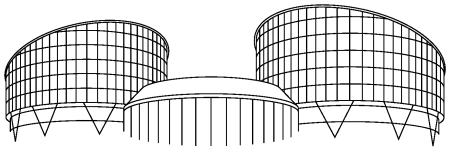

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

# CASE BOCHAN v. UKRAINE (no. 2)

*(Application no. 22251/08)*

JUDGMENT

*This version was rectified on 11 March 2015 under Rule 81of the Rules of Court.*

STRASBOURG

5 February 2015

*This judgment is final but may be subject to editorial revision.*

**In the case of Bochan v. Ukraine (no. 2),**

The European Court of Human Rights (Grand Chamber), sitting as a Grand Chamber composed of:

Dean Spielmann, *President,*
Josep Casadevall,
Guido Raimondi,
Ineta Ziemele,
Mark Villiger,
Isabelle Berro,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Ganna Yudkivska,
Angelika Nußberger,
Erik Møse,
André Potocki,
Paul Lemmens,
Paul Mahoney,
Aleš Pejchal,
Krzysztof Wojtyczek,
Dmitry Dedov, *judges,*
and Lawrence Early, *Jurisconsult,*

Having deliberated in private on 7 May and 19 November 2014,

Delivers the following judgment, which was adopted on the last mentioned date:

# PROCEDURE

1. The case originated in an application (no. 22251/08) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Ms Mariya Ivanivna Bochan ("the applicant"), on 7 April 2008.

2. The applicant was represented by her son, Mr I. Bochan, a lawyer practising in Ternopil. The Ukrainian Government ("the Government") were represented by their Agent, most recently Ms N. Sevostyanova, of the Ministry of Justice.

3. The applicant, relying on Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, complained about the proceedings concerning her "appeal in the light of exceptional circumstances" grounded on the Court's judgment in the applicant's previous case (see *Bochan v. Ukraine*, no. 7577/02, 3 May 2007), as provided for under the applicable Ukrainian legislation.

4. On 6 September 2011 the application was communicated to the Government.

5. On 19 November 2013 a Chamber of the Fifth Section, composed of Mark Villiger, President, Angelika Nußberger, Boštjan M. Zupančič, Ganna Yudkivska, André Potocki, Paul Lemmens, Aleš Pejchal, judges, and also of Claudia Westerdiek, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72 of the Rules of Court).

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court.

7. The applicant and the Government each filed written observations. On 17 March 2014, after consulting the parties, the President of the Grand Chamber decided not to hold a hearing.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1917 and lives in Ternopil.

9. The facts of the case, as submitted by the parties, may be summarised as follows.

### A. Factual background to the case

10. Since 1997 the applicant has claimed, so far unsuccessfully, title to part of a house, owned by Mr M. at the material time, and to the land on which it stands. Her claim is based on the following arguments: that the part of the house in question was constructed at her and her late husband's expense; that her husband lawfully obtained title to the property, which she subsequently inherited; that it was not sold to Mr M. despite there having initially been an agreement with the applicant's son to that effect; and that the sales contract on which Mr M.'s claim to the property was based was forged.

11. The applicant's property claim was considered on numerous occasions by the domestic courts. Eventually, following the reassignment of the case by the Supreme Court to lower courts with different territorial jurisdiction, the applicant's claim was dismissed. Relying on the statements of 17 witnesses, one of whom was heard in person, and documents submitted by Mr M., the courts at two levels of jurisdiction found that Mr M. had bought the foundations of the part of the house in question from the applicant's son in 1993 and had subsequently built it at his own cost.

Mr M., accordingly, was the lawful owner of that part of the house and had the right to use the land on which it had been constructed. The final decision, upholding the rulings of the lower courts, was taken by the Supreme Court on 22 August 2002.

### B. The Court's judgment in the first case

12. On 17 July 2001 the applicant lodged an application with the Court, complaining in particular of unfairness in the domestic court proceedings concerning her claim. She also complained about the length of the proceedings and alleged a violation of Article 1 of Protocol No. 1 to the Convention taken alone and in conjunction with Article 14 of the Convention on account of their outcome.

13. On 3 May 2007 the Court delivered a judgment in the case, which became final on 3 August 2007. The Court held that there had been a violation of Article 6 § 1 of the Convention, having regard to the circumstances in which the applicant's case had been reassigned by the Supreme Court and to the lack of sufficient reasoning in the domestic decisions, these issues being taken together and cumulatively (see *Bochan*, cited above, § 85).

14. The Court reasoned as follows:

> "74. ... [The] reassignment [of the applicant's case] was ordered by the Supreme Court after having expressly disagreed with the findings of the lower courts as to the facts and having stated its position concerning one of the principal aspects of the case ... even before the new assessment of facts and taking of evidence by the lower courts took place ... Considering in addition the Supreme Court's failure to provide reasons for the reassignment, the Court is of the opinion that the applicant's fears that the judges of the Supreme Court, including its Deputy President, had a prefixed idea concerning the outcome of the case and that the judges to whom the case had been transferred on 9 October 2000 would have to consider the case in accordance with the Supreme Court's view could be held to be objectively justified.
>
> 75. The Court considers that this overall procedural situation also disturbed the principle of legal certainty (see *Ryabykh v. Russia*, no. 52854/99, §§ 51-52, ECHR 2003-IX). The fact that the Supreme Court's views on the subject of the applicant's case differed from those of the lower courts could not be a sole ground for its repeated re-examination. Higher courts' power of review should be exercised for correction of judicial mistakes, miscarriages of justice, and not to substitute the lower courts' assessment of facts."

15. The Court further noted that the domestic courts had afforded no reply to the applicant's submissions concerning the reliability of the witnesses' statements and the validity of the documentary evidence, which had been decisive for the outcome of the case (see *Bochan*, cited above, §§ 81-84).

16. Relying on the above findings under Article 6 § 1 of the Convention, the Court decided that it was not necessary to rule on the applicant's

complaint based on Article 1 of Protocol No. 1, as it raised no distinct issue (see *Bochan*, cited above, § 91).

17. The applicant's complaints about the length of the proceedings and a violation of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention were dismissed as unsubstantiated (see *Bochan*, cited above, §§ 87 and 93).

18. The applicant was awarded EUR 2,000 by way of just satisfaction in respect of non-pecuniary damage. The Court also noted "that the applicant was entitled under Ukrainian law to request a rehearing of her case in the light of the Court's finding that the domestic courts had not complied with Article 6 in her case" (see *Bochan*, cited above, §§ 97 and 98).

19. To date, the Committee of Ministers of the Council of Europe has not yet concluded the supervision of the execution of the judgment under Article 46 § 2 of the Convention.

### C. The applicant's "appeal in the light of exceptional circumstances"

20. On 14 June 2007 the applicant lodged with the Supreme Court an "appeal in the light of exceptional circumstances" pursuant in particular to Articles 353-355 of the Code of Civil Procedure of 2004 (see paragraph 24 below). Relying on the Court's judgment of 3 May 2007, she asked the Supreme Court to quash the courts' decisions in her case and to adopt a new judgment allowing her claims in full. She joined to her appeal copies of the Court's judgment and of the domestic decisions.

21. On 14 March 2008 a panel of 18 judges of the Civil Division of the Supreme Court, having examined the appeal in chambers and relying on Article 358 of the Code of Civil Procedure of 2004 (set out in paragraph 24 below), dismissed the applicant's appeal. The relevant part of the Supreme Court's decision reads as follows:

> "By the judgment of 3 May 2007, the European Court of Human Rights declared the applicant's complaints of unfairness in the proceedings and of a violation of Article 1 of Protocol No. 1 admissible, and the remainder of the application inadmissible. A violation of Article 6 § 1 of the Convention ... was found in the case. [The Court] ordered that the respondent State was to pay the applicant, within three months from the date on which the judgment became final according to Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage ...
>
> In paragraph 64 of the judgment of the European Court of Human Rights, it is noted that the applicant's submissions mainly concern four issues, namely:
>
> (a) whether the courts, which dealt with [the applicant's] case, were independent and impartial;
>
> (b) whether the fact that the case was heard by the Chemerovetsk Town Court prevented the applicant from participating in the proceedings;

(c) whether the principle of equality of arms was observed with regard to the failure of the domestic courts to hear the witnesses whose written statements the courts admitted as evidence;

(d) whether the final decisions given by the courts of first, appeal and cassation instances were sufficiently substantiated.

As can be seen from the case materials, the applicant was represented in the [domestic] proceedings by her son, a lawyer ... During the entire duration of the proceedings she failed to appear before the court, although she was duly informed of the hearings.

None of those taking part in the case, including Mr B.I. [the applicant's son], asked for the witnesses to be summoned ... Mr B.I. failed to submit witness statements ... capable of proving that the house was constructed at his (or his father's or his mother's) expense.

None of the parties, including Mr B.I., sought the withdrawal of the [first-instance] judge. Complaints of the court's lack of objectivity ... were only raised by Mr B.I. after the judgment had been adopted in the case.

As can be seen from the case materials, the validity of the sales contract of 18 March 1993, according to which Mr M. purchased from Mr B.I. half of the foundations and some of the construction materials, was not challenged ... There is also a document confirming that the left-hand side of the house was constructed at Mr M.'s expense and a document according to which Mr M. paid Mr B.I. 1,550,000,000 karbovanets [the former transitional currency of Ukraine before September 1996] for the foundations of the left-hand side of the house. These circumstances were not refuted by the expert examination in the case.

In its judgment, the European Court of Human Rights also noted that the applicant ... had failed to provide evidence that she had suffered discrimination in the enjoyment of her property rights, contrary to Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1, on account of the outcome of the civil proceedings. [The Court] concluded that the applicant's complaints [under these provisions] were to be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention. Therefore, the European Court of Human Rights concluded that the [domestic] courts' decisions were lawful and well-founded and decided to award the applicant compensation in the amount of EUR 2,000 only for the violation of the 'reasonable-time' requirement by the Ukrainian courts.

In the light of the foregoing, the courts' decisions in the case may not be quashed on the grounds mentioned in Mrs Bochan's application.

Relying on [Article] 358 of the [Code of Civil Procedure of Ukraine], the panel of judges of the Civil Division of the Supreme Court of Ukraine

[Decided]:

To refuse to allow the appeal [of Mrs Bochan M. I.] for review in the light of exceptional circumstances of the judgment of 19 January 2001 of the Chemerovetsk Town Court of the Khmelnytsk Region, the decision of 1 March 2001 of the Khmelnytsk Regional Court of Appeal and the decision of 22 August 2002 of the Supreme Court of Ukraine."

22. On 8 April 2008 the applicant lodged a new "appeal in the light of exceptional circumstances" with the Supreme Court. She argued that the decision of 14 March 2008 had been based on an incorrect "interpretation"

of the Court's judgment of 3 May 2007 and requested the Supreme Court to reconsider the merits of the case in the light of the Court's findings under Article 6 § 1 of the Convention in that judgment as noted in paragraph 15 above.

23. On 5 June 2008 a panel of seven judges of the Civil Division of the Supreme Court, relying on Article 356 of the Code of Civil Procedure of 2004, declared the appeal inadmissible, as it contained no arguments capable of serving as grounds for reconsideration of the case in the light of exceptional circumstances pursuant to Article 354 of the Code of Civil Procedure of 2004 (see paragraph 24 below for the text of Article 354 and for the relevant extracts from Article 356 of the Code).

## II. RELEVANT DOMESTIC LAW

### A. Code of Civil Procedure of 2004

24. The relevant extracts from the Code, as worded at the material time, read as follows:

**Article 353. The right to challenge judicial decisions in the light of exceptional circumstances**

"1. Parties to proceedings ... have the right to challenge before the Supreme Court of Ukraine judicial decisions in civil cases in the light of exceptional circumstances after [those decisions] have been reviewed in cassation."

**Article 354. Grounds for an appeal in the light of exceptional circumstances**

"1. After judicial decisions in civil cases have been reviewed in cassation, they may be reviewed in the light of exceptional circumstances if they are appealed against on the [following] grounds:

(1) divergent application of the law by the cassation court (or courts);

(2) a finding by an international judicial authority, whose jurisdiction has been recognised by Ukraine, that a [domestic] judicial decision violated the international commitments of Ukraine."

**Article 355. Lodging of an appeal in the light of exceptional circumstances**

"1. An appeal may be lodged within one month of the discovery of exceptional circumstances.

2. An appeal in the light of exceptional circumstances is to be lodged in accordance with the rules applicable to cassation appeals.

..."

**Article 356. Admissibility of an appeal in the light of exceptional circumstances**

"1. The question of admissibility of an appeal in the light of exceptional circumstances ... is to be decided in chambers by a panel of seven judges ...

2. An appeal is to be declared admissible ... if at least three judges decide so ...

3. The decision concerning the admissibility of an appeal ... cannot be appealed against ...

4. A copy of the decision declaring an appeal admissible ... is to be sent to the parties ...

5. If an appeal has been declared admissible ... the court may suspend the execution of the relevant decisions.

6. The rules set out in paragraphs 1 to 4 of this article are not applicable to an appeal lodged on the ground provided for in paragraph 2 of Article 354 of this Code."

**Article 357. Procedure for examination in the light of exceptional circumstances**

"1. Examination of a case in the light of exceptional circumstances is a kind of cassation procedure (*різновидом касаційного провадження*).

2. The case is to be heard by a panel of judges representing at least two-thirds of the members of the Civil Division of the Supreme Court of Ukraine ...

...

4. Examination of the case in the light of exceptional circumstances is to be carried out under the rules applicable to cassation proceedings."

**Article 358. The powers of the Supreme Court of Ukraine when examining cases in the light of exceptional circumstances**

"1. When examining a case in the light of exceptional circumstances the Supreme Court of Ukraine has the power:

(1) to dismiss an appeal and to leave a decision unchanged ...

(2) to quash, in full or in part, a judicial decision and to remit the case for fresh consideration to the court of first instance, the court of appeal or the court of cassation ...

(3) to quash a decision of the court of appeal or of the court of cassation and to uphold a decision which was wrongly quashed ...

(4) to quash the decisions in the case and to discontinue the proceedings ...

(5) to amend a decision or to adopt a new decision on the merits of the case ..."

**Article 360. The force of the Supreme Court's decisions**

"1. The decisions adopted by the Supreme Court of Ukraine in the light of exceptional circumstances have the force of law when delivered and cannot be appealed against."

## B. The Act on the Enforcement of Judgments and the Application of the Case-Law of the European Court of Human Rights, 23 February 2006[1]

25. The relevant parts of the Act, as worded at the material time, read as follows:

"This Act regulates relations emanating from: the State's obligation to enforce judgments of the European Court of Human Rights in cases against Ukraine; the necessity to eliminate the causes of a violation by Ukraine of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto; the need to implement European human-rights standards in the legal and administrative practice of Ukraine; and the necessity to create conditions to reduce the number of applications against Ukraine before the European Court of Human Rights."

**Section 1. Definitions**

"1. For the purposes of this Act these terms are used with the following meanings:

...

*the Convention* – the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto agreed to be binding by [the Parliament] of Ukraine;

*the Court* – the European Court of Human Rights;

...

*Beneficiary* – (a) an applicant before the European Court of Human Rights in a case against Ukraine in whose favour the Court rendered its judgment or in whose case the parties have reached a friendly settlement, or his representative, or his successor ...

*Enforcement of [the Court's] judgment* – (a) payment of compensation to the Beneficiary; (b) adoption of individual measures; (c) adoption of general measures;

..."

**Section 2. Enforcement of [the Court's] judgment**

"1. The [Court's] judgment are to be binding and enforceable for Ukraine in accordance with Article 46 of the Convention.

2. The procedure for enforcement of the judgment is to be determined by this Act, the Enforcement Proceedings Act, and by other regulations, having regard to the specific provisions of the present Act."

**Section 10. Additional individual measures**

"1. Individual measures are to be adopted in addition to the payment of compensation and are aimed at restoring the rights of the Beneficiary [which have been] infringed.

2. Individual measures include:

[1] Rectified on 11 March 2015: the text was "3 February 2006".

(a) restoring as far as possible the legal status which the Beneficiary had before the Convention was violated (*restitutio in integrum*);

...

3. The previous legal status of the Beneficiary is to be restored, inter alia, by means of:

(a) reconsideration of the case by a court, including reopening of the proceedings in that case;

(b) reconsideration of the case by an administrative body."

**Section 11. Actions which the Office of the Government's Agent shall take with regard to individual measures**

"1. The Office of the Government's Agent, within three days from receipt of the Court's notification that the judgment has become final:

(a) sends the Beneficiary a notification explaining his right to initiate proceedings for the review of his case and/or to reopen the proceedings according to the law in force ..."

## III. LAW AND PRACTICE IN THE COUNCIL OF EUROPE MEMBER STATES

26. A comparative survey of national legislation and practice in thirty-eight of the Member States of the Council of Europe demonstrates that many States have put in place domestic mechanisms providing for the possibility to request review of civil cases terminated by a final judicial decision on the basis of a finding of a violation of the Convention by the Court. In particular, in twenty-two of the Member States surveyed, the domestic Code of Civil Procedure explicitly provides for the possibility for a successful applicant to request review of a civil case on the basis of a finding of a violation by the European Court of Human Rights or another international court. This is so for Albania, Andorra, Armenia, Azerbaijan, Croatia, the Czech Republic, Estonia, the former Yugoslav Republic of Macedonia, Georgia, Germany, Latvia, Lithuania, Moldova, Montenegro, Norway, Portugal, Romania, Russia, Serbia, Slovakia, Switzerland and Turkey. In all those States, requests for review are to be made to a court. However, the level of jurisdiction differs from Member State to Member State. In some, it is the highest court which entertains the request, that is the Supreme Court (which is the case in Albania, Azerbaijan, Estonia, and Lithuania) or the Constitutional Court (the Czech Republic). In others, the request is made to the court whose decision is challenged (Croatia, the former Yugoslav Republic of Macedonia and Serbia). Normally, review is not automatic and is subject to admissibility criteria, such as time-limits, an applicant's standing and substantiation of the request (this is the case, for example, in Albania, the former Yugoslav Republic of Macedonia, Georgia, Montenegro, and Turkey). Some domestic provisions provide for other

conditions to be met, for example that the serious consequence of the violation continues to exist (Romania), or that compensation has not remedied the breach (Slovakia), or that the applicant could not be compensated by any other means (Estonia).

27. While in sixteen of the thirty-eight Member States surveyed, review of civil cases on the basis of a finding of a violation of the Convention by the Court is currently not explicitly provided for by the existing legal provisions (this is the case in Austria, Belgium, France, Greece, Hungary, Italy, Ireland, Liechtenstein, Luxembourg, Monaco, the Netherlands, Poland, Slovenia, Spain, Sweden and the United Kingdom (England and Wales)), in some of those States it may still be open to applicants to seek re-examination in such a situation pursuant to the procedure of review in the light of new facts emerging or procedural errors having been committed (for example, France, the Netherlands and Poland).

## IV. THE COMMITTEE OF MINISTERS' RECOMMENDATION NO. R (2000) 2

28. In its Recommendation No. R (2000) 2, adopted on 19 January 2000 at the 694th meeting of the Ministers' Deputies, the Committee of Ministers noted that the practice in supervising the execution of the Court's judgments demonstrated that re-examination of a case or reopening of proceedings proved in certain circumstances the most efficient, if not the only, means of achieving *restitutio in integrum*. The Committee of Ministers, therefore, called upon the States to introduce mechanisms for re-examining a case following the finding of a violation of the Convention by the Court, especially where:

> "(i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and
>
> (ii) the judgment of the Court leads to the conclusion that
>
> (a) the impugned domestic decision is on the merits contrary to the Convention, or
>
> (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AND OF ARTICLE 1 OF PROTOCOL NO. 1

29. The applicant complained of the proceedings concerning her "appeal in the light of exceptional circumstances" ("exceptional appeal") culminating in the Supreme Court's decision of 14 March 2008. In particular, she argued that when dealing with her exceptional appeal the Supreme Court had failed to take into account the Court's findings under Article 6 § 1 of the Convention in its judgment of 3 May 2007 pertaining to the domestic courts' assessment of evidence (see paragraph 15 above). It had also omitted to address some important aspects of the case, notably the validity of the principal documentary evidence on which the domestic courts' decisions had been based. Moreover, its reasoning relating to the outcome of the applicant's previous application had contradicted the Court's findings in the judgment of 3 May 2007 (see paragraphs 13 and 18 above). According to the applicant, the unfair manner in which the Supreme Court had dealt with her exceptional appeal had entailed a fresh violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1. These provisions read, in so far as relevant to the applicant's submissions, as follows:

**Article 6 § 1**

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

**Article 1 of Protocol No. 1**

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

30. At the outset, the Court notes that the present application is a sequel to a previous application lodged by the same applicant in relation to civil litigation concerning a dispute over title to immovable property. In its judgment of 3 May 2007 concerning that application, the Court held that the domestic courts' decisions had been reached in proceedings which failed to respect Article 6 § 1 fair-hearing guarantees of independence and impartiality, legal certainty and the requirement to give sufficient reasons (see paragraphs 13-15 above). Relying principally on the Court's judgment

of 3 May 2007, the applicant lodged an exceptional appeal with the Supreme Court challenging the said decisions. In the proceedings decided in March 2008, which are the subject of her present application, the Supreme Court rejected her appeal, holding that the domestic decisions had been correct and well-founded.

31. The Court must determine in the first place whether it is prevented by Article 46 of the Convention from dealing with the various complaints made by the applicant, in view of the distribution of powers effected by the Convention between the Committee of Ministers and the Court as regards the supervision of the execution of the Court's judgments (see, for instance, *Lyons and Others v. the United Kingdom* (dec.), no. 15227/03, ECHR 2003-IX). Secondly, insofar as it is not so prevented, it must examine whether the domestic proceedings on the applicant's exceptional appeal attracted the guarantees of the Convention, in particular those under its Article 6 § 1 (see *Steck-Risch and Others v. Liechtenstein* (dec.), no. 29061/08, 11 May 2010) and, if so, whether the requirements of Article 6 § 1 were complied with.

32. As a preliminary to this, it is to be noted that the applicant's complaints are principally directed against the proceedings in her exceptional appeal lodged on 14 June 2007 and rejected by the Supreme Court on 14 March 2008. Bearing in mind the nature and outcome of the applicant's similar subsequent appeal, rejected by the Supreme Court on 5 June 2008, the Court will also take into account the latter proceedings (see paragraphs 55-56 below).

## A. Whether the Court is prevented by Article 46 of the Convention from examining the complaints made in the present application

### *1. General principles*

33. The question of compliance by the High Contracting Parties with the Court's judgments falls outside its jurisdiction if it is not raised in the context of the "infringement procedure" provided for in Article 46 §§ 4 and 5 of the Convention (see *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria (no. 2)*, nos. 41561/07 and 20972/08, § 56, 18 October 2011). Under Article 46 § 2, the Committee of Ministers is vested with the powers to supervise the execution of the Court's judgments and evaluate the measures taken by respondent States. However, the Committee of Ministers' role in the sphere of execution of the Court's judgments does not prevent the Court from examining a fresh application concerning measures taken by a respondent State in execution of a judgment if that application contains relevant new information relating to issues undecided by the initial judgment (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, §§ 61-63, ECHR 2009).

34. The relevant general principles were summarised in *Egmez v. Cyprus* ((dec.), no. 12214/07, §§ 48-56, 18 September 2012), as follows:

> "48. The Court reiterates that findings of a violation in its judgments are in principle declaratory (see *Krčmář and Others v. the Czech Republic* (dec.), no. 69190/01, 30 March 2004; *Lyons and Others v. the United Kingdom* (dec.), no. 15227/03, ECHR 2003-IX; and *Marckx v. Belgium*, 13 June 1979, § 58, Series A no. 31) and that, by Article 46 of the Convention, the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers (see, mutatis mutandis, *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B). It follows, inter alia, that a judgment in which the Court finds a breach of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects (see *Pisano v. Italy* (striking out) [GC], no. 36732/97, § 43, 24 October 2002 and *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII). Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see the above-cited *Scozzari and Giunta* judgment, § 249). For its part, the Court cannot assume any role in this dialogue (*Lyons and Others*, cited above).
>
> 49. Although the Court can in certain situations indicate the specific remedy or other measure to be taken by the respondent State (see, for instance, *Assanidze v. Georgia* [GC], no. 71503/01, point 14 of the operative part, ECHR 2004-II; *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003), it still falls to the Committee of Ministers to evaluate the implementation of such measures under Article 46 § 2 of the Convention (see *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, § 107, 23 November 2010; *Suljagić v. Bosnia and Herzegovina*, no. 27912/02, § 61, 3 November 2009; *Hutten Czapska v. Poland* (friendly settlement) [GC], no. 35014/97, § 42, 28 April 2008; *Hutten Czapska v. Poland* [GC], no. 35014/97, §§ 231-239 and the operative part, ECHR 2006-VIII); *Broniowski v. Poland* (friendly settlement) [GC], no. 31443/96, § 42, ECHR 2005-IX; and *Broniowski v. Poland* [GC], no. 31443/96, §§ 189-194 and the operative part, ECHR 2004-V).
>
> 50. Consequently, the Court has consistently emphasised that it does not have jurisdiction to verify whether a Contracting Party has complied with the obligations imposed on it by one of the Court's judgments. It has therefore refused to examine complaints concerning the failure by States to execute its judgments, declaring such complaints inadmissible *ratione materiae* (see *Moldovan and Others v. Moldova* (dec.), no. 8229/04, 15 February 2011; *Dowsett v. the United Kingdom* (no. 2) (dec.), no. 8559/08, 4 January 2011; *Öcalan v. Turkey* (dec.), no. 5980/07, 6 July 2010; *Haase v. Germany*, no. 11057/02, ECHR 2004 III; *Komanický v. Slovakia* (dec.), no. 13677/03, 1 March 2005; *Lyons and Others*, cited above; *Krčmář and Others*, cited above; and [*Fischer*] *v. Austria* (dec.), no. 27569/02, ECHR 2003 VI).
>
> 51. However, the Committee of Ministers' role in this sphere does not mean that measures taken by a respondent State to remedy a violation found by the Court cannot raise a new issue undecided by the judgment (see *Verein gegen Tierfabriken Schweiz*

*(VgT)*, cited above, § 62; *Hakkar v. France* (dec.), no. 43580/04, 7 April 2009; *Haase*, cited above; *Mehemi* [*v. France (no. 2)*, no. 53470/99, § 43, ECHR 2003-IV]; *Rongoni v. Italy*, no. 44531/98, § 13, 25 October 2001; *Rando v. Italy*, no. 38498/97, § 17, 15 February 2000; *Leterme v. France*, 29 April 1998, Reports 1998-III; *Pailot v. France*, 22 April 1998, § 57, Reports 1998-II; and *Olsson v. Swede*n (no. 2), 27 November 1992, Series A no. 250) and, as such, form the subject of a new application that may be dealt with by the Court.

52. On that basis, the Court has found that it had the competence to entertain complaints in a number of follow-up cases for example where the domestic authorities have carried out a fresh domestic examination of the case by way of implementation of one of the Court's judgments whether by reopening of the proceedings (see *Emre v. Switzerland (no. 2)*, no. 5056/10, 11 October 2011, and *Hertel* [*v. Switzerland* (dec.), no. 53440/99, ECHR 2002-I]) or by the initiation of [an] entire new set of domestic proceedings (see *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria (no. 2)*, nos. 41561/07 and 20972/08, 18 October 2011 and *Liu v. Russia (no. 2)*, no. 29157/09, 26 July 2011).

53. Moreover, in the specific context of a continuing violation of a Convention right following adoption of a judgment in which the Court has found a violation of that right during a certain period of time, it is not unusual for the Court to examine a second application concerning a violation of that right in the subsequent period (see, amongst others *Ivanţoc and Others v. Moldova and Russia*, no. 23687/05, §§ 93-96, 15 November 2011 regarding continuing detention; *Wasserman v. Russia (no. 2)*, no. 21071/05, §§ 36-37, 10 April 2008 as to the non-enforcement of a domestic judgment; and *Rongoni v. Italy*, cited above, § 13, concerning length of proceedings). In such cases the 'new issue' results from the continuation of the violation that formed the basis of the Court's initial decision. The examination by the Court, however, is confined to the new periods concerned and any new complaints invoked in this respect (see for example, *Ivanţoc and Others*, cited above).

54. It is clear from the Court's case-law that the determination of the existence of a 'new issue' very much depends on the specific circumstances of a given case and that distinctions between cases are not always clear-cut. So, for instance, in the *Verein gegen Tierfabriken Schweiz (VgT)* case (cited above), the Court found that it was competent to examine a complaint that the domestic court in question had dismissed an application to reopen proceedings following the Court's judgment. The Court relied mainly on the fact that the grounds for dismissing the application were new and therefore constituted relevant new information capable of giving rise to a fresh violation of the Convention (see *Verein gegen Tierfabriken Schweiz (VgT)*, cited above, § 65). It further took into account the fact that the Committee of Ministers had ended its supervision of the execution of the Court's judgment without taking into account the reopening refusal as it had not been informed of that decision. The Court considered that, from that standpoint also, the refusal in issue constituted a new fact (ibid, § 67). Similarly, in its recent judgment in the case of *Emre* (cited above) the Court found that a new domestic judgment given following the reopening of the case, and in which the domestic court had proceeded to carry out a new balancing of interests, constituted a new fact. It also observed in this respect that the execution procedure before the Committee of Ministers had not yet commenced. Comparable complaints were, however, dismissed in the cases of *Schelling v. Austria (no. 2)* (dec.), no. 46128/07, 16 September 2010 and *Steck-Risch and Others v. Liechtenstein* (dec.) no. 629061//08, 11 May 2010), as the Court considered, that on the facts, the decisions of the domestic courts refusing the applications for reopening were not based on or connected with relevant new grounds capable of giving rise to a fresh

violation of the Convention. Further, in *Steck-Risch* the Court observed that the Committee of Ministers had ended its supervision of the execution of the Court's previous judgment prior to the domestic court's refusal to reopen the proceedings and without relying on the fact that a reopening request could be made. There was no relevant new information in this respect either.

55. Reference should also be made in this context to the criteria established in the case-law concerning Article 35 § 2 (b), by which an application is to be declared inadmissible if it 'is substantially the same as a matter that has already been examined by the Court ... and contains no relevant new information': (i) an application is considered as being 'substantially the same' where the parties, the complaints and the facts are identical (see *Verein Gegen Tierfabriken Schweiz (VgT)* cited above, § 63 and *Pauger v. Austria* (dec.), nos. 16717/90 and 24872/94, Commission decisions of 9 January 1995); (ii) the concept of complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see *Guerra and Others v. Italy*, 19 February 1998, § 44, Reports 1998-I and *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 29, Series A no. 172); and (iii) where the applicant submits new information, the application will not be essentially the same as a previous application (see *Patera v. the Czech Republic* (dec.), no. 25326/03), Commission decision of 10 January 1996 and *Chappex v. Switzerland* (dec.), no. 20338/92, Commission decision of 12 October 1994).

56. Accordingly, the powers assigned to the Committee of Ministers by Article 46 to supervise the execution of the Court's judgments and evaluate the implementation of the measures taken by the States under this Article will not be encroached on where the Court has to deal with relevant new information in the context of a fresh application (see *Verein Gegen Tierfabriken Schweiz (VgT)* cited above, § 67)."

### *2. Application of the above principles to the present case*

35. Turning to the present case, the Court considers that some of the applicant's pleadings in the present case may be understood as complaining about an alleged lack of proper execution of the Court's judgment of 3 May 2007 in her previous case. The applicant can in particular be understood as arguing that the shortcomings in the original domestic proceedings that formed the subject-matter of the Court's 2007 judgment were not remedied in the proceedings culminating in the Supreme Court's decision of 14 March 2008, in that the Supreme Court failed to address the validity of the principal documentary evidence on which the contested decisions of the domestic courts had been based (see paragraph 29 above). However, complaints of a failure either to execute the Court's judgment or to redress a violation already found by the Court fall outside the Court's competence *ratione materiae* (see the summary of the Court's case-law reproduced in the preceding paragraph, in particular *Lyons and Others*, cited above). Accordingly, the applicant's complaints, in so far as they concern the failure to remedy the original violation of Article 6 § 1 of the Convention as found in the Court's 2007 judgment, must be declared incompatible *ratione materiae* with the Convention pursuant to Article 35 §§ 3 (a) and 4.

36. However, the applicant's new application also raises a new grievance going not so much to the outcome of the proceedings decided in

2008 by the Supreme Court as to the conduct and fairness of those proceedings – which were chronologically subsequent to and distinct from the domestic proceedings impugned in the Court's 2007 judgment.

37. The applicant's claim in that regard, as it can be derived from her submissions, concerns the manner in which the Supreme Court dealt with one of her principal arguments based on the Court's 2007 judgment. In particular she maintained that the reasoning employed by the Supreme Court in its decision of 14 March 2008 manifestly contradicted the Court's pertinent findings in its 2007 judgment (see paragraph 29 above). This new grievance is thus about the manner in which the March 2008 decision had been reached in the proceedings concerning the applicant's exceptional appeal, not about either their outcome as such or the effectiveness of the national courts' implementation of the Court's judgment (compare and contrast with *Steck-Risch and Others*, *Öcalan*, and *Schelling (no. 2)*, cited above, in which no distinct unfairness was alleged in relation to the conduct of the relevant new proceedings brought by the applicants in those cases at the domestic level). Although the applicant's initiatives to have the domestic decisions in the present case reconsidered were undoubtedly connected with the execution of the Court's judgment of 3 May 2007, her complaints about the unfairness of the subsequent judicial proceedings both concern a situation distinct from that examined in that judgment and contain relevant new information relating to issues undecided by that judgment.

38. As a consequence, in the present case the "new issue" the Court is competent to examine, without encroaching on the prerogatives of the respondent State and the Committee of Ministers under Article 46 of the Convention, concerns the alleged unfairness of the proceedings on the applicant's exceptional appeal, as opposed to their outcome as such and their impact on the proper execution of the Court's judgment of 3 May 2007.

39. Accordingly, the Court is not prevented by Article 46 of the Convention from examining the applicant's new complaint about the unfairness of the proceedings culminating in the decision of the Supreme Court of 14 March 2008. The Court will now turn to the question whether the impugned domestic proceedings attracted the fairness guarantees of Article 6 § 1 of the Convention.

### B. Whether the applicant's new complaint is compatible *ratione materiae* with Article 6 § 1 of the Convention

#### *1. The parties' submissions*

40. The Government maintained that Article 6 of the Convention was inapplicable to the proceedings concerning the applicant's "appeal in the light of exceptional circumstances". They argued that the Supreme Court's

decision of 14 March 2008, rejecting her first appeal, had been an interim one and had not determined her civil rights or obligations. It was the Supreme Court's later decision of 5 June 2008 rejecting her second appeal that had "defined" her civil rights and obligations. However, as the applicant did not complain that the June 2008 proceedings were flawed, Article 6 was not applicable.

41. The applicant submitted that Article 6 § 1 of the Convention was applicable to the proceedings concerning her exceptional appeal culminating in the decision of the Supreme Court of 14 March 2008.

*2. The Court's assessment*

**(a) General principles**

42. The Court reiterates that for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute ("*contestation*" in the French text) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among many other authorities, *Micallef v. Malta* [GC], no. 17056/06, § 74, ECHR 2009; and *Boulois v. Luxembourg* [GC], no. 37575/04, § 90, ECHR 2012).

43. In this regard, the character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, and so on) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, and so forth) are not of decisive consequence (see *Micallef*, cited above, § 74).

**(b) Case-law concerning the applicability of Article 6 to proceedings on extraordinary appeals**

44. In line with the above-mentioned principles, according to long standing and established case-law, the Convention does not guarantee a right to have a terminated case reopened. Extraordinary appeals seeking the reopening of terminated judicial proceedings do not normally involve the determination of "civil rights and obligations" or of "any criminal charge" and therefore Article 6 is deemed inapplicable to them (see, among many other authorities, *X. v. Austria*, no. 7761/77, Commission decision of 8 May 1978, D.R. 14, p. 171; *Surmont and De Meurechy v. Belgium*, nos. 13601/88 and 13602/88, Commission decision of 6 July 1989, D.R. 62, p. 284; *J.F. v. France* (dec.), no. 39616/98, 20 April 1999; *Zawadzki v. Poland* (dec.) no. 34158/96, 6 July 1999; *Sonnleitner v. Austria* (dec.) no. 34813/97, 6 January 2000; *Sablon v. Belgium*, no. 36445/97, § 86,

10 April 2001; *Valentin Gorizdra v. Moldova* (dec.) no. 53180/99, 2 July 2002; *Kucera v. Austria*, no. 40072/98, 3 October 2002; *Fischer*, cited above; *Jussy v. France*, no. 42277/98, § 18, 8 April 2003; *Dankevich v. Ukraine*, no. 40679/98, 29 April 2003; *Steck-Risch and Others*, cited above; *Öcalan*, cited above; *Schelling (no. 2)*, cited above; *Hurter v. Switzerland* (dec.), no. 48111/07, 15 May 2012; *Dybeku v. Albania* (dec.), no. 557/12, § 30, 11 March 2014). This is because, in so far as the matter is covered by the principle of *res iudicata* of a final judgment in national proceedings, it cannot in principle be maintained that a subsequent extraordinary application or appeal seeking revision of that judgment gives rise to an arguable claim as to the existence of a right recognised under national law or that the outcome of the proceedings in which it is decided whether or not to reconsider the same case is decisive for the "determination of ... civil rights or obligations or of any criminal charge" (compare and contrast with *Melis v. Greece*, no. 30604/07, §§ 18-20, 22 July 2010, which departs from the said approach).

45. This approach has been followed also in cases where reopening of terminated domestic judicial proceedings has been sought on the ground of a finding by the Court of a violation of the Convention (see, for instance, *Fischer*, cited above). In declaring the applicant's complaint under Article 6 inadmissible in *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* (no. 32772/02, § 24, 4 October 2007), the Chamber stated:

> "24. ... It is clear from its case-law that this Article is not applicable to proceedings concerning an application for a retrial or for the reopening of civil proceedings (see *Sablon v. Belgium*, no. 36445/97, § 86, 10 April 2001). The Court sees no reason why this reasoning should not also be applied to an application to reopen proceedings after it has found a violation of the Convention (see, in relation to a criminal case, [*Fischer*] *v. Austria* (dec.), no. 27569/02, ECHR 2003-VI). It therefore considers that the complaint under Article 6 is incompatible *ratione materiae* with the provisions of the Convention."

46. However, should an extraordinary appeal entail or actually result in reconsidering the case afresh, Article 6 applies to the "reconsideration" proceedings in the ordinary way (see, for instance, *Sablon*, cited above, §§ 88-89; *Vanyan v. Russia*, no. 53203/99, § 56, 15 December 2005; *Zasurtsev v. Russia*, no. 67051/01, § 62, 27 April 2006; *Alekseyenko v. Russia*, no. 74266/01, § 55, 8 January 2009; *Hakkar*, cited above; and *Rizi v. Albania* (dec.), no. 49201/06, § 47, 8 November 2011).

47. Moreover, Article 6 has also been found applicable in certain instances where the proceedings, although characterised as "extraordinary" or "exceptional" in domestic law, were deemed to be similar in nature and scope to ordinary appeal proceedings, the national characterisation of the proceedings not being regarded as decisive for the issue of applicability.

48. Thus, in *San Leonard Band Club v. Malta* (no. 77562/01, §§ 41-48, ECHR 2004 IX), Article 6 was held to be applicable to proceedings

concerning a request for a new trial. The Court reasoned that the request was similar to an appeal on points of law before a court of cassation, the Maltese authorities did not exercise any discretionary power but were required to give a ruling on the request, and the outcome of the new trial procedure was decisive for the applicant company's "civil rights and obligations".

49. Similarly, in *Maresti v. Croatia* (no. 55759/07, 25 June 2009) the Court found that proceedings concerning a request for extraordinary review of a final judgment in a criminal case fell within the scope of Article 6. In examining the nature and specific features of those proceedings, it noted that the request for extraordinary review was available to the defendant for strictly limited errors of law that operated to the defendant's detriment, the request had to be lodged within a strict one-month time limit following the service of the appeal court's judgment on the defendant, and reasons justifying extraordinary review were expressly enumerated in the Croatian Code of Criminal Procedure and were not subject to any discretionary decision on the part of the Croatian Supreme Court. The Court further observed that the request for extraordinary review had its equivalent in Croatian civil proceedings in the form of an appeal on points of law in civil cases, to which Article 6 applied (see paragraphs 25-28 of the above-mentioned judgment).

50. In sum, while Article 6 § 1 is not normally applicable to extraordinary appeals seeking the reopening of terminated judicial proceedings, the nature, scope and specific features of the proceedings on a given extraordinary appeal in the particular legal system concerned may be such as to bring the proceedings on that kind of appeal within the ambit of Article 6 § 1 and of the safeguards of a fair trial that it affords to litigants. The Court must accordingly examine the nature, scope and specific features of the exceptional appeal at issue in the instant case.

**(c) Application of the above principles to the present case**

51. Turning therefore to the concrete circumstances of the present case, the Court notes that at the relevant time the Code of Civil Procedure guaranteed to parties to proceedings that had already terminated in a cassation decision "the right to challenge before the Supreme Court ... judicial decisions in civil cases in the light of exceptional circumstances" (Article 353, the introductory article in the part of the Code dealing with exceptional appeals – text set out at paragraph 24 above). By virtue of the following provision in the Code (Article 354 § 1 – text also set out at paragraph 24 above), "a finding by an international judicial authority, whose jurisdiction has been recognised by Ukraine, that a [domestic] judicial decision violated the international commitments of Ukraine" was one of the two grounds on which could be brought such an exceptional appeal. Article 357 (ibid.) further defined "examination of a case in the light of

exceptional circumstances" as being "a kind of cassation procedure", with the Supreme Court having the same powers of review as it had in cassation proceedings and the exceptional appeal being subject to the same procedure as in cassation appeals. The Supreme Court's powers of disposal of an exceptional appeal were likewise comparable to those it possessed in cassation appeals. Thus, the exceptional-appeal proceedings could result in one of the different types of decisions set out in Article 358 of the Code, in particular in a decision "to dismiss an appeal and to leave [the contested] decision unchanged", "to quash, in full or in part, [the contested] judicial decision and to remit the case for fresh consideration to the [competent lower court]", "to quash [the contested] decision of the court of appeal or of the court of cassation and to uphold a decision which was wrongly quashed", or "to amend [the contested] decision or to adopt a new decision on the merits of the case" (ibid.).

52. For the purposes of this Court's examination of the nature and scope of the remedy exercised by the applicant under the Code of Civil Procedure, the background legislative context, represented by the provisions of the 2006 Act on the Enforcement of Judgments and the Application of the Case-Law of the European Court of Human Rights, is also capable of being of some relevance (see paragraph 25 above, which sets out the relevant parts of that Act). In particular, section 10(3)(a) of the 2006 Act states that "[t]he previous legal status of the Beneficiary" – that is, the successful applicant before this Court – "is to be restored, inter alia, by means of a reconsideration of the case by a court, including reopening of the proceedings in that case" (ibid.). Moreover, according to section 11 § 1 (a) of the same Act, the Office of the Government's Agent is required to send the Beneficiary "a notification explaining his right to initiate proceedings for the review of his case and/or to reopen the proceedings according to the law in force".

53. The applicable national legal framework thus made available to the applicant a remedy enabling a judicial review of her civil case by the Supreme Court in the light of the finding of this Court that the original domestic decisions had been defective. By virtue of the kind of judicial review that it provided for, the exceptional appeal brought by the applicant can be viewed as a prolongation of the original (terminated) civil proceedings, akin to a cassation procedure as defined by Ukrainian law. This being so, while the special features of this cassation-type procedure may affect the manner in which the prescribed procedural guarantees of Article 6 § 1 operate (see *Delcourt v. Belgium*, 17 January 1970, § 26, Series A no. 11), the Court is of the view that those guarantees should be applicable to it in the same way as they apply to cassation proceedings in civil matters generally (see, for instance, *Mushta v. Ukraine*, no. 8863/06, § 39, 18 November 2010; and, *mutatis mutandis*, *San Leonard Band Club* and *Maresti*, cited above at paragraphs 48-49).

54. This conclusion, derived from the applicable Ukrainian legal provisions, is corroborated by reference to the scope and nature of the "examination" actually carried out by the Supreme Court on 14 March 2008 before it dismissed the applicant's exceptional appeal, leaving the contested decisions unchanged. In the course of that examination the Supreme Court reviewed the case materials and the court decisions from the original proceedings in the light of the applicant's new submissions based mainly on the Court's judgment of 3 May 2007 (see paragraphs 20-21 above). Thus, what occurred in the proceedings in March 2008 can well be compared to the proceedings concerning the applicant's cassation appeal decided by the Supreme Court in August 2002 (see paragraph 11 above and *Bochan*, cited above, § 39), to which Article 6 § 1 applied *ratione materiae*. For the Court, in March 2008 the Supreme Court reviewed the applicant's civil case "in the light of exceptional circumstances", namely the Court's 2007 judgment, in a cassation-type procedure and found no cause to overturn the contested decisions. It thereby conducted a "reconsideration", as the 2006 Act termed it, of her property claim on new and fresh grounds linked to its interpretation of the Court's judgment of 3 May 2007, albeit deciding not to change the outcome of the case and, in particular, not to order a full re-hearing of the case by a lower court.

55. The above considerations are not altered by the fact that, in June 2008, the Supreme Court, relying on Article 356 of the Code, rejected the applicant's follow-up appeal of April 2008 as inadmissible on formal grounds without any further "examination" of the substantive aspects of the case (see paragraph 23 above).

56. Thus, in the light both of the relevant provisions of the Ukrainian legislation and of the nature and scope of the proceedings culminating in the Supreme Court's decision of 14 March 2008 in relation to the applicant's exceptional appeal, followed by its confirmatory decision of June 2008, the Court considers that those proceedings were decisive for the determination of the applicant's civil rights and obligations. Consequently, the relevant guarantees of Article 6 § 1 applied to those proceedings. Accordingly, the Government's objection concerning the applicability of that provision to the impugned proceedings is to be rejected.

57. Independently of the conclusion as to the applicability of Article 6 § 1 to the kind of proceedings at issue in the instant case, the Court would reiterate that it is for the Contracting States to decide how best to implement the Court's judgments without unduly upsetting the principles of *res iudicata* or legal certainty in civil litigation, in particular where such litigation concerns third parties with their own legitimate interests to be protected. Furthermore, even where a Contracting State provides for the possibility of requesting a reopening of terminated judicial proceedings on the basis of a judgment of the Court, it is for the domestic authorities to provide for a procedure to deal with such requests and to set out criteria for

determining whether the requested reopening is called for in a particular case. There is no uniform approach among the Contracting States as to the possibility of seeking reopening of terminated civil proceedings following a finding of a violation by this Court or as to the modalities of implementation of existing reopening mechanisms (see paragraphs 26-27 above).

58. However, the foregoing considerations should not detract from the importance, for the effectiveness of the Convention system, of ensuring that domestic procedures are in place which allow a case to be revisited in the light of a finding that Article 6's safeguards of a fair trial have been violated. On the contrary, such procedures may be regarded as an important aspect of the execution of its judgments as governed by Article 46 of the Convention and their availability demonstrates a Contracting State's commitment to the Convention and to the Court's case-law (see *Lyons and Others*, cited above). The Court recalls in this connection Recommendation No. R (2000) 2 adopted by the Committee of Ministers, in which the States Parties to the Convention are called upon to ensure that there are adequate possibilities of reopening proceedings at domestic level where the Court has found a violation of the Convention (see paragraph 28 above). It reaffirms its view that such measures may represent "the most efficient, if not the only, means of achieving *restitutio in integrum*" (see *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)*, cited at paragraph 33 above, §§ 33 and 89; and *Steck-Risch and Others*, cited above).

### C. As to whether the applicant's new complaint under Article 6 § 1 of the Convention satisfies the other admissibility conditions

59. The Court further finds that the applicant's complaint about the unfairness of the proceedings culminating in the Supreme Court's decision of 14 March 2008 is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other ground. It must therefore be declared admissible.

### D. Merits of the applicant's new complaint under Article 6 § 1 of the Convention

60. As regards the question of compliance with the requirements of Article 6 § 1 in the present case, the Court observes that the applicant's unfairness complaint was directed specifically against the reasoning the Supreme Court employed in its decision of 14 March 2008.

61. It reiterates that, according to its long-standing and established case-law, it is not for this Court to deal with alleged errors of law or fact committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, for instance, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I; and

*Perez v. France* [GC], no. 47287/99, § 82, ECHR 2004-I), for instance where it can, exceptionally, be said that they are constitutive of "unfairness" incompatible with Article 6 of the Convention. While this provision guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts. Normally, issues such as the weight attached by the national courts to given items of evidence or to findings or assessments in issue before them for consideration are not for the Court to review. The Court should not act as a fourth instance and will not therefore question under Article 6 § 1 the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable (see, for instance, *Dulaurans v. France*, no. 34553/97, §§ 33-34 and 38, 21 March 2000; *Khamidov v. Russia*, no. 72118/01, § 170, 15 November 2007; and *Anđelković v. Serbia*, no. 1401/08, § 24, 9 April 2013).

62. Thus, in *Dulaurans* the Court found a violation of the right to a fair trial because the sole reason why the French Court of Cassation had arrived at its contested decision rejecting the applicant's cassation appeal as inadmissible was the result of "*une erreur manifeste d'appréciation*" ("a manifest error of assessment") (see *Dulaurans*, cited above). The thinking underlying this notion of "*erreur manifeste d'appréciation*" (a concept of French administrative law), as used in the context of Article 6 § 1 of the Convention, is doubtless that if the error of law or fact by the national court is so evident as to be characterised as a "manifest error" – that is to say, is an error that no reasonable court could ever have made –, it may be such as to disturb the fairness of the proceedings. In *Khamidov*, the unreasonableness of the domestic courts' conclusion as to the facts was "so striking and palpable on the face" that the Court held that the proceedings complained of had to be regarded as "grossly arbitrary" (see *Khamidov*, cited above, § 174). In *Anđelković*, the Court found that the arbitrariness of the domestic court's decision, which principally had had no legal basis in domestic law and had not contained any connection between the established facts, the applicable law and the outcome of the proceedings, amounted to a "denial of justice" (see *Anđelković*, cited above, § 27).

63. In the present case, the Court notes that in its decision of 14 March 2008 the Supreme Court grossly misrepresented the Court's findings in its judgment of 3 May 2007. In particular, the Supreme Court recounted that this Court had found that the domestic courts' decisions in her case had been lawful and well-founded and that she had been awarded just satisfaction for the violation of the "reasonable-time" guarantee, these being affirmations that are palpably incorrect (see paragraphs 13-18 and 21 above).

64. The Court observes that the Supreme Court's reasoning does not amount merely to a different reading of a legal text. For the Court, it can

only be construed as being "grossly arbitrary" or as entailing a "denial of justice", in the sense that the distorted presentation of the 2007 judgment in the first *Bochan* case (cited above) had the effect of defeating the applicant's attempt to have her property claim examined in the light of the Court's judgment in her previous case in the framework of the cassation-type procedure provided for under domestic law (see paragraphs 51-53 above). In this regard, it is to be noted that in its 2007 judgment the Court found that, given the circumstances in which the applicant's case had been reassigned by the Supreme Court to lower courts, the applicant's doubts regarding the impartiality of the judges dealing with the case, including the judges of the Supreme Court, had been objectively justified (see paragraphs 13-15 above).

65. Accordingly, in the light of the Court's findings as to the nature and the implications of the defect in the Supreme Court's decision of 14 March 2008 (see paragraphs 63-64 above), it must be concluded that the impugned proceedings fell short of the requirement of a "fair trial" under Article 6 § 1 of the Convention and that there has been a violation of that provision.

### E. The applicant's new complaint in so far as it concerns Article 1 of Protocol No. 1

66. The applicant contended that she had been unlawfully deprived of her property on account of the proceedings on her exceptional appeal. She relied upon Article 1 of Protocol No. 1.

67. The Court observes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

68. Having regard to its finding under Article 6 § 1 of the Convention (see paragraph 65 above), the Court finds that it is not necessary to examine whether, in this case, there has been a violation of Article 1 of Protocol No. 1.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

70. The applicant claimed 300,000 euros (EUR) in respect of damage resulting from the alleged violation of her rights under Article 6 of the Convention and Article 1 of Protocol No. 1.

71. The Government argued that the applicant had not specified the nature of the damage she had allegedly suffered on account of the Supreme Court's decision in her case and had provided no evidence in support of her claim. Accordingly, the claim should be rejected in full.

72. The Court notes that the applicant did not provide any details as to the nature of the alleged damage or its gravity. Nevertheless, it considers that the applicant must have suffered some distress and anxiety on account of the "unfair" manner in which the Supreme Court dealt with her exceptional appeal, which, as a consequence, set at naught her attempts to have her property claim examined in the light of the Court's judgment in her previous case in the framework of the cassation-type procedure provided for under domestic law (see paragraph 64 above). The Court does not judge it appropriate to examine whether any further reconsideration of the applicant's property claim at domestic level is feasible in the circumstances, given in particular the considerable time that has elapsed in the meantime as well as the possible implications of such reconsideration for the principles of *res iudicata* and legal certainty in the terminated civil litigation and for the legitimate interests of third parties. On the other hand, the reality is now that the applicant must be taken, for the purposes of the Court's assessment under Article 41, as having no practical opportunity available to her to remedy the violation found in her case at the domestic level. Thus, making its assessment on an equitable basis, the Court considers it reasonable to award the applicant EUR 10,000 for non-pecuniary damage, plus any tax that may be chargeable on that amount.

### B. Costs and expenses

73. The applicant did not submit a claim for costs and expenses.

### C. Default interest

74. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the applicant's complaint under Article 6 § 1 of the Convention about the unfairness of the proceedings culminating in the decision of the Supreme Court of 14 March 2008 and her complaint under Article 1 of Protocol No. 1 to the Convention that she had been

unlawfully deprived of her property on account of those proceedings admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 1 of Protocol No. 1 to the Convention;

4. *Holds*
(a) that the respondent State is to pay the applicant, within three months, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, for non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and notified in writing on 5 February 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Jurisconsult

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) joint concurring opinion of Judges Yudkivska and Lemmens;
(b) concurring opinion of Judge Wojtyczek.

D.S.
T.L.E.

# JOINT CONCURRING OPINION OF JUDGES YUDKIVSKA AND LEMMENS

1. We wholeheartedly concur with the conclusion that Article 6 § 1 has been violated.

On this point, the judgment constitutes an important step forward in the protection offered by the Convention to applicants who have successfully complained of a violation of their fundamental rights, and who subsequently attempt to obtain a reopening of the domestic proceedings.

2. We nevertheless would like to indicate that, in so far as the judgment examines the applicability of Article 6 § 1 to the proceedings before the Supreme Court, we would have preferred a somewhat broader reasoning.

In our opinion, it is sufficient to note that the proceedings concerned the judicial review of the decisions of the domestic courts, including the original decision of the Supreme Court of 22 August 2002, following the finding by our Court that the proceedings before the Supreme Court had been unfair. We attach much importance to the fact that the exceptional appeal brought by the applicant can be viewed as a prolongation of the original proceedings, akin to a cassation procedure (see paragraph 53 of the judgment).

By contrast, we do not think that it is necessary to take account of the way in which the Supreme Court actually carried out its functions in the exceptional appeal proceedings (see paragraph 54 of the judgment). The applicability of Article 6 § 1 should not depend on the outcome of the proceedings, in particular not on the fact that the cassation court may have examined to some extent the merits of the original claim.

3. We would also like to stress that the principles of *res iudicata* and legal certainty referred to in paragraph 57 of the judgment cannot be unduly upset in cases like the present one, since the possibility of reopening terminated proceedings is at the outset provided for by national law.

In this respect we reiterate that the Convention must be interpreted as guaranteeing rights which are practical and effective. Stressing, as a matter of principle, the inalterability of domestic decisions found by this Court to be in breach of the Convention could mean depriving the Court's judgments of much of their real effect, thus rendering the Strasbourg remedy illusory.

4. We take the opportunity to observe that we would generally be in favour of a much broader approach towards the applicability of Article 6 § 1 in civil proceedings.

We should ask ourselves whether Article 6 § 1 does not apply to *all* judicial proceedings concerning legally protected rights or interests, regardless of the extent to which they are held to be decisive for the determination of any (civil) rights and obligations. To hold so would avoid

the lengthy examination of whether or not specific proceedings, having regard to their specific features, fall within the scope of Article 6 § 1.

# CONCURRING OPINION OF JUDGE WOJTYCZEK

*(Translation)*

1. In the present case I voted with the majority in finding a violation of Article 6 § 1 of the Convention. However, I have some doubts as to the reasoning of the judgment and in particular the considerations regarding the applicability of Article 6 to proceedings examining extraordinary appeals against judicial decisions.

2. The question whether and to what extent Article 6 applies to proceedings examining extraordinary appeals against judicial decisions or individual administrative decisions is a very difficult one, in view of the considerable complexity of procedural law and its diversity in Europe. In addition to the substantive difficulties there are linguistic issues, which are particularly acute in this legal sphere since many of the legal terms used in Contracting Parties' legislation have no equivalent in the official languages of the Court.

I note that in its previous case-law the Court has accepted the applicability of Article 6 to "cassation appeals" in judicial proceedings in certain States, even where such an appeal is regarded as an extraordinary remedy under national law. On the other hand, the Court has deemed Article 6 to be inapplicable, in principle, to proceedings examining a request for "the reopening of judicial proceedings" (see the judgments cited in paragraph 44 of the judgment). At the same time, the Court held in several cases that Article 6 was applicable to other extraordinary remedies provided for in certain States (see, in particular, the judgments in *Melis v. Greece*, no. 30604/07, § 19, 22 July 2010; *San Leonard Band Club v. Malta*, no. 77562/01, ECHR 2004-IX; *Maresti v. Croatia*, no. 55759/07, 25 June 2009; and *J.S. and A.S. v. Poland*, no. 40732/98, 24 May 2005).

Various arguments were advanced in those judgments to justify the applicability of Article 6. In *San Leonard Band Club*, concerning a request for a new criminal trial, the Court emphasised three factors: (1) a request for a retrial was the only means in Maltese law of challenging a decision that had been upheld on appeal; (2) the request in the case in question had been founded on the allegedly erroneous application of the law; and (3) if the statutory conditions were met, the request triggered a fresh trial without there being any discretion to decide whether it was appropriate.

In *Melis*, which concerned an application to reopen proceedings, the Court stressed the "decisive factor ... that, in the present case, an application to reopen the proceedings was the only legal remedy by which the applicant could have the appeal judgment in civil proceedings set aside and have his ownership rights restored" (§ 19).

In *Maresti*, concerning a request for extraordinary review of a criminal judgment, the applicability of Article 6 was justified primarily by the

argument that the remedy in question was similar to a cassation appeal in civil proceedings. The Court further stressed that, in lodging the request, the applicant had relied on the fact that criminal prosecution in his case was barred by law.

It is also interesting to note that the judgment in *J.S. and A.S. v. Poland* found Article 6 to be applicable to one of the extraordinary remedies provided for by Polish administrative procedure, in this instance an application for an individual administrative decision characterised by particularly serious flaws to be declared null and void. This remedy enables applicants to obtain a review of the lawfulness of a final individual administrative decision even a number of years after it has been given. Hence, individuals who lodge an application for a declaration of nullity in respect of a final individual administrative decision given a number of years previously, and relating to civil rights or obligations within the meaning of the Convention, are entitled to a hearing within a reasonable time by an independent and impartial tribunal which must determine their claims on the merits. In support of its finding that Article 6 was applicable the Court pointed out that the applicants in the case in question had not sought the reopening of the administrative proceedings, but merely a finding that a past administrative decision was null and void.

3. Without entering into a comparative analysis of procedural law, we can note briefly that, in many legal systems, "cassation appeals" are subject to very strict time-limits and concern points of law, whereas "requests for the reopening of proceedings" may be lodged many years later and are founded in particular on new facts, new evidence or certain serious procedural defects. We can therefore observe, in a very intuitive manner, that the examination of a cassation appeal constitutes in a sense a "natural prolongation" of the original proceedings, focusing at that stage on issues concerning the interpretation of the applicable law and prolonging for the parties the state of uncertainty as to the outcome of the proceedings. The reopening of proceedings appears to be more exceptional and may occur a very long time after a final judicial decision was handed down in the original proceedings.

On the other hand, it is important to stress that a cassation appeal, in many legal systems, primarily serves the public interest. It is a means of establishing the correct interpretation of the law and harmonising the case-law of the lower courts. Persons wishing to lodge an appeal of this kind must demonstrate the public interest in having it examined. By contrast, a request to reopen proceedings is very often not subject to any such condition. It may therefore serve to protect subjective rights without it being necessary to demonstrate that there is a public interest in having it examined. Moreover, injustices remedied by means of the reopening of proceedings and linked to factual errors are often much more glaring than the often unavoidable hesitations in interpreting the law which are overcome

by means of a cassation appeal. Furthermore, cassation appeals are often subject to a preliminary filtering procedure enabling their admissibility to be assessed before they are examined on the merits.

The Court has held in various judgments that the examination of a request for proceedings to be reopened is not in itself a procedure leading to the determination of the parties' rights or obligations or of a criminal charge. A fresh determination of the parties' rights and obligations takes place only once the decision to reopen the proceedings has been taken. I note, for my part, that in some countries a cassation appeal has a number of similarities in this regard. During the first stage, the competent court examines the admissibility of the appeal. During the second stage, it rules on the merits, possibly setting aside the impugned judgment. During the third stage, where applicable, another court will determine afresh the parties' rights and obligations.

Against this background, can we really draw a distinction between the two types of extraordinary remedies for the purposes of the applicability of Article 6? One may doubt it. In any event, a convincing reply in the affirmative would require an in-depth survey of procedural law in the various States. An analysis of the Court's judgments and decisions leads to the conclusion that the case-law has not established precise criteria by which to decide which extraordinary remedies come within the ambit of Article 6 of the Convention. Furthermore, in my view, the approach taken in *J.S. and A.S.* is difficult to reconcile with the Court's case-law concerning remedies enabling review of decisions handed down in the various types of proceedings. The case-law surveyed discloses a very high degree of uncertainty for litigants and for the Contracting Parties to the Convention.

4. The case of *Bochan v. Ukraine* presented a good opportunity to clarify the Court's case-law concerning the applicability of Article 6 to extraordinary appeals in judicial proceedings, at least in civil cases.

The majority states as follows in paragraph 50: "In sum, while Article 6 § 1 is not normally applicable to extraordinary appeals seeking the reopening of terminated judicial proceedings, the nature, scope and specific features of the proceedings on a given extraordinary appeal in the particular legal system concerned may be such as to bring the proceedings on that kind of appeal within the ambit of Article 6 § 1 and of the safeguards of a fair trial that it affords to litigants." In analysing the appeal in question, the Court emphasises the similarities with a "cassation appeal" and the fact that the appeal may be regarded as a prolongation of the original proceedings, before analysing the review conducted by the Ukrainian Supreme Court in the case in question. I regret the fact that the reasoning of the judgment does not offer more specific general criteria for deciding which factors as regards the nature, scope and particular features of a given set of proceedings are decisive in order for Article 6 to apply.

The uncertainty as to the precise scope of application of Article 6 appears to be reflected in the reasoning. For instance, in paragraph 44 *in fine* the Court summarises in the following terms the established case-law concerning extraordinary appeals: "[This is because,] in so far as the matter is covered by the principle of *res iudicata* of a final judgment in national proceedings, it cannot in principle be maintained that a subsequent extraordinary application or appeal seeking revision of that judgment gives rise to an arguable claim as to the existence of a right recognised under national law or that the outcome of the proceedings in which it is decided whether or not to reconsider the same case is decisive for the 'determination of ... civil rights or obligations or of any criminal charge'." I note that this argument, used to explain why Article 6 does not apply to requests for proceedings to be reopened, weighs equally in favour of the inapplicability of Article 6 to cassation appeals in legal systems where such appeals are directed against judicial decisions considered to be final and enforceable in domestic law.

Furthermore, in paragraph 47, the majority notes that the Court has also found Article 6 to be applicable to proceedings deemed to be similar to ordinary appeal proceedings. At the same time, in paragraph 48, which supposedly illustrates this argument, it notes that the *San Leonard Band Club* judgment stressed that a "request for a new trial" in Maltese law was similar to an appeal on points of law before a court of cassation. However, an ordinary appeal and a cassation appeal are two very different remedies.

5. Article 6 of the Convention requires disputes concerning civil rights and obligations to be determined within a reasonable time by an independent and impartial tribunal established by law. The wording of this provision does not exclude its application to extraordinary appeals against judicial decisions which have determined the parties' civil rights and obligations with final effect (within the meaning of domestic law). Furthermore, Article 6 is designed to ensure the effective protection of persons involved in civil and criminal proceedings against procedural injustice. The teleological argument therefore weighs in favour of the broadest possible application of this provision to the various ordinary and extraordinary appeals. In these circumstances it would appear more convincing to regard Article 6 as being applicable – at least in principle – to all extraordinary remedies in judicial proceedings. However, if its scope is to remain limited to certain types of extraordinary remedies, it is essential to define these on the basis of precise criteria.

It should be stressed that these conclusions concern judicial proceedings. The applicability of Article 6 to extraordinary remedies in administrative proceedings is a different issue which would require separate examination.

6. The present case also concerns the very delicate issue of the effects of judgments of the Court finding a violation of the Convention in civil proceedings or arising from a judicial decision in a civil case. Judicial

decisions in civil cases very often serve to determine disputes between parties with opposing interests. When one of the parties challenges before the Court the compatibility with the Convention of the procedure applied or the decision given, the outcome of the proceedings before the Court affects the rights and interests of the other parties. Although the Court examines the vertical relationship (that is, the relationship between the applicant and the State) and rules on violations of the Convention attributed to the State authorities, the judgment finding a violation of the applicant's rights on account of civil proceedings or of a judicial decision in a civil case will have a bearing on the protection afforded to the rights of the other parties to the proceedings and necessarily has a horizontal dimension, that is, pertaining to relations between private parties. The continuing extension by the case-law of the scope of application of Convention rights to relationships between private-law parties (in German: *Drittwirkung*) heightens this tendency.

This influence of the Court's judgments would be even more profound if the finding of a violation of the Convention in civil proceedings or arising from a judicial decision in a civil case were to lead to the reopening of those proceedings. The reasoning of the judgment in the present case quite rightly notes the absence of consensus between the High Contracting Parties in this sphere (see paragraph 57 of the judgment). It also notes, very pertinently, the possible implications of reconsideration of the applicant's case "for the principles of *res iudicata* and legal certainty in the terminated civil litigation and for the legitimate interests of third parties" (paragraph 72). However, the reasoning of the decision appears to express a certain preference for ensuring that possibilities exist to reopen civil proceedings in order to facilitate execution of the Court's judgments (paragraph 58). Personally, I would have preferred to include some qualifications in the Court's reasoning.

Each party to civil proceedings is entitled to a stable final decision, delivered within a reasonable time. A final decision, even one that is defective from the standpoint of the Convention, creates legitimate expectations as to its stability, in particular if the opposing party acted in good faith in a situation where the violations of the Convention were not obvious in the light of the Court's existing case-law. The need to secure the stability of final judicial decisions determining cases involving private parties and the legitimate interests of all the parties to the proceedings constitutes a strong argument against the reopening of civil proceedings following a judgment by the Court finding a violation of the Convention. The reopening of such proceedings may even result in a breach of the other parties' rights protected by the Convention. Nevertheless, it cannot be ruled out that in some situations a final decision by a domestic civil court will create an injustice in relations between private parties which is so glaring that it can only be remedied by setting aside or amending the decision given.

Generally speaking, however, in the types of situation considered here, just satisfaction will most often consist in compensation by the State.

7. The question of the effects of the Court's judgments is intrinsically linked to the question of the procedure before the Court. All procedural rules must be suited to the purpose and object of the proceedings and must ensure effective protection of the legitimate interests of all the parties concerned. Moreover, they must guarantee the undisputed procedural legitimacy of the decisions given.

Procedural justice requires in particular that all the persons concerned by the outcome of the proceedings are guaranteed the right to be heard. As Seneca observed in *Medea*: *Qui statuit aliquid parte inaudita altera, aequum licet statuerit, haud aequus fuit*. The more far-reaching the effects of the Court's judgments the more vital it is to ensure that all the persons concerned have the right to be heard. Developments in case-law and practice regarding the effects and execution of the Court's judgments may call for adjustments to be made to the applicable procedural rules.

8. In examining applications alleging human rights violations in civil proceedings or arising from judicial decisions in civil cases, determining disputes between individuals or legal persons governed by private law, the rights of the party opposing the applicant party must never be overlooked. That is because the Court's finding of a violation of the Convention on account of a judicial decision in a civil case may have practical and legal consequences for the other parties to the civil proceedings and for the implementation of their rights. This problem is particularly acute in the case of applications against States whose legal systems (like that in Ukraine) allow the reopening of civil proceedings following a judgment of the Court.

It should be noted here that, in its judgment in *Ruiz-Mateos v. Spain* (23 June 1993, Series A no. 262), the Court examined the right of the persons concerned to be heard in constitutional review proceedings. The issue had arisen in the context of the relationship between the civil proceedings and the constitutional review proceedings. In that case a Spanish court, in the course of a civil dispute, had referred a preliminary question to the Constitutional Court as to the constitutionality of the legislation applicable in the case. The Court found a violation of the Convention on the grounds that, in the proceedings for concrete review of the legislation before the Constitutional Court, the Spanish authorities had not secured to one of the parties to the civil proceedings the right to submit observations on the opposing party's position regarding the issue of the constitutionality of a statute (§ 67).

9. It is undeniable that the procedure whereby the Court examines individual applications has many specific features distinguishing it from procedures before the various domestic supreme courts. While a judgment of the Court may be important as regards implementation of the rights of other parties to the domestic proceedings, it does not establish rights or

obligations for them with direct effect in the Contracting Parties. However, given that in the types of situation considered third parties are often affected by the outcome of the proceedings before the Court, the approach taken in the case of *Ruiz-Mateos* in the context of the relationship between civil proceedings and proceedings to review legislation also holds true in the context of the relationship between domestic civil proceedings and proceedings before the European Court of Human Rights.

The Convention does not guarantee the other parties to domestic proceedings who are concerned by the impugned judicial decision the right to be heard by the Court. It is true that under Article 36 § 2 of the Convention, as supplemented by Rule 44 § 3 of the Rules of Court, the President of the Chamber may, in the interests of the proper administration of justice, authorise or invite any person concerned who is not the applicant to submit written comments or, in exceptional circumstances, to take part in the hearing. The Court sometimes makes use of this possibility, in particular in cases dealing with family law. The approach adopted strikes me as inadequate, as the option, left to the discretion of the President of the Chamber, of hearing the views of a person who is concerned does not equate to a guarantee of the right to be heard. It is not always used where the rights of third parties are concerned.

When sitting in cases dealing with violations of the Convention in civil proceedings or arising from a judicial decision in a civil case, I invariably wonder whether the other parties concerned should not be granted the right to submit observations to the Court. Is it right to give a decision without hearing the other parties concerned? Ensuring that they have the right to be heard would not only give greater effect to the principles of procedural justice, but in many cases would also afford greater insight into the issues under examination.

Given the case-law developments referred to above, the rules applicable to the procedure for the examination of applications by the Court do not confer a sufficient degree of procedural legitimacy on the decisions given. Against that background, it is time to rethink the procedure before the Court in order better to adapt it to the requirements of procedural justice.