compliance with Malit-5 related measures. In total, approximately 5,000 people participated in the demonstration, protesting against closure of businesses and highlighting the negative impact of the emergency measures.
13. On 13 July 2019, the Charon prosecutor called Mr. Specter for questioning. Mr. Specter, represented by a lawyer, was informed that he was suspected of repeated violations of the emergency decrees and charged under Article 306 of the Criminal Code. The prosecutor presented Mr. Specter with a copy of CCTV footage obtained by the police, stating that he was identified on the video. The footage was recorded by Charon municipality street cameras, located at the city's main square, on 1 July 2019. It depicted approximately 50 among those present at the demonstration. The prosecutor noted that two privacy-rights

activists A. and B., who were convicted under Article 306 of the Criminal Code in separate proceedings, gave statements and confirmed Mr. Specter's presence at the demonstration. She concluded that Mr. Specter had been in clear violation of the Criminal Code.

14. Mr. Specter denied any affiliation with the demonstration. He maintained that after the first warning he had complied with all rules and left home only to buy groceries. He stated that he was not the person pointed out to him on the CCTV footage. Upon Mr. Specter's inquiry about the identification process, the prosecutor noted without any further explanation that the law-enforcement authorities used the special facial recognition software PanOptis. Mr. Specter was identified through a match with one of his public photographs scraped from the social network Friendzone.
15. The prosecutor did not accept Mr. Specter's statements and brought charges against him on 13 August 2019.
16. Before the Charon City Court, Mr. Specter and his lawyer maintained that Mr. Specter opposed the use of artificial intelligence by the authorities, but had not attended the demonstration. He further stated that the indictment was unlawful, in particular in that it was based to a decisive extent on PanOptis and statements of two witnesses who alleged that he had been present at the demonstration. He pointed out that PanOptis results could only be used as lead, not as actual evidence. When cross-examining the witnesses, Mr. Specter said that it was evident from the CCTV footage that these individuals were too far from his alleged position to be able to confirm that it was him and not someone else. Their view was also blocked by the movement of many protesters. The prosecution therefore had failed to show that he had violated the Criminal Code. He also did not know exactly how the police and the prosecution came to the conclusion that he was the person on the footage and how PanOptis worked. Mr. Specter proposed that the court hear the testimony of his friend Z. Z was calling him on daily basis to help him deal with the stress of being confined in his home and would be able to confirm that he had been at home at the relevant time. Mr. Specter explained that, as a privacy-rights activist, he uses his mobile phone only for telephone calls and, when going out, keeps it in a Faraday bag.
17. On 15 October 2019, the Charon City Court found that PanOptis, by scanning faces and matching them against a vast database of photographs, breached requirements for processing faceprints, which could arguably be qualified as unique and sensitive data under the data protection legislation. Apart from the questionable legality, it could not be confirmed with certainty that Mr. Specter was present at the demonstration, relying either on PanOptis or on statements of the witnesses, as the court found them to have been too far (more than 15 meters) from the alleged position of Mr. Specter. The court also relied on reports concerning error rates in the use of PanOptis and agreed with Mr. Specter that PanOptis could only be used as lead to be supported by actual evidence. As this was not the case, the court fully acquitted Mr. Specter. Mr. Specter's request to hear Mr. Z. as a witness was dismissed as irrelevant. The court did not specifically deal with the allegations of a violation of privacy rights.

18. On 20 December 2019 the Charon County Court, on appeal, examined the matter and found that the Charon City Court had erred in its assessment of the issues. The County Court concluded that PanOptis was a system that used only images publicly available and accessible on the Internet. Based on the PanOptis results, witness statements and Mr. Specter's past behaviour showing that he had not respected measures taken to curb the virus, the court found that Mr. Specter had violated the emergency measures beyond reasonable doubt. The County Court dismissed Mr. Specter's request to hear A. and B. in person, but considered their statements given before the prosecutor and the lower court. As to the complaint about a violation of his privacy rights, the court noted that PanOptis was merely using publicly available photos scraped from social media and in no way violated his privacy. Based on the analysis of PanOptis' results, the court did not accept Mr. Specter's argument that his public photographs on Friendzone were not clear enough and PanOptis would have had to access his private photographs on Friendzone to be able to obtain a clear image of his face. The County Court found Mr. Specter guilty of offences under Article 306 of the Criminal Code and ordered him to pay a fine of EUR 2,500. Mr. Specter paid the fine on 2 January 2020 within the time-limit set by the court.
19. On 10 January 2020, Mr. Specter lodged a constitutional complaint, arguing that his rights under Articles 6 and 8 of the Convention had been violated in the context of the criminal proceedings against him. He had been found guilty even though he had not committed any crime and his conviction was based on unlawful evidence violating his privacy rights. Mr. Specter claimed that PanOptis was a dangerous tool invading people's privacy contrary to the Data Protection Law and opening possibilities with future technological development for even more serious privacy invasions. He pointed out that reliance on the state of emergency could not absolve Alethea from its responsibility to protect his human rights. He also complained that the emergency legislation interfered with his Article 11 rights as it prohibited gatherings of more than 100 people and the 1 July demonstration was supported by a lot of privacy activists and other groups. A Friendzone event page showed that over 6,000 persons were going to attend, so he had refrained from going to avoid criminal prosecution.
20. On 15 June 2020, the Constitutional Court declared his complaint manifestly ill-founded. It noted that the criminal proceedings against Mr. Specter were conducted in full compliance with the Alethean substantive and procedural criminal law and did not violate his right to a fair trial. In particular, the conclusions of the Charon County Court were not arbitrary and his conviction was based on lawful evidence. To the extent Mr. Specter complained that the use of PanOptis unlawfully invaded his privacy, this complaint was not substantiated. The use of PanOptis by the law enforcement authorities was not contrary to the Law on Data Protection. Moreover, by being outside and in public places, Mr. Specter had implicitly agreed to be monitored by the municipal CCTV cameras, which are openly visible. Further, the use of PanOptis needed to be considered in a wider context. In addition, outside the current context, because of its efficiency PanOptis served to protect victims of crime and prevent accusations against innocent persons. Finally, the need to protect the public health during the state of emergency prevailed, on balance, over the individual's right to privacy and freedom of assembly, enshrined in Articles 8 and 11, respectively.

21. On 2 July 2020, the Ministry of Health published the 2019 “Health of the Population” statistical report, noting, *inter alia*, that the demonstration of 1 July 2019 was one of the events during which many people had been infected. A few dozens of persons in Charon were diagnosed with Malit-5 a few days after the event, however, it was estimated that around 1,000 of those present had been infected by the virus.
22. On 8 August 2020, Mr. Specter lodged an application before the European Court of Human Rights alleging a violation of his rights guaranteed under Articles 6, 8, 11 and 13 of the Convention.

### Law

23. Alethea is a Council of Europe Member State. It is not a Member State of the European Union. Alethea has ratified all major Council of Europe and United Nations human rights treaties, and all additional protocols to the Convention. The average salary in Alethea is the equivalent of approximately EUR 1,000 per month.
24. The Alethean Constitution guarantees a list of rights, including all articles of the Convention and its Protocols.

#### *Constitutional complaint*

25. Any person may submit a constitutional complaint to the Constitutional Court, alleging that his or her constitutional and/or Convention rights had been violated by a final decision, or other action or inaction of a State organ. The legislation, as such, including decrees adopted by the Government during a state of emergency, cannot be challenged. If the Constitutional Court finds a violation, it can order compensation for material and/or moral damage suffered, annul administrative acts or quash courts’ judgments. The constitutional complaint has been declared an effective remedy by the European Court for Human Rights.

#### *Emergency legislation*

26. Under Article 23 of the Constitution, the President of Alethea declares a state of emergency due to epidemics, natural disasters or other events threatening the life of the nation. The state of emergency can last up to 30 days and may be extended as many times as deemed necessary by the President. However, if the state of emergency lasts more than three months, any further extensions must also be approved by Parliament. According to Article 24 of the Alethean Constitution, for the duration of a state of emergency, the Government or line ministries are entitled to adopt emergency decrees with the aim of addressing root causes of the emergency.
27. Emergency decrees of 14 May and 14 June 2019 (see paras 7 and 8 above) were adopted by the Ministry of Health pursuant to Articles 23 and 24 of the Alethean Constitution. The decrees, and the subsequent extensions, were published in the Official Gazette.

*Criminal law and procedure*

28. Under Article 306 of the Criminal Code (“Failure to comply with health regulations during an epidemic”) it is a criminal offence to violate health regulations adopted by the State to contain an epidemic of an infectious disease, subject to a fine from 500 EUR to 5,000 EUR and/or up to 3 months’ imprisonment. Compliance with measures is monitored by the police, who in case of an alleged breach initiate criminal proceedings. The sanctions are proposed by the local prosecutor.
29. City Courts act as the courts of first instance. An appeal against a first-instance judgment can be lodged with the County Court. The County Court has full competence to review both facts and legal issues. Decisions of the County Court are final and enforceable.
30. Under Article 11 of the Code of Criminal Procedure, legally obtained oral, documentary, video, electronic and other types evidence, is admissible. Evidence obtained contrary to law and in violation of the rights and freedoms set forth in the Constitution or ratified international treaties cannot be used in criminal proceedings.

*Data Protection Law*

31. Article 202 states: “All those using personal data must make sure the information is (i) used fairly, lawfully and transparently, (ii) for specified, explicit purposes, (iii) in a way that is adequate, relevant and limited to only what is necessary, accurate and, where necessary, kept up to date, (iv) kept for no longer than is necessary, (v) handled in a way that ensures appropriate security, including protection against unlawful or unauthorised processing, access, loss, destruction or damage.
32. Article 203 specifies that personal data collected in relation to a possible criminal offence is automatically deleted after the lapse of two years or, in case when criminal proceedings are instituted, two years after a final decision is rendered. Individuals can complain about any violations to the Data Protection Agency.
33. The Data Protection Agency is the regulator under the Data Protection Law, overseeing, *inter alia*, the use of artificial intelligence and PanOptis.
34. Article 270 regulates the overt use of surveillance camera systems operated by the police and local authorities. Use of a surveillance camera system must always be for a specified purpose, which is in pursuit of a legitimate aim, and necessary to meet an identified pressing need. The content of the municipality surveillance cameras may be accessed by the police on the basis of a warrant.
35. Under Article 271, the Data Protection Agency conducts reviews in order to ensure that legal requirements, policies and standards are met.

*PanOptis*

36. PanOptis is a facial-recognition software system developed by a private company and purchased by Alethea for law-enforcement purposes on the basis of an official tender. According to the tender documents, independent research estimated the error rate at 10-15 per cent. PanOptis was introduced in 2018 through a Law on Police and Criminal Investigations. According to the information available on the Government's website, the tool scans faces of persons from photographs or screenshots of videos and compares them with publicly available images scraped from the Internet. It functions as search engine, which scraps and stores data on its servers indefinitely. If information obtained from PanOptis does not match the law enforcement database however, it is deleted immediately by the police from its records. Its use in the criminal proceedings has in practice been widely accepted by the law enforcement agencies. Reliance on PanOptis considerably increased after May 2019, as the police needed to identify those in violation of emergency decrees in order to prevent further spread of Malit-5. PanOptis developers advertised that it had been developed following strict cyber security protocols.
37. PanOptis has attracted much criticism from NGOs, human rights activists and citizens who are concerned about their privacy rights. A study by the local privacy-rights NGO Themis published early 2019 showed that PanOptis had a 50 percent error rate. It also pointed out that PanOptis combines surveillance footage and images pulled from the Internet in an attempt to mass-identify individuals in public spaces. It also discovered that it scraped photos from social media including Friendzone, without permission of users.
38. The 2019 Annual State Police report, referred to the error rate as 15 per cent and highlighted that since the introduction of PanOptis, the overall rate of solved crimes has increased from 70 to 90 per cent. That meant that PanOptis provided tremendous protection to crime victims as law enforcement increased their efficiency and, in turn, its accuracy protected the innocent from being wrongly accused. According to the report, banning the use of PanOptis which merely used publicly available information, would amount to restriction of freedom of expression.

*Law on Freedom of Assembly*

39. No restrictions shall be placed on the exercise of the right to freedom of assembly other than those necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. In case of a planned event, a prior notification to the Ministry of the Interior is required, detailing the relevant details, such as date, time, duration, location, route, purpose of the event, as well as the name and contact details of the organiser. Freedom of assembly can be restricted in the exceptional circumstances mentioned above by any means including changing the time and/or venue of an assembly or the route of a march.